



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

Case No.: IT-03-67-T

Date: 27 November 2007

Original: ENGLISH  
French

**BEFORE TRIAL CHAMBER III**

**Before:** Judge Jean-Claude Antonetti, presiding  
Judge Frederik Harhoff  
Judge Flavia Lattanzi

**Registrar:** Mr Hans Holthuis

**Decision of:** 27 November 2007

**THE PROSECUTOR**

v.

**VOJISLAV ŠEŠELJ**

***PUBLIC DOCUMENT***

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**DECISION ON PRELIMINARY MOTION FILED BY THE ACCUSED**

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**The Office of the Prosecutor:**

Ms Christine Dahl

**The Accused:**

Mr Vojislav Šešelj

## I. PROCEDURAL BACKGROUND

1. Trial Chamber III (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seized of the preliminary motion against the reduced modified amended indictment, presented by Vojislav Šešelj (“Accused”) on 6 September 2007 and filed on 28 September 2007 (“Motion”).<sup>1</sup>

2. An indictment against the Accused was initially issued on 15 January 2003 and then confirmed on 24 February 2003 (“Initial Indictment”).<sup>2</sup> Subsequently, on 24 December 2003, the Accused filed an objection to the Initial Indictment, noting in particular a certain number of defects in the form.<sup>3</sup> In a decision dated 26 May 2004, Trial Chamber II (“Chamber II”) ordered the Office of the Prosecutor (“Prosecution”) to clarify certain ambiguities that remained in paragraphs 11 and 12 of the Initial Indictment dealing with, respectively, the meaning of the term “commit” and the allegations regarding the crimes committed in Vojvodina (Serbia), as well as with the question of the armed conflict (“Decision of 26 May 2004”).<sup>4</sup>

3. In accordance with the Decision of 26 May 2004, the Prosecution filed a motion on 22 October 2004 to amend the Initial Indictment and, in addition, to introduce a series of new allegations.<sup>5</sup> Without presenting a formal response, either in writing or orally, the Accused nonetheless made it known that he was not objecting to any amendments or additions to the Initial Indictment, so long as the commencement of the trial was not delayed.<sup>6</sup> Chamber II granted the changes proposed by the Prosecution and reminded the Accused of his right to file, within 30 days, any

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<sup>1</sup> Objection by Professor Vojislav Šešelj to the Reduced Modified Amended Indictment with Annex, presented 6 September 2007 and filed 28 September 2007 (French translation dated 19 October 2007).

<sup>2</sup> Indictment, 15 January 2003; *see also* Confirmation of Indictment and Order for the Warrant for Arrest and Surrender, 14 February 2003.

<sup>3</sup> Objection to the Indictment, presented 24 December 2003 and filed 15 January 2004, pp. 18-44.

<sup>4</sup> Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 26 May 2004, filed 3 June 2004 (French translation dated 19 August 2007), para. 62.

<sup>5</sup> Prosecution’s Motion to Amend the Indictment with Confidential and *Ex Parte* Supporting Material, dated 22 October 2004 and filed 1 November 2004.

<sup>6</sup> Status conference of 31 January 2005, Transcript in French (“T(F)”) p. 317.

preliminary motions in respect of the new charges he will have to answer, pursuant to Rule 72 of the Rules of Procedure and Evidence (“Rules”).<sup>7</sup>

4. On 8 September 2005, the Accused presented a preliminary motion based on a defect in the form, which was denied on 26 September 2005 by the Judge then in charge of the pre-trial phase (“Decision of 26 September 2005”), on the ground that it exceeded the limit of 3,000 words imposed by the Practice Direction on the Length of Briefs and Motions (“Practice Direction”).<sup>8</sup> Nonetheless, the Accused was given the opportunity to file a new preliminary motion before 7 October 2005, while complying with the Practice Direction.<sup>9</sup> On 27 September 2005, the Accused filed a motion regarding the length of his preliminary motion (“Submission 110”),<sup>10</sup> and on 10 October 2005, he requested on the one hand certification to appeal the Decision of 26 September 2005 and, on the other, an extension of time to file his preliminary motion until he received, in his mother tongue, a certain number of Judgements rendered by the International Criminal Tribunal for Rwanda (“ICTR”) (“Submission 111”).<sup>11</sup> On 10 November 2005, Chamber II denied Submission 111<sup>12</sup> and on 17 November 2005, the Accused filed a new motion jointly requesting certification to appeal this decision and renewing his request for an extension of time to file his preliminary motion (“Submission 119”).<sup>13</sup> On 10 November 2006, Trial Chamber I (“Chamber I”), then seized of the case, denied the Accused’s request of 17 November 2005 for certification to appeal and for an extension of time.<sup>14</sup>

5. In like manner, on 8 November 2006, in its “Decision on the Application of Rule 73 *bis*” (“73 *bis* Decision”), Chamber I ordered that:

<sup>7</sup> Decision on Prosecution’s Motion for Leave to Amend the Indictment, 27 May 2005, filed 2 June 2005 (French translation dated 28 June 2005), p. 9.

<sup>8</sup> Decision on Preliminary Motion Pursuant to Rule 72 (Submissions Nos. 101 and 102), 23 September 2005, filed 26 September 2005, p. 3. *See* Practice Direction on the Length of Briefs and Motions (IT/184 Rev. 2), 16 September 2005 (“Practice Direction”).

<sup>9</sup> *Id.*, p. 3.

<sup>10</sup> English translation of BCS original titled “Submission 110”, presented on 19 September 2005 and filed 27 September 2005.

<sup>11</sup> English translation of BCS original titled “Submission 111”, presented on 3 October 2005 and filed 10 October 2005.

<sup>12</sup> Decision on Submission 110 and 111, 10 November 2005.

<sup>13</sup> English translation of BCS original titled “Submission 119”, presented 14 November 2005 and filed 17 November 2005.

<sup>14</sup> Decision on Request for Certification (Submission 119), 10 November 2006.

“(a) Counts 2, 3, 5, 6, and 7 are hereby removed from the Indictment;

(b) The Prosecution shall not present evidence in respect of crimes allegedly committed in the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Bora as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision;

(c) The Prosecution may present non-crime-base evidence in respect of the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Borašnica as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision;

(d) The Prosecution shall indicate the changes made to the Indictment in accordance with this Decision by the substitution of the relevant parts of the Indictment with “[Omitted pursuant to Rule 73 *bis* (D) of the Rules and the Decision of the Trial Chamber dated 8 November 2006]”.<sup>15</sup>

6. Pursuant to the 73 *bis* Decision and on the instructions of the pre-trial Judge,<sup>16</sup> the Prosecution filed on 30 March 2007 a “Reduced Modified Amended Indictment with Redactions Removed” (“Indictment”).<sup>17</sup> The Indictment has been authoritative until this decision.

7. On 25 April 2007, the Accused requested the Chamber<sup>18</sup> to grant him a time limit of 30 days to present a preliminary motion alleging defects in the form of the Indictment, based on Rule 72 of the Rules.<sup>19</sup> Following the Prosecution’s response, which indicated that it did not object to the motion, the Chamber rendered a decision on 31 May 2007 authorizing the Accused to file his preliminary challenge to the

<sup>15</sup> Decision on the Application of Rule 73 *bis*, 8 November 2006, pp. 10-11.

<sup>16</sup> Status conference of 13 March 2007, T(F), p. 956.

<sup>17</sup> Prosecution’s Submission of Reduced Modified Amended Indictment with Redactions Removed, 30 March 2007.

<sup>18</sup> At that time, Chamber III was composed of Judges Robinson, Antonetti and Bonomy.

<sup>19</sup> English translation of BCS original titled “Professor Vojislav Šešelj’s Motion for Trial Chamber III to Set a Time Limit for Filing a Challenge to the Reduced Modified Amended Indictment,” 25 April 2007, filed 9 May 2007.

Indictment within the 30 day time limit defined in the decision (“Decision of 31 May 2007”).<sup>20</sup> However, the Accused did not receive the Decision of 31 May 2007 in a language he understands until several months later, on 7 August 2007.<sup>21</sup>

8. In like manner, on 25 June 2007, the Prosecution filed a motion to amend the Indictment pursuant to Rule 50 of the Rules (“Motion of 25 June 2007”).<sup>22</sup> During a status conference on 4 July 2007, the Accused was informed by the pre-trial Judge of the existence of the Motion of 25 June 2007 and of the possibility of waiting to receive it in a language he understands before responding to it, combining his objections alleging defects in the form of both versions of the Indictment into one single preliminary motion.<sup>23</sup>

9. On 17 July 2007, the Accused nonetheless presented his response to the Motion of 25 June 2007.<sup>24</sup> Following a Prosecution request for leave to reply, combined with a Reply dated 6 August 2007,<sup>25</sup> the Chamber ordered the Prosecution on 14 September 2007 to file a second modified indictment, in accordance with the directions set out in the said decision (“Decision of 14 September 2007”).<sup>26</sup>

10. The Accused, who was duly notified on 7 August 2007 of the Decision of 31 May 2007 in a language he understands, presented the Motion on 6 September 2007, which was not filed until 28 September 2007.<sup>27</sup> That same day, the Prosecution filed

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<sup>20</sup> Decision on the Accused’s Motion to Set a Time Limit for Challenges to the Form of the Reduced Modified Amended Indictment (Submission Number 287), 31 May 2007 (“Decision of 31 May 2007”).

<sup>21</sup> Procès-verbal of reception of documents, dated 7 August 2007, signed by the Accused.

<sup>22</sup> Prosecution’s Motion for Leave to File an Amended Indictment, 25 June 2007.

<sup>23</sup> Status conference of 4 July 2007, T(F), p. 1311, where the pre-trial Judge stated: “So we now have two indictments. The first indictment was an indictment on which you filed preliminary motion and we now have a second amended indictment. In your written submissions, you may join the two indictments and file a preliminary motion on both the first and the second, but the second is just an extension of the first one, a modified version of it. Now, this starts running 30 days from the day you receive the indictment. You will have to respond.”

<sup>24</sup> English translation of BCS original titled “Response by Professor Vojislav Šešelj to the Prosecution’s Motion for Leave to File an Amended Indictment of 25 June 2007,” dated 17 July 2007 and filed 30 July 2007.

<sup>25</sup> Prosecution’s Reply to Response by Professor Vojislav Šešelj to the Prosecution’s Motion for Leave to File an Amended Indictment of 25 June 2007, filed 6 August 2007.

<sup>26</sup> Decision on Prosecution’s Motion for Leave to File an Amended Indictment, 14 September 2007.

<sup>27</sup> English translation of BCS original titled “Objection by Professor Vojislav Šešelj to the Reduced Modified Amended Indictment with Annex”, dated 5 September 2007 and filed 28 September 2007.

the second amended indictment, following the instructions set out in the Decision of 14 September 2007 (“Second Amended Indictment”).<sup>28</sup>

11. The Prosecution filed an initial response to the Motion on 22 October 2007 as well as a *corrigendum* on 29 October 2007 (“Response”).<sup>29</sup>

12. Accordingly, the Chamber will hereby rule on the preliminary challenge to the Indictment as well as on the Second Amended Indictment’s compliance with the Decision of 14 September 2007.

## II. ARGUMENTS OF THE PARTIES

### A. The Accused’s Motion

13. In his Motion, the Accused argues that the Indictment is vitiated both by defects in the form and by lack of jurisdiction.<sup>30</sup> The Accused further challenges the scope of the reductions introduced to the Indictment through the 73 *bis* Decision.<sup>31</sup>

14. With respect to the defects in the form, the Accused first objects to the criteria applied to the amendments to the Initial Indictment and to the Indictment proposed by the Prosecution. The Accused submits that in order to confirm an indictment, the Chamber must be satisfied that there are reasonable grounds to believe that he was involved in the crimes charged in the Indictment and that this criteria applies likewise to any amendment proposed subsequently by the Prosecution.<sup>32</sup> Moreover, the Accused takes issue with the inadequate description of the Vojvodina geographical crime base,<sup>33</sup> in his submission regarding the physical commission by the Accused<sup>34</sup> of certain crimes, the other modes of responsibility under Article 7(1) of the Statute of

<sup>28</sup> Second Amended Indictment, filed 28 September 2007.

<sup>29</sup> Prosecution Response to Objection by Professor Vojislav Šešelj to the Reduced Modified Amended Indictment with Annex (Corrigendum), filed 29 October 2007.

<sup>30</sup> Motion, p. 9.

<sup>31</sup> *Id.*, pp. 40-46.

<sup>32</sup> *Id.*, pp. 11-13.

<sup>33</sup> *Id.*, pp. 19-20.

<sup>34</sup> *Id.*, pp. 15-18.

the Tribunal (“Statute”)<sup>35</sup> as well as the allegation concerning the direct and public denigration by the Accused in Zvornik.<sup>36</sup>

15. Furthermore, the Accused raises a challenge to jurisdiction with respect to “hate speech”, pleaded by the Prosecution as a mode of physical commission of certain crimes against humanity (persecution, forcible transfer and deportation). According to the Accused, it was not until July 2005 that hate speech was introduced into the Indictment as a mode of physical commission by an *ex post facto* application of ICTR jurisprudence in the context of incitement to commit genocide. Moreover, he submits that hate speech cannot legitimately be included in the Indictment as persecution or more generally as a crime against humanity because it is not specifically set out in Article 5 of the Statute.<sup>37</sup>

16. Lastly, the Accused disputes the fact that the crimes alleged in Vojvodina have remained in the Indictment. On the one hand, the Accused reiterates that the crime base for the crimes alleged in Vojvodina is based on hate speech, an “invented crime against humanity”.<sup>38</sup> On the other, it is also alleged that the application of Article 5 of the Statute requires the existence of an armed conflict.<sup>39</sup>

17. As such, the Accused requests that the following be withdrawn from the Indictment: (i) all the allegations relating to the physical commission of the crimes through hate speech and (ii) all the allegations related to crimes for which the Accused is allegedly responsible in Vojvodina.<sup>40</sup>

### **B. The Prosecution Response**

18. The Prosecution first submits that the Chamber, in its Decision of 31 May 2007, allowed the Accused to present a preliminary motion only alleging defects in

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<sup>35</sup> *Id.*, pp. 15-16.

<sup>36</sup> *Id.*, p. 18.

<sup>37</sup> *Id.*, pp. 23-42.

<sup>38</sup> *Id.*, pp. 45-47.

<sup>39</sup> *Id.*, p. 45-46.

<sup>40</sup> *Id.*, p. 49.

the form of the Indictment, and not lack of jurisdiction. As such, the Prosecution requests that the Accused's challenges to jurisdiction be dismissed.<sup>41</sup>

19. Where appropriate, the Prosecution nonetheless responds on the merits. First, concerning the challenges regarding the criteria applicable to the amendments to the Indictment, the Prosecution submits that the Accused had the possibility of requesting certification or reconsideration of the decisions which allowed the Prosecution to amend the successive versions of the Indictment prepared against him.<sup>42</sup>

20. Next, regarding the lack of specificity in respect of the geographical crime base for the crimes alleged in Vojvodina, the Accused should have, according to the Prosecution, raised this argument in his preliminary challenge to the Initial Indictment alleging lack of jurisdiction.<sup>43</sup>

21. Moreover, the Prosecution disputes the Accused's allegation that the Indictment is defective in that the allegations related to physical commission are ambiguous. For the Prosecution, physical commission is pleaded with sufficient specificity. In fact, in its Decision of 26 May 2004, Chamber II ordered the Prosecution to

clarify the ambiguity in paragraph 11 of the Current Indictment by the Trial Chamber's decision of 26 May 2004. The Trial Chamber is satisfied that the proposed amendments to paragraphs 5, 11 and 29 of the Current Indictment are in line with its earlier decision and specify the meaning of the word 'committed' sufficiently. As no conceivable prejudice of the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion.<sup>44</sup>

22. The Prosecution further submits that the Accused's responsibility under Article 7 (1) of the Statute is sufficiently pleaded but that, in any event, this objection is raised out of time by the Accused, who should have raised it against the Initial Indictment.<sup>45</sup>

23. Regarding the issue as to whether direct and public denigration through hate speech is also alleged in Zvornik (Republika Srpska), the Prosecution submits that

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<sup>41</sup> Response, paras. 6-9.

<sup>42</sup> *Id.*, paras. 11-12.

<sup>43</sup> *Id.*, paras. 13-15.

<sup>44</sup> Decision on Prosecution's Motion for Leave to Amend the Indictment, 27 May 2005, para. 10.

<sup>45</sup> Response, paras. 18-21.



any residual ambiguity in paragraph 17(k) of the Indictment is clarified in the Prosecution motion of 22 October 2004 for leave to amend the Initial Indictment and in the final pre-trial brief. Nonetheless, the Prosecution states that it is prepared to clarify paragraph 17(k) in this respect.<sup>46</sup>

24. As indicated above, the Prosecution requests, with respect to the jurisdictional challenge, that the Motion be denied without further consideration.<sup>47</sup> However, alternatively, the Prosecution submits that the challenges raised by the Accused are not issues of jurisdiction but rather points of fact that are to be settled in the course of the trial.<sup>48</sup> Moreover, for the Prosecution, it is evident that underlying acts of persecution under Article 5(h) of the Statute do not individually need to be crimes in international law.<sup>49</sup> In any case, according to the Prosecution, direct and public denigration through hate speech is a violation of fundamental rights whose gravity is on a par with the other crimes set out in sub-paragraphs (a) to (i) of Article 5 of the Statute.<sup>50</sup>

25. Finally, the Prosecution objects to the Accused's challenges in respect of the allegations in the Indictment related to Vojvodina, since taking them into account would require a reconsideration of the 73 *bis* Decision and that, furthermore, the Appeals Chamber has already ruled on the matter.<sup>51</sup>

### III. APPLICABLE LAW

#### A. Time-Limit to Dispose of the Motion

26. The possibility to file preliminary motions alleging defects in the form of the Indictment is governed by Rule 72 of the Rules, which provides in particular:

(A) Preliminary motions, being motions which:

[...]

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<sup>46</sup> *Id.*, para. 22.

<sup>47</sup> *See* para. 18 *supra*.

<sup>48</sup> Response, paras. 26-32.

<sup>49</sup> *Id.*, paras. 27, 35.

<sup>50</sup> *Id.*, paras. 36-62.

<sup>51</sup> *Id.*, para. 63.

(ii.) allege defects in the form of the Indictment,

[...]

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. [...]

27. The Chamber notes that under Rule 72 of the Rules, the Chamber must dispose of all preliminary motions “not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84”. In this case, however, the Motion was filed in English on 28 September 2007, the Chamber received the French translation of the Motion on 19 October 2007 and the Prosecution responded on 22 October 2007. As the opening statements were made on 7 and 8 November 2007, it was impossible, in the specific circumstances of the case, for the Chamber to make a ruling prior to the opening statements. In fact, because of the length and complexity of the filings, it was necessary to take the time that elapsed between the opening statements and the pronouncement of this decision. Conversely, this decision has been rendered within sixty days of the filing<sup>52</sup> of the Motion, i.e. prior to 27 November 2007, with the understanding that the first Prosecution witness will begin to testify on 11 December 2007.

### **B. General Principles for the Presentation of the Charges**

28. Under Article 18 (4) of the Statute and Rule 47 (C) of the Rules, the Indictment must contain a concise statement of the facts and of the crimes with which the Accused is charged under the Statute. These provisions must be interpreted in the light of Articles 21 (2) and 21 (4) of the Statute, which govern the rights of the accused person before the Tribunal, by guaranteeing, *inter alia*, a public and fair trial, the right to know the allegations against him and to have appropriate resources to prepare his defence.<sup>53</sup>

<sup>52</sup> In this case, “filed” is to be understood as when the document is registered, after translation into one of the two languages of the Tribunal.

<sup>53</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Form of the Joinder Indictment, 19 March 2007 (“*Gotovina et al. Decision*”), para. 7.

29. The Prosecution's obligation to set out, in a concise and detailed manner, the facts and points of law that are essential to its case flows from this inherent right of any Accused before the Tribunal.<sup>54</sup>

30. First, it is acceptable for the Prosecution to enumerate the forms of responsibility under Article 7 (1), according to Tribunal case-law, since the Prosecution seeks to establish the existence of each of these forms for each count in the Indictment, thereby enabling the Accused to prepare his defence effectively.<sup>55</sup> The Chamber further notes that the nature of the individual criminal responsibility alleged must be unambiguous,<sup>56</sup> and that any charge of commission must be clear in order to express whether this is physical commission or whether this implies commission as a form of participation in a joint criminal enterprise.<sup>57</sup>

31. Second, the criminal conduct with which the Accused is charged and the nexus between his acts and the alleged events are essential elements which must be included in the Indictment.<sup>58</sup> Whether or not other facts will be essential depends upon how closely the Accused is linked to the events for which he is held criminally responsible.<sup>59</sup> Including in the Indictment the details of the identity of the victims and information, such as the places where these details occurred, the dates and the sequence of events will depend on their proximity to the Accused.<sup>60</sup>

32. Accordingly, in the *Blaškić* case the Appeals Chamber recalled:

A distinction has been drawn in the International Tribunal's jurisprudence between the level of specificity required when pleading: (i) individual responsibility under Article 7(1) in a case where it is not alleged that the accused personally carried out the acts underlying the crimes charged; (ii) individual responsibility under Article 7(1) in a case where it is alleged that the

<sup>54</sup> *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005 ("*Delić Decision*"), para. 6.

<sup>55</sup> *Prosecutor v. Milorad Krnojević*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojević Appeal Judgement*"), para. 138.

<sup>56</sup> *Ibid*; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, ("*Blaškić Appeal Judgement*"), paras. 215, 226.

<sup>57</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006 ("*Popović et al. Decision*"), para. 25 (citing *Krnojević Appeal Judgement*, para. 138).

<sup>58</sup> *Delić Decision* para. 7.

<sup>59</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal, 30 November 2001 ("*Galić Decision*"), para. 15.

<sup>60</sup> *Gotovina et al. Decision*, para. 39; *Popović et al. Decision*, para. 5; *Blaškić Appeal Judgement*, para. 210.

accused personally carried out the acts in question; and (iii) superior responsibility under Article 7(3).<sup>61</sup>

[...]

When alleging that the accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed "with the greatest precision."<sup>62</sup>

33. Moreover, if the Accused is held responsible for having planned, incited to commit, ordered or otherwise aided and abetted the commission of the crimes, the Prosecution must identify the Accused's particular acts or specific course of conduct on which the charges are based.<sup>63</sup> Accordingly, the *Krnojelac* case set out that

In a case based upon individual responsibility where it is not alleged that the accused personally did the acts for which he is to be held responsible — where the accused is being placed in greater proximity to the acts of other persons for which he is alleged to be responsible than he is for superior responsibility — again what is most material is the conduct of the accused by which he may be found to have planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of those acts [...].<sup>64</sup>

Moreover, in the *Blaškić* case the Appeals Chamber stated that "where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question."<sup>65</sup>

34. Therefore, there is a sliding scale based on the proximity of the Accused to the crime itself: physical commission, the most direct form of commission – and consequently that most intrinsically linked to the Accused, – requiring the highest threshold, that is, the most detail and precision possible – and the other forms of

<sup>61</sup> *Blaškić* Appeal Judgement, para. 211 (underlined in the text).

<sup>62</sup> *Blaškić* Appeal Judgement, para. 213.

<sup>63</sup> *Blaškić* Appeal Judgement, para. 213. See also *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000 ("*Krnojelac* Decision"), para. 18.

<sup>64</sup> *Krnojelac* Decision, para. 18 (footnotes omitted).

<sup>65</sup> *Blaškić* Appeal Judgement, para. 213.

responsibility with a threshold of precision scaled according to the nexus between the Accused and the crime.<sup>66</sup>

35. The Chamber recalls nonetheless that particular attention must be paid to the scale of the crimes brought before the Tribunal and, consequently, to the degree of precision of the information that the Prosecution is able to provide. In any case, the Prosecution must disclose all of the information available to it.<sup>67</sup>

#### IV. DISCUSSION

##### A. Preliminary Considerations

###### 1. Time Limits for Filing

36. In the Decision of 31 May 2007, the Chamber ordered

that the Accused file any preliminary motion to the form of the no later than 30 days from either i) the date of service to the Accused of the present decision in BCS, or ii) the date of service to the Accused of the 15 Rule 66(A)(i) statements pursuant to the 30 May Disclosure Decision.<sup>68</sup>

37. Since he was notified of the Decision of 31 May 2007 in BCS on 7 August 2007, and since he presented the Motion on 6 September 2007, the Accused complied with the time limit of 30 days that was given to him.

38. On 15 October 2007, the Prosecution requested an extension of the time-limit of 14 days to respond to the Motion. The Chamber granted this request in part by granting an extension of time, but only until 22 October 2007. The Response was therefore filed in time.

###### 2. Exceeding of the Word Limit

39. In total, the Motion contains 15,267 words, which is more than five times over the word limit imposed by the Practice Direction. Nonetheless, on 6 September 2007,

<sup>66</sup> *Gotovina et al.* Decision, para. 40; *Galić* Decision, para. 15. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defect in the Form of the Indictment, 22 July 2005, para. 11.

<sup>67</sup> *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.

the pre-trial Judge granted leave to exceed the word limit exceptionally “due to the fundamental character of the issues it raises”.<sup>69</sup>

40. The Chamber notes that the pre-trial Judge, mindful of the need for equality of arms, granted the Prosecution’s request submitted on 19 October 2007 to exceed the word limit in respect of its Response.<sup>70</sup>

3. Annex to the Motion Submitted by the Accused on 15 October 2007

41. On 15 October 2007, in his Submission No. 326, the Accused requested that the statement of a potential defence witness be included as an annex to the Motion.<sup>71</sup>

42. The Chamber recalls the order concerning the sole document the Accused sought to present in annex to the Motion, rendered by the pre-trial Judge on 6 September 2007, according to which:

**CONSIDERING** nevertheless that, at this stage, the Pre-Trial Judge does not hold that translation of the Annex into one of the two official languages of the Tribunal is useful for the examination of the Motion,

**CONSIDERING** moreover that if, after an analysis of the Motion in its translated version, it appears that the contents of the Motion requires a more thorough examination of relevant pages of the Annex, the Pre-Trial Judge will issue an order for the translation of these pages [...]<sup>72</sup>

43. The 386-page brief that the Accused sought to present in annex to the Motion was therefore not translated or filed with the Registry. At this stage, it appears necessary to recall the “Filing Protocol” in this case, dated 4 June 2007 (“Filing Protocol”). According to the Filing Protocol, when the Registry receives a filing from the Accused in BCS, the Court Management and Support Services immediately

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<sup>68</sup> Decision of 31 May 2007, p. 5.

<sup>69</sup> Order to File Motion 314 Submitted by the Accused, 6 September 2007 (“Order Concerning Motion 314”), p. 1.

<sup>70</sup> Prosecution’s Motion for Authorisation to Exceed the Word Limit in its Response to Submission No. 314, 19 October 2007. On 22 October 2007, the Prosecution was informed electronically that the pre-trial Judge was granting its motion and that this leave to exceed the word limit would be part of the present decision.

<sup>71</sup> English translation of BCS original titled “Professor Vojislav Šešelj Submits the Certified Statement of a Potential Defence Witness and Requests that this Statement be Included in the Annex to the Objection to the Indictment, confidential, 19 October 2007 (presented 15 October 2007).

<sup>72</sup> Order Concerning Motion 314, p. 1.

records the date of receipt of the document and sends it to the Tribunal's translation section, after advising the Chamber and the Prosecution of its existence. The said document is officially filed only upon completion of the translation into one of the two languages of the Tribunal. The Filing Protocol also provides that "the Prosecution shall not be entitled to access to any of the Accused's submissions prior to translation and filing".<sup>73</sup> Therefore, the Prosecution did not have access to the Motion's annex, whose translation and filing the pre-trial Judge refused on 6 September 2007, regardless of whether this annex included the statement appended to Submission No. 326.

44. Regarding the merits of the Accused's request to introduce the statement as an annex to the Motion, the Chamber considers that this request has no relevance with to the Motion before it. In fact, this statement has no direct relationship with the content of the Indictment. Furthermore, the Chamber recalls that on 15 May 2007, it stayed its ruling on the request to initiate and execute contempt proceedings, until after the trial, considering that "a challenge to the admissibility of any evidence should be dealt with during the trial through the examination and cross-examination of the witnesses identified in the Motion."<sup>74</sup> An appeal lodged by the Accused against this decision is currently pending.<sup>75</sup>

#### 4. Criteria Applicable to Confirmation of the Indictment and Any Subsequent Amendments Thereto

45. The Chamber notes that the arguments set forth by the Accused here are not relevant to the purpose of the Motion, which is to allege defects in the form of the Indictment. Accordingly, the issue of the criteria applicable to the confirmation of the Indictment and any subsequent amendments thereto is moot in the context of this decision. Moreover, the Accused states that he has set out these arguments without requesting the Chamber to take any decision on the matter, specifying that

As indictments are reviewed by Judges mainly on the basis of discretionary powers, Professor Vojislav Šešelj gives these general and special standards with the intention of drawing the attention of Trial Chamber Judges to take into account at the same time the following:

<sup>73</sup> Filing Policy in the Case of *Prosecutor v. Vojislav Šešelj*, 4 June 2007, pp. 2-3.

<sup>74</sup> Order Regarding Mr. Šešelj's Motion for Contempt Proceedings, 15 May 2007, p. 2.

- there must be no defects in the form of an indictment as set forth in Article 18(4) of the Statute, and
- Professor Vojislav Šešelj's rights under Articles 20 and 21 of the Statute must not be violated.<sup>76</sup>

46. The Chamber considers that the elements set out above are at the very heart of the arguments on defects in the form presented in the Motion. Accordingly, it is in this framework that they will be examined.

## **B. Defects in the Form**

### 1. Lack of Material Facts Related to Physical Commission

47. In response to the Accused's arguments in this respect, the Prosecution submits that the issue of the lack of material facts related to physical commission is moot, since Chamber II already ruled upon it in its Decision of 27 May 2005, wherein it stated that "the proposed amendments to paragraphs 5, 11 and 29 of the Current Indictment are in line with its earlier decision and specify the meaning of the word 'committed' sufficiently. As no conceivable prejudice of the Accused arises out of these amendments, the Trial Chamber will grant this part of the Motion."<sup>77</sup>

48. The Chamber notes that the determination by Chamber II that the meaning of the term "commit" was sufficiently specified was made in the context of a decision on a proposed amendment to the Initial Indictment. This Chamber considers that in the context of a decision on preliminary motions, it would not be sufficient to follow that determination. It is still necessary to examine whether the general principles for presenting an allegation of "physical commission" have been followed.

#### (a) Paragraph 5 of the Indictment

49. According to paragraph 5 of the Indictment

Vojislav Šešelj is individually criminally responsible for the crimes referred to in Articles 3 and 5 of the Statute of the Tribunal and described in this indictment, which he planned, ordered, instigated,

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<sup>75</sup> Decision on the Accused's Request for Certification to Appeal the Trial Chamber's Decision of 19 July 2007, 14 September 2007; *see also* Order Assigning Judges to a Case Before the Appeals Chamber, Case No. IT-03-67-AR77.1, 15 November 2007.

<sup>76</sup> Motion, p. 14.



committed or in whose planning, preparation, or execution he otherwise aided and abetted. By using the word “committed” in this indictment, the Prosecutor does not intend to suggest that the accused physically committed all of the crimes charged personally. Physical commitment is pleaded only in relation to the charges of persecutions (Count 1) by direct and public ethnic denigration (paragraphs 15 and 17(k)) with respect to the Accused’s speeches in Vukovar, Mali Zvornik and Hrtkovci, and by deportation and forcible transfer (paragraphs 15 and 17(i)) with respect to the Accused’s speech in Hrtkovci, and in relation to the charges of deportation and inhumane acts (forcible transfer) (Counts 10-11, paragraphs 31-33), with respect to the Accused’s speech in Hrtkovci. “Committed” in this indictment includes the participation of Vojislav Šešelj in a joint criminal enterprise as a co-perpetrator [...]. (underlined in original)

50. As recalled above, when an Accused is presumed to have personally committed the acts in question, the material facts must be set out with great precisions, and in particular the information must include, to the extent possible, the identity of the victim, the place where and approximate date when the acts in question took place, and the means implemented to commit them.<sup>78</sup>

51. In this case, the Indictment sets out the means by which the Prosecution claims the Accused “physically committed” the crimes charged in Counts 1, 10 and 11. Therefore, the Accused is held responsible for having physically committed persecutions (Count 1) through his speeches in Vukovar in November 1991, in Mali Zvornik in March 1992 and on 6 May 1992 in Hrtkovci. Moreover, the Accused is also held responsible for having physically committed forcible transfer and deportation (Counts 10 and 11) through his speech in Hrtkovci on 6 May 1992.

52. As the making of these speeches is the very foundation of the allegation of physical commission in this case, it is therefore important that the Prosecution clearly define for which speeches this mode of responsibility is charged. As much as the allegation is precise for Hrtkovci, it is equally not precise for Vukovar and Mali Zvornik, because it does not define with sufficient precision the date when the Accused allegedly made these speeches and does not specify whether the Accused is held responsible only for stating in Vukovar that “Not one Ustasha must leave Vukovar alive”<sup>79</sup> and in Mali Zvornik: “Dear Chetnik brothers, especially you across the Drina river, you are the bravest ones. We are going to clean Bosnia of pagans and

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<sup>77</sup> Decision on Prosecution’s Motion for Leave to Amend the Indictment, 27 May 2005(French translation dated 28 June 2005), para. 10.

<sup>78</sup> See para. 32 *supra*.

show them a road which will take them to the east, where they belong”,<sup>80</sup> or whether these words are simply a part of the *speech or speeches* for which the Accused is held responsible for physically committing the crimes charged in Counts 1, 10 and 11.

53. Furthermore, to incur individual responsibility through physical commission in principle requires the identity of the victims to be indicated. However, the Prosecution fails to specify whether the Accused is held responsible for having physically committed the crimes charged in Counts 1, 10 and 11 in respect of *all* the victims referred to in the annexes to the Indictment. Admittedly, the Chamber recalls that only when the Prosecution has more specific information about the identity of the victims of the physical commission of crimes allegedly committed by the Accused does it have the duty to provide that information to the Accused.

54. Accordingly, the Chamber considers that the allegations related to physical commission are not set out in paragraph 5 of the Indictment with sufficient precision as regards the dates and scope of the speeches on the basis of which the Accused is held responsible in Mali Zvornik and in Vukovar. The Prosecution is therefore invited to quote exhaustively, in annex, the speeches charged in the Indictment as well as the dates they are alleged to have been given. The Chamber further invites the Prosecution to identify, with the greatest precision possible and considering all of the information available to it, the alleged victims of the crimes physically committed by the Accused in Hrtkovci, Mali Zvornik and Vukovar.

(b) Other Paragraphs in the Indictment Related to Physical Commission

55. The Chamber considers that paragraph 11 of the Indictment sets out the allegation of physical commission against the Accused with sufficient precision. Conversely, by adding the term “physically”, the Prosecution withdrew all traces of other forms of commission, including joint criminal enterprise. It would be appropriate therefore if the Prosecution were to reintroduce in paragraph 11 of the Indictment the allegation of commission in addition to the allegation of physical commission.

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<sup>79</sup> Indictment, para. 20.

<sup>80</sup> *Id.*, para. 22.

56. Concerning paragraph 33 of the Indictment, the Chamber already noted that except for the issue of victims, the allegation of physical commission in Hrtkovci was sufficiently precise. It hereby reiterates that position.<sup>81</sup>

57. In his Motion, the Accused submits that paragraph 15 of the Indictment “contains no word describing that Professor Vojislav Šešelj physically committed the crime charged”.<sup>82</sup> The Chamber accepts this argument. It is therefore necessary for the Prosecution to include in paragraph 15 the allegation of “physical commission” in addition to the allegation of “commission”, to match paragraphs 5 and 11 of the Indictment.

58. Moreover, in its Response, the Prosecution submits that allegations pertaining to physical commission are now included in paragraph 17(k) of the Indictment. For information purposes only, the Chamber notes that paragraph 17 of the Indictment, of which paragraph 17(k) forms but a sub-part, contains a detailed list of the various forms of persecutions charged in Count 1. Accordingly, in this context “direct and public denigration through ‘hate speech’ of the Croat, Muslim and other non-Serb populations in Vukovar, Zvornik and Hrtkovci on the basis of their ethnicities” is alleged as a form of persecutions, without any indication as to the allegations regarding the form of physical commission.

(c) The Existence of the Allegation of Hate Speech in Zvornik

59. The Accused submits that “it is not clear from the wording of the paragraph whether the Prosecution asserts that the direct and public denigration through hate speech was carried out in Zvornik, Republika Srpska.”<sup>83</sup> The Prosecution responds that the allegation in question concerns Mali Zvornik, located in Serbia, as it indicated in its pre-trial brief.<sup>84</sup>

60. The Chamber notes that Zvornik, located in Republika Srpska (Bosnia-Herzegovina), and Mali Zvornik, located in Serbia, are two different towns. It is therefore necessary for the Prosecution to amend paragraph 17(k) in order to specify that the Accused is being held responsible for public and direct denigration as

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<sup>81</sup> See para. 50 *supra*.

<sup>82</sup> Motion, p. 18.

<sup>83</sup> *Ibid.*

<sup>84</sup> Response, para. 22.

persecutions (Count 1) through a speech given in Mali Zvornik (Serbia) and not in Zvornik (Republika Srpska). Moreover, the Chamber notes that this detail was provided in paragraph 5 concerning the speeches as a form of physical commission directly and publicly denigrating the other communities.

2. Lack of Material Facts Related to the Various Forms of Responsibility under Article 7 (1) of the Statute

61. The Accused objects to the overall inclusion in the Indictment of all of the forms of responsibility under Article 7 (1) of the Statute. While the Accused does not expressly characterize this pleading as a defect in the form, he nonetheless claims that this maintains the vagueness of the Indictment in order to avoid a fair and just trial.<sup>85</sup>

62. While the Prosecution suggests principally that the Accused was not authorized to allege this defect in the form because it deals with the Initial Indictment,<sup>86</sup> it submits alternatively that it established the material facts related to the various forms of responsibility under Article 7 (1) of the Statute for each count.<sup>87</sup>

63. Admittedly, the Decision of 31 May 2007 did not allow the Accused to again allege defects in the form of the Initial Indictment that he could have alleged in his first preliminary motion presented on 24 December 2003.<sup>88</sup> Nonetheless, at this stage of the proceedings it is incumbent upon the Chamber to ensure that the allegations related to the Accused's criminal responsibility are sufficiently precise in the Indictment.

64. In accordance with the above-mentioned Tribunal caselaw,<sup>89</sup> the Prosecution may list in the Indictment all forms of responsibility under Article 7 (1) of the Statute, provided that the Prosecution intends to hold the Accused responsible for each of the counts in the Indictment under each of these forms of responsibility. Accordingly, the Chamber interprets the Indictment as alleging that the Accused is responsible for having planned, ordered, (with the exception of Counts 10 and 11), incited to commit, committed (including physically committed for Counts 1, 10 and 11), or otherwise

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<sup>85</sup> Motion, pp. 15-16.

<sup>86</sup> Response, paras. 19-20.

<sup>87</sup> *Id.*, para. 21.

<sup>88</sup> English translation of BCS original titled "Objection to the Indictment", presented 24 December 2003 and filed 15 January 2003.

<sup>89</sup> *See* para. 30 *supra*.

aided and abetted in the planning, preparation, or execution of the crimes charged in Counts 1 (persecutions), 4 (murders), 8 (torture), 9 (cruel treatment), 10 (deportation) and 11 (forcible transfer as an inhumane act).

65. The Chamber further notes that paragraph 11 is defective since, in the same way as physical commission, it fails to mention "commission" which should be stated in order to match the charges in respect of the joint criminal enterprise.

66. Accordingly, subject to the observations mentioned above with respect to physical commission,<sup>90</sup> the Chamber considers that paragraphs 5, 10, and 11 of the Indictment set out allegations regarding the individual responsibility of the Accused with sufficient precision.

### **C. Lack of Jurisdiction**

#### **1. The Issue of Lack of Jurisdiction**

67. In its Decision of 31 May 2007, the Chamber allowed the Accused to bring a preliminary motion *for defects in the form* of the Indictment. Accordingly, at this stage of the proceedings the Chamber will not examine any objection raised by the Accused in his Motion that does not constitute a defect in the form of the Indictment.

#### **2. The Issue of the Crimes Alleged in Vojvodina**

##### **(a) Preliminary Observation**

68. As an addition to the preceding paragraph, the Chamber recalls nonetheless that the Appeals Chamber twice ruled on the issue of the allegation against the Accused for crimes committed in Vojvodina.<sup>91</sup> On 31 August 2004, following an appeal lodged by the Prosecution against a decision by Chamber II, which ordered that clarifications be made to the Indictment in respect of Vojvodina and the armed conflict, the Appeals Chamber overturned the decision of Chamber II, recalling that

<sup>90</sup> See paras. 47-52 *supra*.

<sup>91</sup> Ruling on a request for reconsideration from the Accused, the Appeals Chamber, on 15 June 2006, confirmed its decision by considering that this request failed to demonstrate any clear error or injustice on the part of the Appeals Chamber. See *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 2007 (French translation dated 28 August 2007), para. 27.

The Appeals Chamber does not accept that the jurisdictional requirement of Article 5 requires the Prosecution to establish that an armed conflict existed within the State (or region) of the Former Yugoslavia in which the charged Article 5 crime is alleged to have been committed. There can be situations where an armed conflict is ongoing in one state and ethnic civilians of one of the warring sides, resident in another state, become victims of a widespread and systematic attack in response to that armed conflict. All that is required under Article 5 of the Statute is that the prosecution establish that an armed conflict is sufficiently related to the Article 5 crime with which the accused is charged. While, as previous jurisprudence of this Tribunal has held, there is no need for the Prosecution to establish a material nexus between the acts of the accused and the armed conflict, the Prosecution must establish a connection between the Article 5 crime itself and the armed conflict. Consistently with the object of the purpose of the Tribunal's Statute, the jurisdictional requirement that Article 5 crimes be committed in armed conflict requires the Prosecution 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. Whether the Prosecution can establish this connection in this case with respect to crimes against humanity in Vojvodina is a question of fact to be determined at trial.<sup>92</sup>

(b) Lack of material facts related to the crimes alleged in Vojvodina

69. The Accused raised a challenge regarding the crimes alleged in Vojvodina which does not deal with jurisdiction but rather a defect in the form. The Accused alleges in fact that there is confusion regarding the manner in which the crimes in Vojvodina are alleged. As such, it is alleged that paragraphs 17(i) ("parts of Vojvodina, Serbia"), 31 ("parts of Vojvodina, Serbia, including the village of Hrtkovci"), 10 ("parts of the Vojvodina region in Serbia") are confusing. For the Prosecution, this challenge also falls outside the scope of the Decision of 31 May 2007, since it deals with the Initial Indictment.

70. The Chamber reiterates its position that at this stage of the proceedings it must ensure that the allegations against the Accused are in line with the general principles for the presentation of charges.<sup>93</sup>

71. As to the issue raised by the Accused, it is important to make the distinction between the general allegations related to the context in which the crimes are alleged — namely paragraphs 6 and 12 of the Indictment — and the paragraphs containing specific allegations entailing the individual criminal responsibility of the Accused. As

<sup>92</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, Decision on Interlocutory Appeal concerning Jurisdiction, 31 August 2004 (French translation dated 27 September 2004, para. 14.

<sup>93</sup> See para. 46 *supra*.

for the first allegations, the Chamber does not object to the Indictment remaining somewhat general by using terms such as “parts of Vojvodina, Serbia”. Conversely, as regards the second allegations, the Chamber reminds the Prosecution that it must set out the material facts in a sufficiently precise and detailed manner to inform the Accused clearly of the charges against him so that he can prepare his defence.

72. Accordingly, the Chamber considers that as matters stand, paragraphs 10(d), 17(g) and 17(i) must be amended because they lack precision. While these three paragraphs refer to “parts of Vojvodina, Serbia”, no reference is made to any other place in Vojvodina than Hrtkovci. The Chamber further notes that it appears, in the light of the 65 *ter* list of Prosecution witnesses, that of the nine Prosecution witnesses scheduled to give evidence about the events in Hrtkovci, only two are scheduled to give evidence about places other than Hrtkovci in Vojvodina, although these places have not been named. If the Prosecution intends to adduce evidence related to Vojvodina only in respect of Hrtkovci, paragraphs 10(d), 17(g) and 17(i) must be amended accordingly. If, on the contrary, the Prosecution intends to adduce evidence about other towns in Vojvodina, the Indictment must be amended in order to specify which towns these are.

### 3. The Question of “Hate Speech”<sup>94</sup>

73. The Indictment deals with “hate speech” in different places, namely paragraphs 5, 10(b), 10(c), 10(d), 10(g), 17(k), 20, 22, and 33. Paragraph 5 sets out the Prosecution’s theory with respect to the Accused’s “physical commission” through “hate speech” of the crimes charged in Counts 1, 10 and 11 and to the incitement of all of the crimes in the Indictment. Paragraphs 10(b), (c), (d) and (g), set out the charges dealing with the forms of the Accused’s participation in the joint criminal enterprise alleged in the Indictment. Paragraph 17(k) deals with “hate speech” as one of the forms of persecution as a crime against humanity, for which the Accused is held responsible. As indicated above, paragraphs 20, 22 and 33 refer more specifically to each of the speeches through which the Accused is alleged to have physically committed the crimes charged in Counts 1, 10 and 11.

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<sup>94</sup> The Chamber makes reference to “hate speech” to the extent that it has been used by the Parties in the Motion and in the Response, respectively.

74. Accordingly, the place of “hate speech” in the Indictment is clear. The Prosecution alleges that it constitutes:

- (i) a form of physical commission under Article 7 (1) of the Statute, for Counts 1 (persecutions), 10 (deportation) and 11 (inhumane acts (forcible transfer)) of the Indictment;
- (ii) a form of incitement under Article 7 (1) of the Statute, for all of the counts in the Indictment;
- (iii) a mode of participation in the joint criminal enterprise under Article 7(1), for all of the counts in the Indictment; and
- (iv) a form of persecution as a crime against humanity.

75. The content of the Motion, which broaches each of the points presented above, demonstrates that the Accused has knowledge of the manner in which the Prosecution will seek to use the speeches referred to in the Indictment against him, and that he is in a position to prepare his defence on this point.<sup>95</sup>

76. However, the Accused requests that “all the charges (counts and paragraphs) asserting that Professor Vojislav Šešelj allegedly directly, physically committed crimes through ‘hate speech’” be removed from the Indictment.<sup>96</sup> The Accused submits that beyond the fact the ICTR caselaw cannot apply retroactively to the crimes allegedly committed in the former Yugoslavia, in any case this caselaw concerns the crime of genocide and cannot be transposed to the crimes alleged against the Accused.<sup>97</sup> Furthermore, the Accused argues that “hate speech” is not recognized as a crime against humanity or as a form of commission.<sup>98</sup>

77. The Chamber recalls that the purpose of a decision on a preliminary motion concerning defects in the form is to ensure that the Indictment “is pleaded with sufficient specificity [and] sets out the material facts of the Prosecution case with enough detail to clearly inform the accused of the charges against him so that he may

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<sup>95</sup> The Accused raises the issue of physical commission (p. 17), persecution (pp. 18-19), joint criminal enterprise (p. 20), incitement (p. 29) and of “hate speech” in general (pp. 23-42).

<sup>96</sup> Motion, p. 49.

<sup>97</sup> *Id.*, pp. 26-27.

<sup>98</sup> *Id.*, pp. 29-42.



prepare his defence”.<sup>99</sup> The purpose is not to rule at this stage of the proceedings on questions of law and of fact which can only be examined in the light of the evidence presented at the trial, including expert reports and expert evidence.

78. Nevertheless, the Chamber wishes to point out that it will be incumbent upon the Prosecution to demonstrate, on the one hand, that the physical commission is constituted in this case through “hate speech”, beyond a reasonable doubt. On the other hand, it will be incumbent upon the Prosecution to establish beyond a reasonable doubt that “hate speech” is a form of persecutions, persecutions which moreover are not listed in the Statute. Finally, it will be incumbent upon the Prosecution to demonstrate that this crime, considered in isolation or jointly with other acts,<sup>100</sup> rises to the same degree of gravity as other crimes against humanity listed in Article 5 of the Statute.<sup>101</sup>

#### **V. THE SECOND AMENDED INDICTMENT’S COMPLIANCE WITH THE DECISION OF 14 SEPTEMBER 2007**

79. Considering the complexity of the procedure leading up to this decision,<sup>102</sup> the Chamber notes that the amendments granted under the Decision of 14 September 2007 did not result in fundamental changes to the Indictment and that, accordingly, the objections of defects in the form raised by the Accused in the Motion apply to the Second Amended Indictment.

80. The Chamber notes that the Second Amended Indictment as proposed by the Prosecution on 28 September 2007 complies in every respect with the Decision of 14 September 2007.<sup>103</sup> Accordingly, the amendments ordered by the Chamber in this decision may be included directly into the Second Amended Indictment. The Chamber will declare that this indictment is authoritative after finding that the Prosecution has included the changes prescribed by the present decision.

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<sup>99</sup> *Gotovina* Decision, para. 7.

<sup>100</sup> *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 296.

<sup>101</sup> See *Prosecutor v. Duško Tadić*, Case No. IT-95-11-T, Judgement, 7 May 1997, para. 703; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, para. 994; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, para. 115.

<sup>102</sup> See paras. 1-12 *supra*.

<sup>103</sup> The Chamber notes that there are remaining problems with the French translation of the Second Amended Indictment but that they will be resolved with the Tribunal’s translation services, as the problems do not come from the Prosecution.

81. The Chamber further reminds the Prosecution that it pledged to provide a revised list of the victims identified in the annex to the Indictment. The Chamber orders that this list be attached to the modified version of the Second Amended Indictment in accordance with this decision.

## VI. DISPOSITION

82. For these reasons, pursuant to Articles 18(4), 21(2), 21(4)(a), 21(4)(b) of the Statute and Rule 47(C) of the Rules, the Chamber partially denies the Accused's Motion with respect to the two measures indicated by the Accused on page 49 of the Motion, but grants some of the submissions relating to defects in the form of the Indictment and presented in the body of the Motion. Accordingly, the Chamber orders, the Prosecution to present, by no later than 7 December 2007, a modified version of the Second Amended Indictment including the following changes:

- (i) To specify in paragraphs 5, 20 and 22 the dates and scope of the speeches in Mali Zvornik and Vukovar for which the Accused is held responsible and to publish in their entirety, in the annex to the Indictment, the three speeches for which the Accused is held responsible in paragraph 5 of the Indictment;
- (ii) To specify in paragraphs 5, 20, 22 and 33, to the extent possible, the identity of the alleged victims of the crimes the Accused allegedly physically committed through his speeches in Vukovar, Mali Zvornik and Hrtkovci;
- (iii) To add the term "committing" to the second sentence of paragraph 11, as follows: "On this basis, he bears individual criminal responsibility for **committing** the crimes under Article 7 (1) of the Statute of the Tribunal [...]" (**emphasis added by the Chamber**);
- (iv) To add the term "physically committed" in paragraph 15, to the list of the forms of responsibility already set out in accordance with Article 7 (1) of the Statute;
- (v) To amend paragraph 17(k) in order to specify that the Accused is held responsible for "public and direct denigration" as persecution (Count 1) through his speech in Mali Zvornik, Serbia;

- (vi) To amend paragraphs 10(d), 17(g) and 17(i) in order to reflect the Prosecution's position which will be either be (a) to hold the Accused responsible for the crimes committed in Vojvodina, for the crimes committed in other areas of Vojvodina besides Hrtkovci, in which case it is necessary for the Prosecution to specify which places these are.

83. The Chamber orders the Prosecution to present the revised list of victims jointly with the Second Amended Indictment pursuant to this decision.

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

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Jean-Claude Antonetti  
Presiding Judge

Done this twenty-seventh day of November 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**