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SUMMARY OF THE PARTIALLY DISSENTING OPINION

TRIAL CHAMBER

(Exclusively for the use of the media. Not an official document)

The Hague, 31 March 2016

Information for the public on the Partially Dissenting Opinion of Judge Lattanzi in Judgement in the case of *Vojislav Šešelj*

The Trial Chamber III of the International Criminal Tribunal for the former Yugoslavia (ICTY) today acquitted Vojislav Šešejl, Serbian politician, president of the Serbian Radical Party and a member of the Assembly of the Republic of Serbia. Vojislav Šešelj faced 9 counts of which 3 Crimes Against Humanity (persecution, deportation and inhumane act of forcible transfer) and 6 War Crimes (murder, torture and cruel treatment, wanton destruction, destruction or wilful damage done to institutions dedicated to religion or education, plunder of public or private property). He was accused of having directly committed, incited, aided and abetted those crimes committed by Serbian forces during the period from August 1991 until September 1993, or to have been part of their commission through his participation in a joint criminal enterprise (JCE).

Judge Lattanzi disagreed with most of the Majority's findings.

Judge Lattanzi noted that the Majority failed to take into consideration the climate of intimidation to which Vojislav Šešelj subjected the witnesses. Judge Lattanzi also found that, in contravention of a Trial Chamber's obligation to provide a reasoned judgment for the benefit of the Accused and the Prosecution, the Majority had provided insufficient reasoning, or no reasoning at all, in support of its findings. Judge Lattanzi further found that the Majority relied on irrelevant considerations to exclude Vojislav Šešelj from responsibility and thereby rendered the judgment replete with considerations that refer to *ius ad bellum* and constitutional law of the former Yugoslavia rather than *ius in bello*.

Based on the evidence admitted, Judge Lattanzi was satisfied that a widespread and systematic attack existed in Croatia and in Bosnia and Herzegovina and that crimes against humanity were committed in this context, including in Vojvodina (Serbia).

Judge Lattanzi also concluded that ample evidence was received that established the existence of a JCE whose purpose was to force the non-Serbs, through the perpetration of crimes, to leave parts of the territory of the former Yugoslavia. Similarly, Judge Lattanzi found that all conditions were met to convict Vojislav Šešelj for the physical commission of the crime of persecution in the form of public and direct denigration of non-Serbian civilians through his speech in Hrtkovci on 6 May 1992.

Judge Lattanzi further found that the requisite evidence existed to conclude that Vojislav Šešelj incited the crimes charged in the Indictment (with the exception of plunder) through all his inflammatory speeches. Judge Lattanzi similarly concluded that no reasonable trier of fact could have dismissed Vojislav Šešelj's responsibility for aiding and abetting through his acts of material and moral assistance to his volunteers and his substantial contribution to the crimes committed by these volunteers.

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Furthermore, Judge Lattanzi noted that the Majority did not consider whether Vojislav Šešelj's state of mind (or *mens rea*) could be established. Judge Lattanzi concluded that there was ample direct and circumstantial evidence admitted to establish Vojislav Šešelj's requisite *mens rea* at all relevant times.

Finally, Judge Lattanzi points out that the fact that Vojislav Šešelj's volunteers were officially placed under the command of the armed forces is an irrelevant consideration when analysing certain forms of responsibility, such as incitement or aiding and abetting. In contrast, Judge Lattanzi noted that the incorporation of the volunteers into the official armed forces is an additional factor that supported a finding of conspiracy and cooperation among the members of the JCE in furtherance of the criminal purpose of ethnic cleansing.

Summary of the Partially Dissenting Opinion of Judge Lattanzi

Please find below the summary of the Partially Dissenting Opinion of Judge Latanzi.

For several reasons, I disagree with most of the majority's findings.

First of all, I find that the **climate of intimidation** to which Vojislav Šešelj subjected the witnesses, by his conduct inside the courtroom and by that of his associates outside the courtroom, which also resulted in contempt proceedings, has not been taken into account by the majority. Yet, this factor should have been included in the Chamber's analysis of the evidence, and more specifically of the prior statements of various witnesses who later, partially or completely, withdrew their statements when they came to testify before the Chamber. These statements, which incriminate Vojislav Šešelj, often corroborate one another, but the majority does not take this element into consideration.

Furthermore, I find that **insufficient reasoning**, or **no reasoning at all**, is provided in support of most of the majority's findings, in contravention of a Trial Chamber's obligation to provide a reasoned judgment for the benefit of the Accused and of the Prosecution. According to this principle, questions of law and fact, that form the basis of the Chamber's reasoning, are always provided.

I note, for instance, that the majority refers to witnesses' written statements and to their testimonies, without providing any explanation, even though these various pieces of evidence are often contradictory. I also note that the majority's reasoning does not include the totality of the Prosecution evidence and knowingly focuses on the sparse Defence evidence on the record. This prompts the majority, for instance, to consider the forced displacement in buses of non-Serbs from their villages as a "humanitarian aid" operation, which is not a reasonable conclusion in light of the evidence on the record.

In addition, the majority very seldom mentions the applicable law, which is often contradicted by the reasoning followed by the Chamber; in the event that it does follow the applicable law, the Chamber adds standards that are not provided for in the Tribunal case-law.

I also find that the majority relies on **irrelevant considerations** to exclude Vojislav Šešelj's responsibility. For instance, an element that is relevant when reconstructing the overall historical background, such as the war situation in the former Yugoslavia, which, according to the majority, simply originated from an unlawful secession, is deemed relevant by the majority when drawing its conclusions on the crimes committed on the ground or on the question of responsibility. Another example: the war, which the majority seems to consider as legitimate, for it was aimed at defending Serb interests, or the fact that the non-Serbs armed themselves, are considered relevant to support the exclusion of the existence of a widespread or systematic attack in Croatia and in BiH, and to discard the crimes of destruction of villages or religious sites. One last example: the legality of recruitment and deployment of the volunteers is considered relevant by the majority when

excluding Vojislav Šešelj's responsibility for aiding and abetting, without taking into account the applicable case-law on this issue. The judgment of the majority is replete with considerations that refer to *ius ad bellum* and constitutional law of the former Yugoslavia rather than *ius in bello*, the sole relevant consideration before this Tribunal.

Indeed, the Tribunal's competence must be limited to determining whether war crimes or crimes against humanity have been committed and, thereafter, whether such crimes may have involved the responsibility of the Accused.

I am, furthermore, satisfied that we have all the requisite evidence on the record to conclude beyond all reasonable doubt that a widespread and systematic attack existed in Croatia and in BiH and that crimes against humanity were committed in this context, including in Vojvodina (Serbia).

Likewise, we received ample evidence that established the existence of a **joint criminal enterprise** between Vojislav Šešelj and the other members of the Serb forces cited in paragraph 8 (a) of the Indictment. The purpose of this JCE, as the Prosecution clearly alleges - as opposed to what the majority contends - was to force the non-Serbs, through the perpetration of crimes, to leave parts of the territory of the former Yugoslavia.

In my view, all the conditions have also been met to convict Vojislav Šešelj for the **physical commission** of the crime of persecution in the form of public and direct denigration of the non-Serbian civilians through his speech in Hrtkovci on 6 May 1992.

We also have the requisite evidence to conclude that he **incited** the crimes charged in the Indictment (with the exception of plunder) through all of his inflammatory speeches, calling clearly and directly for the expulsion and forcible transfer of the non-Serbs, in addition to his speeches in which he denigrated and dehumanized the Croats comparing them to "primates" and "vampires" and qualifying them as cowards. In the same way, he called the Bosnian Muslims "balija" or "pogani" which he himself translated as "excrements". I hold that the use of these terms, together with his constant references to "genocide" committed by the Croats during World War Two and the saying "an eye for an eye, a tooth for a tooth" and "revenge is blind", Vojislav Šešelj also took the risk that murder, torture, cruel treatment and destruction would be committed in furtherance of the common criminal purpose he shared with the other leaders in the former Yugoslavia who participated in the JCE, the purpose of which was to force through the perpetration of crimes, the non-Serbs to leave the territories claimed by the Serb forces.

Also, in my view, no reasonable trier of fact could have dismissed Vojislav [e{elj's responsibility for **aiding and abetting**. Indeed, all the conditions required by case–law have been met to establish, on the one hand, his acts of material and moral assistance to his volunteers, called "Šešeljevci", and, on the other, his substantial contribution to the crimes committed by these volunteers. This assistance comprised not only the recruitment of volunteers but also the organisation of the recruitment that involved all levels of the Serbian Chetnik Movement (or S^P) and of the Serbian Radical Party (or SRS), which he controlled with an iron fist. In addition, before going to the front, these volunteers were indoctrinated with his violent speeches that, instead of reminding them of the need to abide by the Geneva and the Hague Conventions, fostered violence against the non-Serbs by brandishing the chivalric traditions of the Chetniks, who are not known for exercising restraint on violence in war time. The Šešeljevci were deployed on the ground in localities more often than not decided by Vojislav Šešelj. Besides, these volunteers knew full well what their mission was: to participate in the ethnic cleansing operations conducted by the Serb forces, by forcibly removing the non-Serbs from territories claimed by the Serbs. Furthermore, based on the evidence on the record, it appears that Vojislav Šešelj's numerous visits to the field, and the speeches he delivered during these visits, boosted the morale of these volunteers and encouraged them in their mission. The evidence has shown that these volunteers and their families were financially, medically and psychologically supported by Vojislav Šešelj, his Chetnik movement and his party during the entire time of

their military service and even after that time, which constituted another reason to enrol, in addition to the nationalist and extremist ideology they shared with the man whom they considered as their "God" or "Supreme Commander" – I am quoting the evidence.

There is no need for me to expand further on Vojislav Šešelj's physical acts of assistance (or *actus reus*) in connection with the crimes committed by the Serb forces on the ground and the evidence that demonstrates beyond all reasonable doubt that such acts of assistance existed. Furthermore, as regards Vojislav Šešelj's state of mind (or *mens rea*) at the relevant time, we also admitted ample direct and circumstantial evidence that, in my view, serves to establish it. Thus, the majority does not even consider it, which is not reasonable for a trier of fact.

I wish to point to one last aspect of the majority's unreasonable approach towards the Prosecution's allegations of Vojislav Šešelj's responsibility for complicity with his volunteers: in the majority's view, the fact that these volunteers were officially placed under the command of the armed forces militates in favour of excluding Vojislav Šešelj's responsibility. This consideration is irrelevant when analysing forms of responsibility, such as incitement or aiding and abetting. However, as regards Vojislav Šešelj's responsibility for participating in a JCE with the Serbian forces and their leaders, the incorporation of the volunteers into the official armed forces is an additional element that supports a finding of conspiracy and cooperation among the members of the JCE in furtherance of the criminal purpose of ethnic cleansing.

Under the pretext that the Prosecution did not do its job well – one can always do better, and the Trial Chamber could have also done better from the outset of this case, notwithstanding the difficulties it encountered during the trial – the majority sets aside all the rules of international humanitarian law that existed before the creation of the Tribunal and all the applicable law established since the inception of the Tribunal in order to acquit Vojislav Šešelj.

On reading the majority's Judgement, I felt I was thrown back in time to a period in human history, centuries ago, when one said – and it was the Romans who used to say this to justify their bloody conquests and murders of their political opponents in civil wars: "*silent enim leges inter arma*".[1]

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[1] "In time of war the laws fall silent" (Cicero Oratio pro Milone, 52 B.C.).