UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-16-99-A

Date: 11 April 2018

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. Olufemi Elias**
Judgement of:	**11 April 2018**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Mathias Marcussen
Ms. Barbara Goy

The Respondent:

Mr. Vojislav Šešelj, *pro se*

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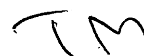

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1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the appeal of the Office of the Prosecutor ("Prosecution") against the "*Jugement*" in the case of *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, rendered on 31 March 2016 ("Trial Judgement") by Trial Chamber III 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 ("Trial Chamber" and "ICTY", respectively).[1]

I. INTRODUCTION

A. Background

2. Vojislav Šešelj was born on 11 October 1954 in Sarajevo, Republic of Bosnia and Herzegovina.[2] On 23 February 1991, he was appointed President of the Serbian Radical Party, and in June 1991, he was elected as a member of the Assembly of the Republic of Serbia.[3]

3. The Prosecution charged Šešelj with persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity (Counts 1, 10, and 11, respectively), as well as murder, torture, cruel treatment, wanton destruction of villages, destruction or wilful damage to institutions dedicated to religion or education, and plunder of public and private property as violations of the laws or customs of war (Counts 4, 8, 9, 12, 13, and 14, respectively).[4] The Prosecution alleged that Šešelj planned, ordered, instigated, committed, or otherwise aided and abetted these crimes.[5] It further alleged that he participated in these crimes between August 1991 and September 1993 by way of a joint criminal enterprise, the common purpose of which was the permanent and forcible removal, through the commission of crimes, of a majority of the Croatian, Bosnian Muslim, and other non-Serbian populations from approximately one-third of the territory of Croatia and large parts of Bosnia and Herzegovina in order to make these areas part of a new Serbian-dominated state.[6]

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[1] *See also* Trial Judgement, Individual Statement of Judge Mandiaye Niang, 14 June 2016 (original French version filed on 31 March 2016); Concurring Opinion of Presiding Judge Jean-Claude Antonetti Attached to the Judgement, 16 September 2016 (original French version filed on 31 March 2016); Partially Dissenting Opinion of Judge Flavia Lattanzi – Amended Version, 1 July 2016 (original French version filed on 12 April 2016).
[2] Indictment, para. 1.
[3] Trial Judgement, paras. 2, 55; Indictment, para. 4.
[4] Indictment, paras. 15-34. *See also* Trial Judgement, para. 8.
[5] Indictment, paras. 5, 11, 15, 18, 28, 31, 34. *See also* Trial Judgement, paras. 2, 4, 7, 221.
[6] Indictment, paras. 5-11, 15, 18, 28, 31, 34. *See also* Trial Judgement, paras. 2, 5, 222. The Indictment also charged Šešelj with responsibility, through participation in a joint criminal enterprise, for the crimes committed in Vojvodina, Serbia. *See* Indictment, paras. 15, 31. However, at the conclusion of its case, the Prosecution no longer sought Šešelj's conviction for the crimes committed in Vojvodina on that basis. *See* Prosecution Final Trial Brief, paras. 1, 9. *See also* Appeal Brief, nn. 423, 649; Reply Brief, para. 1.

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4. The Trial Chamber, by a majority, Judge Lattanzi dissenting, acquitted Šešelj of all charges.[7]

B. The Appeal

5. The Prosecution challenges the Trial Judgement on two grounds, namely that the Trial Chamber erred in law by failing to deliver a reasoned opinion and erred in fact by acquitting Šešelj.[8] It requests that the Appeals Chamber revise the Trial Judgement to find Šešelj guilty as charged and sentence him accordingly, or, in the alternative, order a retrial.[9] Šešelj responds that the Prosecution's appeal should be dismissed in its entirety.[10]

6. In his Response Brief, Šešelj also indicated his intention not to attend the appeal hearing.[11] On 18 September 2017, the Appeals Chamber issued an order specifically warning Šešelj that, should he maintain his intention to not attend the appeal hearing, it will be in the interests of justice to instruct the Registrar to assign a standby counsel to represent Šešelj's interests at the hearing.[12] In doing so, the Appeals Chamber recognized Šešelj's right to self-representation and to be present at the appeal hearing, but specified that he could waive his right to appear only if his interests are represented by counsel.[13] Moreover, prior to instructing the Registrar to assign standby counsel, the Appeals Chamber gave Šešelj the opportunity to reconsider his position to not attend the appeal hearing and invited him to clarify his position within 10 days of receiving the B/C/S version of the Order of 18 September 2017.[14]

7. Noting that Šešelj confirmed receipt of the Order of 18 September 2017 and considering his refusal to respond, on 11 October 2017, the Appeals Chamber issued a decision instructing the Registrar to assign standby counsel pursuant to Rules 46 and 131 of the Rules.[15] The Appeals Chamber explicitly considered that "any restriction on Šešelj's right to self-representation must be limited to the minimum extent necessary to protect the Mechanism's interests in a reasonably expeditious resolution of the appeal before it".[16] On this basis, the Appeals Chamber further decided that the mandate of standby counsel "shall be strictly limited to ensuring that Šešelj's

[7] Trial Judgement, p. 109 (Disposition). The Trial Chamber acquitted Šešelj of Counts 1, 4, and 8-13 by a majority, Judge Lattanzi dissenting, and of Count 14 unanimously.
[8] Notice of Appeal, paras. 2-12; Appeal Brief, paras. 7-252.
[9] Notice of Appeal, paras. 8, 12; Appeal Brief, paras. 216-252; Reply Brief, para. 4. *See also* T. 13 December 2017 pp. 25, 26.
[10] Response Brief, paras. 47, 56, 63, 72, 86, 92, 102, 106, 209, 409.
[11] Response Brief, paras. 410-412.
[12] Order in Relation to the Appeal Hearing, 18 September 2017 ("Order of 18 September 2017"), p. 3.
[13] Order of 18 September 2017, pp. 2, 3.
[14] Order of 18 September 2017, p. 3.
[15] Decision on Assignment of Standby Counsel for the Appeal Hearing, 11 October 2017 ("Decision Assigning Standby Counsel"), pp. 2, 3.
[16] Decision Assigning Standby Counsel, p. 2, n. 11.

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procedural rights at the upcoming appeal hearing are protected in the event that Šešelj does not appear for the hearing".[17] In accordance with the Decision Assigning Standby Counsel, on 19 October 2017, the Registrar assigned Ms. Colleen Rohan as standby counsel for Šešelj.[18]

8. On 17 October 2017, the Appeals Chamber issued an order scheduling the appeal hearing on 13 December 2017 in The Hague, the Netherlands.[19] The Scheduling Order further informed the parties that, should Šešelj not participate in the hearing, his response in writing to the Prosecution's oral submissions would be due within 10 days of receiving the B/C/S transcript of the hearing, and that the Prosecution's reply would be due within five days of receiving the English version of Šešelj's response, if any.[20]

9. The Appeals Chamber heard oral submissions regarding the appeal on 13 December 2017.[21] At the start of the hearing, the Presiding Judge noted that Šešelj, who elected to represent himself, was not present, and that, as a consequence, his assigned standby counsel was present.[22]

10. Šešelj confirmed receipt of the B/C/S transcript of the appeal hearing on 25 December 2017.[23] He did not file a written response.[24]

[17] Decision Assigning Standby Counsel, p. 3.
[18] Decision, 19 October 2017, p. 2.
[19] Scheduling Order for the Appeal Hearing, 17 October 2017 ("Scheduling Order"), p. 2.
[20] Scheduling Order, p. 3.
[21] *See* T. 13 December 2017 pp. 1-27.
[22] *See* T. 13 December 2017 pp. 1, 2.
[23] *See Procès-Verbal*, 27 December 2017.
[24] In accordance with the Scheduling Order, Šešelj's written response was due on 4 January 2018. *See* Scheduling Order, p. 3.

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II. STANDARDS OF APPELLATE REVIEW

11. The Appeals Chamber recalls that the Mechanism was established pursuant to United Nations Security Council Resolution 1966 (2010) and continues the material, territorial, temporal, and personal jurisdiction of the ICTY and ICTR.[25] The Statute and the Rules of the Mechanism reflect normative continuity with the Statutes and Rules of the ICTY and ICTR.[26] The Appeals Chamber considers that it is bound to interpret the Statute and Rules in a manner consistent with the jurisprudence of the ICTY and ICTR.[27] Likewise, where the respective Rules or Statutes of the ICTY or ICTR are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them.[28] The Appeals Chamber is guided by the principle that, in the interests of legal certainty and predictability, it should follow previous decisions of the ICTY or the ICTR Appeals Chambers and depart from them only for cogent reasons in the interests of justice, that is, where a previous decision has been decided on the basis of a wrong legal principle or has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".[29] It is for the party submitting that the Appeals Chamber should depart from such jurisprudence to demonstrate that there are cogent reasons in the interest of justice that justify such departure.[30]

12. Article 23(2) of the Statute stipulates that the Appeals Chamber may affirm, reverse, or revise the decisions taken by a trial chamber. The Appeals Chamber recalls that an appeal is not a trial *de novo*.[31] The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage

[25] United Nations Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), Annex 1, Statute of the Mechanism ("Statute"), Preamble, Article 1. *See also* Security Council Resolution 1966, Annex 2, Article 2(2); *Ngirabatware* Appeal Judgement, para. 6.
[26] *See, e.g., Ngirabatware* Appeal Judgement, para. 6. *See also Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case Nos. IT-08-91-A & MICT-13-55, Decision on Karadžić's Motion for Access to Prosecution's Sixth Protective Measures Motion, 27 June 2016, p. 2; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012 ("*Munyarugarama* Decision of 5 October 2012").
[27] *See Ngirabatware* Appeal Judgement, para. 6.
[28] *See Ngirabatware* Appeal Judgement, para. 6.
[29] *Stanišić and Župljanin* Appeal Judgement, para. 968; *Bizimungu* Appeal Judgement, para. 370; *Đorđević* Appeal Judgement, para. 24; *Galić* Appeal Judgement, para. 117; *Rutaganda* Appeal Judgement, para. 26; *Aleksovski* Appeal Judgement, para. 107. *Cf. Munyarugarama* Decision of 5 October 2012, para. 5 (noting the "normative continuity" between the Mechanism's Rules of Procedure and Evidence and Statute and the ICTY Rules and ICTY Statute and that the "parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice").
[30] *Stanišić and Župljanin* Appeal Judgement, para. 968, *Bizimungu* Appeal Judgement, para. 370; *Đorđević* Appeal Judgement, para. 24; *Galić* Appeal Judgement, para. 117; *Rutaganda* Appeal Judgement, para. 26; *Aleksovski* Appeal Judgement, para. 107.
[31] *See Stanišić and Župljanin* Appeal Judgement, para. 17; *Stanišić and Simatović* Appeal Judgement, para. 15; *Đorđević* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 13.

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of justice.[32] These criteria are set forth in Article 23 of the Statute and are well established in the jurisprudence of both the ICTY and ICTR.[33]

13. A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision.[34] An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground.[35] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[36] It is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments that the appellant submits the trial chamber omitted to address and to explain why this omission invalidates the decision.[37]

14. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[38] In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[39] The Appeals Chamber will not review the entire trial record *de novo*; rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the

[32] *See Ngirabatware* Appeal Judgement, para. 7. *See also Prlić et al.* Appeal Judgement, para. 18; *Karemera and Ngirumpatse* Appeal Judgement, para. 13; *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7.

[33] *See Ngirabatware* Appeal Judgement, para. 7. *See also Prlić et al.* Appeal Judgement, para. 18; *Karemera and Ngirumpatse* Appeal Judgement, para. 13; *Bizimungu* Appeal Judgement, para. 8; *Ndindiliyimana et al.* Appeal Judgement, para. 8; *Đorđević* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 19; *Perišić* Appeal Judgement, para. 7.

[34] *See Ngirabatware* Appeal Judgement, para. 8. *See also Prlić et al.* Appeal Judgement, para. 19; *Karemera and Ngirumpatse* Appeal Judgement, para. 14; *Bizimungu* Appeal Judgement, para. 9; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8.

[35] *See Ngirabatware* Appeal Judgement, para. 8. *See also Prlić et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11.

[36] *See Ngirabatware* Appeal Judgement, para. 8. *See also Prlić et al.* Appeal Judgement, para. 19; *Karemera and Ngirumpatse* Appeal Judgement, para. 14; *Bizimungu* Appeal Judgement, para. 9; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 8; *Lukić and Lukić* Appeal Judgement, para. 11.

[37] *See Ngirabatware* Appeal Judgement, para. 8. *See also Prlić et al.* Appeal Judgement, para. 19; *Đorđević* Appeal Judgement, para. 14; *Šainović et al.* Appeal Judgement, para. 20; *Perišić* Appeal Judgement, para. 9.

[38] *See Ngirabatware* Appeal Judgement, para. 9. *See also Prlić et al.* Appeal Judgement, para. 20; *Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9.

[39] *See Ngirabatware* Appeal Judgement, para. 9. *See also Prlić et al.* Appeal Judgement, para. 20; *Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bizimungu* Appeal Judgement, para. 10; *Ndindiliyimana et al.* Appeal Judgement, para. 10; *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Perišić* Appeal Judgement, para. 9.

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judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[40]

15. When considering alleged errors of fact, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[41] The Appeals Chamber applies the same standard of reasonableness to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[42] It is not every error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has caused a miscarriage of justice.[43] In determining whether a trial chamber's finding was reasonable, the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber.[44]

16. When considering an appeal by the Prosecution, the same standard of reasonableness and deference to factual findings applies.[45] Nevertheless, considering that, at trial, it is the Prosecution that bears the burden of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction.[46] Whereas an accused must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt, the Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[47]

17. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the

[40] *See Prlić et al.* Appeal Judgement, para. 20; *Stanišić and Župljanin* Appeal Judgement, para. 19; *Stanišić and Simatović* Appeal Judgement, para. 17; *Tolimir* Appeal Judgement, para. 10; *Popović et al.* Appeal Judgement, para. 18.
[41] *See Ngirabatware* Appeal Judgement, para. 10. *See also Prlić et al.* Appeal Judgement, para. 21; *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10.
[42] *See Ngirabatware* Appeal Judgement, para. 10. *See also Prlić et al.* Appeal Judgement, para. 21; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Lukić and Lukić* Appeal Judgement, para. 13.
[43] *See Ngirabatware* Appeal Judgement, para. 10. *See also Prlić et al.* Appeal Judgement, para. 21; *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 16; *Šainović et al.* Appeal Judgement, para. 22; *Perišić* Appeal Judgement, para. 10.
[44] *See Ngirabatware* Appeal Judgement, para. 10. *See also Prlić et al.* Appeal Judgement, para. 22; *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Bizimungu* Appeal Judgement, para. 11; *Ndindiliyimana et al.* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 17; *Šainović et al.* Appeal Judgement, para. 23; *Perišić* Appeal Judgement, para. 10.
[45] *See Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22. *See also Stanišić and Simatović* Appeal Judgement, para. 20; *Đorđević* Appeal Judgement, para. 18.
[46] *See Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Popović et al.* Appeal Judgement, para. 21; *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Halilović* Appeal Judgement, para. 11.

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intervention of the Appeals Chamber.[48] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[49]

18. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[50] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[51] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[52]

[47] *See Prlić et al.* Appeal Judgement, para. 23; *Stanišić and Župljanin* Appeal Judgement, para. 22; *Popović et al.* Appeal Judgement, para. 21; *Đorđević* Appeal Judgement, para. 18; *Šainović et al.* Appeal Judgement, para. 24; *Halilović* Appeal Judgement, para. 11.

[48] *See Ngirabatware* Appeal Judgement, para. 11. *See also Prlić et al.* Appeal Judgement, para. 25; *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Perišić* Appeal Judgement, para. 11.

[49] *See Ngirabatware* Appeal Judgement, para. 11. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Bizimungu* Appeal Judgement, para. 12; *Ndindiliyimana et al.* Appeal Judgement, para. 12; *Perišić* Appeal Judgement, para. 11; *Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15.

[50] *See Ngirabatware* Appeal Judgement, para. 12. *See also Prlić et al.* Appeal Judgement, para. 24; *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Šainović et al.* Appeal Judgement, para. 26; *Perišić* Appeal Judgement, para. 12.

[51] *See Ngirabatware* Appeal Judgement, para. 12. *See also Prlić et al.* Appeal Judgement, para. 24; *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Perišić* Appeal Judgement, para. 12. *See also Đorđević* Appeal Judgement, para. 20; *Šainović et al.* Appeal Judgement, para. 27; *Lukić and Lukić* Appeal Judgement, para. 15.

[52] *See Ngirabatware* Appeal Judgement, para. 12. *See also Prlić et al.* Appeal Judgement, para. 24; *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Bizimungu* Appeal Judgement, para. 13; *Ndindiliyimana et al.* Appeal Judgement, para. 13; *Đorđević* Appeal Judgement, para. 19; *Šainović et al.* Appeal Judgement, para. 26; *Perišić* Appeal Judgement, para. 12.

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III. COMPLIANCE OF THE APPEAL BRIEF WITH THE PRACTICE DIRECTION

19. Šešelj argues that the Appeal Brief should be rejected because it does not comply with the Mechanism's Practice Direction on Requirements and Procedures for Appeals.[53] Specifically, Šešelj submits that: (i) the grounds of appeal in the Appeal Brief do not correspond to the Notice of Appeal, and the arguments in the Appeal Brief are not presented in the required order;[54] (ii) the references to the paragraphs of the Trial Judgement in the Appeal Brief are overly broad;[55] (iii) the Appeal Brief improperly cross-references other paragraphs or sections thereof and duplicates arguments under Ground 1 in Ground 2;[56] (iv) the Appeal Brief distorts the Trial Chamber's findings or the Prosecution's arguments are too vague and do not articulate the alleged errors;[57] and (v) the Appeal Brief does not clearly set out the remedies requested.[58]

20. The Prosecution responds that the Appeal Brief clearly sets out the arguments for the two grounds contained in the Notice of Appeal as well as the remedies requested.[59]

21. A review of the Appeal Brief shows that, in accordance with the Appeals Practice Direction, the grounds of appeal and arguments in support thereof are generally set out in the same order as those presented in the Notice of Appeal and that the remedies requested are specified in the Notice of Appeal and developed in the Appeal Brief.[60] Where arguments in the Appeal Brief might fail to make specific reference to the Trial Judgement or clearly articulate alleged errors, the Appeals Chamber may dismiss such submissions without rejecting the Appeal Brief in its entirety.[61] Moreover, nothing in the Appeals Practice Direction prohibits the use of internal cross-references or the duplication of arguments in any filings.

22. The Appeals Chamber recalls that the requirements of the Appeals Practice Direction "are based on principles of fair trial and effectiveness, aimed at ensuring that both parties have adequate opportunity to be fully apprised of each other's submissions and to respond in good time to these".[62] A review of the length and content of the Response Brief demonstrates that Šešelj had an adequate

[53] Response Brief, paras. 3-6, 23-25, 142, *referring to* Practice Direction on Requirements and Procedures for Appeals, MICT/10, 6 August 2013 ("Appeals Practice Direction").
[54] Response Brief, paras. 6, 28, 29, 48, 57, 64, 65, 104, 112,113, 133-135.
[55] Response Brief, paras. 25, 133.
[56] Response Brief, paras. 26, 79.
[57] Response Brief, paras. 27, 28, 297, 298, 333.
[58] Response Brief, paras. 114-123.
[59] *See* Reply Brief, para. 2.
[60] *See* Appeals Practice Direction, paras. 2, 5.
[61] *See* Appeals Practice Direction, para. 32.

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understanding of the Prosecution's submissions to meaningfully respond to the substance and merits of the appeal. Šešelj therefore fails to demonstrate that the Appeal Brief does not comply with the Appeals Practice Direction or that he suffered any prejudice from any purported defects therein.

23. For the foregoing reasons, Šešelj's challenges to the form of the Appeal Brief are dismissed.

[62] *See Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Prosecution's Motion to Order Veselin Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds Contained in his Appeal Brief, 26 August 2008, para. 9.

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IV. PROCEDURAL FAIRNESS

24. In his Response Brief, Šešelj raises several issues pertaining to his fair trial rights.[63] The Prosecution replies that Šešelj's submissions were already addressed in decisions during trial.[64] In this section, the Appeals Chamber considers procedural challenges advanced by Šešelj in relation to: (i) the Indictment and alleged political bias; (ii) self-representation; (iii) his detention conditions and the preparation of his defence; (iv) the admission of witness statements and allegedly false evidence; and (v) undue delay.[65]

A. <u>Indictment and Political Bias</u>

25. The original indictment against Šešelj was issued on 15 January 2003 and confirmed on 14 February 2003.[66] The Indictment subsequently underwent a series of amendments before reaching its operative form on 9 January 2008.[67]

26. Šešelj argues that the multiple amendments to the Indictment violated his rights to an expeditious trial and to be informed promptly of the charges against him and alleges that the Prosecution only conducted investigations after filing the Indictment and detaining him.[68] He contends that the Indictment is vague with respect to commission and joint criminal enterprise as modes of liability and that it is imprecise in charging him under all modes of liability for the same underlying crimes.[69] Šešelj further submits that the Indictment and the trial were politically biased

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[63] *See* Response Brief, paras. 17, 18, 31, 46, 55, 84, 100, 101, 114, 126, 128, 136, 139, 145-155, 163, 166, 184, 185, 196, 198, 211, 212, 215-221, 224-281, 286-289, 291, 299, 300-303, 306, 308, 314-321, 323, 324, 329, 332, 341, 347, 354, 355, 389-393.

[64] Reply Brief, para. 3, nn. 7-9.

[65] The Appeals Chamber recalls that statements and arguments in a respondent's brief are limited to arguments made in the relevant appellant's brief; however, in cases of acquittal, "the Respondent may support the acquittal on additional grounds". *See* Appeals Practice Direction, para. 6.

[66] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, Indictment, 15 January 2003; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, Confirmation of Indictment and Order for the Warrant for Arrest and Surrender, 14 February 2003, p. 2. *See also* Trial Judgement, Annex 2 – Procedural Background, para. 1.

[67] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Modified Amended Indictment, 15 July 2005; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution's Submission of Reduced Modified Amended Indictment with Redactions Removed, 30 March 2007; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Second Amended Indictment, 28 September 2007; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Regarding Third Amended Indictment, 15 January 2008 (original French version filed on 9 January 2008), p. 4. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 11-15.

[68] Response Brief, paras. 145, 215-218, 236, 237, 314. *See also*, Response Brief, paras. 126, 128.

[69] Response Brief, paras. 100, 101, 146-152, 163, 184, 185, 198. Šešelj also submits that "the Prosecut[ion] is attempting to make use of the appeals proceeding as a new charging instrument". *See* Response Brief, para. 153. This submission is dismissed for lack of clarity or substantiation.

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against him,[70] contending that the Prosecution had a "malicious fixation" on him and supported officials who wanted to remove him from the political scene.[71]

27. A review of the decisions allowing amendments to the Indictment shows that the Trial Chamber duly considered the changes proposed by the Prosecution, the challenges raised by Šešelj, as well as whether the proposed amendments would prejudice him.[72] As to the ambiguity in the Prosecution's reference to commission to allege both Šešelj's physical perpetration of persecution through speeches and his participation in a joint criminal enterprise,[73] the Trial Chamber addressed this matter in its Decisions of 3 June 2004, 2 June 2005, and 27 November 2007.[74] The alleged lack of specificity regarding the multiple modes of liability charged was considered by the Trial Chamber in its Decision of 27 November 2007.[75] The Trial Chamber also examined the specificity of joint criminal enterprise pleadings in the Decisions of 14 September 2007 and 3 June 2004.[76] Moreover, the Trial Chamber issued several decisions rejecting Šešelj's allegations that the Prosecution was politically biased.[77]

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[70] Response Brief, paras. 166, 196, 218, 223, 228, 260, 299, 302.

[71] Response Brief, paras. 196, 223, 260, 302, 317-319, 323, 347, 354, 355.

[72] *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to File an Amended Indictment, 14 September 2007 ("Decision of 14 September 2007"), paras. 20, 22, 26, 29, 33, 37, 38, 40, 43 (the Trial Chamber allowed the Prosecution's proposed amendments where Šešelj would not be prejudiced, but rejected those that were not adequately justified); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment, 2 June 2005 (dated 27 May 2005) ("Decision of 2 June 2005"), paras. 10, 12, 16-18, 20 (the Trial Chamber allowed the Prosecution's proposals to amend the indictment where it considered that Šešelj would not be prejudiced, or otherwise allowed Šešelj to respond to amendments that brought forth new charges with respect to events in Greater Sarajevo); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004) ("Decision of 3 June 2004"), paras. 51, 62 (Šešelj challenged the reference to commission in the Indictment and the Trial Chamber ordered the Prosecution to clarify the ambiguity).

[73] Response Brief, paras. 146, 147.

[74] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Preliminary Motion Filed by the Accused, 16 March 2009 (original French version filed on 27 November 2007) ("Decision of 27 November 2007"), paras. 47-60; Decision of 2 June 2005, paras. 2, 7-10; Decision of 3 June 2004, paras. 51, 62. In particular, the Trial Chamber in its Decision of 2 June 2005 allowed the Prosecution to amend paragraphs of the Indictment in order to clarify whether the mode of liability of commission was based on Šešelj's speeches (persecution through the use of illegal "hate speech") or on his being a participant in a joint criminal enterprise. *See* Decision of 2 June 2005, paras. 7-10, 20(1). It further ordered the Prosecution to quote, in an annex, the text, dates, and alleged victims of the speeches charged under physical commission of persecution. *See* Decision of 27 November 2007, para. 54.

[75] The Trial Chamber stated that the Prosecution may list all forms of responsibility under Article 7(1) of the ICTY Statute provided that it intends to hold Šešelj accountable under each mode of liability, and concluded that paragraphs 5, 10, and 11 of the Indictment set out allegations regarding Šešelj's individual responsibility with sufficient precision. *See* Decision of 27 November 2007, para. 66. *See also* Decision of 3 June 2004, para. 47.

[76] *See* Decision of 14 September 2007, para. 40 (where the Trial Chamber considered pleadings regarding the third category of joint criminal enterprise); Decision of 3 June 2004, paras. 54-61 (where the Trial Chamber considered and found that – except for the distinction of commission through physical perpetration of "hate speeches" and as a participant in a joint criminal enterprise – all relevant elements of joint criminal enterprise were sufficiently pleaded and dismissed Šešelj's arguments).

[77] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Motion by the Accused to Dismiss All Charges Against Him (Submission 387) and Its Addendum (Submission 391), 29 September 2008 (original French version filed on 18 September 2008) ("Decision of 18 September 2008"), paras. 21, 23, 25, 28, 29 (where the Trial Chamber concluded that Šešelj failed to establish that Prosecutor Carla Del Ponte had indicted him or continued to prosecute him for discriminatory or otherwise unlawful or improper motives). In two subsequent decisions, the Trial Chamber dismissed Šešelj's arguments alleging Prosecution's political bias as moot. *See Prosecutor v. Vojislav Šešelj*, Case No.

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28. Šešelj's submissions on appeal are repetitive of arguments that failed at trial[78] and do not demonstrate that the Trial Chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber. Šešelj's challenges that the Prosecution holds malicious intentions against him are equally repetitive of arguments rejected at trial without establishing an error that warrants the intervention of the Appeals Chamber. The Appeals Chamber accordingly dismisses Šešelj's challenges to the Indictment.

B. Self-Representation

29. On 24 February 2003, Šešelj voluntarily surrendered to the ICTY.[79] The following day, he sent a letter to the Registrar invoking his right to self-representation.[80] On 9 May 2003, the Trial Chamber ordered the Registrar to assign standby counsel to Šešelj.[81] On 21 August 2006, the Trial Chamber decided to assign counsel to represent Šešelj;[82] this decision was reversed on appeal on 20 October 2006.[83] On 25 October 2006, the Trial Chamber ordered the assignment of standby counsel to Šešelj;[84] this decision was also overturned on appeal on 8 December 2006.[85] When trial commenced on 7 November 2007, Šešelj represented himself.[86]

IT-03-67-T, Decision on Continuation of Proceedings, 23 December 2013 (original French version filed on 13 December 2013) ("Decision of 13 December 2013"), para. 45; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, 19 February 2010 (original French version filed on 10 February 2010) ("Decision of 10 February 2010"), para. 24.

[78] Regarding the Indictment, *see Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Accused's Claim for Damages on Account of Alleged Violations of his Elementary Rights During Provisional Detention, 16 April 2012 (original French version filed on 21 March 2012) ("Decision of 21 March 2012"), para. 91, n. 205; Decision of 27 November 2007, para. 14, nn. 34, 35; Decision of 3 June 2004, para. 44, n. 69. Regarding political bias, *see* Decision of 13 December 2013, para. 45; Decision of 10 February 2010, paras. 7, 24; Decision of 18 September 2008, paras. 2-11, 29.

[79] *See* Trial Judgement, Annex 2 – Procedural Background, para. 2.

[80] *See* Trial Judgement, Annex 2 – Procedural Background, para. 32; Decision of 21 March 2012, para. 6; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006 ("Appeal Decision of 20 October 2006"), para. 2.

[81] *See* Trial Judgement, Annex 2 – Procedural Background, para. 32; *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, p. 13. The Registrar subsequently assigned and replaced various standby counsel to assist Šešelj with his defence. *See* Trial Judgement, Annex 2 – Procedural Background, para. 33; Decision of 21 March 2012, para. 8.

[82] *See* Trial Judgement, Annex 2 – Procedural Background, para. 34; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, 21 August 2006, para. 81, p. 25.

[83] *See* Trial Judgement, Annex 2 – Procedural Background, para. 36; Appeal Decision of 20 October 2006, paras. 26, 52.

[84] *See* Trial Judgement, Annex 2 – Procedural Background, para. 36; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, 25 October 2006, para. 5.

[85] *See* Trial Judgement, Annex 2 – Procedural Background, para. 39; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006 ("Appeal Decision of 8 December 2006"), para. 30.

[86] *See* Trial Judgement, Annex 2 – Procedural Background, para. 40. During the course of the trial, the Prosecution sought to have counsel assigned to Šešelj for the remainder of the trial, and this was subsequently rejected by the Trial Chamber. *See* Trial Judgement, Annex 2 – Procedural Background, paras. 41, 42; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Public Version of the "Consolidated Decision on Assignment of Counsel, Adjournment and

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30. Šešelj submits that, from the time of his initial detention, the Prosecution was determined to have counsel assigned to him in order for the trial to proceed to his detriment and that for four years he was not allowed to represent himself.[87] According to Šešelj, this resulted in his hunger strike in November 2006 until the ICTY Appeals Chamber granted his requests and "annulled" the trial that commenced without his presence.[88]

31. As noted above, Šešelj's right to self-representation was heavily litigated at trial. Additionally, in the Decision of 21 March 2012, the Trial Chamber rejected Šešelj's claims that his right to self-representation was violated from 2003 to 2006 and that he be awarded 300,000 euros in damages.[89] The Trial Chamber found, *inter alia*, that he "correctly exercised the effective remedies available to him and it was decided in his favour"[90] and that any errors were immediately rectified by the Appeal Decision of 8 December 2006 without prejudice to Šešelj.[91] According to the Trial Chamber, since the trial resumed, Šešelj was never prevented from exercising his right to self-representation.[92] In the Decision of 13 December 2013, the Trial Chamber again considered Šešelj's contentions that his right to self-representation was violated[93] and found that the ICTY could not be held responsible for Šešelj's choice to undertake a hunger strike when legitimate and established remedies were available.[94]

32. Šešelj's submissions on appeal are repetitive of arguments that failed at trial[95] and do not demonstrate any error in the decisions taken by the Trial Chamber warranting the intervention of the Appeals Chamber. The Appeals Chamber therefore dismisses his arguments pertaining to his right to self-representation.

C. Detention Conditions and Preparation of Defence

33. Šešelj submits that his ability to adequately prepare for trial was limited by, *inter alia*, inadequate time and resources compared to the Prosecution,[96] communication bans with his team of legal experts,[97] and the Prosecution's failure to disclose documents, including in a language he

Prosecution Motion for Additional Time with Separate Opinion of Presiding Judge Antonetti in Annex", 11 December 2009 (original French version filed on 24 November 2009), para. 122.
[87] Response Brief, paras. 220, 221, 234, 266, 278, 291, 314.
[88] Response Brief, paras. 229, 234, 235, 270, 280.
[89] *See* Trial Judgement, Annex 2 – Procedural Background, para. 43; Decision of 21 March 2012, paras. 5, 18.
[90] Decision of 21 May 2012, para. 18.
[91] Decision of 21 May 2012, para. 18.
[92] Decision of 21 May 2012, para. 18.
[93] Decision of 13 December 2013, para. 25.
[94] Decision of 13 December 2013, para. 25. The Trial Chamber also considered that, since Šešelj's request with respect to the imposition of standby counsel against his wishes had already been ruled on, any alleged violation of his right to self-representation in this regard was rendered moot. *See* Decision of 13 December 2013, para. 25.
[95] *See*, *e.g.*, Decision of 13 December 2013, para. 8; Decision of 21 March 2012, para. 5.
[96] Response Brief, paras. 273-276, 289, 389-393.
[97] Response Brief, paras. 279-281, 289, 291.

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understands.[98] He argues that his rights were further violated by the imposition of detention conditions that prevented him from having contact with his wife and friends.[99]

34. In its Decision of 21 March 2012, the Trial Chamber rejected Šešelj's arguments that he was not provided with adequate time and facilities to prepare his defence, that his right to equality of arms was violated, and that he should be awarded 600,000 euros in damages.[100] In the same decision, the Trial Chamber also dismissed Šešelj's contentions regarding the lack of privileged communication with his legal associates.[101] As to disclosures in a language he understands, the Trial Chamber found no violation of his fair trial rights when it considered that Šešelj was granted access in December 2006 to all documents in the Prosecution's possession in Serbian, that he received translations of all documents in a systematic and timely manner, and that all deadlines applicable to him ran from the date he received translations.[102] The Trial Chamber further considered alleged violations of Šešelj's rights with respect to detention conditions, in particular his inability to receive visits from his wife and friends, and dismissed them as unsubstantiated.[103]

35. Šešelj merely repeats on appeal matters already addressed at trial,[104] without demonstrating any error in the decisions taken by the Trial Chamber. Accordingly, Šešelj fails to discharge his burden on appeal. His submissions are therefore dismissed.

D. Admission of Witness Statements and Allegedly False Evidence

36. Šešelj submits that many witnesses did not testify in court but rather had their written statements admitted into the record, thus depriving him of the opportunity to cross-examine the witnesses.[105] Šešelj further argues that the Prosecution obtained false witness statements against

[98] Response Brief, paras. 219, 226, 238, 239, 266-269, 276-278, 286-288, 291, 314.
[99] Response Brief, paras. 219, 223, 241-243, 291.
[100] Decision 21 March 2012, paras. 30-33. The Trial Chamber considered that Article 21(4)(d) of the ICTY Statute and ICTY jurisprudence did not require that an accused who opts for self-representation receive all benefits held by an accused represented by counsel. In citing ICTY jurisprudence, the Trial Chamber stated that "allowing an accused to self-represent and yet also receive full legal aid funding from the Tribunal would, as the saying goes, let him have his cake and eat it too". *See* Decision 21 March 2012, para. 34.
[101] *See* Decision 21 March 2012, paras. 46-65. The Trial Chamber considered, *inter alia*, that where an accused chooses to represent himself, lawyer-client privilege does not apply, but that nevertheless, the Registry may exercise its discretionary power to allow a self-represented accused to have privileged access to up to three designated associates. *See* Decision 21 March 2012, para. 46. It also considered that Šešelj benefited from this authorization by the Registry, and, although it was temporarily taken away, it was subsequently restored to him, and that, upon exhausting all means of remedy available to him, Šešelj failed to demonstrate a violation of his fair trial rights in this regard. *See* Decision 21 March 2012, para. 65.
[102] *See* Decision of 13 December 2013, paras. 27, 28; Decision of 21 March 2012, paras. 27-29.
[103] *See* Decision of 21 March 2012, paras. 66-69.
[104] *See*, *e.g.*, Decision of 13 December 2013, para. 8; Decision of 21 March 2012, paras. 27, 30-33, 66-67. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 44-60.
[105] *See* Response Brief, paras. 226, 291.

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him, often through manipulation and/or intimidation, and that this evidence should therefore be discarded on appeal.[106]

37. In its Decision of 13 December 2013, the Trial Chamber found that Šešelj was duly notified that, in the interest of judicial efficiency, the written statements of some witnesses would be admitted *in lieu* of their oral testimony, and noted that Šešelj was given the right to cross-examine those witnesses but refused to exercise this right on principle.[107] Allegations that the Prosecution engaged in witness intimidation were also duly considered at trial. The Trial Chamber appointed an *amicus curiae*,[108] whose report, with which the Trial Chamber agreed, concluded that no grounds existed to initiate contempt proceedings against the Prosecution.[109]

38. Šešelj simply repeats arguments on appeal which did not succeed at trial,[110] without demonstrating any error in the decisions taken by the Trial Chamber. His submissions are accordingly dismissed in their entirety.

E. Undue Delay

39. On 24 February 2003, Šešelj surrendered to the ICTY and was remanded in custody.[111] His trial commenced on 7 November 2007 and concluded on 20 March 2012.[112] On 28 August 2013, Judge Frederik Harhoff was disqualified[113] and subsequently replaced by Judge Mandiaye Niang on 31 October 2013.[114] On 13 December 2013, the Trial Chamber decided to continue the proceedings as soon as Judge Niang finished familiarizing himself with the record.[115] On 6 November 2014, the

[106] Response Brief, paras. 46, 84, 136, 139, 154, 155, 225, 302, 303, 308, 320, 321, 329, 332, 341.
[107] Decision of 13 December 2013, paras. 30-36.
[108] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Redacted Version of the "Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 27 July 2010 (original French version filed on 29 June 2010), para. 32. *See also* Trial Judgement, Annex 2 – Procedural Background, para. 65.
[109] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, 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, 14 February 2012 (original French version filed on 22 December 2011), para. 29. *See also* Trial Judgement, Annex 2 – Procedural Background, para. 66; Decision of 13 December 2013, paras. 38, 39.
[110] *See* Decision of 13 December 2013, paras. 8, 30, 31, 38, n. 81; Decision of 10 February 2010, paras. 10, 25, nn. 52, 53.
[111] *See* Trial Judgement, Annex 2 – Procedural Background, para. 2.
[112] Trial Judgement, Annex 2 – Procedural Background, para. 10.
[113] Trial Judgement, Annex 2 – Procedural Background, paras. 10, 25; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 23-27.
[114] Trial Judgement, Annex 2 – Procedural Background, para. 28; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning a Judge Pursuant to Rule 15, 31 October 2013, p. 2.
[115] Trial Judgement, Annex 2 – Procedural Background, para. 29; Decision of 13 December 2013. The decision to continue the proceedings was upheld by the Appeals Chamber on 6 June 2014. *See* Trial Judgement, Annex 2 – Procedural Background, para. 30; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR15bis, Decision on Appeal Against Decision on Continuation of Proceedings, 6 June 2014 ("Appeal Decision of 6 June 2014").

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Trial Chamber, by majority, ordered *proprio motu* Šešelj's provisional release on medical grounds.[116] The Trial Judgement was delivered on 31 March 2016, in Šešelj's absence.[117]

40. Šešelj argues that the trial proceedings in his case were the longest in the history of the ICTY and amounted to undue delay.[118] Pointing to the length of his pre-trial detention, which he submits was caused by the Prosecution's failure to be ready for trial and the inefficiencies of the ICTY Trial Chambers and the Registry, he contends that his rights to be tried within a reasonable time and to be presumed innocent were violated.[119] Šešelj submits that he "in no way contributed to the inappropriate length of proceedings" and "was never absent from the courtroom, even when he was hampered by serious illness".[120]

41. The Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 19(4)(c) of the Statute[121] and protects an accused against *undue* delay, which is determined on a case-by-case basis.[122] A number of factors are relevant to this assessment, including: the length of the delay, the complexity of the proceedings, the conduct of the parties, the conduct of the relevant authorities, and any prejudice to the accused.[123] Additionally, trial chambers have a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.[124]

42. The Appeals Chamber considers that, while the trial proceedings in this case have been lengthy,[125] the issues that Šešelj now raises on appeal were addressed at trial. In particular, the length of his pre-trial detention and arguments that his right to be tried without undue delay was violated were rejected in the Trial Chamber's Decisions of 10 February 2010,[126] 21 March 2012,[127]

[116] Trial Judgement, Annex 2 – Procedural Background, para. 83; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order on the Provisional Release of the Accused *Proprio Motu*, 7 November 2014 (original French version filed on 6 November 2014) (public with confidential annex).
[117] Trial Judgement, Annex 2 – Procedural Background, para. 10. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 85, 86.
[118] Response Brief, paras. 17, 18, 31, 55, 211, 212, 300, 301, 306, 315, 324.
[119] Response Brief, paras. 114, 224-272, 300, 314, 316.
[120] Response Brief, para. 324.
[121] The language of Article 19(4)(c) of the Statute tracks the language of Article 21(4)(c) of the ICTY Statute.
[122] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 346; Appeal Decision of 6 June 2014, para. 63.
[123] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 346; Appeal Decision of 6 June 2014, para. 63.
[124] *See Nyiramasuhuko et al.* Appeal Judgement, para. 346; *Šainović et al.* Appeal Judgement, para. 100.
[125] The Appeals Chamber notes that, from the time of Šešelj's surrender to the ICTY on 24 February 2003, approximately 4 years and 8 months lapsed before the commencement of his trial (*see* Trial Judgement, Annex 2 – Procedural Background, para. 3), approximately 11 years and 8 months lapsed before his provisional release (*see* Trial Judgement, Annex 2 – Procedural Background, para. 83), and approximately 13 years and 1 month lapsed before the delivery of the Trial Judgement.
[126] The Trial Chamber considered Šešelj's submissions that both the length of his pre-trial detention and his trial were excessively long and that the delays were attributable to the Prosecution who, *inter alia*, repeatedly amended the Indictment, changed the type and number of evidence presented, and attempted to impose counsel on him. *See* Decision of 10 February 2010, para. 14. The Trial Chamber acknowledged the lengthy period of time Šešelj spent in detention. In doing so, the Trial Chamber was mindful of Šešelj's fundamental right to be tried without undue delay under Article 21(4)(c) of the ICTY Statute. It also noted the complexity of the case, the seriousness of the charges against Šešelj, the

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and 13 December 2013.[128] The ICTY Appeals Chamber upheld the Decision of 13 December 2013 in so far as it related to undue delay.[129] It also considered, *inter alia*, that, according to the jurisprudence, a 12-year incarceration prior to the issuance of a trial judgement does not amount to prejudice *per se*[130] and that, owing to contempt proceedings against him, Šešelj was sentenced to serve a total of four years and nine months' imprisonment.[131]

43. Šešelj's submissions on appeal alleging undue delay are repetitive of those that failed at trial without demonstrating any error in the decisions taken by the Trial Chamber. Moreover, they fail to take into account that many of his arguments have already been addressed and rejected by the ICTY

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conduct of all parties involved, and that interruptions of the trial were justified by procedures with a higher interest aimed at preserving the fairness of the trial, such as contempt proceedings against Šešelj. *See* Decision of 10 February 2010, paras. 29, 30. Recalling that international and European jurisprudence does not establish a predetermined threshold of the time period beyond which a trial may be considered unfair on account of undue delay, the Trial Chamber found that Šešelj's right to be tried without undue delay had not been violated. *See* Decision of 10 February 2010, para. 30. *See also* Trial Judgement, Annex 2 – Procedural Background, para. 70.

[127] The Trial Chamber considered Šešelj's argument that the ICTY violated his right to be tried within a reasonable time – the length of his detention, including pre-trial, was excessive, and the Trial Chamber never justified this length – and that he sought 500,000 euros in damages. *See* Decision of 21 March 2012, para. 87. The Trial Chamber recalled its prior decisions and reiterated its finding that Šešelj's right to be tried without undue delay was not violated. *See* Decision of 21 March 2012, paras. 89, 90, *referring to* Decision of 10 February 2010; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Motion by Accused to Discontinue Proceedings, 12 October 2011 (original French version filed on 29 September 2011) ("Decision of 29 September 2011"), paras. 32, 33. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 71, 72. It further found that procedures between the Decision of 10 February 2010 and the Decision of 21 March 2012 did not result in violation of this right. *See* Decision of 21 March 2012, para. 90. Noting that Šešelj did not appeal or seek reconsideration of the Decision of 10 February 2010, the Trial Chamber only examined his arguments for the period after 10 February 2010. *See* Decision of 21 March 2012, para. 90, n. 202; Decision of 29 September 2011, para. 31

[128] Having reiterated its findings in previous decisions, the Trial Chamber determined that Šešelj's undue delay arguments for the period leading up to the Decision of 21 March 2012 were moot as they had already been addressed and that there was no delay for the period thereafter, including proceedings whereby Judge Harhoff was disqualified. *See* Decision of 13 December 2013, paras. 19-21, *citing* Decision of 10 February 2010, Decision of 29 September 2011, and Decision of 21 March 2012. *See also* Decision of 13 December 2013, paras. 23, 24.

[129] The ICTY Appeals Chamber explicitly observed that Šešelj merely repeated on appeal arguments that the Trial Chamber had already addressed and that he failed to demonstrate any error by the Trial Chamber. *See* Appeal Decision of 6 June 2014, paras. 47, 48, n. 91. *See also* Appeal Decision of 6 June 2014, paras. 29, 31, 60.

[130] Appeal Decision of 6 June 2014, para. 63, *referring to Mugenzi and Mugiraneza* Appeal Judgement, paras. 28, 37, 64, 144.

[131] Appeal Decision of 6 June 2014, para. 64. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 61-64. On appeal, Šešelj argues that the three contempt cases brought against him should not have interrupted his trial on the most serious international crimes. *See* Response Brief, para. 224. The Appeals Chamber notes that the Trial Chamber balanced his right to be tried without undue delay with the overall fairness of the proceedings and found that "its duty to preserve the integrity and fairness of the proceedings must prevail over time considerations in light of the exceptional circumstances of this case". *See* Decision of 10 February 2010, paras. 28, 29. The Appeals Chamber finds no error in the Trial Chamber's approach as Šešelj was found guilty of contempt of the Tribunal for, *inter alia*, deliberately and knowingly hindering the course of justice by revealing confidential information about 13 protected witnesses, in violation of protective measures ordered by the Trial Chamber, and for failing to remove confidential information from his personal website. *See* Trial Judgement, Annex 2 – Procedural Background, paras. 62-64. The ICTY Appeals Chamber upheld the sentences in all three contempt judgements against Šešelj. *See* Trial Judgement, Annex 2 – Procedural Background, paras. 62-64. *See also In the Case Against Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010, para. 42; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Judgement, 28 November 2012, para. 34; *Contempt Proceedings Against Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Public Redacted Version of "Judgement" Issued on 30 May 2013, 30 May 2013, para. 54.

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Appeals Chamber.[132] The Appeals Chamber accordingly rejects his arguments alleging undue delay in their entirety.

F. Conclusion

44. For the reasons set out above, the Appeals Chamber dismisses Šešelj's submissions that his fair trial rights were violated.

[132] The Appeals Chamber notes that the Trial Chamber explicitly considered that Šešelj's pre-trial detention was prolonged by 12 months following his hunger strike and the reassignment of the case to a different Trial Chamber. *See* Trial Judgement, Annex 2 – Procedural Background, para. 22. *See also* Trial Judgement, Annex 2 – Procedural Background, paras. 61-64; Appeal Decision of 20 October 2006, para. 29 (the ICTY Appeals Chamber considered the Trial Chamber's reasoning to assign counsel to Šešelj because of "the frivolous and abusive nature of many of Šešelj's 191 pre-trial submissions; his wilful refusal on a number of occasions to follow the rules for the proceedings as established by the International Tribunal's Rules and Practice Directions as well the orders of the Trial Chamber; his persistent use of abusive language in his submissions and during his pre-trial appearances in the courtroom; his revelation of the name of a protected witness, intimidation of potential witnesses, and unauthorized disclosure of confidential materials; and his continued obstructionist and disruptive behaviour despite repeated general warnings from the Trial Chamber, Appeals Chamber, Bureau and President of the International Tribunal" – all of which "clearly suffice to lead to the conclusion that Šešelj displayed a deliberate lack of good faith to cooperate in pre-trial proceedings, which led to considerable disruption and waste of the International Tribunal's resources"); Appeal Decision of 8 December 2006, para. 2.

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V. VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR

45. The Trial Chamber found that, in Vukovar, Zvornik, Greater Sarajevo, Mostar, and Nevesinje, some alleged acts of murder, torture, cruel treatment, and plunder as violations of the laws or customs of war "were indeed committed".[133] In making these findings, the Trial Chamber cited the evidence upon which it relied, but did not discuss the reasons why it accepted this evidence.[134] The Trial Chamber also found that other alleged acts of murder, cruel treatment, torture, plunder, as well as wanton destruction or devastation not justified by military necessity and deliberate destruction of sacred Muslim sites in the same municipalities were not conclusively established by the evidence.[135] Specifically, in relation to the alleged wanton destruction of the city of Mostar, the Trial Chamber considered that, although the city was shelled "indiscriminately", the evidence did not show beyond reasonable doubt that the destruction was not justified by military necessity.[136]

46. The Prosecution argues that the Trial Chamber failed to provide a reasoned opinion in relation to all of its findings on the alleged violations of the laws or customs of war.[137] According to the Prosecution, the Trial Chamber's findings contain no reference to the applicable law and consist of "mere one-sentence bullet-point conclusions regarding charged crimes" without providing any analysis or reasons for its conclusions.[138] In relation to those violations which were not found established, the Prosecution suggests that the Trial Chamber may have applied an erroneous legal standard and illustrates this point by referring to a seeming inconsistency in the Trial Chamber's description of the shelling of Mostar as "indiscriminate" and its later conclusion that it could not be excluded that the destruction was justified by military necessity.[139]

47. The Prosecution requests the Appeals Chamber to find that the Trial Chamber failed to provide a reasoned opinion and to then find, based on the evidence, that the violations of the laws or customs of war which the Trial Chamber found established are proven beyond reasonable doubt.[140] The Prosecution submits, however, that "[f]or the purpose of correcting the [Trial] Judgement, [it]

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[133] Trial Judgement, paras. 207, 213, 216, 219. *See also* Trial Judgement, paras. 210, 220; Indictment, paras. 18, 20-22, 24-30, 34.
[134] Trial Judgement, paras. 207, 210, 213, 216, 219.
[135] Trial Judgement, paras. 203, 204. *See also* Indictment, paras. 22, 24, 26, 27, 29, 30, 34.
[136] Trial Judgement, para. 204(a), n. 175.
[137] Notice of Appeal, paras. 4-6; Appeal Brief, paras. 2, 7, 11, 21, 42-44, 74, 118, 119, 122, 123, 220. *See also* Reply Brief, para. 2; T. 13 December 2017 pp. 5, 6, 11-15.
[138] Appeal Brief, para. 43. *See also* Appeal Brief, para. 122.
[139] Appeal Brief, paras. 122, 123. In this respect, the Prosecution emphasizes that indiscriminate attacks are never permitted. *See* Appeal Brief, para. 123, *referring to*, *inter alia*, J-M. Henckaerts and L. Doswald-Beck, eds., International Committee of the Red Cross: Customary International Humanitarian Law, Vol. I (Rules) (Cambridge: Cambridge University Press, 2005), Rule 11; *Galić* Appeal Judgement, para. 130.
[140] Appeal Brief, para. 220.

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does not challenge the [Trial] Chamber's conclusions that certain war crimes [...] were not proven".[141]

48. Šešelj responds that the Prosecution conflates errors of law and errors of fact[142] and fails to articulate the remedy that it seeks.[143] He adds that the Trial Chamber correctly concluded that neither he nor members of the Serbian Radical Party participated in the commission of violations of the laws or customs of war.[144]

49. The Appeals Chamber recalls that, in claiming an error of law on the basis of the lack of a reasoned opinion, a party is required to identify the specific issues, factual findings, or arguments that the trial chamber omitted to address and to explain why this omission invalidates the decision.[145] At its core, the Prosecution's request is simply for the Appeals Chamber to supply the reasoning for those violations of the laws or customs of war that the Trial Chamber found established beyond a reasonable doubt and to confirm the findings. The Prosecution does not seek any revision of Trial Chamber's findings that certain violations were not proven. The Appeals Chamber recalls that an allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground alone.[146] Accordingly, the Appeals Chamber need not consider the Prosecution's submissions that the Trial Chamber failed to provide a reasoned opinion as they effectively seek to maintain the *status quo* of the Trial Chamber's conclusions on the existence of the violations of the laws or customs of war without any consequent impact on the verdict.[147] In any case, with respect to the Trial Chamber's observation that the indiscriminate shelling of Mostar might have been justified by military necessity, the Appeals Chamber recalls that there is an absolute prohibition against the targeting of civilians in customary international law, encompassing indiscriminate attacks, and that this prohibition may not be derogated from by invoking military necessity.[148]

50. For the foregoing reasons, the Prosecution's challenges to the Trial Chamber's findings on violations of the laws or customs of war are dismissed.

[141] Appeal Brief, n. 619. *See also* T. 13 December 2017 pp. 14, 15.
[142] Response Brief, para. 55. *See also* Response Brief, paras. 49-52.
[143] Response Brief, para. 114.
[144] Response Brief, para. 343.
[145] *See supra* para. 13.
[146] *See supra* para. 13.
[147] *See also* T. 13 December 2017 pp. 14, 15.
[148] *D. Milošević* Appeal Judgement, para. 53; *Strugar* Appeal Judgement, para. 275; *Galić* Appeal Judgement, para. 130; *Blaškić* Appeal Judgement, para. 109.

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VI. CRIMES AGAINST HUMANITY

51. The Prosecution alleged at trial that Šešelj was responsible for crimes against humanity that formed part of a widespread or systematic attack directed against the non-Serbian civilian populations in Croatia, Bosnia and Herzegovina, and Vojvodina, Serbia.[149] As a threshold consideration, the Trial Chamber first examined whether a widespread or systematic attack was launched against the non-Serbian civilian population in Croatia and Bosnia and Herzegovina and concluded that the Prosecution had not presented sufficient evidence to irrefutably establish this.[150] The Trial Chamber next concluded that there was no widespread or systematic attack against the non-Serbian civilian population in Vojvodina, observing that Vojvodina was not an area of armed conflict, that no nexus existed between the events there and the conflict in Croatia and Bosnia and Herzegovina, and that the scale and *modus operandi* of the abuses, even if proven, did not amount to a widespread or systematic attack.[151] Accordingly, the Trial Chamber found that the *chapeau* elements of Article 5 of the ICTY Statute were not met with regard to crimes against humanity in Croatia, Bosnia and Herzegovina, and Vojvodina[152] and, therefore, did not enter findings on the underlying crimes of persecution, deportation, and other inhumane acts (forcible transfer) charged under Counts 1, 10 and 11 of the Indictment.

52. The Prosecution submits that the Trial Chamber erred in finding that there was no widespread or systematic attack against the non-Serbian civilian population in Croatia, Bosnia and Herzegovina, and Vojvodina.[153] It requests that the Appeals Chamber reverse the Trial Chamber's conclusion and enter findings on the *chapeau* elements of crimes against humanity and the underlying crimes charged in the Indictment.[154] Šešelj responds that the Prosecution's submissions are unsubstantiated, repetitive of its arguments at trial, misrepresent the evidence, and fail to show any error in the Trial Chamber's findings.[155] He further argues that the Prosecution fails to establish that any of the alleged errors invalidates the Trial Judgement or has occasioned a miscarriage of justice.[156]

53. In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) failing to state the applicable law; and (ii) finding that there was no widespread or systematic

[149] Trial Judgement, para. 188. *See* Indictment, paras. 14-17, 31-33.
[150] Trial Judgement, paras. 192, 193.
[151] Trial Judgement, paras. 194-197.
[152] Trial Judgement, para. 198.
[153] Notice of Appeal, paras. 5, 6, 11(a); Appeal Brief, paras. 3, 12, 18-20, 22, 24, 25, 45-74, 118-121, 139-157. *See also* T. 13 December 2017 pp. 14-20.
[154] Appeal Brief, paras. 221-230. *See also* T. 13 December 2017 pp. 24-26.
[155] *See*, *e.g.*, Response Brief, paras. 48, 53-56, 68-72, 80-86, 115, 164-170, 174-182, 208, 360-362, 368, 387.
[156] *See*, *e.g.*, Response Brief, paras. 72, 86.

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attack against the non-Serbian civilian population in Croatia, Bosnia and Herzegovina, and Vojvodina, Serbia.

A. Applicable Law for Crimes Against Humanity

54. The Trial Chamber found that there was no widespread or systematic attack against the non-Serbian civilian population in Croatia, Bosnia and Herzegovina, and Vojvodina.[157] In setting out the law, it stated that:

> To qualify as crimes against humanity under Article 5 of the Statute, the crimes must have been committed "in armed conflict", whether international or internal in character. In addition, there has to be an objective link, geographical and temporal, between the acts of the accused and the armed conflict.[158]

55. In relation to the alleged attack in Croatia and Bosnia and Herzegovina, the Trial Chamber considered that the Prosecution "failed to fulfil [its] obligation" to demonstrate that "the civilians were targeted en masse".[159] Regarding Vojvodina, the Trial Chamber determined that the acts of the Serbian refugees were essentially driven by private motives focused on the acquisition of housing, which did not allow "for a finding of a massive attack against the Croatian civilian population".[160]

56. The Prosecution submits that the Trial Chamber failed to set out the legal requirements applicable to the *chapeau* elements of crimes against humanity and, in particular, what is required to prove the existence of an attack against the civilian population and its widespread or systematic nature.[161] The Prosecution thus argues that the Trial Chamber failed to provide a reasoned opinion.[162] It further submits that the Trial Chamber's reference to "massiveness" suggests that it only considered whether the attack against the civilian population was widespread and that, had the Trial Chamber applied the correct legal standard to the evidence on the record, it would have found that there was a widespread or systematic attack against the civilian population.[163]

57. The Appeals Chamber recalls that, in order to find that a crime against humanity has been committed, a trial chamber must be satisfied, *inter alia*, that the crime was part of a widespread or systematic attack directed against a civilian population.[164] The term "widespread" refers to the large

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[157] Trial Judgement, paras. 192-198.
[158] Trial Judgement, para. 191 (internal references omitted).
[159] Trial Judgement, para. 193.
[160] Trial Judgement, para. 196.
[161] Appeal Brief, para. 120, *referring to* Trial Judgement, paras. 192-198.
[162] Appeal Brief, paras. 118-120, *referring to Hadžihasanović and Kubura* Appeal Judgement, para. 13. The Prosecution also contends that the failure to set out the substantive law applied is "particularly troublesome" as one of the judges forming the majority stated in his separate opinion that he does not feel bound by the rule of precedent applicable at the ICTY. *See* Appeal Brief, para. 119.
[163] Appeal Brief, para. 121, *referring to, inter alia*, Trial Judgement, para. 193.
[164] *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 260; *Šainović et al.* Appeal Judgement, para. 264; *Bagosora and Nsengiyumva* Appeal Judgement, para. 389; *Mrkšić and Šljivančanin* Appeal Judgement, para. 41.

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scale nature of the attack and the number of victims, whereas the term "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.[165] The Appeals Chamber observes that, in the present case, the Trial Chamber did not explicitly set out the legal requirements applicable to the *chapeau* elements of crimes against humanity. However, contrary to the Prosecution's submission, this *per se* does not amount to a failure by the Trial Chamber to provide a reasoned opinion. While, in practice, trial chambers usually state the law that they intend to apply, the duty to provide a reasoned opinion does not necessarily entail a formal requirement to set out the applicable law. Accordingly, while it would have been preferable for the Trial Chamber to explicitly set out the *chapeau* elements of crimes against humanity, the Prosecution fails to show that the Trial Chamber's omission to do so amounts to an error of law.

58. Moreover, a review of the Trial Chamber's analysis reveals that the Trial Chamber applied the correct legal standard in its assessment of the existence of an attack against the civilian population and its widespread or systematic nature.[166] In this respect, the Appeals Chamber notes that the Trial Chamber stated that it was incumbent on the Prosecution to demonstrate that civilians were "targeted en masse",[167] discussed evidence of abuses against civilians in Hrtkovci in terms of their "scale",[168] and found that there was insufficient proof that a "massive attack" was carried out against the civilian population.[169] The Trial Chamber's considerations thus evince the application of the "widespread" requirement. In applying the "systematic" requirement, the Trial Chamber considered that there was insufficient proof of a "campaign of violence and mistreatment",[170] discussed evidence of abuses against civilians in Hrtkovci in terms of their "*modus operandi*",[171] and found that they amounted to "latent harassment, targeted and limited",[172] and "spontaneous incidents".[173] The Trial Chamber was also clearly aware of the requirement that the attack be directed against the civilian population when it found that the evidence indicated the existence of "an armed conflict between enemy military forces, with some civilian components".[174]

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[165] *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 260; *Bagosora and Nsengiyumva* Appeal Judgement, para. 389; *Nahimana et al.* Appeal Judgement, para. 920; *Kordić and Čerkez* Appeal Judgement, para. 94; *Blaškić* Appeal Judgement, para. 101.
[166] The Appeals Chamber notes that the English translation of paragraphs 192 and 196 of the Trial Judgement refers to a "widespread *and* systematic" attack (emphasis added). However, the French original text of paragraphs 192 and 196 of the Trial Judgement refers to an attack that is "généralisée *ou* systématique" (emphasis added). The Appeals Chamber notes that the French original is the authoritative version of the Trial Judgement. *See* Trial Judgement, p. 110.
[167] Trial Judgement, para. 193.
[168] Trial Judgement, para. 196.
[169] Trial Judgement, para. 196.
[170] Trial Judgement, para. 192.
[171] Trial Judgement, para. 196.
[172] Trial Judgement, para. 196.
[173] Trial Judgement, n. 155.
[174] Trial Judgement, para. 192.

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59. Accordingly, the Prosecution fails to show that the Trial Chamber erred in failing to state and apply the correct law related to crimes against humanity.

B. Existence of a Widespread or Systematic Attack Against the Civilian Population

1. Croatia and Bosnia and Herzegovina

60. The Trial Chamber found that the Prosecution failed to prove that the non-Serbian civilian populations in Vukovar in Croatia and in Zvornik, Greater Sarajevo, Mostar, and Nevesinje in Bosnia and Herzegovina were targeted by a campaign of violence and mistreatment.[175] It held that the evidence pointed rather to "an armed conflict between enemy military forces, with some civilian components".[176] The Trial Chamber specified that:

> 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.[177]

The Trial Chamber was also unable to dismiss Šešelj's arguments that civilians fled the combat zones to find shelter in areas occupied by members of the same ethnic or religious group and that the buses, which were provided in this context, were acts of humanitarian assistance rather than part of operations to forcibly transfer the population.[178] In this respect, the Trial Chamber considered that Šešelj's arguments were supported by the evidence of Witnesses VS-1022 and VS-1087.[179]

61. The Prosecution submits that the Trial Chamber failed to provide a reasoned opinion or, in the alternative, erred in fact in finding that there was no widespread or systematic attack against the non-Serbian civilian population in Croatia and Bosnia and Herzegovina.[180] Specifically, the Prosecution argues that the Trial Chamber: (i) did not refer to the evidence it relied upon[181] and that the evidence it considered, namely that of Witnesses VS-1022 and VS-1087, does not support its conclusions;[182] (ii) omitted to consider its own findings on violations of the laws or customs of war;[183] (iii) failed to consider adjudicated facts of which it took judicial notice;[184] and (iv) did not

[175] Trial Judgement, para. 192.
[176] Trial Judgement, para. 192.
[177] Trial Judgement, para. 192.
[178] Trial Judgement, para. 193.
[179] Trial Judgement, para. 193, *referring to* Witness VS-1022, T. 17 July 2008 pp. 9524, 9525, 9528-9530 (closed session); Exhibit P696 (confidential), para. 16.
[180] Appeal Brief, paras. 3, 18-20, 24, 25, 42, 45-74, 139-143, 221. *See also* T. 13 December 2017 pp. 14-20.
[181] Appeal Brief, para. 46, *referring to* Trial Judgement, para. 192.
[182] Appeal Brief, paras. 49-57. *See also* T. 13 December 2017 p. 19.
[183] Appeal Brief, paras. 59, 60, *referring to*, *inter alia*, Trial Judgement, paras. 205-220. *See also* T. 13 December 2017 pp. 17, 18.
[184] Appeal Brief, para. 24. *See also* T. 13 December 2017 p. 17.

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take into account the large body of evidence on crimes committed against non-Serbian civilians and their consistent pattern.[185]

62. The Appeals Chamber notes that the section of the Trial Judgement, rejecting the existence of a widespread or systematic attack against the civilian population in Croatia and Bosnia and Herzegovina, contains little reference to the trial record.[186] However, a trial judgement must be read as a whole,[187] and it is not necessary for a trial chamber to refer to every piece of evidence on the record, as long as there is no indication that it completely disregarded evidence which is clearly relevant.[188] In the present case, the Trial Chamber explicitly stated that it reached its findings "[i]n light of the totality of the evidence in the case file" and provided reasons as to why it was not convinced beyond a reasonable doubt that there was a widespread or systematic attack against the non-Serbian civilian population in Croatia and Bosnia and Herzegovina.[189] In particular, the Trial Chamber explained that it was not persuaded that an attack was directed against civilians and found that other reasonable inferences were available on the evidence.[190]

63. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that could be drawn from the evidence presented.[191] In the present case, in finding that the existence of a widespread or systematic attack against the civilian population was not the only reasonable inference, the Trial Chamber relied on the evidence of Witnesses VS-1022 and VS-1087.[192]

64. A review of the specific portions of Witness VS-1022's testimony relied upon by the Trial Chamber indicates that, in the months prior to April 1992, Serbian soldiers in Mostar created an

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[185] Appeal Brief, paras. 18-20, 24, 25, 58, 59, 61-73. The Prosecution also contends that the Trial Chamber erroneously rejected pattern evidence of crimes in municipalities outside the scope of the Indictment. *See* Appeal Brief, paras. 22, 23, *referring to*, *inter alia*, Trial Judgement, para. 29. *See also* T. 13 December 2017 p. 16. The Prosecution does not, however, substantiate its contention with reference to any specific evidence disclosing a similar pattern of violence at other locations that it relied on at trial or that the Trial Chamber should arguably have considered. The Prosecution's contention in this respect is accordingly dismissed.

[186] *See* Trial Judgement, paras. 192, 193, *referring to* Witness VS-1022, T. 17 July 2008 pp. 9524, 9525, 9528-9530 (closed session); Exhibit P696 (confidential), para. 16.

[187] *See Prlić et al.* Appeal Judgement, paras. 329, 453; *Stanišić and Župljanin* Appeal Judgement, para. 138; *Šainović et al.* Appeal Judgement, paras 306, 321; *Boškoski and Tarčulovski* Appeal Judgement, para. 67; *Orić* Appeal Judgement, para. 38.

[188] *See*, *e.g.*, *Prlić et al.* Appeal Judgement, para. 628; *Stanišić and Župljanin* Appeal Judgement, para. 310; *Nyiramasuhuko et al.* Appeal Judgement, para. 3100; *Tolimir* Appeal Judgement, para. 56; *Popović et al.* Appeal Judgement, paras. 306, 340, 359, 375, 830, 847, 925, 1136, 1171, 1213, 1257, 1521, 1541, 1895, 1971; *Đorđević* Appeal Judgement, n. 2527.

[189] Trial Judgement, paras. 192, 193.

[190] Trial Judgement, paras. 192, 193.

[191] *See*, *e.g.*, *Nyiramasuhuko et al.* Appeal Judgement, para. 1509; *Karemera and Ngirumpatse* Appeal Judgement, para. 146; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Nchamihigo* Appeal Judgement, para. 80; *Stakić* Appeal Judgement, para. 219.

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atmosphere of intimidation as they drove around shouting insults and firing shots in the air, causing Bosnian Muslim civilians to fear leaving their homes.[193] It also reflects that, in a village in Nevesinje municipality, Bosnian Muslim civilians, including women, children, and the elderly, who had already spent nights in trenches, fled the village after it was shelled, and that elderly people from a neighbouring village who were unable to flee were killed by having their throats slit.[194] A review of the rest of Witness VS-1022's testimony reflects that only villages inhabited exclusively by Bosnian Muslims were shelled,[195] that there were individual and mass killings of Bosnian Muslim civilians,[196] and that Bosnian Muslim civilians were murdered or severely mistreated by Serbian forces in Nevesinje.[197]

65. As to the portion of Witness VS-1087's statement relied upon by the Trial Chamber, the Appeals Chamber notes that it reflects that some Bosnian Muslims who wanted to leave Zvornik were allowed to do so.[198] A review of Witness VS-1087's statement as a whole, however, reveals that those Bosnian Muslims who wanted to leave were likely survivors of the attack on Zvornik during which a number of Bosnian Muslim civilians were killed and following which dead bodies of Bosnian Muslims were removed from various detention facilities in Zvornik.[199]

66. The Appeals Chamber notes that, elsewhere in the Trial Judgement, the Trial Chamber considered extensive evidence showing that, between November 1991 and October 1992, Serbian forces, including paramilitary groups and volunteers, committed numerous violations of the laws or customs of war against non-Serbian civilians.[200] Specifically, the Trial Chamber found that members of these forces committed murder, torture, cruel treatment, and plunder of private property at various locations throughout the municipalities of Vukovar,[201] Zvornik,[202] Greater Sarajevo,[203]

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[192] *See* Trial Judgement, para. 193, *referring to* Witness VS-1022, T. 17 July 2008 pp. 9524, 9525, 9528-9530 (closed session); Exhibit P696 (confidential), para. 16.
[193] Witness VS-1022, T. 17 July 2008 pp. 9524, 9525 (closed session).
[194] Witness VS-1022, T. 17 July 2008 pp. 9528-9530 (closed session).
[195] Witness VS-1022, T. 17 July 2008 pp. 9526, 9527 (closed session).
[196] Witness VS-1022, T. 17 July 2008 pp. 9527, 9528 (closed session).
[197] Witness VS-1022, T. 17 July 2008 pp. 9531-9547 (closed session).
[198] *See* Exhibit P696 (confidential), para. 16.
[199] *See* Exhibit P696 (confidential), paras. 9, 12, 19-25, 33-37, 43-45.
[200] *See* Trial Judgement, paras. 207, 210, 213, 216, 219, 220, n. 161.
[201] Trial Judgement, para. 207 (the Trial Chamber found that, in November 1991, Serbian forces, including members of the Vukovar Territorial Defence and "Šešelj's men", members of the Leva Supoderica Detachment, committed murder, torture, and cruel treatment of detainees at the Velepromet warehouse and at the Ovčara farm).
[202] Trial Judgement, para. 210 (the Trial Chamber found that, in the period between April and July 1992, Serbian forces, including members of various paramilitary groups and members of the Serbian police, murdered civilians, committed plunder of private property and murder, torture, and cruel treatment of detainees at the Ekonomija farm, the Ciglana factory, Čelopek Dom Kulture, Drinjača Dom Kulture, Karakaj Technical School, Gero's slaughterhouse, and the Standard shoe factory).
[203] Trial Judgement, para. 213 (the Trial Chamber found that, between June and October 1992, Serbian forces, including Serbian Radical Party volunteers, and members of the Army of Republika Srpska murdered civilians and committed plunder of private property as well as torture and cruel treatment of detainees in the Iskra warehouse and in Planja's house).

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Mostar,[204] and Nevesinje.[205] In relation to several of these incidents the Trial Chamber either referred to "large number[s]" of victims,[206] or to specific numbers ranging from at least six to 130.[207] The Trial Chamber clarified that its findings on violations of the laws or customs of war related to civilian victims only.[208]

67. In addition, throughout the Trial Judgement, the Trial Chamber extensively referred to its prior decisions to take judicial notice of adjudicated facts,[209] including: in the context of its findings on violations of the laws or customs of war committed in Vukovar,[210] Zvornik,[211] Nevesinje,[212] and Greater Sarajevo;[213] in discussing the deteriorating political climate in the period leading up to the commission of the crimes;[214] and in determining that an armed conflict existed in Croatia and in Bosnia and Herzegovina during the period covered by the Indictment.[215] A review of the adjudicated facts relied upon by the Trial Chamber in relation to Croatia reveals that, "[o]n 12 and 13 November 1991, there was street-to-street fighting close to the centre of Vukovar",[216] and that in the months leading up to the capitulation of Vukovar on 18 November 1991, there were up to 1,500-1,700 Croatian combatants opposing the Serbian forces.[217] However, there were also daily aircraft, artillery, tank and rocket attacks by the Yugoslav People's Army,[218] the city was largely

[204] Trial Judgement, para. 216 (the Trial Chamber found that, in April and June 1992, members of the local Territorial Defence, paramilitary groups, and "Šešelj's men" murdered civilians, committed plunder of private property in the Topla hamlet and torture and cruel treatment of detainees at Uborak dump, in the Sutina municipal cemetery and the Vrapčići football stadium).
[205] Trial Judgement, para. 219 (the Trial Chamber found that, in June 1992, Serbian forces, including members of the police, local Serbians, and paramilitary groups were responsible for numerous incidents of murder, as well as torture and cruel treatment in various locations, such as the Dubravica natural pit, the Kilavci heating factory, and the Zijemlje school).
[206] Trial Judgement, para. 210 (e), (f).
[207] Trial Judgement, paras. 210 (a), (d), 213 (a)-(c), 216 (a)-(d), 219 (b), (d), (f).
[208] Trial Judgement, n. 161 ("Generally speaking, the Chamber did not accept the evidence relating to crimes committed against prisoners of war, considering that the totality of the crimes alleged in the Indictment concern exclusively civilians").
[209] *See* Trial Judgement, nn. 12-15, 22, 24-27, 29-32, 47, 50, 51, 55, 63, 66-70, 72-77, 79-81, 160, 202, 238, 239, *referring to The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-T, *Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de faits en application de l'article 94(B) du Règlement de procédure et de prevue*, 10 December 2007 ("Decision of 10 December 2007"), Annex; Trial Judgement, nn. 18, 19, 21, 55, 57, 58, 61, 62, 64, 159, 164, 172, 182-185, 238, *referring to The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-T, *Décision relative aux requêtes de l'Accusation aux fins de dresser le constat judiciaire de faits relatifs à l'affaire Mrkšić*, 8 February 2010 ("Decision of 8 February 2010"), Annexes; Trial Judgement, nn. 22-27, 29, 31, 50, 68, 69, 71-74, 77-81, 111, 176, 187, 188, 204, 205, 214-216, 218, *referring to The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-T, *Décision relative à la requête de l'Accusation aux fins de dresser le constat judiciaire de faits relatifs à l'affaire Krajišnik*, 23 July 2010 ("Decision of 23 July 2010"), Annex.
[210] Trial Judgement, nn. 182-186.
[211] Trial Judgement, nn. 187, 188.
[212] Trial Judgement, nn. 214-216, 218. The Trial Chamber also generally cited the Decision of 23 July 2010 to conclude that wanton destruction or devastation not justified by military necessity of several villages in Nevesinje municipality was not established. *See* Trial Judgement, n. 176.
[213] Trial Judgement, nn. 202, 204, 205.
[214] Trial Judgement, nn. 18, 19, 24-27, 29-31.
[215] Trial Judgement, nn. 159, 160.
[216] Decision of 8 February 2010, Annex A, Adjudicated Fact 101.
[217] Decision of 8 February 2010, Annex A, Adjudicated Facts 81, 108.
[218] Decision of 8 February 2010, Annex A, Adjudicated Fact 102.

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destroyed by the shelling, hundreds of people were killed,[219] and "[w]hen the city of Vukovar was occupied by Serb forces in November [1991] hundreds more non-Serbs were killed by Serb forces[,] [while] [t]he majority of the remaining non-Serb population were expelled from the city in the days following the fall of Vukovar".[220] The adjudicated facts describe that the exhumation of a mass grave, which had been dug following the fall of Vukovar, unearthed 938 bodies, of which 358 were identified as civilians,[221] while another mass grave at Ovčara was found to contain 200 bodies of persons ranging in age from 16 to 72.[222]

68. The adjudicated facts decisions relied upon by the Trial Chamber with respect to Bosnia and Herzegovina also depict prevalent instances of displacements, detentions, killings, torture, and cruel treatment of non-Serbian civilians by Serbian forces throughout the territory, especially between March and December 1992,[223] which can be summarized as follows:

> 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.[224]

69. Having considered the evidence on the record, the Trial Chamber nevertheless concluded that it pointed to "an armed conflict between enemy military forces with some civilian components" and that "[t]he 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."[225] The Appeals Chamber recalls that the term "civilian population" refers to a population that is predominantly civilian,[226] and that the presence within it of individuals who do not come within the definition of civilians does not necessarily deprive a civilian population

[219] Decision of 8 February 2010, Annex B, Adjudicated Fact 3.
[220] Decision of 8 February 2010, Annex B, Adjudicated Fact 4. *See also* Exhibit P412, p. 13 ("Meanwhile in [Yugoslav People's Army] tactics a consistent pattern has emerged [...]. In differing time-scales and intensities this has been the case in Vukovar [...]. Nor is this limited to big towns. 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. No attempt is made to occupy or otherwise exploit captured places; they are simply and wantonly destroyed"). The Appeals Chamber notes that the Trial Chamber considered Exhibit P412 to have probative value, relying on it as evidence of the process of Croatia's independence from the former Yugoslavia and the resultant heightening in tensions between Serbians and Croatians. *See* Trial Judgement, paras. 37-39, nn. 18-20.
[221] Decision of 8 February 2010, Annex A, Adjudicated Fact 211.
[222] Decision of 8 February 2010, Annex A, Adjudicated Facts 252, 256, 262.
[223] *See* Decision of 23 July 2010, Annex, Adjudicated Facts 135, 136, 152, 155, 157, 158, 165, 188-192; Decision of 10 December 2007, Annex, Adjudicated Facts 171, 172, 274-293, 295, 297-300, 314, 324, 325, 327.
[224] Decision of 10 December 2007, Annex, Adjudicated Fact 172.
[225] Trial Judgement, para. 192.
[226] *See Popović et al.* Appeal Judgement, para. 567; *D. Milošević* Appeal Judgement, paras. 50, 51.

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of its civilian character.[227] In addition, an attack against the civilian population is not limited to the use of armed force, but encompasses any mistreatment of the civilian population.[228] In assessing whether the attack was directed against a civilian population, the following factors, *inter alia*, are to be considered: the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in the course of the attack, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[229]

70. The Appeals Chamber notes that the totality of the record considered and relied upon by the Trial Chamber shows that Serbian forces committed acts of violence against a large number of non-Serbian civilians on a regular basis at various locations over a period of approximately one year, first in Croatia and then in Bosnia and Herzegovina. The numerous incidents of murder, torture, and cruel treatment of civilians, including in detention camps, the overall atmosphere of violence, fear, and intimidation created by Serbian forces as well as the methods used in the course and aftermath of attacks on towns and villages inhabited by non-Serbians clearly show the existence of a widespread and systematic attack directed against the non-Serbian civilian population in large areas of Croatia and Bosnia and Herzegovina.

71. In view of the foregoing, the Appeals Chamber can only conclude that the Trial Chamber either ignored a substantial portion of highly relevant evidence and its own findings or erred in fact in assessing whether the Prosecution established a widespread or systematic attack against the civilian population in Croatia and Bosnia and Herzegovina. In light of the record in this case, the Appeals Chamber finds that no reasonable trier of fact could have concluded that there was no widespread or systematic attack against the non-Serbian civilian population in Croatia and in Bosnia and Herzegovina. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in this respect and concludes that there was a widespread or systematic attack against the non-Serbian civilian population in Croatia and Bosnia and Herzegovina.

72. Having found that there was no widespread or systematic attack against the civilian population in Croatia and Bosnia and Herzegovina, the Trial Chamber did not enter any findings on the underlying crimes of persecution, deportation, and other inhumane acts (forcible transfer) charged as crimes against humanity under Counts 1, 10 and 11 of the Indictment. In view of the Trial Chamber's error in relation to the *chapeau* elements of Article 5 of the ICTY Statute, the

[227] *See Popović et al.* Appeal Judgement, para. 567; *Šainović et al.* Appeal Judgement, para. 549; *Mrkšić and Šljivančanin* Appeal Judgement, para. 31; *Kordić and Čerkez* Appeal Judgement, para. 50.
[228] *See Nahimana et al.* Appeal Judgement, paras. 916, 918; *Kunarac et al.* Appeal Judgement, para. 86.

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Appeals Chamber will consider the Prosecution's arguments regarding the crimes against humanity charged in the Indictment.[230] The Appeals Chamber will do so, to the extent relevant, in the context of its analysis of the Prosecution's appeal against Šešelj's acquittals for instigating, aiding and abetting, physically committing, and committing, through participation in a joint criminal enterprise, the alleged crimes.[231]

2. Vojvodina (Serbia)

73. The Prosecution sought to hold Šešelj responsible for crimes against humanity allegedly committed in the village of Hrtkovci, Vojvodina.[232] In concluding that the Prosecution failed to prove that crimes against humanity were committed there, the Trial Chamber reasoned that Vojvodina was not an area of armed conflict and that "an undeniable nexus" between the events there and the conflict in Croatia and Bosnia and Herzegovina had not been demonstrated.[233] The Trial Chamber stated that it could not infer this nexus solely from the presence of Serbian refugees coming from Croatia to the village of Hrtkovci, particularly as the circumstances surrounding their expulsion from Croatia had not been specified.[234] The Trial Chamber found that, despite Šešelj's "particularly disturbing speech of 6 May [1992], which clearly called for the deportation of Croats",[235] the evidence of abuses against Croatian civilians in Hrtkovci did not amount to a widespread or systematic attack,[236] but pointed rather to "latent harassment, targeted and limited, [...] driven by essentially domestic motives, private in nature, whose main focus was the acquisition of housing, which the Serbs did not have due to their refugee status".[237]

74. The Prosecution submits that the Trial Chamber erred in finding that the crimes in Hrtkovci were not committed in an armed conflict, given their close geographic and temporal proximity to the armed conflicts in Croatia and Bosnia and Herzegovina.[238] It contends that the presence of Serbian refugees in Hrtkovci was intrinsically connected with the ensuing campaign of deportation and forcible transfer of Croatian civilians.[239] The Prosecution further argues that the Trial Chamber ignored evidence showing that there was a widespread or systematic attack against the non-Serbian

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[229] *See Kordić and Čerkez* Appeal Judgement, para. 96, *citing Kunarac et al.* Appeal Judgement, para. 91.
[230] *See* Appeal Brief, paras. 223-230.
[231] *See infra* paras. 107-119, 142-174.
[232] *See* Indictment, paras. 15, 17, 31, 33; Prosecution Final Trial Brief, paras. 484-526, 548, 555. *See also* Trial Judgement, paras. 188, 282, 286, 329.
[233] Trial Judgement, para. 194.
[234] Trial Judgement, para. 194.
[235] Trial Judgement, para. 197.
[236] Trial Judgement, paras. 195-197.
[237] Trial Judgement, para. 196.
[238] Appeal Brief, paras. 144-148.
[239] Appeal Brief, para. 148.

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civilian population in Hrtkovci.[240] In addition, the Prosecution submits that the Trial Chamber erroneously limited its analysis of the existence of a widespread or systematic attack to events in Hrtkovci, disregarding evidence that the crimes committed there were part of the wider attack against the non-Serbian civilian population in Croatia and in Bosnia and Herzegovina.[241]

75. It is well-established that the existence of an armed conflict is not a constitutive element of crimes against humanity, but only a jurisdictional prerequisite,[242] which is satisfied by showing the existence of an armed conflict at the time and place relevant to the indictment.[243] It is not required that an armed conflict existed within the region of the former Yugoslavia in which crimes against humanity were allegedly committed, but rather that there is a link to an armed conflict.[244] In this respect, the Appeals Chamber observes that, in an interlocutory appeal in this case, the ICTY Appeals Chamber held that, to establish this link, the Prosecution was merely required to "establish that a widespread or systematic attack against the civilian population was carried out while an armed conflict in Croatia and/or Bosnia and Herzegovina was in progress".[245] The Trial Chamber found that an armed conflict existed in Croatia and in Bosnia and Herzegovina during the period relevant to the Indictment.[246] Therefore, in accordance with the holding of the ICTY Appeals Chamber in this case, the requirement that the alleged crimes against humanity in Hrtkovci be committed in an armed conflict, and thus have a link to it, was satisfied. The Trial Chamber's considerations that Vojvodina itself was not an area of armed conflict and regarding the circumstances surrounding the expulsion of Serbian refugees from Croatia[247] were irrelevant for the purposes of this determination since its own findings established the link with the armed conflict. Moreover, the Appeals Chamber recalls that the motives of the perpetrators are irrelevant and that a crime against humanity may be committed for purely personal reasons.[248] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in concluding that the jurisdictional prerequisite of crimes against humanity was not met in relation to crimes allegedly committed in Hrtkovci.

[240] Appeal Brief, paras. 154-156, nn. 410, 413, 418-420. *See also* Appeal Brief, nn. 406, 412, 421, 422, *referring to* Appeal Brief, paras. 207, 209, 210.
[241] Appeal Brief, paras. 149-153, 221.
[242] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction" Dated 31 August 2004", 15 June 2006 ("Decision of 15 June 2006"), para. 21; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, 2 September 2004 ("Decision of 2 September 2004"), paras. 13, 14; *Kunarac et al.* Appeal Judgement, para. 83; *Tadić* Appeal Judgement, para. 249.
[243] Decision of 2 September 2004, para. 13. *See also* Decision of 15 June 2006, para. 24.
[244] Decision of 2 September 2004, para. 14.
[245] Decision of 2 September 2004, para. 14. *See also* Decision of 15 June 2006, para. 20.
[246] Trial Judgement, para. 201.
[247] Trial Judgement, para. 194.
[248] *See Kvočka et al.* Appeal Judgement, para. 463; *Kunarac et al.* Appeal Judgement, para. 103.

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76. The Appeals Chamber notes that, after finding that there was no widespread or systematic attack in Croatia and Bosnia and Herzegovina,[249] the Trial Chamber examined in isolation the acts of violence committed in Hrtkovci to determine whether they in and of themselves amounted to a widespread or systematic attack against the civilian population.[250] As discussed above, the Appeals Chamber has reversed the Trial Chamber's finding concerning the non-existence of a widespread or systematic attack in Croatia and Bosnia and Herzegovina.[251] The Appeals Chamber further notes that the Indictment alleges a single attack against the civilian population in Croatia, Bosnia and Herzegovina, and Vojvodina, Serbia.[252] Accordingly, and in view of the reversal of the Trial Chamber's finding regarding the existence of an attack against the civilian population in Croatia and Bosnia and Herzegovina, it is immaterial whether there was a widespread or systematic attack specifically in Vojvodina itself; what was required was proof that the alleged crimes committed there were part of the larger attack encompassing also areas in Croatia and Bosnia and Herzegovina, which, as noted above, was linked to the armed conflict.[253]

77. Accordingly, the Appeals Chamber need not examine whether the Trial Chamber erred in determining that the acts of violence committed in Hrtkovci amounted in themselves to a widespread or systematic attack. The Appeals Chamber will address the Prosecution's submission that the crimes committed in Hrtkovci were part of the wider attack against the non-Serbian civilian population in Croatia and in Bosnia and Herzegovina in the context of its analysis of the Prosecution's appeal against Šešelj's acquittals for instigating and physically committing the alleged crimes in Hrtkovci.[254]

C. Conclusion

78. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's arguments in relation to the Trial Chamber's alleged failure to set out the substantive law or to provide a reasoned opinion in reaching its findings on crimes against humanity. The Appeals Chamber, however, allows the Prosecution's arguments in relation to the Trial Chamber's assessment of the evidence on the existence of a widespread or systematic attack in Croatia and Bosnia and Herzegovina, and reverses the Trial Chamber's findings in this regard. Additionally, the Appeals Chamber finds that the Trial Chamber erred in finding that the jurisdictional requirement was not met with respect to events in Hrtkovci, Vojvodina.

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[249] *See* Trial Judgement, paras. 192, 193,
[250] Trial Judgement, paras. 195, 196.
[251] *See supra* para. 71.
[252] Indictment, para. 14. *See also* Prosecution Final Trial Brief, paras. 542, 544, 549, 555.
[253] *Cf. Hategekimana* Appeal Judgement, para. 62.
[254] *See infra* paras. 138-166.

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VII. JOINT CRIMINAL ENTERPRISE

79. The Indictment alleges that a joint criminal enterprise existed from before 1 August 1991 until at least December 1995 and that its common purpose was the permanent forcible removal, through the commission of crimes, of a majority of the Croatian, Muslim, and other non-Serbian populations from approximately one-third of the territory of Croatia and large parts of Bosnia and Herzegovina, in order to make these areas part of a new Serbian-dominated state.[255] At trial, the Prosecution submitted that the "core crimes" necessary for the implementation of the common purpose were forcible transfer, deportation, and persecution based on deportation and forcible transfer and that, by the time of the attack on Vukovar and the commission of the first crimes charged in the Indictment, the Serbian campaign had incorporated large-scale ethnic cleansing through wanton destruction, plunder, other forms of persecution, torture, cruel treatment, and murder.[256] According to the Indictment, the participants in the joint criminal enterprise included political, police, military, and paramilitary leaders, as well as Serbian forces, which comprised various armed and police forces, paramilitary groups and volunteer units, such as "Šešelj's men".[257] The Indictment alleges that Šešelj participated in the joint criminal enterprise until September 1993 when he had a conflict with Slobodan Milošević.[258]

80. The Trial Chamber found that the Prosecution failed to prove the existence of a joint criminal enterprise.[259] In reaching this conclusion, the Trial Chamber noted that the plan for a "Greater Serbia" supported by Šešelj was "*a priori* a political and not a criminal goal".[260] It further considered various factors purportedly showing the existence of a common criminal purpose, including the establishment of Serbian autonomous regions, the arming of Serbian civilians, the recruitment and deployment of volunteers, and the commission of crimes.[261] The Trial Chamber concluded that "[a] lot of the evidence rather shows that the collaboration [among the alleged members of the joint criminal enterprise] was aimed at defending the Serbs and the traditionally Serbian territories and at preserving Yugoslavia, not at committing the alleged crimes".[262] The Trial

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[255] Indictment, paras. 6-11, 15, 18, 28, 31 34. The Indictment also charges Šešelj with responsibility, through participation in a joint criminal enterprise, for the crimes committed in Vojvodina, Serbia. *See* Indictment, paras. 15, 31. However, at the conclusion of its case, the Prosecution no longer sought Šešelj's conviction for the crimes committed in Vojvodina on that basis. *See* Prosecution Final Trial Brief, paras. 1, 9. *See also* Appeal Brief, nn. 423, 649; Reply Brief, para. 1.
[256] Prosecution Final Trial Brief, para. 573.
[257] Indictment, para. 8(a).
[258] Indictment, para. 8(a).
[259] Trial Judgement, para. 281.
[260] Trial Judgement, para. 230.
[261] Trial Judgement, paras. 231-249.
[262] Trial Judgement, para. 252.

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Chamber was also not persuaded that the alleged members of the joint criminal enterprise acted "in coordination" with Šešelj.[263]

81. The Prosecution submits that the Trial Chamber erred in acquitting Šešelj of the crimes charged in the Indictment as a participant in the joint criminal enterprise described above, and requests that the Appeals Chamber reverse his acquittal.[264] Šešelj responds that the Prosecution's submissions are unsubstantiated and repetitive of arguments presented at trial, and that the Trial Chamber's conclusion on the non-existence of a joint criminal enterprise was correct.[265] He also argues that the Trial Chamber correctly concluded that the establishment of Serbian autonomous regions and his promotion of the idea of "Greater Serbia" were legal[266] and that the recruitment and deployment of volunteers were for the purpose of helping the Serbians rather than for committing crimes.[267] Šešelj further submits that the Prosecution fails to show that the Trial Chamber's alleged error in relation to the existence of a joint criminal enterprise resulted in a miscarriage of justice.[268]

82. In this section, the Appeals Chamber considers whether the Trial Chamber erred in: (i) misconstruing the nature of the common criminal purpose alleged by the Prosecution; (ii) relying on transcripts from the case of *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54 ("*S. Milošević* case"); (iii) finding that a plurality of persons did not share the common criminal purpose; and (iv) failing to address evidence on the pattern of crimes committed by cooperating Serbian forces under the control of the alleged members of the joint criminal enterprise.

A. Nature of the Common Purpose

83. The Trial Chamber noted that the Prosecution's submissions created the impression that the ideology of "Greater Serbia", as such, was criminal,[269] failed to clarify the meaning of "a new Serb-dominated state",[270] and suggested that the Serbian military campaign was illegal.[271] The Trial Chamber further found that the proclamation of Serbian autonomous regions in Croatia and Bosnia and Herzegovina, the recruitment and deployment of volunteers, and the arming of Serbian civilians did not demonstrate the existence of a common criminal purpose.[272] Specifically in relation to the deployment of volunteers, the Trial Chamber relied on the evidence of Witness Asim Alić to

[263] Trial Judgement, paras. 253-264.
[264] Notice of Appeal, paras. 5-8, 10-12; Appeal Brief, paras. 75-108, 158-171, 231-238.
[265] Response Brief, paras. 163, 171, 172, 183, 199, 208, 312, 337, 339, 340, 342, 370-374.
[266] Response Brief, paras. 186-193, 330, 331.
[267] Response Brief, paras. 173, 197, 369.
[268] Response Brief, para. 92.
[269] Trial Judgement, para. 16.
[270] Trial Judgement, para. 227.
[271] Trial Judgement, para. 16.
[272] Trial Judgement, paras. 238, 244, 248.

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conclude that the purpose of the deployment was to support the war effort and not the commission of crimes.[273]

84. The Prosecution submits that the Trial Chamber misconstrued the Prosecution's case without supporting its interpretation with any references to the Prosecution's submissions.[274] The Prosecution contends that the Trial Chamber erroneously described the Prosecution's submissions concerning the common purpose as alleging that the creation of a Serbian-dominated state was *per se* criminal.[275] The Prosecution also argues that it did not allege that seeking territorial control or waging war, as such, can result in criminal liability,[276] but rather that the creation of "a new Serb-dominated state" was to be achieved through crimes committed by Serbian forces under the control of the members of the joint criminal enterprise.[277]

85. The Prosecution further submits that, in analysing the existence of the common criminal purpose, the Trial Chamber erred in considering legal activities, such as the proclamation of Serbian autonomous regions, the recruitment and deployment of volunteers, and the arming of civilians, in isolation.[278] The Prosecution contends that it did not allege that such activities were criminal, but rather that they showed the context in which Serbian forces – established, deployed, and controlled, by Šešelj and other members of the joint criminal enterprise – systematically committed crimes against non-Serbians.[279] Specifically in relation to the Trial Chamber's conclusion that volunteers were deployed to support the war effort, the Prosecution submits that the Trial Chamber erred in relying solely on Witness Alić's evidence, without taking into consideration its previous findings on the crimes committed by "Šešelj's men" and "Arkan's men" during the takeover of Zvornik.[280]

86. The Appeals Chamber recalls that joint criminal enterprise liability requires the existence of "a common plan, design or purpose" amounting to, or involving the commission of a crime.[281] Such a common plan, design, or purpose may "be inferred from the facts",[282] including events on the

[273] Trial Judgement, para. 242, *referring to* Witness Alić, T. 15 May 2008 pp. 7013, 7014, 7017, 7018; T. 20 May 2008 p. 7047.
[274] Appeal Brief, paras. 78-81. *See also* T. 13 December 2017 pp. 7, 10, 11.
[275] Appeal Brief, paras. 77, 81.
[276] Appeal Brief, para. 81.
[277] Appeal Brief, para. 81, *referring to* Indictment, para. 6.
[278] Appeal Brief, para. 83.
[279] Appeal Brief, paras. 75, 76, 80, 84.
[280] Appeal Brief, para. 87.
[281] *See Šainović et al.* Appeal Judgement, para. 611, *citing Tadić* Appeal Judgement, para. 227(ii) (emphasis omitted).
[282] *See Šainović et al.* Appeal Judgement, para. 611, *citing Vasiljević* Appeal Judgement, para. 100, *Tadić* Appeal Judgement, para. 227(ii).

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ground.[283] While the Trial Chamber noted that the Prosecution's approach to defining the common plan was confusing,[284] it concluded that:

> [The] plan [for a Greater Serbia] allegedly contained an implicit criminal element arising from the aim to unify "all Serbian lands" in a *homogenous* Serbian state which included Serbia, Montenegro, Macedonia and considerable parts of Croatia and [Bosnia and Herzegovina], implying the expulsion or forcible removal of the non-Serb population.[285]

It follows from this observation that the Trial Chamber did not ultimately consider that the creation of a Serbian state was alleged by the Prosecution to be criminal *per se*, but that it was to be achieved through criminal means. The Appeals Chamber is unable to discern, however, the basis for the Trial Chamber's observation that the Prosecution Final Trial Brief alleged that the Serbian military campaign was illegal.[286] In any event, the Prosecution fails to show that this observation had any impact on the Trial Chamber's ultimate finding that there was insufficient evidence of the existence of a common criminal purpose.

87. The Appeals Chamber is also not persuaded by the Prosecution's argument that, in discussing the existence of the common criminal purpose, the Trial Chamber erred in considering legal activities, such as the proclamation of Serbian autonomous regions, the recruitment and deployment of volunteers, and the arming of Serbian civilians, in isolation.[287] The Appeals Chamber observes that, at trial, the Prosecution alleged that the members of the joint criminal enterprise "earmarked territories that they considered should be Serb"[288] and that the existence of the common criminal purpose could be inferred from, *inter alia*, the coordinated efforts to create exclusively Serbian political structures and Serbian fighting forces, the pattern of deployment of volunteers by Šešelj, and the large-scale arming of the Serbian population.[289]

88. Having considered the Prosecution's submissions, the Trial Chamber concluded that the evidence did not show that the proclamation of Serbian autonomous regions "stemmed from a criminal design".[290] In relation to the deployment of volunteers, the Trial Chamber considered that there was a reasonable possibility that such deployment was carried out for the purpose of protecting the Serbians,[291] and that the evidence did not support a conclusion that the criminal design was "linked to the recruitment and deployment of volunteers".[292] The Trial Chamber also

[283] *See Šainović et al.* Appeal Judgement, para. 611.
[284] Trial Judgement, para. 226. *See also* Trial Judgement, n. 227, paras. 266, 280.
[285] Trial Judgement, para. 227.
[286] *See* Trial Judgement, para. 16.
[287] Appeal Brief, para. 83.
[288] Prosecution Final Trial Brief, para. 64.
[289] *See* Prosecution Final Trial Brief, paras. 64, 126, 275, 576-578.
[290] Trial Judgement, para. 238.
[291] Trial Judgement, para. 239. *See also* Trial Judgement, paras. 242, 243.
[292] Trial Judgement, para. 244.

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considered that Šešelj's involvement in the recruitment and subsequent deployment of volunteers does not imply that he had knowledge of their crimes or that he provided instructions or support for their commission.[293] In relation to the arming of Serbian civilians, the Trial Chamber observed that Croatian and Muslim civilians were also arming themselves, and that it was therefore "reasonably possible to envisage a scenario in which all the warring factions were preparing for imminent hostilities in order to preserve the territories that they considered as their own".[294] Accordingly, the Trial Chamber did not limit its analysis to whether the impugned activities were in and of themselves criminal. Instead, it examined whether these activities, when considered in context and taking into account evidence on Šešelj's intent and contribution, supported a conclusion on the existence of a common criminal purpose. The Prosecution fails to show any error in the Trial Chamber's approach.

89. Likewise, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on Witness Alić's evidence to find that volunteers were deployed to support the war effort and not for the purpose of committing crimes.[295] Witness Alić testified that he interrogated members of "Šešelj's men" and "Arkan's men" who had been arrested while driving into Zvornik shortly before the Serbian takeover.[296] According to Witness Alić, one of "Šešelj's men" stated that they had come to Zvornik to protect the Serbians.[297] Contrary to the Prosecution's submission, the Trial Chamber's reliance on Witness Alić does not demonstrate that it disregarded its previous findings on crimes committed in Zvornik by members of these two groups.[298] While the Trial Chamber found that "Šešelj's men" and "Arkan's men" committed crimes in Zvornik, it was not satisfied beyond reasonable doubt that volunteers were deployed *for the purpose* of committing those crimes and that, therefore, their deployment showed the existence of a common criminal purpose. Accordingly, the Prosecution fails to show any error in the Trial Chamber's consideration of Witness Alić's evidence.

B. Reliance on Transcripts from the *S. Milošević* Case

90. Upon a request by the Prosecution, the Trial Chamber admitted into evidence transcripts from the *S. Milošević* case containing, *inter alia*, Šešelj's testimony in that case.[299] In discussing the existence of a common criminal purpose, the Trial Chamber extensively cited excerpts from these transcripts that contained exchanges between the trial chamber and the parties in that case on the

[293] Trial Judgement, para. 245.
[294] Trial Judgement, para. 248.
[295] Trial Judgement, para. 242.
[296] Witness Alić, T. 15 May 2008 pp. 7001-7005, 7009; T. 20 May 2008 pp. 7042, 7043.
[297] Witness Alić, T. 15 May 2008 p. 7018; T. 20 May 2008 p. 7048.
[298] Trial Judgement, para. 210.
[299] *See* Trial Judgement, para. 266, n. 308; Exhibit P31.

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notion of a "Greater Serbia" and its relevance to Slobodan Milošević's criminal responsibility.[300] The Trial Chamber concluded that the "confusion" regarding the alleged common criminal purpose in the *S. Milošević* case was "strongly reflected in this case and reinforce[d] the judges' doubts in regard to the Prosecution's demonstration of the very existence of [...] a common criminal plan".[301]

91. The Prosecution submits that, in relying on transcripts from the *S. Milošević* case, the Trial Chamber allowed itself to be influenced by extraneous material.[302] Specifically, the Prosecution claims that the discussion of the notion of a "Greater Serbia" in the *S. Milošević* case is irrelevant to the present case and argues that the Trial Chamber failed to explain how this discussion impacted its considerations.[303]

92. The Appeals Chamber is not persuaded by the Prosecution's argument that the Trial Chamber's conclusions were influenced by extraneous material. The Trial Chamber found that the evidence did not show that a common criminal purpose existed.[304] It then cited excerpts from the transcripts in the *S. Milošević* case for the purpose of illustrating its view that certain deficiencies in the Prosecution's pleadings were common to both cases.[305] The Trial Chamber was cognizant that, while the transcripts in the *S. Milošević* case were part of the evidence in the present case, the cited exchanges concerned a different trial.[306] It was also mindful of the need to reach independent conclusions on the basis of the relevant evidence before it.[307] While the Trial Chamber's reference to the exchanges in the *S. Milošević* case was superfluous, nothing in the Trial Chamber's considerations suggests that it reached its finding on the non-existence of the common criminal purpose on the basis of the cited exchanges. The Prosecution's submissions in this regard are, therefore, dismissed.

C. Whether a Plurality of Persons Shared the Common Criminal Purpose

93. Relying on the *Brđanin* Appeal Judgement, the Trial Chamber stated that an "*identité de vues*" is a necessary element of joint criminal enterprise liability.[308] The Trial Chamber then determined that the evidence showed that there were considerable differences and disagreements between Šešelj and the other alleged members of the joint criminal enterprise.[309] The Trial Chamber

[300] Trial Judgement, paras. 266-279.
[301] Trial Judgement, para. 280. *See also* Trial Judgement, para. 266.
[302] Appeal Brief, paras. 106, 107. *See also* T. 13 December 2017 pp. 11, 12.
[303] Appeal Brief, paras. 105, 106.
[304] Trial Judgement, paras. 225-265.
[305] Trial Judgement, paras. 266-279.
[306] Trial Judgement, para. 280.
[307] Trial Judgement, para. 280.
[308] *See* the French original of the Trial Judgement, para. 250, *referring to Brđanin* Appeal Judgement, para. 430.
[309] Trial Judgement, paras. 253-263.

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concluded that "[a] lot of the evidence rather shows that the collaboration [among the alleged members] was aimed at defending the Serbs and the traditionally Serbian territories and at preserving Yugoslavia, not at committing the alleged crimes".[310] In reaching its findings, the Trial Chamber relied, *inter alia,* on evidence of Milošević's participation in peace negotiations, the evidence of Witnesses VS-051, Zoran Rankić, Zoran Dražilović, VS-1062, and Expert Witness Yves Tomić, as well as on a report by Zdravko Tolimir and a statement by Života Panić.[311]

94. The Prosecution argues that the Trial Chamber's reference to an "*identité de vues*" remains unclear and unsupported in law and that the Trial Chamber erred to the extent that it required that the members of the joint criminal enterprise have identical views.[312] Relying on the *Martić* Appeal Judgement, the Prosecution further submits that the Trial Chamber failed to explain how the purported differences among the members of the joint criminal enterprise affected their shared intent and the existence of a common purpose.[313] The Prosecution specifically challenges the Trial Chamber's assessment of the evidence, including its reliance on Milošević's participation in peace negotiations,[314] arguing that, even if the evidence supported the conclusion that some of the alleged members of the joint criminal enterprise did not share the common purpose, the Trial Chamber failed to explain why Šešelj did not share the common purpose with other alleged members of the joint criminal enterprise, such as Jovica Stanišić, Franko Simatović, Milan Babić, Goran Hadžić, and Radovan Karadžić, to whom crimes against non-Serbians could be attributed.[315] Finally, the Prosecution argues that the Trial Chamber failed to consider evidence on Šešelj's ideology, goals, and statements, which is relevant to the determination of his criminal intent and thus to the existence of the common criminal purpose.[316]

95. The Appeals Chamber finds no merit in the Prosecution's submission that the Trial Chamber erred in law in relation to the elements of joint criminal enterprise liability. In the *Brđanin* Appeal Judgement, the ICTY Appeals Chamber held that for a conviction under joint criminal enterprise

[310] Trial Judgement, para. 252. *See also* Trial Judgement, paras. 251, 255, 258, 263.
[311] Trial Judgement, paras. 252-254, 256, 260, 261, 263.
[312] Appeal Brief, paras. 6, 88-92, *referring to, inter alia, Brđanin* Appeal Judgement, para. 430.
[313] Appeal Brief, paras. 93, 94, *referring to, inter alia, Martić* Appeal Judgement, para. 123.
[314] Appeal Brief, paras. 97-103.
[315] Appeal Brief, para. 95. *See also* Appeal Brief, para. 82. The Prosecution further argues that the Trial Chamber erred in failing to provide a reasoned opinion on key evidentiary issues related to the credibility and weight to be given to: (i) the evidence of several witnesses who had recanted their statements; (ii) Šešelj's testimony in the *S. Milošević* case; and (iii) Šešelj's statement under Rule 84*bis* of the ICTY Rules. *See* Appeal Brief, paras. 14-17; T. 13 December 2017 pp. 6-8. The Appeals Chamber notes that the Trial Chamber was clearly aware that it had to treat with caution the prior statements of recanting witnesses. *See* Trial Judgement, paras. 26, 27. Further, the Trial Chamber considered Šešelj's testimony in the *S. Milošević* case and his statement under Rule 84*bis* of the ICTY Rules in the context of other evidence on the record, thus evincing a careful consideration of the weight to be afforded to the evidence. *See, e.g.*, Trial Judgement, paras. 107-111, 119-123, 128-133, 180, 181, 206, 207. While it would have been preferable for the Trial Chamber to articulate explicitly its credibility assessment of the evidence, the Appeals Chamber does not consider that the error alleged by the Prosecution requires the Appeals Chamber's intervention.
[316] Appeal Brief, paras. 26-41, 82; T. 13 December 2017 pp. 7-10.

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liability, a trial chamber must be satisfied, *inter alia*, that a plurality of persons shared a common criminal purpose.[317] A trial chamber is required to make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise.[318] In the present case, in stating that an "*identité de vues*" is an element of joint criminal enterprise liability, the Trial Chamber referred to the legal elements expounded in the *Brđanin* Appeal Judgement.[319] In view of the Trial Chamber's reference and its ensuing discussion of the evidence on the cooperation among the alleged members of the joint criminal enterprise, the Appeals Chamber understands that, by "*identité de vues*", the Trial Chamber meant the existence of a criminal purpose common to all of the alleged members of the joint criminal enterprise.

96. The Appeals Chamber is also not persuaded by the Prosecution's argument that the Trial Chamber failed to explain how the differences among the alleged members of the joint criminal enterprise affected their shared intent and the existence of a common criminal purpose. The Prosecution's reliance on the ICTY Appeals Chamber's conclusion in the *Martić* case regarding the impact of political disagreements on the common criminal purpose is misplaced.[320] In the present case, the Trial Chamber did not find a lack of cohesion among the alleged members of the joint criminal enterprise in relation to the political objective to be achieved. Rather, the Trial Chamber was not convinced that their collaboration was in furtherance of a common criminal purpose given their disagreements in relation to, *inter alia*, the conduct of the operations.[321]

97. The Appeals Chamber turns next to the Prosecution's arguments that the Trial Chamber erred in its assessment of the evidence it relied upon. In relation to Milošević's participation in peace talks, the Trial Chamber concluded that Milošević's negotiations with the leader of Bosnia and Herzegovina, Alija Izetbegović, in August 1991 and the *Cutileiro* peace plan of March 1992, which aimed at allowing the various ethnic communities to continue living together in Bosnia and Herzegovina, were "clearly incompatible with the alleged contemporaneous implementation of the joint criminal enterprise".[322] It added that the fact that some Serbian authorities agreed to various peace plans was "incompatible with the ideology of ethnic cleansing which underpinned the alleged [joint criminal enterprise]".[323] The Appeals Chamber notes that, in challenging the Trial Chamber's conclusion, the Prosecution refers to previous cases before the ICTY where the accused were convicted for their role in a joint criminal enterprise despite providing support to peace

[317] *Brđanin* Appeal Judgement, para. 430.
[318] *Brđanin* Appeal Judgement, para. 430.
[319] Trial Judgement, para. 250, *referring to Brđanin* Appeal Judgement, para. 430.
[320] *See* Appeal Brief, para. 91, *referring to Martić* Appeal Judgement, para. 123.
[321] *See* Trial Judgement, paras. 253, 257-264.
[322] Trial Judgement, para. 254, *referring to*, *inter alia*, Exhibit P31, pp. 43276, 43277, 43323, 43325.
[323] Trial Judgement, n. 306.

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negotiations.[324] The Appeals Chamber recalls that decisions of individual trial chambers have no binding force on each other and that a trial chamber must make its own final assessment on the basis of the totality of the evidence presented in the case before it.[325] The Appeals Chamber, therefore, finds that the Prosecution merely disagrees with the Trial Chamber's conclusion, offering its own interpretation of the evidence, without demonstrating that no reasonable trier of fact could have reached the same conclusion on the basis of the specific evidence before it.

98. The Appeals Chamber is also not persuaded by the Prosecution's argument that the Trial Chamber erred in relying on Witness VS-051's testimony to conclude that the alleged members of the joint criminal enterprise did not share a common criminal purpose.[326] Witness VS-051 testified about the disagreement between members of the Yugoslav People's Army and the Territorial Defence in Vukovar regarding the treatment of prisoners of war at the Velepromet warehouse.[327] The Prosecution argues that the Trial Chamber failed to explain the relevance of Witness VS-051's personal views and that, in any event, they did not undermine the existence of a joint criminal enterprise as they showed that the Yugoslav People's Army were indifferent to the crimes committed by other Serbian forces in Velepromet.[328] Contrary to the Prosecution's submission, the Trial Chamber clearly explained that Witness VS-051's evidence was relevant to its assessment of the level of cooperation among the various Serbian forces in the context of the alleged joint criminal enterprise.[329] Indeed, one of the Prosecution's arguments at trial was that members and groups of the Serbian forces, including the Yugoslav People's Army and local Territorial Defence, were also members of the joint criminal enterprise and shared the intent to implement the common criminal purpose.[330] As to the Prosecution's submission that Witness VS-051's testimony did not undermine the existence of a joint criminal enterprise, the Appeals Chamber finds that the Prosecution advances an alternative interpretation of the evidence without showing that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber on the basis of the specific evidence before it.

99. The Trial Chamber further referred to the evidence of Witness Zoran Rankić, Deputy Chief of the Serbian Radical Party "War Staff",[331] that Milošević and Šešelj, initially political opponents,

[324] Appeal Brief, para. 101 n. 301, *referring to Karadžić* Trial Judgement, paras. 383, 409, 6046, *Martić* Trial Judgement, paras. 149, 434, *Krajišnik* Trial Judgement, paras. 950, 1078, *Krajišnik* Appeal Judgement, para. 685.
[325] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, paras. 52, 151; *Đorđević* Appeal Judgement, para. 143; *Lukić and Lukić* Appeal Judgement, para. 260; *Stakić* Appeal Judgement, para. 346; *Aleksovski* Appeal Judgement, para. 114.
[326] Appeal Brief, para. 98. *See also* Trial Judgement, para. 253.
[327] Trial Judgement, para. 253, *referring to* Witness VS-051, T. 28 May 2008 pp. 7542-7544, 7548, 7549, 7552 (closed session).
[328] Appeal Brief, para. 98, *referring to* Witness VS-051, T. 29 May 2008 pp. 7616, 7640 (closed session).
[329] *See* Trial Judgement, para. 253.
[330] *See* Indictment, para. 8(a); Prosecution Final Trial Brief, para. 571.
[331] *See* Trial Judgement, para. 108.

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cooperated in the deployment of volunteers and that, outside of the context of the war, there was no cooperation between the Serbian Radical Party and the Socialist Party of Serbia, which was headed by Milosević.[332] The Prosecution argues that the Trial Chamber's analysis is flawed because the witness's evidence regarding the lack of open cooperation between Šešelj and Milošević was consistent with his explanation that Šešelj unofficially assisted Milošević.[333] The Appeals Chamber notes that the Trial Chamber seems to have accepted Witness Rankić's evidence that Milošević and Šešelj cooperated in the deployment of volunteers.[334] However, it was not persuaded that such cooperation was for the purpose of the commission of crimes, but rather aimed at protecting the Serbian population.[335] The Prosecution fails to show that the Trial Chamber erred in its consideration of this evidence.

100. The Appeals Chamber equally finds no merit in the Prosecution's challenges to the Trial Chamber's reliance on the evidence of Witness Zoran Dražilović, Head of the Serbian Radical Party volunteers,[336] and on a statement by General Života Panić, Chief of Staff of the Army of Yugoslavia, as recorded in the notes from a session of the Supreme Defence Council held on 5 July 1993.[337] The Trial Chamber noted that, according to Witness Dražilović, Milošević constantly arrested *Chetniks*, which was "another indication of the discord" between Šešelj and Milošević.[338] In addition, it found that Panić's complaint that members of the Serbian Radical Party continued to "penetrate" the Army of Yugoslavia revealed "a climate of mistrust and suspicion between the different Serbian entities, undoubtedly driven by the same desire to defend the Serbs, while everything else divided them".[339] The Prosecution submits that the evidence relied upon by the Trial Chamber supported its submission that Šešelj's relationship with other members of the joint criminal enterprise deteriorated in 1993.[340] According to the Prosecution, at a minimum, this evidence should have been considered in light of Witness Drazilović's further statement that the Serbian Radical Party recruited volunteers to be incorporated into the Yugoslav People's Army/Army of Republika Srpska to fight in Croatia and that this close relationship implied Milošević's support.[341] The Appeals Chamber notes that the Trial Chamber was aware of the Prosecution's allegation that Šešelj's participation in the joint criminal enterprise ended in

[332] Trial Judgement, para. 256, *referring to* Witness Rankić, T. 11 May 2010 pp. 15908, 15909; Exhibit P1074, paras. 54, 84.
[333] Appeal Brief, para. 99, *referring to* Exhibit P1074, paras. 12, 54, 84.
[334] *See* Trial Judgement, para. 256.
[335] *See* Trial Judgement paras. 239, 244, 252, 256.
[336] *See* Trial Judgement, para. 108.
[337] *See* Trial Judgement, para. 257.
[338] Trial Judgement, para. 260, *referring to* Exhibit C10, para. 76.
[339] Trial Judgement, para. 258. *See also* Trial Judgement, para. 257, *referring to* Exhibit P1012, pp. 56-58.
[340] Appeal Brief, para. 100, *referring to, inter alia*, Exhibit P1012, pp. 56-58, Exhibit C10, para. 76.
[341] Appeal Brief, para. 100, *referring to* Exhibit C10, paras. 18-21, 23, 28, 34, 36.

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September 1993.[342] The Trial Chamber also found that the Serbian Radical Party recruited and sent volunteers in response to requests from Territorial Defence units and armed forces stationed in Croatia.[343] The Prosecution fails to explain how this recruitment and deployment, even if supported by Milošević, undermines the Trial Chamber's ultimate conclusion that there was mistrust between the different units, and that their cooperation was for the purpose of defending the Serbian population.

101. The Trial Chamber further referred to a report, dated 28 July 1992, by Colonel Zdravko Tolimir, Head of the Department for Intelligence and Security Affairs of the Army of Republika Srpska, condemning the criminal activities of various paramilitary units, including the Serbian Radical Party.[344] The Prosecution submits that the Trial Chamber failed to mention that, according to the report, Tolimir objected only to the crimes committed against Serbians.[345] The Appeals Chamber recalls that a trial chamber is presumed to have evaluated all the evidence before it and that not referring to a specific portion of the evidence, as such, does not indicate that the Trial Chamber failed to consider it as long as there is no indication that it completely disregarded any particular piece of evidence.[346] The Prosecution's unsubstantiated submission is, therefore, dismissed.

102. The Appeals Chamber turns next to the Prosecution's argument that, in finding that "Šešelj's men" protected civilians from "Arkan's men", the Trial Chamber erred in its assessment of the evidence of Witness VS-1062.[347] The Appeals Chamber notes that Witness VS-1062 gave evidence of hiding in a shelter in Zvornik with other civilians when "Arkan's men" broke in, took out all the men, and lined them up against a wall.[348] The witness further testified that, after the men were taken out, "Šešelj's men" entered the shelter and took the remaining women and children out to another building, telling them: "[w]e are guarding you, whereas Arkan's men are killing you".[349] While the women and children were being escorted out of the shelter, "Arkan's men" opened fire and killed all the men.[350] According to the witness, "Šešelj's men" "were pretending to be good guys", giving chocolate bars to the children.[351] The Prosecution argues that the Trial Chamber's

[342] Trial Judgement, para. 222.
[343] Trial Judgement, para. 110.
[344] Trial Judgement, para. 261, *referring to* Exhibit P974, pp. 6, 11, Exhibit P261, part II, paras. 223-233.
[345] Appeal Brief, para. 102, *referring to* Exhibit P974, p.5.
[346] *See, e.g., Stanišić and Župljanin* Appeal Judgement, para. 536; *Popović et al.* Appeal Judgement, para. 306; *Đorđević* Appeal Judgement, para. 864, n. 2527; *Haradinaj et al.* Appeal Judgement, para. 129; *Kvočka et al.* Appeal Judgement, para. 23.
[347] Appeal Brief, para. 103. *See also* Trial Judgement, para. 263, *referring to* Witness VS-1062, T. 10 April 2008 pp. 5954, 5958-5960.
[348] Witness VS-1062, T. 10 April 2008 pp. 5954, 5955.
[349] Witness VS-1062, T. 10 April 2008 pp. 5955-5957, 5960.
[350] Witness VS-1062, T. 10 April 2008 p. 5958.
[351] Witness VS-1062, T. 10 April 2008 p. 5959.

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analysis of Witness VS-1062's testimony was selective and that the entirety of her account supports the conclusion that "Šešelj's men" and "Arkan's men" cooperated in the commission of crimes against non-Serbians.[352]

103. The Appeals Chamber recalls that the task of hearing, assessing, and weighing the evidence presented at trial is left primarily to the Trial Chamber and that it will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[353] In view of Witness VS-1062's description of "Šešelj's men" escorting the women and children away from the killing site, as well as the accompanying statements made by "Šešelj's men",[354] the Appeals Chamber considers that a reasonable trial chamber might not have been able to exclude that another reasonable inference from the evidence was that "Šešelj's men" were protecting the women and children rather than cooperating with "Arkan's men" in the killings. Moreover, the Trial Chamber also relied on the testimony of Witness Jovan Glamočanin that there was no cooperation between the Serbian Radical Party and "Arkan's men".[355] Bearing in mind that it must give deference to the Trial Chamber which received the evidence at trial, the Appeals Chamber finds that the Prosecution fails to show an error in the Trial Chamber's consideration of this evidence warranting the intervention of the Appeals Chamber.[356]

104. The Appeals Chamber is also not persuaded by the Prosecution's argument that the Trial Chamber erred in its assessment of the evidence of Expert Witness Yves Tomić who explained that the defence of Serbian national ideas was a point of agreement between the Serbian Radical Party, headed by Šešelj, and the Socialist Party of Serbia, headed by Milošević.[357] Referring to Witness Tomić's evidence, the Trial Chamber held that the collaboration among the various Serbian forces "was aimed at defending the Serbs and the traditionally Serbian territories and at preserving Yugoslavia, not at committing the alleged crimes."[358] The Prosecution submits that the Trial Chamber erred in relying solely on Witness Tomić's evidence and ignoring other evidence showing that Šešelj and Milošević cooperated in the commission of crimes.[359] Having reviewed the evidence specifically referred to by the Prosecution, the Appeals Chamber observes that the evidence indicates that Šešelj cooperated with Milošević in relation to the recruitment and deployment of

[352] Appeal Brief, para. 103.
[353] *See supra* para. 15.
[354] *See* Witness VS-1062, T. 10 April 2008 pp. 5955, 5960.
[355] Trial Judgement, para. 263, *referring to* Witness Glamočanin, T. 11 December 2008 pp. 12968-12970.
[356] *See supra* para. 15.
[357] Appeal Brief, para. 97, *referring to* Trial Judgement, para. 252, n. 278.
[358] Trial Judgement, para. 252, *referring to* Witness Tomić, T. 5 February 2008 p. 3104. *See also* Witness Tomić, T. 5 February 2008 p. 3105.
[359] Appeal Brief, para. 97, *referring to* Exhibits P299, P644, pp. 10-11; Witness Tomić, T. 5 February 2008 pp. 3104-3107. The Prosecution further submits that Witness Tomić did not testify that defending Serbians was exclusive of using criminal means and that his silence regarding the commission of crimes is inconclusive as he was not a fact witness. *See* Appeal Brief, para. 97.

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volunteers, without elaborating on the purpose of such cooperation.[360] The Prosecution therefore fails to demonstrate that the Trial Chamber erred in not explicitly discussing this evidence.

105. The Appeals Chamber similarly finds no merit in the Prosecution's submission that the Trial Chamber erred in failing to explain why Šešelj did not share the common criminal purpose with other alleged members of the joint criminal enterprise, such as Stanišić, Simatović, Babić, Hadžić and Karadžić.[361] The Appeals Chamber recalls that a common criminal purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[362] A trial chamber is not required to identify by name each of the persons involved in a joint criminal enterprise[363] or to make a separate finding on the individual actions and intent of each alleged member.[364] In the present case, the Trial Chamber noted that the Prosecution's main allegation against Šešelj was that he shared the common criminal purpose with Milošević, who represented the Yugoslav People's Army/Army of Yugoslavia and the Serbian Ministry of the Interior Police, with individuals associated with the Republika Srpska and the Army of Republika Srpska, as well as with paramilitary groups such as "Arkan's men".[365] However, the Trial Chamber was not satisfied that the Prosecution had adduced sufficient evidence showing that these Serbian forces acted in furtherance of a common criminal purpose.[366] Having found that there was no common criminal purpose, the Trial Chamber was not required to explicitly address the alleged participation of each individual member of the joint criminal enterprise named in the Indictment. Accordingly, the Prosecution fails to show any error in this regard.

106. The Appeals Chamber turns next to the Prosecution's argument that the Trial Chamber failed to consider evidence on Šešelj's ideology, goals, and statements as indicative of the existence of a common criminal purpose.[367] The Appeals Chamber notes that the Trial Chamber referred to evidence showing that, in June 1990, Šešelj founded the Serbian *Chetnik* Movement, which was refused registration by the Serbian authorities as the name of the movement recalled the crimes committed against the population during the Second World War.[368] The Trial Chamber further

[360] *See* Exhibit P644, pp. 10, 11 (where Šešelj stated that the "regime" reserved the barrack in Bubanj Potok exclusively for Serbian Radical Party volunteers and equipped these volunteers with uniforms, weapons, and buses to transfer them to the frontline); Exhibit P299 (which indicates that Milošević provided Serbian Radical Party volunteers with weapons, buses, uniforms, and placed the barracks in Bubanj Potok at their disposal).
[361] Appeal Brief, para. 95.
[362] *See Đorđević* Appeal Judgement, para. 141; *Krajišnik* Appeal Judgement, n. 418.
[363] *See Karemera and Ngirumpatse* Appeal Judgement, para. 150; *Gotovina and Markač* Appeal Judgement, para. 89; *Krajišnik* Appeal Judgement, para. 156; *Brđanin* Appeal Judgement, para. 430.
[364] *See Đorđević* Appeal Judgement, para. 141.
[365] Trial Judgement, para. 251.
[366] *See* Trial Judgement, para. 252 (where the Trial Chamber held that "[a] lot of the evidence rather shows that the collaboration was aimed at defending the Serbs and the traditionally Serbian territories and at preserving Yugoslavia, not at committing the alleged crimes"). *See also* Trial Judgement, para. 281.
[367] *See supra* para. 94.
[368] Trial Judgement, paras. 52, 54.

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discussed the evidence of Expert Witness Yves Tomić that the programme of the Serbian *Chetnik* Movement was the creation of a Greater Serbia and that, from its inception, it propagated the need to implement a policy of protection of the Serbian population against Croatia's "new genocidal policy".[369] While the Trial Chamber did not explicitly refer to the section of Witness Tomić's expert report discussing the history of the *Chetnik* movement's ideology and goals, this *per se* is not indicative of the Trial Chamber ignoring this part of the evidence.[370] The Trial Chamber also discussed evidence on the subsequent establishment, goals, and structure of the Serbian Radical Party, including the creation of a "War Staff" tasked with providing support to the army,[371] as well as evidence on the manner in which Šešelj promoted his ideology and on his inflammatory speeches calling for the commission of crimes.[372] The Trial Chamber explicitly noted that it had considered this evidence in the context of its analysis of the existence of a joint criminal enterprise.[373] In view of the Trial Chamber's considerations, the Prosecution fails to demonstrate that the Trial Chamber did not address evidence on Šešelj's ideology, goals, and statements relevant to the existence of a common criminal purpose.

D. Evidence on Pattern of Crimes

107. In finding that the Prosecution failed to prove the existence of a common criminal purpose,[374] the Trial Chamber observed that, *inter alia*: (i) "the bulk of the recorded crimes" did not involve "Šešelj's men"; (ii) the perpetrators "were often local people, frequently serving in the local [Territorial Defence] or in especially violent paramilitary groups, such as Arkan's Tigers"; (iii) witnesses were often unable to distinguish between *Chetniks* and "Šešelj's men"; and (iv) where a perpetrator could be identified, as in relation to crimes committed "by a certain Vaske", the parties agreed that the perpetrator was under the command of the Army of Republika Srpska.[375] Elsewhere in the Trial Judgement, the Trial Chamber also noted that it was unable to dismiss Šešelj's argument that civilians fled the combat zones to find shelter in areas occupied by members of the same ethnic or religious group, and that the buses were provided in this context by Serbian forces as acts of humanitarian assistance rather than as part of operations to forcibly transfer the population.[376] In relation to crimes in which "Šešelj's men" might have been involved, the Trial Chamber was not satisfied that Šešelj knew of the commission of those crimes or that he instructed

[369] Trial Judgement, para. 53, *citing* Witness Yves Tomić, T. 30 January 2008 pp. 2968, 2969; Exhibit P27, pp. 1, 2; Exhibit P1263, p. 2.
[370] *See contra* Appeal Brief, paras. 33, 34.
[371] Trial Judgement, paras. 56-61.
[372] Trial Judgement, paras. 297-344.
[373] Trial Judgement, para. 344.
[374] Trial Judgement, paras. 225-250.
[375] Trial Judgement, para. 249.
[376] Trial Judgement, para. 193, *referring to* Witness VS-1022, T. 17 July 2008 pp. 9524, 9525, 9528-9530 (closed session); Exhibit P696 (confidential), para. 16.

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and supported their commission.[377] The Trial Chamber, therefore, concluded that the crimes could not be "considered as an inherent element of the political plan for a Greater Serbia or to protect the Serbs".[378]

108. The Prosecution submits that the Trial Chamber failed to address the vast body of evidence showing the pattern of crimes committed by cooperating Serbian forces under the control of the members of the joint criminal enterprise which, it claims, was at the heart of its case.[379] In this context, the Prosecution argues that the Trial Chamber erred in not weighing the evidence of the purported disagreement among the members of the joint criminal enterprise together with the evidence showing their close cooperation in establishing, arming, training, and deploying Serbian forces that together committed a "pattern of coordinated crimes" against non-Serbian civilians.[380] The Prosecution argues that the only reasonable inference from this evidence was that a common criminal purpose existed to permanently forcibly remove non-Serbians from areas of Croatia and Bosnia and Herzegovina through the commission of crimes.[381]

109. The Appeals Chamber observes that, in its analysis on the existence of a common criminal purpose, the Trial Chamber explicitly considered whether the crimes were committed by "Šešelj's men" and whether they could be directly imputed to Šešelj.[382] The Appeals Chamber recalls that, where the principal perpetrator is not shown to belong to the joint criminal enterprise, the trier of fact must establish that the crime can be imputed to at least one member of the joint criminal enterprise and that this member – when using the principal perpetrator – acted in accordance with the common plan.[383] This member need not necessarily be the accused as the imputation of crimes to one of the members of the joint criminal enterprise is sufficient to impute criminal responsibility for these crimes to the other members.[384] The Appeals Chamber observes that the Trial Chamber made extensive findings on the composition, hierarchical structure, and leadership of the Serbian forces, which included paramilitary and volunteer groups, implicated in the commission of crimes, thus establishing the necessary link between the physical perpetrators and several of the named

[377] Trial Judgement, para. 245.
[378] Trial Judgement, para. 245.
[379] *See* Appeal Brief, paras. 18-20, 24, 59-73, 82, 85, 86, 104, 160-169. *See also* Reply Brief, para. 2; T. 13 December 2017 pp. 10, 11, 14.
[380] Appeal Brief, paras. 104, 160-169.
[381] Appeal Brief, paras. 73, 158, 159, 169, 231.
[382] *See* Trial Judgement, para. 249.
[383] *Brđanin* Appeal Judgement, paras. 413, 430. *See also Đorđević* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, paras. 225, 235-237.
[384] *See Stanišić and Župljanin* Appeal Judgement, para. 119; *Šainović et al* Appeal Judgement, para. 1520; *Krajišnik* Appeal Judgement, n. 624.

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members of the joint criminal enterprise.[385] However, it is unclear from the Trial Chamber's analysis, whether the Trial Chamber fully considered its previous findings that, in addition to "Šešelj's men", these Serbian forces committed numerous violations of the laws or customs of war, including murder, torture, cruel treatment, and plunder in the municipalities of Vukovar in Croatia, and Zvornik, Greater Sarajevo, Mostar, and Nevesinje in Bosnia and Herzegovina.[386]

110. The Trial Chamber also did not explicitly discuss other evidence on the record, suggesting that various Serbian forces, including paramilitary groups and volunteers such as "Šešelj's men", forcibly displaced non-Serbian civilians in locations in Croatia and Bosnia and Herzegovina. For instance, while the Trial Chamber noted that street fighting and mortar fire rendered conditions in Vukovar generally unsafe for civilians,[387] the Prosecution points to evidence showing that, after the takeover of Vukovar in November 1991, civilians, including women, children and the elderly, were separated from the men and transported by Serbian forces out of Vukovar by buses.[388] In addition, Witness VS-051 testified that about 2,000 people left the city on foot in the direction of the Velepromet warehouse where a unit was tasked with separating the men of military age from the women, children, and the elderly, in order for the latter to be evacuated to Croatia.[389] According to the witness, this was done in accordance with the "plan of the Superior Command".[390] Witness Aleksander Filković also stated that, at the Borovo Komerc industrial complex, approximately 1,500 people surrendered to the Serbian forces and that, to his knowledge, the women and children were loaded into buses and transported to Croatia via Bosnia and Herzegovina.[391] The evidence also shows that, in the context of these movements, members of the Serbian forces made derogatory remarks targeting non-Serbians, particularly Croatians.[392]

111. In relation to Zvornik, the Prosecution points to evidence suggesting that, after the takeover of the city in early April 1992, some non-Serbian women and children were separated from the men

[385] *See* Trial Judgement, paras. 63-184, 247. The Trial Chamber explicitly took note of the fact that volunteers and paramilitary groups were subordinated to the army in accordance with the principle of unity of command. *See* Trial Judgement, paras. 78, 94, 114, 247.
[386] Trial Judgement, paras. 207, 210, 213, 216, 219, 220. *See also supra* para. 66.
[387] *See* Trial Judgement, para. 230.
[388] *See* Appeal Brief, para. 68, *referring to, inter alia*, Witness Radić, T. 20 November 2008 p. 11991. The Prosecution further refers to evidence showing that, in the months leading up to the fall of Vukovar, the Yugoslav People's Army launched a campaign of shelling and bombardment of the Croatian-held areas of the city, causing many civilians to flee. *See* Appeal Brief, para. 68, *referring to, inter alia*, Exhibit P268 (confidential), paras. 8, 15, Exhibit P844 (confidential), p. 7; Exhibit P857, paras. 66, 67; Witness Radić, T. 20 November 2008 p. 11978; Witness VS-051, T. 28 May 2008 pp. 7525-7528 (closed session).
[389] *See* Appeal Brief, para. 68, *referring to* Witness VS-051, T. 28 May 2008 pp. 7525-7528 (closed session).
[390] Witness VS-051, T. 28 May 2008 p. 7528 (closed session).
[391] *See* Appeal Brief, para. 68, *referring to* Exhibit P857, paras. 66, 67.
[392] *See* Appeal Brief, para. 68 and the evidence cited therein. *See also* Witness Čakalić, T. 18 March 2008 pp. 4953, 4954; Exhibit P58; Witness VS-051, T. 28 May 2008 pp. 7542-7554 (closed session); Exhibit P268 (confidential), para. 33; Exhibit P844 (confidential), p. 3450.

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and driven away on buses by Serbian forces, including "Arkan's men".[393] The evidence referred to by the Prosecution suggests that a pattern of deportation and forcible transfer was carried out in other locations throughout the municipality of Zvornik between May and June 1992. After villages were taken over by Serbian forces, non-Serbian civilians, mostly Bosnian Muslims, were gathered, men were separated from women and children, and were moved by foot or on buses and trucks by members of the Yugoslav People's Army and Serbian paramilitary units, including *Chetniks*, to detention facilities or to other areas in Bosnia and Herzegovina or Serbia.[394] The violence ensuing from the attacks and the deportation and forcible transfer in the Zvornik area were aimed primarily at Bosnian Muslims, with some perpetrators making derogatory remarks referring to the ethnicity of the victims.[395]

112. The Prosecution also points to evidence strongly suggesting that non-Serbian civilians were forcibly displaced by Serbian forces from villages in the Nevesinje municipality in June 1992.[396] The evidence indicates that members of the Yugoslav People's Army, the Army of Republika Srpska, groups of *Chetniks*, paramilitary groups, and Serbian Radical Party volunteers, including "Šešelj's men", attacked Bosnian Muslim villages in Nevesinje municipality, while sparing Serbian ones.[397] According to witness evidence, it was a "military policy and a pattern that, when the Serbs were 'cleansing' any town they would loot and steal the valuables, set the houses on fire, and destroy the religious monuments", and that Muslim residents of Nevesinje who did not escape the attack were killed.[398] Panic-stricken villagers fled their homes into neighbouring forests, and many escaped to Velež Mountain, hoping to cross into Mostar or other Bosnian Muslim held territory.[399] Civilians who were captured by Serbian forces were transported to and detained in locations, such as the elementary school in Zijemlje and/or a camp in Boracko Jezero, where many were tortured,

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[393] *See* Appeal Brief, para. 69, *referring to*, *inter alia*, Witness VS-1062, T. 10 April 2008 pp. 5960-5964; Exhibit P836, para. 21.

[394] *See* Appeal Brief, para. 69, *referring to, inter alia*, Witness VS-1012, T. 18 June 2008 pp. 8439, 8445 (closed session); Witness VS-1064, T. 25 June 2008 pp. 8698-8704; Witness VS-1065, T. 22 April 2008 pp. 6301-6303; Witness VS-1066, T. 3 February 2009 pp. 13836-13843 (closed session); Exhibit P1144 (confidential), para. 95; Exhibit P854 (confidential), p. 10. *See also* Witness VS-1012, T. 18 June 2008 pp. 8445-8449 (closed session).

[395] *See* Appeal Brief, para. 69, *referring to*, *inter alia*, Witness Banjanović, T. 2 December 2008 p. 12447; Exhibit P836, para. 21; Witness VS-1064, T. 25 June 2008 pp. 8702, 8704.

[396] *See* Appeal Brief, para. 71. *See also* Appeal Brief, para. 24.

[397] *See* Appeal Brief, para. 71, *referring to, inter alia*, Witness Kujan, T. 22 July 2008 p. 9657; Witness VS-1022, T. 17 July 2008 pp. 9526, 9527, 9529 (closed session); Exhibit P524, pp. 6-8; Exhibit P880 (confidential), p. 30; Exhibit P881 (confidential), p. 7. *See also* Witness Kujan, T. 22 July 2008 p. 9656; Exhibit P880 (confidential), pp. 24, 25.

[398] *See* Appeal Brief, para. 71, *referring to*, *inter alia*, Exhibit P880 (confidential), p. 30. *See also* Exhibit P483 (confidential) para. 9; Witness Stoparić, T. 22 January 2008 pp. 2511, 2512; Witness VS-1022, T. 17 July 2008 pp. 9526, 9529 (closed session); Exhibit P524, p. 6.

[399] *See* Appeal Brief, para. 71, *referring to* Witness VS-1022, T. 17 July 2008 p. 9529 (closed session); Exhibit P487 (confidential), para. 6; Exhibit P524, pp. 6, 7; Exhibit P880 (confidential), pp. 27, 30; Decision of 23 July 2010, Annex, Adjudicated Facts 181, 182. *See also* Witness Stoparić, T. 22 January 2008 pp. 2520, 2522; Exhibit P483 (confidential) paras. 5-11; Exhibit P487 (confidential), paras. 7, 8.

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beaten, raped, and/or killed.[400] The evidence consistently points to the fact that Serbian forces targeted non-Serbian civilians, predominantly Bosnian Muslims as well as Croatians.[401]

113. Similarly, in relation to the Greater Sarajevo area, the Prosecution points to evidence suggesting that non-Serbian civilians from villages in the area were forcibly displaced by Serbian forces in June 1992. For example, the village of Lješevo was heavily shelled and houses owned by Bosnian Muslims were set on fire, causing their inhabitants to flee for shelter.[402] Non-Serbian civilians who remained in the village were subsequently robbed and killed by members of the Territorial Defence and *Chetniks*, members of Vaske's unit.[403] The Prosecution further refers to evidence suggesting that non-Serbian civilians were victims of persecution through torture, beating, robbery, and the imposition of restrictive and discriminatory measures, committed by various Serbian forces in the municipalities of Vukovar,[404] Zvornik,[405] Mostar,[406] and Greater Sarajevo.[407]

114. The evidence referred to by the Prosecution and discussed above, as well as the evidence relied upon by the Trial Chamber in the context of its findings on violations of the laws or customs of war,[408] indicates that: non-Serbian civilians in the areas of Vukovar, Zvornik, Nevesinje, and Greater Sarajevo fled the violence ensuing from the coordinated attacks by Serbian forces and that, during these attacks, numerous civilians were killed, men were separated from women and children, and many were taken to detention facilities where they were tortured, cruelly treated, and killed.[409] There are also clear indications in the evidence referred to by the Prosecution on appeal that

[400] *See* Appeal Brief, para. 71, *referring to* Exhibit P524, pp. 6, 7; Exhibit P880 (confidential), pp. 27-30. *See also* Witness VS-1022, T. 17 July 2008 pp. 9532-9544 (closed session); Witness VS-1051, T. 2 July 2008 pp. 8846-8861 (closed session); Exhibit P487 (confidential), paras. 11-30.
[401] The evidence referred to by the Prosecution also shows that, during the attacks, mosques and other religious monuments were destroyed. *See* Appeal Brief, para, 71, *referring to* Exhibit P880 (confidential), p. 30; Exhibit P881 (confidential), para. 27.
[402] *See* Appeal Brief, para. 70, *referring to* Witness VS-1055, T. 4 June 2008 pp. 7803-7805, 7817-7818; Witness VS-1111, T. 3 June 2008 pp. 7694, 7710, 7711, 7717 (closed session).
[403] *See* Appeal Brief, para. 70, *referring to* Witness VS-1055, T. 4 June 2008 pp. 7820, 7821; Witness VS-1111, T. 3 June 2008 pp. 7718-7726; 7734-7737 (closed session); Exhibit P451 (confidential); Exhibit P840, paras. 13, 15.
[404] *See* Appeal Brief, para. 62, *referring to* Witness Karlović, T. 11 March 2008 pp. 4742-4747; Prosecution Final Trial Brief, Annex Persecutions, nn. 33, 37; Exhibit P268 (confidential), para. 61.
[405] *See* Appeal Brief, paras. 62, 63, *referring to* Witness VS-1015, T. 24 March 2008 pp. 5402-5404; Witness VS-1012, T. 18 June 2008 p. 8453 (closed session); Exhibit P521 (confidential), p. 2; Witness Banjanović, T. 2 December 2008 pp. 12448, 12464; Witness VS-1066, T. 3 February 2009 pp. 13837, 13838 (closed session); Witness VS-037, T. 12 January 2010 p. 14871; Exhibit P1144 (confidential), paras. 17, 101-106, 111; Exhibit P874; Exhibit P959, pp. 9, 16; Witness Alić, T. 15 May 2008 p. 6992; Prosecution Final Trial Brief, paras. 286, 307, 335, 342, Annex Persecutions, nn. 39, 41, 45, 50, 76, 78.82.
[406] *See* Appeal Brief, para. 63, *referring to* Exhibit P880 (confidential), p. 15; Prosecution Final Trial Brief, Annex Persecutions, nn. 99-101; Witness Bilić, T. 3 July 2008 pp. 8954-8958, 8965, 8966.
[407] *See* Appeal Brief, paras. 62, 63, *referring to* Witness VS-1111, T. 3 June 2008 pp. 7718, 7722, 7724, 7726 (closed session); Witness Sejdić, T. 12 June 2008 pp. 8169-8172; Witness VS-1055, T. 3 June 2008 pp. 7816, 7817, 7821-7825; Exhibit P456 (confidential); Exhibit P975, p. 16; Witness VS-1060, T. 24 June 2008 pp. 8573-8581, 8591, 8599, 8600, 8602-8606, 8609, 8610, 8620, 8627, 8628; Exhibit P993; Exhibit P1398, pp. 2, 3; Exhibit P1400 (confidential), p. 1; Exhibit P1164 (confidential), p. 2; Prosecution Final Trial Brief, paras. 387, 426, Annex Persecutions, nn. 54, 56, 86, 88, 90, 94.
[408] *See* Trial Judgement, paras. 207, 210, 213, 216, 219.
[409] *See also supra* paras. 64-70.

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numerous non-Serbian civilians were forcibly displaced and that these and other acts of violence also constituted acts of persecution.[410] This evidence significantly undermines the Trial Chamber's conclusion that these non-Serbian civilians might have chosen to leave their homes voluntarily and that the buses, which were often provided by Serbian forces to transport non-Serbian civilians from areas in Croatia and Bosnia and Herzegovina, constituted acts of humanitarian assistance.[411] The Appeals Chamber is of the view that, on its face, there is a discernable pattern of crimes committed in these locations by cooperating Serbian forces, including "Šešelj's men", which could have led a reasonable trier of fact to infer that the crimes were committed in furtherance of a common criminal purpose to permanently forcibly remove a majority of the Croatian, Bosnian Muslim, and other non-Serbian populations in order to make these areas part of a new Serbian-dominated state.

115. The Appeals Chamber recalls, however, that the Prosecution has failed to show an error in the Trial Chamber's rejection of other factors, which allegedly showed the existence of common criminal purpose involving Šešelj. In particular, as noted above, the Trial Chamber was not convinced beyond a reasonable doubt that the creation of Serbian autonomous regions, the recruitment and deployment of volunteers, and the arming of Serbian civilians, all factors alleged by the Prosecution at trial, were indicative of the existence of a common criminal purpose.[412] The Trial Chamber was of the view that the Prosecution's theory of the common purpose provided "a very fragmented reading of the events [...] without explaining the broader context of the double secession of Croatia and [Bosnia and Herzegovina] within which [the establishment of Serbian autonomous regions took place]".[413] The Trial Chamber explicitly noted that its findings on the cooperation among the Serbian forces on the ground, including the deployment of volunteers, did not "purport to underestimate, much less to conceal the crimes committed in the various parts of Croatia and [Bosnia and Herzegovina]", but that, in its view, they could not be "considered as an inherent element of the political plan for a Greater Serbia or to protect the Serbs".[414]

116. The Trial Chamber was further concerned that Šešelj's right to a fair trial could be compromised should the Prosecution's submissions suggesting "the existence of a criminal enterprise with variable principles, whose objectives and modes of execution changed depending on the dynamics of power" be accepted.[415] Indeed, some of the Prosecution's submissions at trial indicated that the common purpose developed throughout 1990 and 1991.[416] Such developments

[410] *See supra* paras. 110-113.
[411] *See* Trial Judgement, para. 193.
[412] *See supra* paras. 87, 88.
[413] Trial Judgement, para. 229.
[414] Trial Judgement, para. 245.
[415] Trial Judgement, para. 265.
[416] *See* Prosecution Final Trial Brief, para. 576.

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allegedly included: the escalation of divisive nationalistic sentiment based on propaganda; the pursuit of ethnic separation through the creation of separate Serbian political and military structures; the large scale arming of the Serbian population; the creation of Serbian forces independent of the Socialist Federal Republic of Yugoslavia; the enclosure of the Yugoslav People's Army under the *de facto* control of the Belgrade-based members of the joint criminal enterprise; and the role played by the Yugoslav People's Army in the systematic arming of Serbian volunteers, including the military support provided in the course of the attacks by Serbian forces on towns and villages.[417] On appeal, the Prosecution does not present any arguments to show that the Trial Chamber's explicit rejection of this evolving common purpose was unreasonable in the context of this case.

117. The Appeals Chamber also recalls that the Prosecution has failed to show an error in the Trial Chamber's conclusion that the disagreements between Šešelj and the alleged members of the joint criminal enterprise demonstrated that their collaboration was aimed at defending the Serbian population and not at the commission of crimes.[418] The Trial Chamber's considerations clearly indicate that it was not persuaded beyond a reasonable doubt that the alleged members of the joint criminal enterprise – when using the principal perpetrators – acted in accordance with a common criminal plan.[419] Indeed, the existence of a certain level of coordination on the ground among various factions and the commission of crimes by some of these factions may not necessarily suffice, in the context of a given case, to show beyond a reasonable doubt that such cooperation was in pursuance of a common criminal purpose. The various factors and evidence considered by the Trial Chamber in this particular case, including its doubt as to the purpose behind the recruitment and deployment of volunteers by Šešelj and the limited involvement of "Šešelj's men" in proven crimes, could also be potentially consistent with a conclusion that the cooperation among the various Serbian forces and Šešelj resulted from the necessities of the war effort and was not necessarily indicative of the existence of a common criminal purpose.[420]

118. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence if it is the only reasonable conclusion that could be drawn from the evidence presented.[421] If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the

[417] *See* Prosecution Final Trial Brief, para. 576.
[418] *See supra* paras. 96-100.
[419] *See* Trial Judgement, para. 252.
[420] *See* Trial Judgement, paras. 245, 249, 253, 263.
[421] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 1509; *Karemera and Ngirumpatse* Appeal Judgement, para. 146; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Nchamihigo* Appeal Judgement, para. 80; *Stakić* Appeal Judgement, para. 219; *Karera* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, para. 306.

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non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.[422] The Appeals Chamber further recalls that, when considering alleged errors of fact, it will apply a standard of reasonableness[423] and that, as such, the question before the Appeals Chamber is not whether it agrees with the Trial Chamber's conclusion.[424] The Appeals Chamber must give deference to the Trial Chamber which received the evidence at trial and substitute its own finding for that of the Trial Chamber only where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[425] Bearing these principles in mind, the Appeals Chamber considers that, in the particular circumstances of this case, the Prosecution has not demonstrated that the Trial Chamber erred in relation to its findings on the non-existence of a joint criminal enterprise involving Šešelj.

E. Conclusion

119. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's arguments related to Šešelj's acquittal for commission of crimes through participation in a joint criminal enterprise.

[422] *See, e.g., Nyiramasuhuko et al.* Appeal Judgement, para. 1509; *Karemera and Ngirumpatse* Appeal Judgement, paras. 535, 553; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al.* Appeal Judgement, para. 306; *Delalić et al.* Appeal Judgement, para. 458.
[423] *Stanišić and Župljanin* Appeal Judgement, para. 20; *Tolimir* Appeal Judgement, para. 11; *Popović et al.* Appeal Judgement, para. 19. *See also supra* para. 15.
[424] *See Prlić et al.* Appeal Judgement, para. 22; *Stanišić and Župljanin* Appeal Judgement, para. 470; *Popović et al.* Appeal Judgement, para. 131. *See also supra* para. 15.
[425] *See Karemera and Ngirumpatse* Appeal Judgement, para. 16, *citing Krstić* Appeal Judgement, para. 40. *See also Prlić et al.* Appeal Judgement, para. 22; *Stanišić and Župljanin* Appeal Judgement, para. 21, *citing Kupreškić et al.* Appeal Judgement, para. 30; *Tolimir* Appeal Judgement, para. 12; *Popović et al.* Appeal Judgement, para. 20.

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VIII. PHYSICAL PERPETRATION AND INSTIGATION THROUGH SPEECHES

120. The Trial Chamber examined a number of speeches given by Šešelj during the conflict and concluded that they did not amount to commission or instigation of the crimes charged in the Indictment.[426] In particular, the Trial Chamber entered findings in relation to Šešelj's speeches in Vukovar, Mali Zvornik, before the Serbian Parliament, and Hrtkovci (Vojvodina, Serbia), as well as his statements encouraging the creation of a Greater Serbia and indoctrinating his party members.[427] On appeal, the Prosecution argues that the Trial Chamber erred in not holding Šešelj responsible for crimes on the basis of his speeches.[428] Specifically, the Prosecution requests that the Appeals Chamber find Šešelj responsible for instigating persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as murder, torture, cruel treatment, and plunder of public or private property as violations of the laws or customs of war.[429] The Prosecution also requests that the Appeals Chamber find Šešelj responsible for committing persecution, deportation and other inhumane acts (forcible transfer) as crimes against humanity.[430] Šešelj responds that the Prosecution's submissions are unsubstantiated and fail to demonstrate any error in the Trial Chamber's assessment of his speeches.[431]

121. In this section, the Appeals Chamber considers whether the Trial Chamber erred: (i) by failing to provide a reasoned opinion; (ii) in its consideration of whether Šešelj's speeches in Mali Zvornik, before the Serbian Parliament, and other statements instigated the crimes charged in the Indictment; (iii) in not holding Šešelj responsible for committing or instigating crimes on the basis of his speeches en route to Vukovar on 7 November 1991 and around 12 or 13 November 1991 in Vukovar; and (iv) in not holding Šešelj responsible for committing or instigating crimes on the basis of his speech in Hrtkovci, Vojvodina on 6 May 1992.

A. Failure to Provide a Reasoned Opinion

122. In describing the law applicable to the mode of responsibility of instigation, the Trial Chamber stated that the physical element of instigation involves prompting another person to commit an offence and that it is sufficient to demonstrate that the instigation substantially

[426] Trial Judgement, paras. 282-350.
[427] Trial Judgement, paras. 304-345.
[428] Notice of Appeal, paras. 6, 7, 11(c), 11(e), 12(4)(d), 12(4)(e); Appeal Brief, paras. 125-132, 172-192, 239-242, 247.
[429] Appeal Brief, para. 242.
[430] Appeal Brief, para. 247.
[431] *See*, *e.g.*, Response Brief, paras. 72, 93-97, 103-106, 119, 121-123, 146, 180, 181, 184, 200-204, 208, 210, 350-353, 375, 380-382, 397-400, 402-404.

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contributed to the commission of the crime.[432] The Trial Chamber added that "it should also be demonstrated that the instigator used different forms of persuasion such as threats, enticement or promises to the physical perpetrators of the crimes".[433]

123. The Prosecution submits that, in relation to the *actus reus* of instigation, the Trial Chamber erred in failing to provide any legal support or explanation for requiring that the instigator use different forms of persuasion.[434] It further submits that the Trial Chamber failed to engage with its core argument that Šešelj's relentless propaganda campaign instigated the commission of crimes against non-Serbians and that the Trial Chamber only addressed a limited number of speeches without assessing the evidence in its proper context, offering little, if any, reasons or analysis.[435]

124. The Appeals Chamber recalls that the *actus reus* of "instigating" implies prompting another person to commit an offence.[436] It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[437] In recounting the law, the Trial Chamber noted these requirements and referred to relevant jurisprudence.[438] The Trial Chamber, however, added an element – "that it should also be demonstrated that the instigator used different forms of persuasion such as threats, enticement or promises to the physical perpetrators of the crimes" – without citing any authoritative support for it.[439] The Appeals Chamber cannot exclude that proof of threats, enticement, or promises to physical perpetrators may have some relevance in assessing whether a particular conduct amounts to instigation. However, it is not a legal requirement, and the Trial Chamber erred in stating so. Nonetheless, the Prosecution has not shown how this error invalidates the decision. The Trial Chamber does not appear to have applied this requirement in its assessment of Šešelj's speeches, focusing instead on whether their content was proven,[440] whether they were aimed at prompting the commission of crimes, contributing to the war effort, or reinforcing his political party,[441] and whether they had an impact on the subsequent commission of crimes.[442]

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[432] Trial Judgement, paras. 294, 295.
[433] Trial Judgement, para. 295.
[434] Appeal Brief, para. 132.
[435] Appeal Brief, paras. 109-117.
[436] *See*, *e.g.*, *Nyiramasuhuko et al.* Appeal Judgement, para. 3327; *Ngirabatware* Appeal Judgement, para. 162; *Karera* Appeal Judgement, para. 317; *Nahimana et al.* Appeal Judgement, para. 480; *Kordić and Čerkez* Appeal Judgement, para. 27.
[437] *See*, *e.g.*, *Nyiramasuhuko et al.* Appeal Judgement, para. 3327; *Karera* Appeal Judgement, para. 317; *Nahimana et al.* Appeal Judgement, paras. 480, 660; *Kordić and Čerkez* Appeal Judgement, para. 27.
[438] *See* Trial Judgement, para. 295, nn. 327, 328.
[439] Trial Judgement, para. 295.
[440] *See* Trial Judgement, para. 318.
[441] *See*, *e.g.*, Trial Judgement, paras. 303, 307, 318, 328, 344.
[442] Trial Judgement, paras. 333, 338-343.

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125. As to the Prosecution's contention that the Trial Chamber failed to engage with its arguments about the impact of Šešelj's propaganda campaign,[443] the Appeals Chamber notes that elsewhere in its Appeal Brief, the Prosecution submits that the "[Trial Chamber] accepted that Šešelj believed that propaganda could influence people and that he had studied the mass psychology of fascism".[444] Moreover, a review of the Trial Judgement shows that the Trial Chamber extensively discussed evidence of Šešelj's use of propaganda techniques[445] and that this discussion formed the lens through which the Trial Chamber subsequently analysed the impact of Šešelj's speeches.[446] The Prosecution's claim that the Trial Chamber ignored this aspect of the case is therefore ill-founded.

126. The Prosecution's assertions that the Trial Chamber excluded from its analysis statements that it considered "nothing more than support for the war effort" or "electoral speeches",[447] as well as statements relating to "other locations",[448] are similarly unsubstantiated. In this regard, the Appeals Chamber notes that the Trial Chamber expressly stated that it considered such statements, but that it did not deem them "detrimental to the Accused".[449] As to the Prosecution's grievance that the Trial Chamber provided insufficient analysis or references to the evidence, the Appeals Chamber recalls that a trial chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count; it is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record.[450] In the Appeals Chamber's view, upon determining that the alleged speeches had limited impact and were non-criminal in nature given their context, it was unnecessary for the Trial Chamber to engage in further analysis or to extensively refer to the evidence on the record.

B. Speeches in Mali Zvornik, Before the Serbian Parliament, and Other Statements

127. The Trial Chamber found that Šešelj gave a speech in March 1992 in Mali Zvornik,[451] in which he called "on the Serbs to 'clear up' Bosnia of the '*pogani*' and the '*balijas*'",[452] the former meaning "waste" or "faeces".[453] The Trial Chamber further found that, on 1 and 7 April 1992,

[443] Appeal Brief, para. 109.
[444] Appeal Brief, para. 241, *referring to* Trial Judgement, para. 299.
[445] *See* Trial Judgement, paras. 297-300.
[446] *See* Trial Judgement, para. 300.
[447] Appeal Brief, para. 112.
[448] Appeal Brief, para. 113.
[449] Trial Judgement, para. 303.
[450] *See, e.g., Haradinaj et al.* Appeal Judgement, para. 128; *Hadžihasanović and Kubura* Appeal Judgement, para. 13; *Kvočka et al.* Appeal Judgement, para. 23; *Kordić and Čerkez* Appeal Judgement, para. 382. *See also Stanišić and Župljanin* Appeal Judgement, para. 137; *Stanišić and Simatović* Appeal Judgement, para. 78; *Popović et al.* Appeal Judgement, paras. 1771, 1906.
[451] Trial Judgement, para. 327.
[452] Trial Judgement, para. 328. *See also* Trial Judgement, paras. 322, 324.
[453] Trial Judgement, para. 325.

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Šešelj delivered in the Serbian Parliament two speeches, which "clearly constituted calls for the expulsion and forcible transfer of Croats".[454] The Trial Chamber nevertheless concluded that these speeches, as well as his statements encouraging the creation of a Greater Serbia through violence and indoctrinating his party members, did not amount to instigation.[455] The Trial Chamber determined that, in each case, Šešelj's speeches and statements could not be considered criminal because they had too little impact and/or the possibility could not be excluded that they were aimed at supporting the war effort or his political campaign.[456]

128. The Prosecution submits that, on the basis of the evidence on the record, no reasonable trier of fact could have found that Šešelj's speeches and statements did not prompt violence against the non-Serbian population and did not have a substantial effect on the commission of crimes in Bosnia and Herzegovina as charged in the Indictment.[457] In particular, the Prosecution contends that, as the prospect of Bosnian independence neared in 1992, Šešelj made repeated inflammatory statements against Muslims and other non-Serbians in Bosnia and Herzegovina, thus resulting in the commission of crimes during Serbian takeovers of Bosnian towns, and thereafter in detention centres.[458] The Prosecution points to evidence that, throughout February and March 1992, Šešelj repeatedly threatened that "rivers of blood" would follow a Bosnian declaration of independence, and that days later large-scale crimes were orchestrated against non-Serbians in Bijeljina with the involvement of Mirko Blagojević, the President of the Serbian Radical Party in North-Eastern Bosnia.[459] The Prosecution further asserts that, when at the end of March 1992 Šešelj stated that he was about "to visit 'critical points' in Eastern Herzegovina", crimes in Nevesinje and Mostar rapidly ensued.[460]

129. Similarly, the Prosecution submits that, following Šešelj's speeches in Mali Zvornik in mid-March 1992 and at the Serbian Parliament in the first week of April 1992, Serbian forces including paramilitaries initiated the takeover of Zvornik on 8 April 1992 and almost immediately started killing Muslim civilians.[461] According to the Prosecution, while the killings in Zvornik were ongoing, Šešelj called on Serbians to defend Republika Srpska from "Ustasha and pan-Islamist hordes" and told Serbian Radical Party supporters that the only remaining task in Bosnia and Herzegovina was "to clean up the left bank of the river Drina" and "liberate the Serbian part of

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[454] Trial Judgement, paras. 335-338.
[455] Trial Judgement, paras. 319-328, 334-345. *See also* Trial Judgement, para. 350.
[456] Trial Judgement, paras. 303, 318, 328, 338-343.
[457] Appeal Brief, paras. 172-179, 184-189, 191, 192.
[458] Appeal Brief, paras. 184-189.
[459] Appeal Brief, para. 184.
[460] Appeal Brief, para. 186, *citing* Exhibit P1296.
[461] Appeal Brief, para. 185, *referring to, inter alia*, Trial Judgement, paras. 210(a), 322, 335.

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Sarajevo".[462] The Prosecution further submits that, on 4 June 1992, following Šešelj's statement that the Serbian ethnic borders were on the Karlobag-Ogulin-Karlovac-Virovitica line, the attack on Lješevo unfolded, during which various crimes against Muslim civilians were committed.[463]

130. Bearing in mind that the violent takeovers of municipalities throughout Bosnia and Herzegovina by Serbian forces were accompanied by widespread and systematic mistreatment of non-Serbian civilians,[464] the Appeals Chamber considers that Šešelj's statements threatening with "rivers of blood"[465] and using derogatory epithets[466] were undoubtedly inflammatory. Moreover, in relation to Šešelj's speech in Mali Zvornik, the evidence of Witness VS-2000, upon which the Trial Chamber relied, indicates that Šešelj called on the *Chetniks* to "show the *balijas*, the Turks and the Muslims [...] the direction to the east" as "[t]hat's where their place is".[467] In his testimony in the *S. Milošević* case, Šešelj confirmed that in his speech in Mali Zvornik he implored the *Chetniks* "to clear up Bosnia from the pagans and show them the road to the east where they belonged".[468] The Appeals Chamber considers that, in view of this evidence, no reasonable trial chamber could have found that Šešelj's speech in March 1992 in Mali Zvornik did not call for ethnic cleansing but was instead "contributing to the war effort by galvanizing the Serbian forces".[469] Indeed, the inflammatory language of Šešelj's speech and statements could have prompted other persons to commit crimes against non-Serbian civilians.

131. Notwithstanding the Trial Chamber's error in relation to the nature of Šešelj's speech in Mali Zvornik, the Appeals Chamber observes that the Trial Chamber was also not persuaded that the speech, as well as other statements made by Šešelj during the relevant period, had an impact on, or "causal link" to the commission of crimes against non-Serbians.[470] In addressing the Prosecution's challenges in this regard, the Appeals Chamber is cognizant that the Prosecution was not required to establish that the crimes would not have been committed without Šešelj's involvement; it was sufficient to demonstrate that Šešelj's speeches were a factor substantially contributing to the conduct of the perpetrators.[471]

132. The crux of the Prosecution's argument on appeal is the temporal link between Šešelj's statements and the contemporaneous or subsequent commission of crimes in various locations. The

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[462] Appeal Brief, paras. 187, 188.
[463] Appeal Brief, para. 189.
[464] *See supra* paras. 68, 71. *See also* Decision of 23 July 2010, Annex; Decision of 10 December 2007, Annex.
[465] Exhibits P395; P685, p. 1; P1186, p. 6; P1324, p. 1.
[466] *See* Witness VS-2000, T. 4 February 2009 p. 13994; Exhibit P31, T. 5 September 2008 p. 43725.
[467] Trial Judgement, para. 322, *citing* Witness VS-2000, T. 4 February 2009 pp. 13994, 13995.
[468] Trial Judgement, para. 324, *citing* Exhibit P31, T. 5 September 2008 pp. 43724-43726.
[469] Trial Judgement, para. 328.
[470] *See* Trial Judgement, paras. 328, 338-343.
[471] *See supra* para. 124.

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Appeals Chamber considers that a reasonable trier of fact could find such a link to be tenuous in circumstances where there was a significant lapse of time between the statement and the offences, allowing for the reasonable possibility that Šešelj's statement did not substantially contribute to the commission of the specific crimes and that other factors may have influenced the conduct of the perpetrators.[472] The Appeals Chamber notes that the Trial Chamber received evidence that Šešelj delivered a speech in Mali Zvornik in mid-March 1992,[473] whereas the attack on Zvornik commenced nearly three weeks later, on 8 April 1992.[474] In relation to Šešelj's speeches on 1 and 7 April 1992 at the Serbian Parliament that the Trial Chamber found to have constituted calls for the expulsion and transfer of Croatians,[475] the Prosecution did not demonstrate at trial the breadth of their dissemination and the specific impact that they had on the commission of crimes in Zvornik and other areas.[476] Other than disagreeing with the Trial Chamber, the Prosecution does not demonstrate that no reasonable trier of fact could have reached the impugned conclusion.

133. In relation to Šešelj's repeated threats in February and March 1992 that "rivers of blood" would follow a Bosnian declaration of independence, the Appeals Chamber finds that such statements are undoubtedly capable of creating fear and emboldening perpetrators of crimes against the non-Serbian population. Similarly, Šešelj's call to defend Republika Srpska from "Ustasha and pan-Islamist hordes",[477] and his appeal to Serbian Radical Party supporters on 28 May 1992 "to clean the left bank of the river Drina" and "liberate the Serbian part of Sarajevo",[478] are clearly inflammatory when viewed in the context of the events which were unfolding in Zvornik at the time, including the detention, torture, and murder of Muslim civilians by several factions of the Serbian forces.[479] Moreover, the Trial Chamber was cognizant that Šešelj exerted influence over members of his party and some combatants.[480] However, the Appeals Chamber is mindful of the highly circumstantial nature of the evidence related to the specific impact, if any, that Šešelj's statements had on the conduct of the perpetrators. In order to succeed on appeal, the Prosecution must show that no reasonable trier of fact could have found that Šešelj's statements did not *substantially* contribute to the commission of the crimes in Zvornik. In the present context, the Appeals Chamber is not persuaded that the Prosecution has discharged its burden on appeal.

134. In the Appeals Chamber's view, the link between Šešelj's statement that he was about to visit "critical points" in Eastern Herzegovina and the commission of crimes in Nevesinje and

[472] *Cf. Nahimana et al.* Appeal Judgement, para. 513; *Ndindabahizi* Appeal Judgement, para. 116.
[473] Trial Judgement, paras. 322, 324, 326.
[474] Trial Judgement, para. 210(a).
[475] Trial Judgement, para. 335.
[476] *See* Trial Judgement, paras. 338, 343.
[477] Exhibit P685, p. 11.
[478] Exhibit P1200, p. 4.
[479] *See* Trial Judgement, para. 210.

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Mostar is even more tenuous, as is the link between his declaration that Serbian ethnic borders are on the Karlobag-Ogulin-Karlovac-Virovitica line and the killings of Muslim civilians in Lješevo. The Appeals Chamber does not consider that it was unreasonable for the Trial Chamber to find that the evidence presented by the Prosecution at trial regarding Šešelj's statements discussed above was insufficient to discern the impact that they had on the commission of the crimes charged in the Indictment.

C. Speeches in Vukovar

135. At trial, the Prosecution sought to hold Šešelj responsible for instigating murder and committing persecution on the basis of speeches that he made in November 1991 en route to Vukovar and in the city.[481] The Trial Chamber found that Šešelj made statements at a press conference en route to Vukovar on 7 November 1991, and that he gave a speech in Vukovar around 12 or 13 November 1991.[482] In particular, the Trial Chamber examined a newspaper article recounting that, on 7 November 1991, Šešelj stated that "'this entire area will soon be cleared of the Ustashas' and told the Catholics in the region that they would have nothing to fear if they did not cooperate with the *Ustashas* and join their units".[483] The Trial Chamber further considered various accounts of Šešelj's speech given on 12 or 13 November 1991.[484] The evidence included witness testimony that Šešelj told high-ranking members of the Serbian forces that "[n]o *Ustashas* must leave Vukovar alive",[485] as well as evidence that Šešelj encouraged the Croatian soldiers to surrender, "telling the '*Ustashas*' that they would be given a fair trial, or the fact that if they did not do so, they would die".[486] The Trial Chamber concluded that the exact content of Šešelj's statements remained unclear and that there was a reasonable possibility that his statements were aimed at reinforcing his political party or the morale of the Serbian forces, "rather than being an appeal to them to show no mercy".[487]

136. The Prosecution submits that, after months of "building a reservoir of hate" by repeatedly exposing his army of volunteers to his propaganda and increasingly incendiary rhetoric as the war in Croatia escalated, Šešelj triggered the crimes in Vukovar when he instructed Serbian forces that "[n]o Ustaša should leave Vukovar alive".[488] The Prosecution refers to the testimonies of witnesses who understood the statement to mean that detainees should be executed and that bloodshed would

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[480] Trial Judgement, para. 341.
[481] Indictment, paras. 17(k), 20; Prosecution Final Trial Brief, paras. 588-590, 592-594, 597, 598, 600, 602.
[482] Trial Judgement, para. 318.
[483] Trial Judgement, para. 306.
[484] Trial Judgement, paras. 308-317.
[485] Trial Judgement, para. 309. *See also* Trial Judgement, para. 314.
[486] Trial Judgement, para. 310. *See also* Trial Judgement, para. 314.
[487] Trial Judgement, paras. 307, 318.

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follow,[489] as well as evidence which allegedly shows that Šešelj deliberately equated the broader Croatian population with *Ustasha*.[490] The Prosecution contends that Šešelj's volunteers who heard the statements subsequently killed Croatian detainees at the Velepromet warehouse and the Ovčara farm, thus supporting the conclusion that the statements constituted a direct call to kill civilians and persons *hors de combat*.[491] The Prosecution argues that no reasonable trier of fact could have found that Šešelj's statement that "no *Ustasha* should be allowed to leave Vukovar alive" did not amount to physical commission of persecution as a crime against humanity, based on a violation of the right to dignity and security.[492]

137. On appeal, the Prosecution's challenges focus on the Trial Chamber's observations regarding the impact of Šešelj's statements on the commission of crimes in Vukovar and the meaning of the term "*Ustasha*". However, the Prosecution does not address the Trial Chamber's key reservation, namely that the evidence before it did not establish beyond reasonable doubt the content of Šešelj's statements of 7 November and 12 or 13 November 1991. In this regard, the Trial Chamber noted that the author of the news article reporting on Šešelj's 7 November 1991 remarks did not testify and that no other witness provided evidence on the context of Šešelj's remarks.[493] As to the statements from 12 or 13 November 1991, the Trial Chamber noted that the evidence of some witnesses was inconsistent, which, in its view, "sow[ed] a seed of doubt as regards the exact content of [Šešelj's] statements".[494] The Prosecution asserts that the Trial Chamber erred in finding that there was any doubt as to the nature of Šešelj's statements, but does not demonstrate that the Trial Chamber's conclusions in this regard were unreasonable.[495] The Appeals Chamber therefore does not find it necessary to address the Prosecution's further arguments concerning Šešelj's responsibility for statements made in November 1991 en route to Vukovar and in the city.

D. Hrtkovci, Vojvodina

138. The Indictment alleges that, on 6 May 1992, Šešelj gave an inflammatory speech in the village of Hrtkovci, Vojvodina, calling for the expulsion of the Croatian population.[496] On the basis of this conduct, the Prosecution charged Šešelj under Count 1 of the Indictment with persecution as a crime against humanity through deportation or forcible transfer and through direct and public denigration through "hate speech", on the basis of ethnicity, of the non-Serbian population in

[488] Appeal Brief, paras. 180-183. *See also* Appeal Brief, para. 175.
[489] Appeal Brief, para. 179.
[490] Appeal Brief, paras. 183, 214.
[491] Appeal Brief, para. 183. *See also* T. 13 December 2017 p. 23.
[492] Appeal Brief, para. 213. *See also* T. 13 December 2017 p. 24.
[493] Trial Judgement, para. 307.
[494] Trial Judgement, para. 318.
[495] *See* T. 13 December 2017 p. 23.

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Hrtkovci.[497] The Prosecution also charged Šešelj under Counts 10 and 11 of the Indictment with deportation and other inhumane acts (forcible transfer) as crimes against humanity committed in Hrtkovci between May and August 1992.[498]

139. The Trial Chamber found that, on 6 May 1992 at an electoral campaign rally in Hrtkovci to promote the Serbian Radical Party, Šešelj gave a speech that was "certainly anti-Croat in tenor",[499] "particularly disturbing",[500] and "clearly constitute[d] a call for the expulsion or forcible transfer of Croats from the village".[501] The Trial Chamber nevertheless concluded that Šešelj could not be held responsible for having physically committed or instigated crimes in Hrtkovci.[502] In addition, the Trial Chamber was not satisfied that there was a widespread or systematic attack against the civilian population in Hrtkovci and, therefore, did not make any findings on whether persecutions, deportation, and other inhumane acts (forcible transfer) as crimes against humanity were committed during the relevant period.[503]

140. The Prosecution submits that the Trial Chamber erred in finding that, through his speech of 6 May 1992, Šešelj did not physically commit or instigate the commission of the crimes of persecution, deportation, and other inhumane acts (forcible transfer) in Hrtkovci.[504] The Prosecution accordingly requests that the Appeals Chamber find Šešelj criminally responsible under Counts 1, 10, and 11 of the Indictment.[505] Šešelj responds that the Trial Chamber was correct in concluding that he cannot be held responsible for committing or instigating crimes under Article 7(1) of the ICTY Statute as a result of his speech in Hrtkovci on 6 May 1992.[506]

141. In this section, the Appeals Chamber considers whether the Trial Chamber erred in finding that Šešelj did not: (i) physically commit or instigate deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity; and (ii) physically commit persecution (violation of the right to security) as a crime against humanity.

[496] Indictment, para. 33.
[497] Indictment, paras. 17(i) and 17(k). *See also* Prosecution Final Trial Brief, para. 561 (where the Prosecution alleged that "[Šešelj] engaged in a campaign of persecutory speeches that denigrated non-Serbs, thereby infringing their right to dignity and security"), para. 564.
[498] Indictment, paras. 31-33.
[499] Trial Judgement, para. 196.
[500] Trial Judgement, para. 197.
[501] Trial Judgement, para. 333. *See also* Trial Judgement, para. 197 (where the Trial Chamber stated that the speech "clearly called for the deportation of Croats, especially those [Šešelj] considered to be disloyal)".
[502] Trial Judgement, paras. 282-285, 330-333, 350.
[503] Trial Judgement, paras. 194-198, 283, n. 391.
[504] Appeal Brief, paras. 190-192, 239, 247.
[505] Appeal Brief, paras. 242, 249.
[506] Response Brief, para. 200.

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1. Commission and Instigation of Deportation, Persecution (Forcible Displacement), and Other Inhumane Acts (Forcible Transfer)

142. The Trial Chamber concluded that Šešelj could not be held responsible for physically committing or instigating the crimes in Hrtkovci[507] that involved, *inter alia*, acts of intimidation by Serbian refugees against Croatians to incite the latter to exchange their houses in Hrtkovci for refugees' homes in Croatia.[508] In reaching its conclusion, the Trial Chamber found that Šešelj did not take direct part in any housing exchanges and that "[e]ven if he encouraged them, in a context that was deemed coercive, he would not be a direct perpetrator of persecutory acts".[509] The Trial Chamber also concluded that Šešelj's call to "cleanse" the area of Croatians were neither accepted nor executed.[510]

143. In addition, the Trial Chamber found that the Prosecution failed to prove that Šešelj's speech "was the reason" for the departure of Croatians from Hrtkovci or for the campaign of persecution that allegedly followed his speech.[511] In particular, the Trial Chamber observed that: (i) the expert report of Witness Ewa Tabeau did not specify the reason for the departure of the Croatian population; (ii) the evidence, including that of Witness VS-061, did not reliably establish the link between Šešelj's speech and the departures; (iii) there were various reasons for the departure of Croatians from Hrtkovci; (iv) it was not possible to establish the number of departures and whether they indeed took place; and (v) even if the testimony of Witness VS-067 that he left Hrtkovci because of Šešelj's speech were accepted, a single departure was insufficient to establish the crime of deportation as a crime against humanity, especially since the Trial Chamber had found that there was no widespread or systematic attack against Croatian civilians in Hrtkovci.[512]

144. The Prosecution submits that no reasonable trier of fact could have found that Šešelj's speech in Hrtkovci did not amount to physical commission of deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity.[513] It argues that, for the people who left Hrtkovci directly because of Šešelj's speech, the speech itself constituted the force that drove them out.[514] In relation to the displacement of the population which allegedly resulted from the violence triggered by Šešelj's speech, the Prosecution submits that the speech was an "integral part" of the force that drove the population out.[515] In this regard, the

[507] Trial Judgement, paras. 282-285, 330-333, 350.
[508] Trial Judgement, paras. 196, 197.
[509] Trial Judgement, para. 284. *See also* Trial Judgement, para. 197.
[510] Trial judgement, para. 284.
[511] Trial Judgement, para. 333.
[512] Trial Judgement, para. 333, n. 391. *See also* Trial Judgement, paras. 195, 196.
[513] Appeal Brief, para. 197.
[514] Appeal Brief, paras. 198, 203-205, 211.
[515] Appeal Brief, paras. 198, 212. *See also* T. 13 December 2017 pp. 21, 22.

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Prosecution submits that Šešelj's speech was given in front of a large audience and was quickly disseminated.[516] The Prosecution further argues that, following Šešelj's speech, there was an increase in inter-ethnic violence which was carried out, at least in part, by Serbians with a connection to Šešelj and sanctioned by the local authorities.[517] According to the Prosecution, this resulted in the almost complete expulsion of the Croatian population of Hrtkovci.[518]

145. In addition, the Prosecution argues that no reasonable trier of fact could have concluded that Šešelj did not instigate the crimes in Hrtkovci by substantially contributing, through his speech, to their commission.[519] It contends that Šešelj's speech clearly called for expulsion and immediately triggered a campaign of inter-ethnic violence, which was rapidly implemented, forcing Croatians to leave Hrtkovci.[520]

146. The Appeals Chamber notes that, according to a transcript of the "Promotion Rally of the Serbian Radical Party" held on 6 May 1992 in Hrtkovci, an exhibit to which the Trial Chamber accorded significant probative value,[521] Šešelj addressed his "Serbian brothers and sisters", declaring, *inter alia*, that "there was no room for Croats in Hrtkovci", and that "we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord".[522] He directly addressed Croatians by telling them "you have nowhere to return to"[523] and ended his speech by stating: "I firmly believe that you, Serbs from Hrtkovci and other villages around here, will also know how to preserve your harmony and unity, that you will promptly get rid of the remaining Croats in your village and the surrounding villages".[524]

147. The Appeals Chamber further notes that, according to a report by the State Security Department of the Serbian Ministry of Interior, an exhibit to which the Trial Chamber accorded high probative value,[525] the rally in Hrtkovci on 6 May 1992 was attended by some 700 Serbian Radical Party sympathizers and citizens of neighboring villages, 60 percent of whom were Serbian refugees from Croatia.[526] The evidence showed that Ostoja Sibinčić, a member of the Serbian Radical Party who subsequently became mayor of Hrtkovci, was also present.[527] Following Šešelj's

[516] Appeal Brief, paras. 199, 201, 202.
[517] Appeal Brief, paras. 206-209.
[518] Appeal Brief, para. 210. *See also* Appeal Brief, para. 155.
[519] Appeal Brief, paras. 190-192, 239.
[520] Appeal Brief, para. 190.
[521] *See* Trial Judgement, paras. 330, 331, *referring to* Exhibit P547.
[522] *See* Trial Judgement, paras. 330, 331, *referring to* Exhibit P547, p. 4, Exhibit P548 (confidential), p. 2.
[523] Exhibit P547, p. 4.
[524] Exhibit P547, p. 8.
[525] *See* Trial Judgement, paras. 330, 332, *referring to* Exhibit P548 (confidential).
[526] Exhibit P548 (confidential), p. 1. *See also* Witness Ejić, T. 7 October 2008 p. 10343; T. 8 October 2008 p. 10496.
[527] Witness Ejić, T. 7 October 2008 pp. 10343; 10380; Witness Baričević T. 14 October 2008 pp. 10603, 10604, 10621, 10623.

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speech, the crowd chanted slogans such as "Croats, go to Croatia", and "[t]his is Serbia".[528] Elsewhere in the Trial Judgement, the Trial Chamber noted that Šešelj had influence over the members of his party, that he was an ideological leader, even seen by some "as if he were a god", and that his speeches had a significant impact on the audience.[529]

148. The Trial Chamber further heard witness testimony that Šešelj's speech was perceived as a serious threat to the Croatian population of Hrtkovci and a strong encouragement for them to leave.[530] In relation to the crimes which were committed in Hrtkovci following Šešelj's speech, in addition to Witness VS-061 whose evidence the Trial Chamber found not sufficiently reliable, the Prosecution presented evidence showing that: (i) after Šešelj's speech, Croatians and other non-Serbians were increasingly harassed and threatened on a regular basis to leave Hrtkovci;[531] (ii) most Croatians and other non-Serbians left Hrtkovci as a result of the stream of violence, threats, and intimidation whereby they were pressured to exchange, or forced to abandon their homes;[532] and (iii) local police and authorities were often complacent and did little to assist targeted civilians.[533]

149. On appeal, the Prosecution specifically points to the evidence of Witness Aleksa Ejić that, Šešelj's associates, including Sibinčić, held meetings at which they advised Serbian refugees in Hrtkovci to "break into houses" and draw up fake contracts.[534] In relation to the Trial Chamber's observation that Witness Tabeau's expert report did not specify the reason for the departure of the Croatian population, the Appeals Chamber notes that the report nevertheless indicated that, from May until August 1992, a large number of Croatian civilians left Hrtkovci and the overall

[528] Trial Judgement, para. 332, *referring to* Exhibit P548 (confidential), p. 2.
[529] Trial Judgement, para. 341.
[530] Witness VS-067, T. 16 February 2010 p. 15412; Witness Paulić, T. 19 November 2008 p. 11910; Exhibit P1049 (confidential), para. 17.
[531] *See, e.g.*, Witness Baričević, T. 14 October 2008 pp. 10626, 10632, 10640, 10647; Witness VS-1134, T. 15 October 2008 pp. 10777, 10786; Witness Paulić, T. 19 November 2008 pp. 11910-11912; Exhibit P550; Exhibit P551 (confidential); Exhibit P554, pp. 7-12; Exhibit P557; Exhibit P559; Exhibit P564 (confidential), pp. 3, 4.
[532] *See, e.g.*, Witness Paulić, T. 19 November 2008 pp. 11905-11913; Witness Baričević, T. 14 October 2008 pp. 10621, 10626, 10632, 10640, 10647-10650; Witness Ejić, T. 7 October 2008 p. 10380; Witness VS-1134, T. 15 October 2008 pp. 10777, 10778, 10786, 10788. *See also* Exhibit P550; Exhibit P551 (confidential); Exhibit P554, pp. 8, 9; Exhibit P557, pp. 1, 2; Exhibit P559; Exhibit P564 (confidential), pp. 3, 4.
[533] The Appeals Chamber observes that, according to Witness VS-1134, special police force entered Hrtkovci in July 1992 to restore some order, and that some other witnesses testified to the police providing some, but limited, assistance. *See* Witness VS-1134, T. 15 October 2008 pp. 10786-10788; Witness Ejić, T. 7 October 2008 pp. 10328, 10331; Witness VS-067, T. 17 February 2010 pp. 15553, 15554. The Appeals Chamber further notes that former mayor of Hrtkovci, Ostoja Sibinčić, among others, was arrested and tried for threatening the life of non-Serbians and forcing them to leave Hrtkovci or to exchange properties. *See* Exhibit P554, pp. 8-12. Nevertheless, there is consistent evidence showing that between the time Šešelj gave his speech on 6 May 1992 and July 1992, local authorities and police did little to assist targeted non-Serbian civilians. *See, e.g.*, Witness Paulić, T. 19 November 2008 pp. 11898, 11911; Witness Baričević, T. 14 October 2008 p. 10626; Witness VS-1134, T. 15 October 2008 pp. 10786-10788; Witness Ejić, T. 7 October 2008 p. 10380, T. 8 October 2008 pp. 10437, 10438, T. 9 October 2008 p. 10535.
[534] *See* Appeal Brief, para. 209, *referring to, inter alia* Witness Ejić, T. 7 October 2008 p. 10380.

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population of ethnic Croatians in Hrtkovci was reduced by 76.3 percent.[535] In its submissions on appeal, the Prosecution points to witness evidence which corroborates both the expert report and Witness VS-061's testimony concerning the massive exodus of Croatian civilians for reasons of repeated mistreatment, threats, and violence.[536]

150. The Appeals Chamber further notes that the Trial Chamber's own findings reflect that many non-Serbian civilians left Hrtkovci by way of housing exchanges with Serbian refugees in the context of coercion, harassment, and intimidation.[537] In light of this context, as well as the evidence of regular threats and violence perpetrated by Serbians against non-Serbian civilians, the inaction of the local authorities, and the pressured housing exchanges or forced abandonment of homes, the Appeals Chamber considers that no reasonable trier of fact could have found that the non-Serbian civilians genuinely consented to leave Hrtkovci and that the perpetrators did not intend their deportation and/or forcible transfer from an area in which they were lawfully present, without grounds permitted under international law.[538] The Trial Chamber's observation elsewhere in the Trial Judgement that the perpetrators' conduct was driven by "domestic motives" is extraneous in this context, as crimes against humanity may be committed for purely personal reasons.[539] In addition, given that the acts of violence and intimidation were aimed at non-Serbian civilians, particularly Croatians,[540] the only reasonable inference is that the acts of forcible displacement amounted to discrimination in fact, were carried out with discriminatory intent on ethnic grounds, and constituted part of a widespread or systematic attack against the non-Serbian civilian population, encompassing also areas in Croatia and Bosnia and Herzegovina.[541] Given the content

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[535] Exhibit P565, pp. 33, 34.

[536] *See* Appeal Brief, paras. 209, 210, *referring to, inter alia*, the evidence of Witnesses Paulić, Baričević, VS-007, VS-067, and VS-1134. *See also* Witness Paulić, T. 19 November 2008 pp. 11910-11913; Witness Baričević, T. 14 October 2008 pp. 10640, 10648-10650; Witness VS-1134, T. 15 October 2008 p. 10777; Witness VS-007, T. 16 April 2008 pp. 6115, 6116 (closed session); Exhibit P1049 (confidential), para. 18.

[537] Trial Judgement, paras. 196, 197, 284.

[538] The *actus reus* of the crime of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. *See Krajišnik* Appeal Judgement, para. 304; *Stakić* Appeal Judgement, para. 278. *See also Đorđević* Appeal Judgement, para. 532. In comparison, forcible transfer, which may be recognized as being sufficiently serious as to amount to other inhumane acts under the ICTY Statute as well as other enumerated crimes against humanity, requires that persons be forcibly displaced, but may take place within national boundaries. *See Krajišnik* Appeal Judgement, paras. 330, 331; *Stakić* Appeal Judgement, para. 317. The *mens rea* of both deportation and forcible transfer do not require that the perpetrator intended to displace individuals on a permanent basis. *See Krajišnik* Appeal Judgement, para. 304; *Brđanin* Appeal Judgement, para. 206; *Stakić* Appeal Judgement, paras. 278, 317.

[539] Trial Judgement, para. 196. *See supra* para. 75.

[540] *See supra* para. 149. *See also* Witness Baričević, T. 14 October 2008 pp. 10626, 10640, 10647; Witness VS-1134, T. 15 October 2008 pp. 10776, 10777, 10786; Witness Paulić, T. 19 November 2008 pp. 11910-11912; Exhibit P550; Exhibit P554, pp. 7-12; Exhibit P559; Exhibit P564 (confidential), pp. 3, 4.

[541] Acts of forcible displacement, taken separately or cumulatively, have been recognized as having equal gravity to other crimes against humanity and thus constituting persecution under Article 5(h) of the ICTY Statute. *See Simić* Appeal Judgement, para. 174; *Naletilić and Martinović* Appeal Judgement, paras. 153, 154; *Blaškić* Appeal Judgement, paras. 151-153; *Krnojelac* Appeal Judgement, paras. 218, 221-224. Forcible displacement underlying persecution is not limited to displacement across a national border as the prohibition against forcible displacements aims at safeguarding

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of Šešelj's speech[542] and the contemporaneous events in Croatia and Bosnia and Herzegovina,[543] the perpetrators were also undoubtedly aware that their acts formed part of the attack. Accordingly, the Appeals Chamber considers that no reasonable trier of fact could have found that these acts did not fulfill the requirements of the crimes against humanity of persecution (forcible displacement), other inhumane acts (forcible transfer), and deportation, for those civilians who crossed the Serbian border.[544]

151. Turning to Šešelj's responsibility, the Appeals Chamber notes that the evidence referred to by the Prosecution on appeal indicates that Šešelj's speech contributed to the increase in tension and to the coercive atmosphere of violence and intimidation against the Croatian population in Hrtkovci. The Appeals Chamber is not persuaded, however, by the Prosecution's submission that Šešelj's speech was "an integral part" of the force that drove the population out.[545] As acknowledged by the Prosecution, sporadic acts of violence had begun in Hrtkovci even prior to Šešelj's speech, with the arrival of Serbian refugees from Croatia.[546] The departure of Croatian civilians spread over four months following Šešelj's speech.[547] The Appeals Chamber considers that a reasonable trier of fact could have found that Šešelj's role in triggering the violence which led to the deportation and forcible transfer of the Croatian population in Hrtkovci did not amount to physical perpetration. Accordingly, the Prosecution fails to show an error in the Trial Judgement in this regard.

152. The Appeals Chamber turns next to the Prosecution's submission that some Croatians left Hrtkovci as a direct result of Šešelj's speech. In this regard, the Prosecution points to the evidence of Witness VS-067 who testified that, in view of the events in Vukovar and Bosnia and Herzegovina at the time, he was considering that he "would probably be forced to leave".[548] The witness stated that, after Šešelj's speech on 6 May 1992, he finally decided to leave Hrtkovci

the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants were sent. *See Simić* Appeal Judgement, para. 174; *Naletilić and Martinović* Appeal Judgement, para. 153; *Blaškić* Appeal Judgement, para. 154; *Krnojelac* Appeal Judgement, paras. 218, 222, 223

[542] *See*, *e.g.*, Exhibit P547, pp. 3, 4.

[543] *See*, *e.g.*, *supra* paras. 66-70.

[544] *See* Exhibit P565, pp. 37-61 for lists of individuals who were documented to have left Hrtkovci in relation to events in May-August 1992 and whose destinations were listed as Croatia, Yugoslavia, or unknown. *See also* Witness Paulić, T. 19 November 2008 pp. 11910-11913; Witness Baričević, T. 14 October 2008 pp. 10640, 10647; Witness VS-1134, T. 15 October 2008 p. 10789.

[545] *See* Appeal Brief, paras. 198, 212.

[546] Appeal Brief, para. 155, *referring to, inter alia*, Witness Ejić, T. 8 October 2008 p. 10467; Witness Baričević, T. 14 October 2008 pp. 10604, 10605; Witness Paulić, T. 19 November 2008 p. 11896; Witness VS-067, T. 16 February 2010 pp. 15431, 15432; Exhibit P564 (confidential), p. 3.

[547] *See supra* para. 149.

[548] Witness VS-067, T. 16 February 2010 p. 15450 (private session); Exhibit P1050 (confidential), p. 5.

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together with his family.[549] The Appeals Chamber notes that Witness VS-067 did not attend the rally and did not personally hear Šešelj's speech, but heard about it through an acquaintance.[550] Witness Franja Baričević, who attended the rally, testified that he exchanged his house "because that is what was said at the rally".[551] The witness further stated that he and his family were subjected to repeated harassment and that he left Hrtkovci on 19 May 1992.[552] The Appeals Chamber concurs with the Prosecution's submission that, in light of the coercive context in which the housing exchange and departure took place, Witness Baričević did not leave Hrtkovci voluntarily.[553] Notwithstanding this conclusion, the Appeals Chamber is not persuaded by the Prosecution's argument that the only reasonable inference was that Šešelj's "speech itself constitute[d] the force that drove out" Witnesses VS-067 and Baričević,[554] rather than the violence that ensued.

153. The Appeals Chamber turns next to the Prosecution's argument that the Trial Chamber erred in finding that Šešelj did not instigate the crimes in Hrtkovci. In particular, the Trial Chamber was not satisfied that Šešelj's speech "was the reason" for the departure of Croatians from Hrtkovci or for the campaign of persecution that allegedly followed his speech.[555] The Appeals Chamber recalls that the *actus reus* of "instigating" implies prompting another person to commit an offence and that it is not necessary to prove that the accused was present when the instigated crime was committed or that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[556]

154. The Appeals Chamber notes the Trial Chamber's finding that Šešelj's speech of 6 May 1992 constituted a clear appeal for the expulsion of the Croatian population in Hrtkovci.[557] Further, as described above, the evidence showed that, soon after Šešelj's speech, many Croatians and other non-Serbians left for Croatia either out of fear, or by way of fraudulent housing exchanges with Serbian refugees in a context of coercion, harassment, and intimidation, which was met with inaction by the local authorities. Additionally, Serbians, including then Mayor Sibinčić who attended the rally, regularly threatened non-Serbians who still remained in the village. The Appeals Chamber considers that, in light of Šešelj's influence over the crowd and the striking parallels

[549] Witness VS-067, T. 17 February 2010 pp. 15469, 15470; Exhibit P1050 (confidential), p. 5; Exhibit P1049 (confidential), pp. 3, 4.
[550] Exhibit P1050 (confidential), p. 5; Exhibit P1049 (confidential), p. 3.
[551] Witness Baričević, T. 14 October 2008 p. 10647.
[552] Witness Baričević, T. 14 October 2008 pp. 10630, 10632.
[553] *See* Appeal Brief, para. 204.
[554] *See* Appeal Brief, para. 198
[555] Trial Judgement, para. 333.
[556] *See supra* para. 124.
[557] Trial Judgement, paras. 197, 333.

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between his inflammatory words and the acts subsequently perpetrated by, *inter alia*, members of the audience, no reasonable trier of fact could have found that, through his speech, he did not substantially contribute to the conduct of the perpetrators. The Appeals Chamber further finds that, in view of the content of his speech, Šešelj intended to prompt the commission of the crimes or, at the very least, was aware of the substantial likelihood that the crimes of deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity would be committed in execution of his instigation.

155. Based on the foregoing, the Appeals Chamber finds Šešelj responsible, pursuant to Article 1 of the Mechanism's Statute and Articles 5(d), 5(h), 5(i) and 7(1) of the ICTY Statute, for instigating deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity.

2. Commission of Persecution (Right to Security)

156. The Trial Chamber found that Šešelj's speech of 6 May 1992 constituted a clear appeal for the expulsion of the Croatian population in Hrtkovci.[558] Nevertheless, the Trial Chamber held that the mere use of abusive or defamatory language was not sufficient to demonstrate persecution and that the Prosecution failed to present "contextual evidence" that would allow the Trial Chamber "to measure the real significance or impact" of Šešelj's speech of 6 May 1992.[559] It added that, even if the Prosecution had proven the commission of persecutory acts, they may not be the basis of a conviction since the ICTY jurisdiction was confined to acts which are "sufficiently massive".[560]

157. The Prosecution submits that the Trial Chamber failed to state the law it applied in rejecting the allegation that Šešelj physically committed persecution through his speech and that it erroneously applied a "massiveness" requirement in its analysis.[561] It further argues that no reasonable trier of fact could have found that Šešelj's speech did not amount to physical commission of persecution, based on a violation of the right to security.[562] The Prosecution submits that, considering the context in which the speech was given, the violation of the right to security was of sufficient gravity and that, following Šešelj's speech, Croatians in Hrtkovci were subjected to discrimination, harassment and violence, forcing them to leave the village.[563] In relation to

[558] Trial Judgement, paras. 197, 333.
[559] Trial Judgement, para. 283.
[560] Trial Judgement, para. 284 (in the French original: "*suffisamment massifs*").
[561] Appeal Brief, paras. 125-131.
[562] Appeal Brief, paras. 128, 196.
[563] Appeal Brief, paras. 129, 130.

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Šešelj's *mens rea*, the Prosecution submits that Šešelj was fully aware of the intended consequences of his conduct.[564]

158. In response, Šešelj submits that the "incendiary nature of [his] speeches is a matter for the listener's personal impression"[565] and that his public statements did not constitute inflammatory speech.[566] He argues that the Prosecution's claim that he advocated population exchanges is an attempt to bring freedom of speech charges against him.[567]

159. The Appeals Chamber recalls that persecution as a crime against humanity under Article 5(h) of the ICTY Statute is an act or omission which: (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and (ii) was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion, or politics (*mens rea*).[568] In assessing whether speech may constitute an underlying act of persecution, the ICTR Appeals Chamber in the *Nahimana et al.* case held that "speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes 'actual discrimination'".[569] It further held that the context in which the underlying act of persecution takes place is particularly important for the purpose of assessing its gravity.[570]

160. The Appeals Chamber observes that the Trial Chamber did not explicitly set out the legal requirements applicable to the physical commission of the crime of persecution. However, contrary to the Prosecution's submission, this does not amount, *per se*, to an error as the duty to provide a reasoned opinion does not necessarily entail a formal requirement to set out the applicable law. In using the term "*massifs*" in the original French version of the Trial Judgement,[571] and having regard to the rest of paragraph 284 of the Trial Judgement, the Appeals Chamber understands the Trial Chamber to be referring to the serious nature and gravity of these acts – a matter which is

[564] Appeal Brief, para. 247.
[565] Response Brief, para. 352.
[566] Response Brief, paras. 352, 353.
[567] Response Brief, para. 352.
[568] *See, e.g., Nahimana et al.* Appeal Judgement, para. 985; *Kvočka* Appeal Judgement, para. 320; *Blaškić* Appeal Judgement, para. 131.
[569] *Nahimana et al.* Appeal Judgement, para. 986, *referring to* Article 3 of the Universal Declaration of Human Rights.
[570] *Nahimana et al.* Appeal Judgement, paras. 987, 988.
[571] The last sentence in paragraph 284 of the French original of the Trial Judgement states: "*L'aurait-il fait que ces actes criminels ne suffiraient pas pour entrer en voie de condamnation, s'agissant d'un Tribunal dont la compétence est confinée aux seuls actes* suffisamment massifs *pour êtres qualifiés de crimes contre l'humanité*". (Emphasis added). The official English translation of this same sentence at paragraph 284 of the Trial Judgement reads: "Even if [the Prosecution] had [proven the existence of persecutory acts], these criminal acts would not suffice to convict, since this is a Tribunal whose jurisdiction is confined to acts *the magnitude of which is sufficient* to be qualified as crimes against humanity" (emphasis added).

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appropriate to consider in assessing allegations of persecution as a crime against humanity.[572] The Appeals Chamber finds that the Prosecution's contention reflects a misreading of the Trial Judgement.

161. The Appeals Chamber further notes that the Trial Chamber considered evidence showing that, in his speech of 6 May 1992, Šešelj stated that "there is no room for Croats in Hrtkovci" and called on the Serbian population to:

> give every Serbian family of refugees the address of one Croatian family. The police will give it to them, the police will do as the government decides, and soon we will be the government. [...] Every Serbian family of refugees will come to a Croatian door and give the Croats they find there their address in Zagreb or other Croatian town. Oh, they will, they will. There will be enough buses, we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord.[573]

162. Šešelj also directly addressed Croatians who might entertain thoughts of returning to Hrtkovci with the message: "no, you have nowhere to return to",[574] and reaffirmed his belief that the Serbian population of Hrtkovci and the surrounding villages would "promptly get rid of the remaining Croats".[575] At the end of Šešelj's speech, the crowd chanted "Croats, go to Croatia".[576]

163. The Appeals Chamber considers that, in view of the above evidence and the Trial Chamber's own finding that Šešelj's speech constituted a clear appeal for the expulsion of the Croatian population in Hrtkovci,[577] no reasonable trier of fact could have found that Šešelj's speech did not incite violence that denigrated and violated the right to security of members of the Croatian population. The Appeals Chamber finds that by instigating the forcible expulsion of Croatians from Hrtkovci,[578] Šešelj incited violence against them, in violation of their right to security. The Appeals Chamber also considers that Šešelj's speech denigrated the Croatians of Hrtkovci on the basis of their ethnicity, in violation of their right to respect for dignity as human beings. In the Appeals Chamber's view, Šešelj's speech rises to a level of gravity amounting to the *actus reus* of persecution as a crime against humanity. The Trial Chamber's finding that, at the time that Šešelj gave his speech, there was a "lack of a specific war context in Vojvodina",[579] is further indicative that Hrtkovci had known relative peace from the ongoing attacks in Croatia and Bosnia and Herzegovina. With his speech, Šešelj ended that sense of safety by infecting the village with hatred and violence, which led to the departure of Croatian civilians in the ensuing months, thereby

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[572] *See Blaškić* Appeal Judgement, paras. 135, 138; *Vasiljević* Appeal Judgement, para. 113.
[573] Trial Judgement, para. 331, *referring to* Exhibit P547 (confidential), p. 4.
[574] Exhibit P547, p. 4.
[575] Exhibit P547, p. 8.
[576] *See* Trial Judgement, para. 332, *referring to* Exhibit P548, p. 2.
[577] *See* Trial Judgement, paras. 197, 333.
[578] *See supra* paras. 154, 155.
[579] Trial Judgement, para. 333.

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expanding the wider attack against the non-Serbian population in Croatia and Bosnia and Herzegovina.

164. As discussed above, following Šešelj's speech, members of the Croatian population of Hrtkovci were increasingly harassed and subjected to repeated mistreatment, threats, and violence, resulting in a large percentage of them leaving Hrtkovci.[580] The evidence before the Trial Chamber thus showed that Šešelj's speech amounted to discrimination in fact and was delivered with discriminatory intent. Moreover, the Appeals Chamber is satisfied that his conduct formed part of the widespread or systematic attack against the civilian population encompassing also parts of Croatia and Bosnia and Herzegovina[581] and that Šešelj was aware that his conduct formed part of the attack.

165. Based on the foregoing, the Appeals Chamber finds Šešelj responsible, pursuant to Article 1 of the Mechanism's Statute and Articles 5(h) and 7(1) of the ICTY Statute, for committing persecution, based on a violation of the right to security, as a crimes against humanity.

E. Conclusion

166. Accordingly, the Appeals Chamber grants the Prosecution First and Second Grounds of Appeal, in part, and finds, on the basis of his 6 May 1992 speech in Hrtkovci, Vojvodina, Šešelj responsible, pursuant to Article 1 of the Mechanism's Statute and Articles 5(d), 5(h), 5(i) and 7(1) of the ICTY Statute for instigating deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity and for committing persecution (violation of the right to security) as a crime against humanity.

[580] *See supra* paras. 149, 150.
[581] *See supra* paras. 70, 71, 76.

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IX. AIDING AND ABETTING

167. The Trial Chamber found that Šešelj could not be held responsible for aiding and abetting the crimes charged in the Indictment.[582] In particular, it noted that the Prosecution's allegations in relation to Šešelj's responsibility for aiding and abetting the crimes committed by "Šešelj's men" had, in part, the same factual basis as the allegations in relation to Šešelj's liability for commission, through participation in a joint criminal enterprise, and instigation.[583] The Trial Chamber recalled its earlier finding that the recruitment and deployment of volunteers "could have been legal activities", and added that "it was not able to exclude the possibility that [Šešelj] was simply providing legitimate support for the war effort".[584] The Trial Chamber further found that:

> [T]he "nationalist" propaganda of [Šešelj] was not criminal in itself and [...] if some of the speeches could constitute a call for the expulsion and forcible transfer of non-Serbs, the Prosecution had not presented evidence that the speeches had substantially contributed to the perpetration of the crimes charged in the Indictment.[585]

168. The Prosecution submits that the Trial Chamber's consideration of the lawfulness of Šešelj's activities suggests that it may have erroneously required that, to incur criminal liabity, the conduct of the aider and abettor be criminal as such.[586] The Prosecution further argues that, in finding that by recruiting and deploying volunteers Šešelj may have provided legitimate support to the war effort, the Trial Chamber appears to have erroneously applied a "specific direction" requirement to the *actus reus* of aiding and abetting.[587]

169. In addition, the Prosecution contends that no reasonable trier of fact could have found that Šešelj's conduct did not substantially contribute to the crimes committed by "Šešelj's men".[588] Specifically, the Prosecution submits that Šešelj was involved in the recruitment and deployment of volunteers and, through his speeches, instigated the commission of their crimes.[589] The Prosecution further argues that Šešelj fulfilled the *mens rea* requirement of aiding and abetting as he knew that his acts would assist the commission of crimes by "Šešelj's men".[590] The Prosecution thus requests the Appeals Chamber to find Šešelj responsible for aiding and abetting persecution, deportation, and other inhumane acts (forcible transfer) as crimes against humanity, as well as murder, torture, cruel

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[582] Trial Judgement, para. 357.
[583] Trial Judgement, para. 354.
[584] Trial Judgement, para. 355.
[585] Trial Judgement, para. 356.
[586] Notice of Appeal, para. 6; Appeal Brief, paras. 134, 135, *referring to, inter alia,* Trial Judgement, paras. 355, 356.
[587] Appeal Brief, para. 136, *referring to, inter alia*, Trial Judgement, para. 355.
[588] Appeal Brief, paras. 193-195. *See also* Notice of Appeal, paras. 11(d), 12(4)(d).
[589] Appeal Brief, para. 194.
[590] Appeal Brief, paras. 243-246.

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treatment, and plunder of public or private property as violations of the laws or customs of war perpetrated by "Šešelj's men".[591]

170. In response, Šešelj argues that the Prosecution's submissions are unsubstantiated and that the Trial Chamber correctly concluded that he was not responsible for aiding and abetting the crimes charged in the Indictment.[592] Šešelj further submits that the Prosecution fails to establish that the alleged errors invalidate the Trial Judgement or cause a miscarriage of justice.[593]

171. The Appeals Chamber notes that the Trial Chamber accurately stated the basic requirements for the *actus reus* of aiding and abetting[594] and substantiated its articulation with reference to relevant jurisprudence.[595] The Appeals Chamber does not find merit in the Prosecution's contention that the Trial Chamber erroneously disregarded Šešelj's indoctrinating or instigating conduct through his speeches because it did not consider such conduct to be criminal.[596] Rather, having observed that Šešelj's "nationalist" propaganda was lawful and that some of his speeches could constitute calls for the forcible expulsion of non-Serbians, the Trial Chamber concluded that, "the Prosecution had not presented evidence that the speeches had *substantially contributed* to the perpetration of the crimes charged in the Indictment".[597] The Appeals Chamber recalls that it has upheld the Trial Chamber's conclusion that some of Šešelj's speeches did not substantially contribute to the commission of crimes in Croatia and Bosnia and Herzegovina.[598] The Appeals Chamber, however, has found Šešelj responsible for instigating persecution (forcible displacement), deportation, and other inhumane acts (forcible transfer), as well as for committing persecution (violation of the right to security) on the basis of his 6 May 1992 speech in Hrtkovci, Vojvodina.[599] The Appeals Chamber is satisfied that these modes of liability best encapsulate Šešelj's conduct.

172. Turning to Šešelj's involvement in the recruitment and deployment of volunteers, the Appeals Chamber recalls that it is well established in the jurisprudence that the participation of the aider and abettor need not be a crime in itself.[600] As such, the Trial Chamber's observation that such

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[591] Appeal Brief, para. 246.
[592] *See* Response Brief, paras. 205-210.
[593] *See* Response Brief, paras. 72, 102. *See also* Response Brief, para. 120, where Šešelj states that the legal remedy sought is unclear.
[594] *See* Trial Judgement, para. 353. The Appeals Chamber recalls that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and the *mens rea* is "the knowledge that these acts assist the commission of the offense". *See Nyiramasuhuko et al.* Appeal Judgement, para. 1955; *Popović et al.* Appeal Judgement, para. 1758; *Šainović et al.* Appeal Judgement, para. 1649; *Blaškić* Appeal Judgement, para. 46.
[595] Trial Judgement, para. 353, nn. 411-413.
[596] Appeal Brief, para. 194.
[597] Trial Judgement, para. 356 (emphasis added).
[598] *See supra* paras. 131-134. *See also supra* para. 137.
[599] *See supra* paras. 155, 165, 166.

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activities might have been lawful and performed as a legitimate support to the war effort[601] is not in and of itself determinative of whether Šešelj's involvement in these activities can be characterized as unlawful. However, when reading the Trial Judgement as a whole, the Appeals Chamber notes that the Trial Chamber was also not satisfied that Šešelj fulfilled the *mens rea* element of aiding and abetting. Specifically, elsewhere in the Trial Judgement, the Trial Chamber noted that it was not satisfied that Šešelj had knowledge of the crimes committed by the volunteers or that he provided instructions or support for their commission.[602]

173. The Appeals Chamber notes that the Trial Chamber made specific findings that: (i) "Šešelj's men" were among the Serbian forces who committed murder, torture and cruel treatment of detainees, as violations of laws or customs of war, at the Velepromet warehouse and Ovčara farm in Vukovar, Croatia, between 19 and 21 November 1991;[603] and (ii) "Šešelj's men", together with another faction of the Serbian forces, murdered civilians at the Uborak dump in Mostar, Bosnia and Herzegovina, in mid-June 1992.[604] The Appeals Chamber recalls that the *mens rea* of aiding and abetting requires that the aider and abettor be aware that his acts assist in the commission of the offence.[605] Having reviewed the evidence referred to by the Prosecution on appeal, the Appeals Chamber finds that the Prosecution fails to demonstrate that no reasonable trier fo fact could have found that Šešelj was not aware that his acts assisted in the commission of crimes by "Šešelj's men"[606] in Vukovar or Mostar.[607]

174. For the foregoing reasons, the Appeals Chamber dismisses the Prosecution's arguments related to Šešelj's acquittal for aiding and abetting the crimes in the Indictment.

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[601] Trial Judgement, para. 355.

[602] Trial Judgement, para. 245. *See also supra* para. 88. The Appeals Chamber considers that, since the Trial Chamber incorporated its earlier findings regarding the recruitment and deployment of volunteers from its discussion of the joint criminal enterprise into its analysis of Šešelj's responsibility for aiding and abetting the crimes, these findings are equally applicable therein.

[603] *See* Trial Judgement, paras. 207(a), (c), (d).

[604] *See* Trial Judgement, para. 216(a).

[605] *Šainović et al.* Appeal Judgement, para. 1649, *referring to Blaškić* Appeal Judgement, para. 46.

[606] *See Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgment, para. 50. *See also Popović et al.* Appeal Judgement, para. 1751; *Šainović et al.* Appeal Judgement, para. 1772; *Haradinaj et al.* Appeal Judgement, para. 58.

[607] In particular, the Appeals Chamber observes that, in his testimony in the *S. Milošević* case, relied upon by the Prosecution, Šešelj expressly denied that he or his party knew of the crimes committed by the volunteers on the ground. *See* Exhibit P31, p. 43474. Likewise, other evidence highlighted by the Prosecution is at best inconclusive as it relates to behaviour of undisciplined volunteers in Western Srem, Slavonia, and Voćin, Croatia, around August 1991, and Zvornik, Bosnia and Herzegovina, in April 1992. *See* Exhibit P221, p. 1; Exhibit P1074, paras. 45, 129; Witness VS-033, T. 1 April 2008 pp. 5524-5526.

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X. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON THE VERDICT

175. The Appeals Chamber has found that, on the basis of his 6 May 1992 speech in Hrtkovci, Vojvodina, Šešelj is criminally responsible and therefore guilty, pursuant to Article 1 of the Mechanism's Statute and Articles 5(d), 5(h), 5(i) and 7(1) of the ICTY Statute for instigating deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity and for committing persecution (violation of the right to security) as a crime against humanity.[608] Accordingly, the Appeals Chamber must consider an appropriate sentence.

176. Šešelj surrendered to the ICTY and was detained on 24 February 2003.[609] On 6 November 2014, the Trial Chamber by majority ordered *proprio motu* Šešelj's provisional release on medical grounds.[610] The Trial Judgement, acquitting him, was delivered in his absence on 31 March 2016.[611] From his surrender until his provisional release, Šešelj was detained for approximately 11 years and 8 months. During the period of his detention, Šešelj was found guilty of contempt of court on three separate occasions and was sentenced to 15 months, 18 months, and 2 years of imprisonment, respectively, and the ICTY Appeals Chamber recognized this as time served.[612]

177. Rule 125(C) of the Rules provides that: "[c]redit *shall be given* to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the ICTY, the ICTR, or the Mechanism or pending trial or appeal."[613] Nothing in this provision or the jurisprudence suggests that the contempt sentences should be subtracted from the time that Šešelj spent in pre-trial detention. The fact remains that, whether Šešelj was convicted of contempt or not, he was still subject to detention by virtue of the charges against him in his main trial. There is nothing in the contempt judgements to suggest that the contempt sentences should not be served concurrently to any main sentence.

178. On appeal, the Prosecution requests that Šešelj be sentenced to 28 years of imprisonment.[614] This proposed sentence assumes that all convictions are entered which would include a greatly expanded crime base encompassing – deportation, other inhumane acts (forcible transfer), murder,

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608 *See supra* para. 166.
609 *See supra* para. 39.
610 *See supra* para. 39.
611 *See supra* para. 39.
612 *See supra* para. 42; Trial Judgement, Annex 2 – Procedural Background, paras. 62-64.
613 Rule 125(C) of the Rules (emphasis added).
614 *See* Appeal Brief, para. 250.

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and destruction of villages and religious and educational institutions throughout Bosnia and Herzegovina and Croatia as a member of a joint criminal enterprise. Instead, Šešelj has been found responsible for instigating deportation, other inhumane acts (forcible transfer), and persecution (forcible displacement) of non-Serbian civilians in the village of Hrtkovci and committing persecution (violation of the right to security) through a single speech.[615] Accordingly, a lower sentencing range should be considered.

179. In accordance with Article 22 of the Statute, the Appeals Chamber has taken into account the general sentencing practice of the former Yugoslavia,[616] the gravity of the offences, and any individual circumstances. The Appeals Chamber considers that Šešelj's crimes are grave. He instigated the deportation, other inhumane acts (forcible transfer) and persecution (forcible displacement) of civilians in the village of Hrtkovci and committed persecution (violation of the right to security) through a hate-filled speech, endemic of his general public discourse throughout the relevant period of the Indictment. Šešelj also consistently obstructed the proper administration of justice by exposing to risk protected witnesses during the course of his proceedings, for which he received multiple sentences of imprisonment during the course of his detention.[617] The Appeals Chamber has also considered that he was provisionally released due to a serious health condition.[618]

180. Bearing in mind all relevant considerations, the Appeals Chamber considers that Šešelj should be sentenced to 10 years of imprisonment.

[615] *See supra* para. 166.
[616] *See generally* Articles 23, 38, 141-156 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (1976/77).
[617] *See* Trial Judgement, Annex 2 – Procedural Background, paras. 61-64.
[618] *See supra* para. 39.

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XI. DISPOSITION

181. For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 23 of the Statute and Rule 144 of the Rules;

NOTING the written submissions of the parties and the Prosecution's oral arguments presented at the appeal hearing on 13 December 2017;

SITTING in open session;

GRANTS the Prosecution's First and Second Grounds of Appeal, in part, and **REVERSES** Šešelj's acquittals for instigating persecution (forcible displacement), deportation, and other inhumane acts (forcible transfer) as crimes against humanity and for committing persecution (violation of the right to security) as a crime against humanity;

FINDS Šešelj **GUILTY** pursuant to Article 1 of the Mechanism's Statute and Articles 5(d), 5 (h), 5 (i) and 7(1) of the ICTY Statute and **ENTERS** convictions under Counts 1, 10, and 11 of the Indictment for instigating persecution (forcible displacement), deportation, and other inhumane acts (forcible transfer) as crimes against humanity and for committing persecution (violation of the right to security) as a crime against humanity in Hrtkovci, Vojvodina;

SENTENCES Šešelj to a term of 10 years of imprisonment;

DECLARES, in accordance with Rule 125(C) of the Rules, that Šešelj's sentence has been served in view of the credit which shall be given for his detention in the custody of the ICTY pending trial from 14 February 2003 to 6 November 2014; and

DISMISSES the Prosecution's appeal in all other respects.

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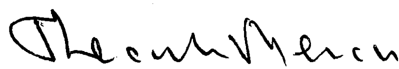
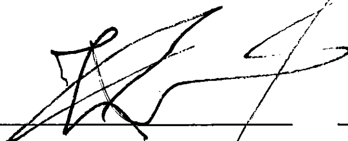
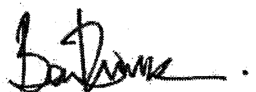
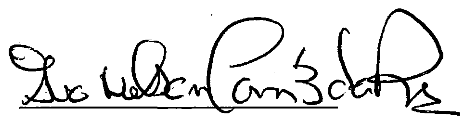
Done in English and French, the English text being authoritative.

Theodor Meron	Lee G. Muthoga	Florence Rita Arrey
Presiding Judge	Judge	Judge

Ben Emmerson	Ivo Nelson de Caires Batista Rosa
Judge	Judge

Done this 11th day of April 2018 at The Hague, the Netherlands

[Seal of the Mechanism]

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XII. ANNEX A – PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarised below.

A. Composition of the Appeals Chamber

2. On 10 May 2016, the President of the Mechanism ordered that the Bench in the present case be composed of Judge Theodor Meron (Presiding), Judge Lee G. Muthoga, Judge Florence Rita Arrey, Judge Ben Emmerson, and Judge Ivo Nelson de Caires Batista Rosa.[1] On 8 July 2016, the Presiding Judge assigned himself as the Pre-Appeal Judge in this case.[2]

B. Notice of Appeal and Briefs

3. On 2 May 2016, the Prosecution filed its notice of appeal against the Trial Judgement pursuant to Article 23 of the Statute and Rule 133 of the Rules.[3] On 8 July 2016, the Pre-Appeal Judge issued an order setting out relevant deadlines and word-limits for the filing of a response brief and a reply brief, if any, by Šešelj and the Prosecution, respectively.[4]

4. On 18 July 2016, the Prosecution filed its appeal brief confidentially with a confidential annex.[5] The Prosecution filed a confidential *corrigendum* to its appeal brief with a confidential annex on 29 August 2016.[6] On 19 December 2016, Šešelj submitted his response brief in Serbian, which was subsequently filed on 7 February 2017 along with its official English translation.[7] On 22 February 2017, the Prosecution filed its reply brief.[8]

C. Appeal Hearing

5. On 18 September 2017, the Appeals Chamber, noting Šešelj's intention to not attend the appeal hearing, issued an order: (i) specifically warning him that standby counsel will be assigned to represent his interests at the hearing should he maintain his position; and (ii) inviting Šešelj to clarify his position.[9] Noting Šešelj's failure to respond, the Appeals Chamber issued a decision on

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[1] Order Assigning Judges to a Case Before the Appeals Chamber, 10 May 2016.
[2] Order Designating a Pre-Appeal Judge, 8 July 2016.
[3] Prosecution's Notice of Appeal, 2 May 2016.
[4] Order Regarding Time Limits, 8 July 2016.
[5] Prosecution Appeal Brief, 18 July 2016 (confidential with confidential annex). *See also* Prosecution Book of Authorities, 18 July 2016.
[6] Corrigendum to Prosecution Appeal Brief, 29 August 2016 (confidential with confidential annex). On 29 August 2016, the Prosecution filed a public redacted version of its appeal brief. *See* Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, 29 August 2016.
[7] Profes[s]or Vojislav [Š]ešelj's Respondent's Brief, 7 February 2017 (original B/C/S version received on 19 December 2016).
[8] Prosecution Reply Brief, 22 February 2017.
[9] Order in Relation to the Appeal Hearing, 18 September 2017, pp. 2, 3.

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11 October 2017 instructing the Registrar to assign standby counsel, whose mandate "shall be strictly limited to ensuring that Šešelj's procedural rights at the upcoming appeal hearing are protected in the event that Šešelj does not appear for the hearing".[10] On 17 October 2017, the Appeals Chamber issued a scheduling order for the appeal hearing.[11] On 19 October 2017, the Registrar assigned Ms. Colleen Rohan as standby counsel for Šešelj during the appeal hearing.[12] The Appeals Chamber heard oral submissions regarding the appeal on 13 December 2017.[13] At the start of the hearing, the Presiding Judge noted that Šešelj, who elected to represent himself, was not present and that his assigned standby counsel was present.[14]

6. Šešelj received the B/C/S transcript of the appeal hearing on 25 December 2017,[15] and, according to the Scheduling Order, was provided 10 days to respond.[16] Šešelj did not file a written response to the transcript.

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[10] Decision on Assignment of Standby Counsel for the Appeal Hearing, 11 October 2017, p. 3.
[11] Scheduling Order for the Appeal Hearing, 17 October 2017 ("Scheduling Order").
[12] Decision, 19 October 2017, p. 2.
[13] *See* T. 13 December 2017 pp. 1-27.
[14] *See* T. 13 December 2017 pp. 1, 2.
[15] *See Procès-Verbal*, 27 December 2017.
[16] Scheduling Order, p. 3.

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XIII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Mechanism

NGIRABATWARE, Augustin

Augustin Ngirabatware v. The Prosecutor, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgement").

2. ICTR

BAGOSORA, Théoneste and NSENGIYUMVA, Anatole

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

BIZIMUNGU, Augustin

See Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("*Bizimungu* Appeal Judgement").

HATEGEKIMANA, Ildephonse

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement").

KAREMERA, Édouard and NGIRUMPATSE, Matthieu

Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor, Case No. ICTR-98-44-A, Judgement, 29 September 2014 ("*Karemera and Ngirumpatse* Appeal Judgement").

KARERA, François

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 ("*Karera* Appeal Judgement").

MUGENZI, Justin and MUGIRANEZA, Prosper

Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement").

NAHIMANA, Ferdinand *et al.*

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (originally filed in French, English translation filed on 15 May 2008) ("*Nahimana et al.* Appeal Judgement").

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NCHAMIHIGO, Siméon

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 ("*Nchamihigo* Appeal Judgement").

NDINDABAHIZI, Emmanuel

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 ("*Ndindabahizi* Appeal Judgement").

NDINDILIYIMANA, Augustin *et al.*

Augustin Ndindiliyimana, François-Xavier Nzuwonemeye, and Innocent Sagahutu v. The Prosecutor, Case No. ICTR-00-56-A, Judgement, 11 February 2014 ("*Ndindiliyimana et al.* Appeal Judgement").

NTAGERURA, André *et al.*

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 (originally filed in French, English translation filed on 9 May 2007) ("*Ntagerura et al.* Appeal Judgement").

NYIRAMASUHUKO, Pauline *et al.*

The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al.* Appeal Judgement").

RUTANGANDA, Georges Anderson Nderubumwe

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2006 (originally filed in French, English translation filed on 9 February 2004) ("*Rutaganda* Appeal Judgement").

3. ICTY

ALEKSOVSKI, Zlatko

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BLAŠKIĆ, Tihomir

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BOŠKOSKI, Ljube and TARČULOVSKI, Johan

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 ("*Boškoski and Tarčulovski* Appeal Judgement").

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BRĐANIN, Radoslav

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement).

DELALIĆ, Zejnil *et al.*

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić, and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

ĐORĐEVIĆ, Vlastimir

Prosecutor v. Vlastimir Đorđević, Case No. IT-05-87/1-A, Judgement, 27 January 2014 ("*Đorđević* Appeal Judgement").

GALIĆ, Stanislav

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement).

GOTOVINA, Ante and MARKAČ, Mladen

Prosecutor v. Ante Gotovina and Mladen Markač, Case No. IT-06-90-A, Judgement, 16 November 2012 ("*Gotovina and Markač* Appeal Judgement").

HADŽIHASANOVIĆ, Enver and KUBURA, Amir

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

HALILOVIĆ, Sefer

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

HARADINAJ, Ramush *et al.*

Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement").

KORDIĆ, Dario and ČERKEZ, Mario

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement").

KRAJIŠNIK, Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

KRNOJELAC, Milorad

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 (originally filed in French, English translation filed on 5 November 2003) ("*Krnojelac* Appeal Judgement").

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KRSTIĆ, Radislav

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC, Dragoljub *et al.*

Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković, Cases Nos. IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

KUPREŠKIĆ, Zoran *et al.*

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement").

KVOČKA, Miroslav *et al.*

Prosecutor v. Miroslav Kvočka, Mlađo Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

LUKIĆ, Milan and LUKIĆ, Sredoje

Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

MARTIĆ, Milan

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement").

MILOŠEVIĆ, Dragomir

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B. Defined Terms and Abbreviations

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ICTR

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ICTY

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

ICTY Statute

Statute of the ICTY

Indictment

The Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007

Mechanism or MICT

International Residual Mechanism for Criminal Tribunals

Notice of Appeal

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Prosecution's Notice of Appeal, 2 May 2016

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para. (paras.)

paragraph (paragraphs)

Prosecution

Office of the Prosecutor

Prosecution Final Trial Brief

The Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Re-Filing of Prosecution Final Trial Brief, 6 February 2012 (confidential), annexing *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Closing Brief, dated 5 February 2012 (confidential with confidential annexes)

Reply Brief

Prosecution Reply Brief, 22 February 2017

Response Brief

Profes[s]or Vojislav [Š]ešelj's Respondent's Brief, 7 February 2017 (original Serbian version submitted on 19 December 2016)

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