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ICTY in the Year 2011: Atrocity Crime Litigation Review in the Year 2011

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ICTY COMPLETION STRATEGY

¶1 On November 16, 2011, the ICTY released its current Completion Strategy Report. There are currently two cases in the pre-trial stages, seven at trial, one at partial retrial, and six on appeal. The *Dorđević, Gotovina et al.*, and *Perišić* trials concluded in 2011. Six trials, and the *Haradinaj* retrial, are anticipated to conclude in 2012. The *Karadžić* trial should be completed in mid-2014. All appeals are to conclude by end-2015. On preliminary assessment, the *Mladić* trial will not commence before November 2012, and the *Hadžić* trial will begin in January 2013. There is no timetable for the completion of the *Mladić* and *Hadžić* trials. These completion goals are estimates, and further revisions of estimates are anticipated.

¶2 Per Security Council Resolution 1966 of December 12, 2010, the International Residual Mechanism for Criminal Tribunals will begin functioning for the ICTY on July 1, 2013. The Residual Mechanism will conduct all appeals proceedings against the judgment or sentence, and all appeals filed after July 1, 2013. The Residual Mechanism will similarly complete the work of the ICTR beginning July 1, 2012. The transfer schedule will rely on various factors, including the requisite resources and work processes the transfer of judicial and prosecutorial functions will entail, the Residual Mechanism's own long-term interests, budgetary considerations, and the need for the Residual Mechanism to continually provide support and assistance. The ICTY and ICTR are working closely to ensure a smooth, efficient transition.

A. *Haradinaj et al.*, IT-04-84 and IT-04-84bis¹

1. Legal Highlights

¶3 Prior to *Haradinaj*, the scope of retrial had only been addressed post-conviction, not post-acquittal. The first issue the *Haradinaj* Court faced was determining what witnesses the Office of the Prosecutor ("OTP") could call. OTP's appeal was based on their inability to call two witnesses, Shefqut Kabashi and another, during the partial retrial. In his February 10, 2011,

¹ ICTY, Prosecutor v. Haradinaj et al., IT-04-84 and IT-04-84bis, <http://www.icty.org/case/haradinaj/>.

Appeals Brief, Haradinaj argued that the OTP should only be allowed to call those two witnesses on appeal. Haradinaj asserted that this testimony should be held against the original trial. The Appeals Chamber held that all evidence may be introduced in the retrial.

¶4 Second, the operative indictment had to be set. Haradinaj further moved that all allegations concerning incidents unrelated to Jablanica/Jabllanicë (“J/J”) be stricken from the fourth indictment. Likewise, Haradinaj moved to limit the alleged joint criminal enterprise (“JCE”) to the J/J allegations from the broader JCE as alleged in the original trial and in the Revised Indictment. The Appeals Chamber ruled against both motions, with Judge Robinson dissenting.

¶5 Balaj and Brahimaj moved (January 14, 2011 motion, Brahimaj January 31, 2011 joinder) for access to confidential materials in the *Haraqija* and *Morina* cases, pursuant to Rule 75(g). The OTP did not oppose this. Nonetheless, the Trial Chamber denied this motion. These issues are discussed in greater detail below.

¶6 Indictment and Case Status

¶7 On April 3, 2008, Brahimaj was sentenced to six years’ imprisonment, and Haradinaj and Balaj were fully acquitted. The OTP moved for a partial retrial because of their lack of opportunity to call two witnesses at trial. These witnesses would give testimony regarding participation in a JCE to commit crimes at KLA headquarters and the prison at J/J. The Revised Fourth Amended Indictment was filed on January 21, 2011, and re-charged Haradinaj and Balaj for crimes related to the KLA headquarters and the prison at J/J.

2. Partial Retrial

¶8 The partial retrial is presently ongoing. Balaj and Brahimaj filed their pre-trial briefs on July 11, 2011, and Haradinaj filed his on July 19, 2011. All three contest accuracy of all facts, and raise *res judicata* concerns and issues with evidence admissibility during the retrial. All three contended that “close association” was not enough for conviction. On July 22, 2011, the Court allowed admission of written testimony pursuant to Rule 92bis for all but two proposed witnesses. Stojanović and Stojanović (*viva voce* only) and Witnesses 78 and 79 were required to appear in person.

¶9 Witness 75 expressed concerns to Mr. Harvey, counsel for Brahimaj, regarding his asylum case and the serious political persecution he would face in Kosovo, who relayed concerns to Mr. Rogers of the OTP.

¶10 The Appeals Chamber found that the Trial Chamber failed to take sufficient steps to counter the witness intimidation that pervaded the trial, especially with regards to securing the potentially vital testimony of Kabashi and another witness. The Appeals Chamber limited retrial to acquittals on JCE participation, crimes committed at KLA headquarters in J/J, and related individual criminal responsibility.

¶11 Judgment is expected in August 2012.

3. Legal Highlights

¶12 In arguing the OTP should only be allowed to call the two contested witnesses, Haradinaj contended that opening a case for a retrial is an extraordinary remedy and departs from the principles of finality, so “it should provide a tailored remedy [to] rectify a clearly identified error in the [trial] proceedings, and no more.” The *Muvunyi* Court admitted all evidence at retrial, but Haradinaj distinguished his appeal from the *Muvunyi* matter in that *Muvunyi* dealt with a retrial post-conviction, not post-acquittal. Haradinaj contended that all evidence that was admitted or

deemed inadmissible at trial should stand as such, and that if the OTP were allowed to present new evidence at retrial it would circumvent Rule 115.

¶13 The OTP argued that a retrial is a *de novo* hearing, which inherently includes the possibility of presenting new evidence. The OTP further argued that the retrial was tailored to the error in the first trial because it was limited to the *J/J* counts, and a “blanket restriction” would compound the error.

¶14 The Appeals Chamber noted that neither Rule 117(C) nor the *Muvunyi* Decision mentioned the distinction Haradinaj argued, and the *Muvunyi* decision suggested that the new Trial Chamber has discretion to set the scope of admissible evidence in any retrial. The Appeals Chamber held evidence was not to be confined to the two witnesses, as evidentiary decisions might reflect the different scopes of the retrial and trial.

¶15 Haradinaj next moved to overturn the Trial Chamber’s order that the alleged JCE not be limited to the narrower purpose of committing crimes at *J/J*, as the allegations unrelated to *J/J* were not appealed, and may not be re-litigated under *res judicata*. The Appeals Chamber held that no amendment should be made, because the retrial focused on “a narrower *participation* by the Accused in the JCE,” not a narrower JCE. Judge Robinson dissented to this holding on the basis of *non bis in idem* and *res judicata*, fearing that allowing the OTP to re-allege and attempt to prove guilt of allegations the Accused had already been acquitted of might prejudice the Accused.

¶16 Haradinaj further moved to delete allegations from the Statement of Facts of Operative Indictment that were unrelated to the six counts being retried (specifically, those in paragraphs 28(a)-(f) that made no reference to *J/J*) on the basis of *res judicata*, contending that inclusion would amount to abuse of process, violate the principle of finality, and allow evidence of allegations for which Haradinaj had been acquitted. Haradinaj moved that only evidence of the narrower JCE should be admissible.

¶17 The OTP responded that despite the limited purpose of retrial, broader evidence was relevant to show that the alleged *J/J* crimes did not occur in isolation, to demonstrate Haradinaj’s criminal propensity, and to show that discretion over evidence admissibility rests with the Trial Chamber.

¶18 The Appeals Chamber echoed its decision in holding that the alleged JCE need not be limited to the narrow purpose of committing crimes at *J/J* in that the allegations did not render the retrial unfair *per se*, and that the Trial Chamber should apply the rules of evidentiary admissibility with respect to undue prejudice.

¶19 Lastly, the Trial Chamber rejected Balaj’s motion (with Brahimaj joining) seeking access to confidential material from *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, pursuant to Rule 75(G). Judge Orić, the Presiding Judge of *Haraqija and Morina*, did not believe the requested information would materially assist Balaj and Brahimaj, and information as to witness credibility should not be provided by the OTP. Chamber held that no there was no legitimate forensic purpose with regards to the materials.

B. Šainović et al (formerly Milutinović et al) – IT-05-87²

1. Indictment and Case Status

¶20 On May 27, 2009, Defendants Šainović, Pavković, Lukić, Ojdanić, and Lazarević filed Notices of Appeal. The same day, the OTP filed its Notice of Appeal against each Accused except Milutinović, who was acquitted on all counts. Each Defendant moved for a not guilty verdict, and the OTP moved for the Appeals Chamber to quash the imposed sentences and impose more severe sentences, citing the sentences imposed in *Martić* and *Brđanin*. During 2011, Defendants Lukić and Šainović filed various motions of appeal in the Appeals Chamber. The next status conference will be held on January 12, 2012, and there are no pending motions. The ICTY aims to issue judgment in July 2013.

¶21 Judgment was rendered on February 26, 2009. Milutinović was acquitted on all charges. Šainović, Pavković, and Lukić were each sentenced to 22 years' imprisonment for

¶22 deportation, other inhumane acts (forcible transfer), murder, persecutions on political, racial or religious grounds under article 5, and murder under article 3. Ojdanić and Lazarević were each sentenced to 15 years for deportation and other inhumane acts (forcible transfer) under article 5. The June 21, 2006 indictment charged Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić for individual criminal responsibility under article 7(1) of the Statute, and superior criminal responsibility under article 7(3). The Accused were charged with crimes against humanity, including deportation, other inhumane acts (forcible transfer), murder, persecutions on political or religious under article 5, and murder under article 3.

2. 2011 Activity

¶23 Lukić moved to vary the grounds of his appeal on December 17, 2010. The OTP argued that Lukić failed to provide good cause for why the “new” grounds of appeal were not included in his May 27, 2009 Notice of Appeal, per Rule 108. The Appeals Chamber rejected Lukić's motion, holding that Lukić did not present specific “good cause,” and no explanation as to the substantial performance of each variation would be necessary to “avoid a miscarriage of justice.”

¶24 On June 14, 2011, Lukić filed a second motion for leave to vary grounds of appeal. Lukić argued he did not have adequate opportunity to contribute to his Notice of Appeal and Appeal Brief due to a delayed trial judgment translation. Lukić claims he found errors related to interpretation, disregard of evidence, credibility of evidence, and misrepresentation of evidence. The OTP submitted on July 1, 2011 that good cause was not shown, and Lukić failed to explain his unique ability to review. The Appeals Chambers denied this motion based on Lukić's failure to both specifically explain the relevance of his particular knowledge to his amendments, and to show his Counsel's inadequacy in identifying errors.

C. Prlić et al., IT-04-74³

1. Indictment and Case Status

¶25 The *Prlić* Defendants are awaiting judgment. Judgment is expected in June 2012. The Second Amended Indictment was filed on June 11, 2008, and charged Prlić, Stojić, Praljak,

² ICTY, Prosecutor v. Šainović et al., IT-05-87, <http://www.icty.org/case/milutinovic/4>.

³ ICTY, Prosecutor v. Prlić et al., IT-04-74, <http://www.icty.org/case/prlic/4>.

Petković, Ćorić, and Pušić for individual criminal responsibility under article 7(1) of the Statute of the Tribunal, superior criminal responsibility under article 7(3), grave breaches of the Geneva Conventions (article 2), violations of the laws or customs of war (article 3), and crimes against humanity (article 5).

¶26 Closing arguments took place between February 7, and March 2, 2011, and all parties filed final trial briefs between March 28, and April 1, 2011. Each Defendant argued for full acquittal. Petković and Ćorić entered preliminary mitigation considerations. OTP asserted that Prlić, Stojić, Praljak, and Petković should be sentenced to 40 years' imprisonment, Ćorić to 35 years, and Pušić to 25 years.

2. Legal Highlights

¶27 Prlić moved for provisional release until judgment on March 31, 2011. Rule 65(B) of the original ICTY Rules on Procedure and Evidence stated that for provisional release, the Accused must (1) neither present a flight risk nor be likely to influence or endanger persons while released, and (2) present a sufficient humanitarian reason for release. Prlić argued that he did not present a flight risk in light of his compliance with previous provisional releases granted, he did not be present as the Chamber was not in session, and cited "sufficiently compelling humanitarian reasons," appealing to the presumption of innocence and right to a fair trial, and the fact that the lengthy trial had taken a large physical and psychological toll on him. The OTP contended that risk of flight would be heightened as the trial was ending, that Prlić failed to present valid humanitarian reasons, and that Appeals Chamber case law opposed provisional release.

¶28 The Appeals Chamber noted that the Republic of Croatia made assurances that Prlić would comply in returning to The Hague when required, and would not influence or endanger persons when released. The Chamber agreed with these assertions. The first criterion of Rule 65(B) was satisfied on this basis. The Appeals Chamber appealed to the principles of human rights from the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Court of Human Rights as international law to evaluate whether there were compelling humanitarian concerns. These authorities supported lenient detention measures when sufficient, and focused on whether deprivation of liberty was justified. Despite these authorities, the Appeals Chamber held that Rule 65(B) was binding authority. Prlić failed to satisfy his Rule 65(B) burden to present sufficiently compelling humanitarian reasons, so provisional release was denied. Presiding Judge Jean-Claude Antonetti intends to attach a dissent to this decision.

¶29 Praljak also moved for provisional release on April 7, 2011 pursuant to Rule 65(B). Praljak further argued that the "sufficiently compelling humanitarian reasons" requirement in Rule 65(B) for provisional release was flawed. The OTP objected on the same grounds as it did to Prlić's motion. The Appeals Chamber denied this motion on similar grounds to their denial of Prlić's provisional release.

¶30 Prlić again moved for provisional release until final judgment on October 31, 2011. The Netherlands Ministry of Foreign Affairs stated it did not object to Prlić's motion on November 3, and the OTP objected on November 14 to Prlić's provisional release for an indefinite time period. OTP argued that the Chamber's discretion had to be in line with the Tribunal's application of a principal of proportionality to determining the duration of provisional release with respect to the defendant's provided justification. On November 15, 2011, Prlić moved for

provisional release to Zagreb from December 15, to January 15, 2012. Prlić and OTP argued over the applicability of the Rule 65(B) “compelling humanitarian grounds” clause.

¶31 On October 28, 2011, Rule 65(B) was amended to read, “the existence of sufficiently compelling humanitarian grounds may be considered in granting [provisional] release.” Prlić and OTP argued over this amendment. Prlić contended that the choice to consider humanitarian concerns was at the Chamber’s discretion, and the OTP argued that at an advanced stage of proceedings, humanitarian concerns must be considered, and that the conclusion of the hearing did not justify provisional release. The Trial Chamber emphasized their discretion in determining provisional release, and cited Prlić’s lengthy pretrial detention and likely substantial deliberation period before judgment. Trial Chamber partially granted Prlić’s motion—they held Rule 65(B) to be satisfied, and issued a provisional release confined to Zagreb for three months with the possibility of extension.

¶32 Petković moved for provisional release on November 14, 2011. After argument and discussion similar to Prlić’s motion, the Trial Chamber granted Petković a three-month provisional release under 24-hour surveillance to Split, Croatia.

D. Ratko Mladić, IT-09-92⁴

1. Indictment and Arrest

¶33 Ratko Mladić was appointed Commander of the Main Staff of the Bosnian Serb Army (VRS) on May 12, 1992, and was promoted to Colonel General in June, 1994. Mladić was alleged to be the most senior officer of the VRS, as Commander of the Main Staff. On July 24, 1995, Mladić was indicted for genocide, crimes against humanity, and various war crimes, including those related to an alleged sniping campaign against Sarajevo civilians. On November 16, 1995, the indictment was expanded to include war crime charges for the July 1995 attack on Srebrenica. The Trial Chamber reviewed the indictment and the OTP’s evidence, and found that the evidence provided reasonable grounds for a belief of guilt. Subsequently, the Chambers issued an international arrest warrant pursuant to Rule 61 on July 11, 1996.

¶34 From the date of issuance of this arrest warrant, Mladić was deemed a fugitive, and could not be located. On May 26, 2011, Mladić was arrested in Lazarevo, in the Banat region of the northern province of Vojvodina, by Serbian special police officers and agents of the Security Information Agency and War Crimes Prosecutor’s Office. The Tribunal noted that Serbia’s failure to arrest Mladić undermined Serbia’s credibility and its expressed commitment to cooperate with the Tribunal. This long delay directly created an obstacle to the Tribunal’s commitment to international justice.

¶35 The Third Amended Indictment (“Indictment”) was filed on October 20, 2011. The indictment charged Mladić on the basis of individual and superior criminal responsibility under articles 7(1) and 7(3), with two counts of genocide under article 4, persecutions, extermination, murder, deportation, inhumane acts, terror, unlawful attacks on civilians, and taking of hostages under articles 3 and 5.

¶36 The indictment alleged that from May 12, 1992, to November 30, 1995, Mladić was involved in a JCE to permanently remove Bosnian Muslims and Bosnian Croats from Bosnia and Herzegovina. The indictment further alleged that in the same time frame Mladić participated in another JCE to establish and carry out a campaign of sniping and shelling against Sarajevo

⁴ ICTY, Prosecutor v. Ratko Mladić, IT-09-92, <http://www.icty.org/case/mladic/4>.

civilians to spread terror. The indictment further alleged that Mladić participated in a JCE to eliminate Bosnian Muslims in Srebrenica by killing the men and boys, and removing women, young children, and some elderly, from just before July 11, 1995 to November 1, 1995. Lastly, the indictment alleged that from May 1995 to June 1995, Mladić participated in a JCE to take U.N. personnel hostage to prevent NATO from ordering air strikes.

¶37 On October 13, 2011, the Trial Chamber granted the OTP's request to amend the indictment to include crimes committed in Bišina. This incident provided a new basis for conviction on charged counts of genocide, persecution, extermination, and murder as a crime against humanity and war crimes. On November 18, OTP moved pursuant to Rule 73bis to reduce the third indictment to limit their presentation of evidence to 106 of the 196 crimes as this reduced presentation would suffice in establishing a basis for conviction for all eleven counts in the Third Indictment. The operative Fourth Amended Indictment was filed on December 16, 2011, and reflected the above two amendments. Mladić has pled not guilty to the indictment.

2. Pre-Trial Stage

¶38 On June 3, 2011, the OTP moved to restrict the Defense's public disclosure of information and material that the OTP had provided, and sought privacy and protective orders to restrict disclosure about the whereabouts of the OTP's victims and witnesses in the interests of justice. To the second aspect of the OTP's motion, the Defense argued that the OTP must "show exceptional circumstances for a variation of its disclosure obligations."

¶39 The Trial Chamber granted the first part of the OTP's motion in the interests of justice so as not to preclude the effectiveness of any future motions to seek specific protective measures by the OTP. The Chamber rejected the Defense's parallel comparison to the *Milošević* case, as that decision concerned the "identifying information of witnesses, [not] the current whereabouts of victims and witnesses whose identities are known to the Defence." The Chamber noted the importance of ensuring protection and privacy and the lack of implications to the Defense's preparations, and restricted disclosure as requested pursuant to article 20 of the Statute of the Tribunal and Rules 53 and 75.

¶40 On August 16, 2011, the OTP requested leave to sever the Second Indictment and conduct two trials: the first dealing with the 1995 Srebrenica massacre and the Bišina Crimes, and the second with other atrocities from the 1992-95 Bosnian War, citing Rule 54 and considerations of justice. Mladić opposed severance, arguing that holding two trials against a single Accused was inconsistent with the Tribunal's jurisprudence and was not dealt with by the Statute or Rules, severance would be illegal under the SFRY Criminal Procedure Code, severance should only be granted if an Accused was prejudiced by joinder of the charges, and that severance would violate Accused's right to a fair trial. In its reply, the OTP argued that Rule 72(A)(iii) provided a basis for severance, that the principle of legality applied only to substantive criminal law, and that the SFRY Code was not controlling or applicable authority.

¶41 The Trial Chamber noted that it had authority to sever joined charges, and that it could join against a single Accused either by granting leave to amend a proposed indictment prior to the Accused's initial appearance, or upon motion, per the Appeals Chamber's holding in *Milošević*. The Trial Chamber found the following relevant factors: (1) potential prejudice to the right to a fair trial (Statute articles 20 and 21), (2) relative manageability of one versus separate trials and other factors in the interests of justice, and (3) potential burden on witnesses. The principle of legality, health concerns, and a speedy resolution were not relevant to the Chamber's decision. The Trial Chamber denied the OTP's motion to sever, noting there was no compelling reason to

do so, severance might prejudice the Accused, witnesses might be unduly burdened, and trials likely would be less manageable and less efficient.

¶42 Mladić's deteriorating health has impeded his court appearances. It has also affected the Trial Chambers' duty to prepare for and conduct his trial, and ensure that trial would be fair and expeditious. Since October 5, 2011, Mladić has been treated for pneumonia, which resulted in a one-week hospitalization, a hernia, had several teeth removed, and will be treated for kidney stones. Mladić has suffered three strokes since 1996. On November 9, Mladić consented to release of his complete medical records to Chambers and Registry. Pursuant to Rules 54 and 74*bis*, the Trial Chamber ordered a comprehensive physical and mental evaluation of Mladić, and review of health records, to be filed confidentially by December 6, 2011.

*E. Goran Hadžić (IT-04-75)*⁵

1. Background

¶43 Arrested on July 20, 2011, Goran Hadžić was the last major figure implicated in the crimes stemming from the 1992-1995 Bosnian War to still be at large. Specifically, Hadžić has been implicated as a member of a Serbian "Joint Criminal Enterprise" ("JCE"), the purpose of which was the ethnic cleansing via the removal of Croats and other non-Serbian nationals from particular areas deemed as Serbian during the war. According to the Tribunal, this particular JCE came into existence no later than April 1, 1991, and continued until December 1993. The Prosecution contended that Hadžić's involvement with the JCE lasted from June 1991 until December 1993. The JCE was part of the larger civil war that followed the breakup of the former Yugoslavia, and the factions largely broke down along stringent ethnic and religious lines. The purpose of the Serbian JCE was to create an ethnically pure living space for Serbs only. During the period in question, Hadžić was proclaimed the President of the Serbian Autonomous Region of Slavonia, Baranja and Western Srem ("SAO SBWS"). He was subsequently declared the President of the proclaimed Republic of the Serbian Krajina ("RSK"), in present-day Croatia.

2. Indictment: Legal Highlights, Theories of Liability

¶44 The initial indictments against Hadžić were issued on June 4, 2004, and were made public on July 16, 2004. An amended indictment was filed on July 22, 2011. Hadžić was transferred to the ICTY chambers on July 22, 2011. He was charged under articles 3 and 5 of the ICTY Statute for crimes directed against non-Serbian residents of the Krajina region. His article 5 indictments for crimes against humanity included the following: persecution on political, racial or religious grounds; extermination; murder; imprisonment; torture; inhumane acts; deportation; and forcible transfer. His article 3 indictments, for violations of the law or customs of war, included the following: murder; torture; cruel treatment; wanton destruction of villages, or devastation not justified by military necessity; destruction or willful damage done to institutions dedicated to education and religion; and plunder of private or public property.

¶45 The Prosecution aimed to find Hadžić individually and personally liable for war crimes and crimes against humanity committed in the furtherance of the JCE's goals. The Prosecution did not contend that Hadžić necessarily physically committed any of the alleged crimes; rather, they based his liability off his position of authority, and alleged that he "planned, instigated, ordered, committed and/or aided and abetted" the actual crimes that did occur. The Prosecution

⁵ ICTY, Prosecutor v. Goran Hadžić, IT-04-75, <http://www.icty.org/case/hadzic/4>.

looked to Hadžić's position as leader and an organizer of the JCE, and of governmental bodies and police organizations whose purpose it was to carry out the goals of the JCE, to personally implicate him in any and all criminal results of this JCE that followed. They highlighted the fact that, as a presidential figure, Hadžić had effective control and authority over the Serbian forces that carried out crimes in furtherance of the JCE's objectives.

¶46 In particular, the Prosecution contended that by participating in the JCE, Hadžić had the intent that the goals of, and attendant crimes stemming from, the JCE would occur. The Prosecution also contended that, in the alternative, Hadžić and others in charge of the JCE knowingly took the risk that it was foreseeable that certain crimes would be committed by others in the furtherance of the JCE's end goal, and that through his awareness of certain possible results, Hadžić participated in the JCE. The Prosecution, for some of the counts, were imputing to him a lower but still culpable mens rea of knowledge or recklessness with regards to some of the crimes. The Prosecution also contended that Hadžić had knowledge and evidence that crimes had been committed by Serbian forces, and failed to appropriately use his authority prevent the commission of crimes against non-Serbian populations, or punish those who did, thus implicating his support, approval of and involvement in said crimes.

3. Procedural Background

¶47 The presiding judges in the case are Guy Delvoie, Burton Hall, and Antoine Esia-Mbe Mindua. As the case against Hadžić is just commencing, there have been no judgments made. On July 22, 2011, in the wake of Hadžić's arrest, an order was granted to list the confidentiality of the indictments against him.

¶48 On August 23, 2011, the Tribunal granted the Prosecution's motion requesting that the confidentiality of any material provided to the Hadžić Defense by the Prosecution be maintained. This would bar the Hadžić team from disclosing to any third party or the public any information received from the Prosecution. The motion also requested that any information that could disclose the whereabouts of protected witnesses be redacted from documents given to Hadžić's team. The motion was granted under articles 21(2) and 22 of the Statute, which provide for the protection of victims and witnesses of the relevant prosecuted crimes. The Court found that it was appropriate in these circumstances to restrict information about witnesses to the crime. The Court also ordered that the Hadžić team could not contact witnesses identified by the Prosecution without prior written notice to the Prosecution, so that the Prosecution would have time to take the needed steps to protect the identity and/or location of witnesses.

4. Pre-Trial Plan

¶49 On November 29, 2011, the presiding Judge Guy Delvoie issued an order scheduling the entirety of the cases' pre-trial preparation, and establishing various procedural deadlines with which the parties must comply. Upon further consideration and consultation with the parties, Judge Delvoie re-issued an amended pre-trial schedule on December 16, 2011, which shortened the pre-trial window by three months. On January 31, 2012, the parties are scheduled to file information regarding facts agreed upon by both sides. The final pre-trial conference is set to occur on October 15, 2012, with the actual trial set to commence on October 16, 2012.

F. Stanišić and Župljanin (IT-08-91) “Bosnia and Herzegovina”⁶

1. Background

¶50 Mićo Stanišić and Stojan Župljanin were charged together for crimes committed against non-Serbian populations in present-day Bosnia and Herzegovina. Their alleged participation in crimes against humanity and war crimes occurred during the 1992-1995 civil war in the former Yugoslav Republic. The Prosecution for the Tribunal contended that they were part of a Joint Criminal Enterprise (“JCE”), carried out by the nascent Serbian government, against non-Serbian populations in specific regions earmarked as a future Serbian state. Starting in April 1992, Stanišić was the Minister for the Serbian Ministry of Internal Affairs in Bosnia and Herzegovina, and Župljanin was the Chief of Regional Security Services Center (“CSB”) of Banja Luka in Bosnia and Herzegovina, was a member of the Autonomous Region of Krajina Crisis Staff, and an advisor to the President of the Serbian Republic (“Republika Srpska”).

2. Indictment

¶51 The initial indictments against Stanišić and Župljanin were issued on February 25, 2005, and were made public on March 10, 2005. Between 2005 and 2009, indictments against the two went through many amendments and consolidations; the final version of the indictment was issued September 10, 2009. The Prosecution under articles 7(1) and 7(3) of the Statute has charged the parties. They have been charged with both individual and superior criminal responsibility for crimes including the following: under article 5, crimes against humanity, persecution, murder, extermination, torture, inhumane acts including forcible transfer, and deportation. Under article 3, violations of the laws and customs of war, they have been charged with murder, torture, and cruel treatment.

3. Legal Highlights and Theories

¶52 Trial is currently underway; as such, no judgments against the parties have been rendered. This year the proceedings against them have been subject to several inter-case requests for material; similarly, the Stanišić and Župljanin teams have requested information from other trials pertinent to the proceedings against them. The Stanišić and Župljanin teams have requested material from the Karadžić case. Additionally, the Defense Team representing Franko Simatović requested ongoing access to confidential inter-parte and ex parte Prosecution and Defense materials entered into the Stanišić and Župljanin case. Jovica Stanišić’s Defense Team also requested ongoing access to confidential material tendered in the case against Stanišić and Župljanin.

¶53 In reviewing the requests by all parties above-named, the Court established that for a case to gain access to confidential information from another ongoing trial, the party making the motion must demonstrate that there is a close nexus between the facts and legal issues of one case and those of the other. Such nexus must demonstrate a legitimate forensic purpose such that access to the information will aid in the case of the party requesting the information. The Courts generally require that there be some geographical and temporal, or other “material,” overlap between the cases. Inter parte information is generally granted on a showing by the applicant of the above criteria. Access to confidential ex parte material, however, generally requires a higher

⁶ ICTY, Prosecutor v. Stanišić and Župljanin, IT-08-91, http://www.icty.org/case/zupljanin_stanismic/4.

showing of connection and necessity than a geographic or temporal overlap, and a higher need than legitimate forensic purpose. The reason behind the higher standards for ex parte material is the material's elevated level of confidentiality, such that those witnesses and parties providing ex parte evidence have been assured of a greater level of discretion with respect to the information they have provided.

¶54 Inter-parte information requested by the above-named parties was uniformly found to meet the necessary criteria, and the parties requesting such material were granted access. However, requests for ex parte information were summarily rejected, with the Court citing the applicants' failure to demonstrate a pressing enough evidentiary need based on the elevated confidentiality criteria of this information. The crux of the Court's allowing of the cross-case transfer of material seems to be that all the parties involved have been implicated as having acted within the large, Serbian government-produced, JCE against non-Serbian populations. Thus, while all parties are being tried separately, they are all implicated in the same crimes, and during the commission of said crimes, had interconnected relationships and dealings with the other members of the JCE. Thus it seems unsurprising that evidence from one case necessarily relates to many other cases now pending at the ICTY.

¶55 On February 1, 2011, the Prosecution rested its case against Stanišić and Župljanin, which had begun on September 14, 2009. The Defense began its case on April 11, 2011. On July 8, 2011, however, the Prosecution filed a motion to allow additional evidence (12 additional documents) for their case, pursuant to Rules 73 and 89(c) of the governing trial and evidence procedures at the Tribunal. The Defense objected to the admission of new evidence after the Prosecution already rested its case. To support this argument, they put forth the legal theory that to admit fresh evidence after presenting a full case, the Prosecution must prove, per an appeals decision in the Prlić case, that "exceptional circumstances" exist such that, in the interest of justice, additional material should be admitted. The documents in question purport to corroborate witness testimony about the detention and treatment of non-Serb civilians during the JCE. The Defense contended that such documents were not on the initial evidence list, and therefore, as the case was closed, no longer available for admission.

¶56 The Prlić decision related to evidence not admitted during the Prosecution's initial case, but was evidence that was tendered by the Prosecution during its cross-examination of Defense witnesses. The Court expressly rejected the idea that the Prlić decision required a showing of exceptional circumstances, and instead held that admission of such documents could be granted so long as the Prosecution explained why the new evidence was not admitted during its primary case, and why they were now seeking to admit the evidence through the cross-examination of a particular witness. The Court stated "there is no ban on the Prosecution tendering evidence during the cross-examination of a witness." New evidence will be reviewed by the Court and admitted or excluded on a case by case basis, after the Court has weighed the evidence in light of the Accused's right to a fair trial, and the Prosecution's duty to prove its case beyond a reasonable doubt. New evidence will be admitted or excluded as "it is in the interest of justice" to do so. After evaluation, the Court granted admission to all but two of the new documents tendered by the Prosecution.

¶57 On November 18, 2011, the Court granted Mićo Stanišić's request for a provisional release during the Court's winter recess, which coincided with the winter holidays and New Year. Traditionally, as per an Appeal's Court ruling, provisional releases under Rule 65(B) of Accused persons during trial were limited to cases in which the Accused has presented compelling issues of "humanitarian grounds." However, the Trial Court noted a recent amendment to Rule 65(B),

which established that humanitarian grounds was not a required element of granting release, but was rather another element that the Court could consider when deciding to grant release. Citing compliant behavior by Stanišić during the trial, the Court granted his provisional release, which began on December 19, 2011, and finished on January 9, 2012.

4. Case History

¶58 Mićo Stanišić’s defense team rested its case in the Trial Chamber on July 20, 2011.

*G. Gotovina, Čermak, Markač (IT-06-90) “Operation Storm”*⁷

1. Background

¶59 The case against Gotovina, et. al. centered on their involvement with a Croatian JCE to depopulate the Knin region in Krajina, in present-day Croatia, of Serbs and other non-Croat civilians who populated the area. The goal was to create an ethnically pure area for Croats to repopulate. The impetus for this JCE seems to stem from or be in retaliation to a similar JCE committed against Croats by Serbs in the same region early in the civil war. Towards the end of the civil war, Croatian forces retook the Krajina back from Serbian forces, and it was upon this acquisition of land that the JCE allegedly commenced. The Prosecution argued that the Croatian JCE began in July 1995 and continued until sometime in September 1995. The Prosecution alleged that Gotovina, et. al., were directly part of formulating the plans and policies that led to the commission of the JCE.

2. Indictments

¶60 Ante Gotovina was indicted for both crimes against humanity and violations of the laws and customs of war. His article 5 indictments, for crimes against humanity, included the following: persecution, deportation, murder, and inhumane acts. His article 3 indictments, for violations of the laws and customs of war, included the following: plunder of private and public property, wanton destruction, murder and cruel treatment.

¶61 Ivan Čermak was indicted for persecution, deportation, murder and inhumane acts as crimes against humanity, and plunder, wanton destruction, murder and cruel treatment as violations of the laws and customs of war.

¶62 Markač was indicted with the exact same charges as were charged against Gotovina, for both crimes against humanity and violations of the laws and customs of war.

¶63 The trial against the three parties closed with a verdict rendered on April 15, 2011.

3. Judgments: Legal Highlights and Theories

¶64 The Tribunal found that the guilty parties were part of a larger JCE, “Operation Storm,” in which many high level Croatian governmental officials had participated. The Court found Gotovina guilty on all charges but inhumane acts (specifically forcible transfer) as a crime against humanity, and sentenced him to 24 years in prison. He was given credit for the 1956 days he had served in prison during his trial. Markač was also convicted by the Tribunal of all counts against him except inhumane acts (specifically forcible transfer) as a crime against humanity,

⁷ ICTY, Prosecutor v. Gotovina, Čermak, and Markač, IT-06-90, <http://www.icty.org/case/gotovina/4>.

and he was sentenced to 18 years imprisonment. He also received credit for the 1477 days he had served in prison during his trial. Čermak was acquitted of all charges brought against him, and was released by the Tribunal at the close of trial.

4. Gotovina:

¶65 As Colonel General of the military, Gotovina was head of Croatian military operations, including Operation Storm, and was also Commander of the Split Military District during the indictment period. As such, he held a vast amount of exclusive control over the Croatian military forces. The Court found that he, along with President Franjo Tudjman and other top government and military leaders, planned Operation Storm at a spring 1995 meeting, the “Brioni” meeting. The Court found that this meeting created Operation Storm with the express purpose that Serbian civilians would leave the areas now under Croatian control.

¶66 Much of Gotovina’s guilt did not stem from direct physical implementation of crimes against humanity and war crimes. The Court found that it was mostly lower police and military forces that were carrying out specific attacks on Serbian civilians and property. However, the Court found that, as head of the military forces carrying out illegal attacks, he was responsible for the actions or crimes that he knew or should have known to be foreseeable consequences of the ultimate goal of Operation Storm. The Court found that Gotovina’s failure to prevent or punish these crimes against civilians, was evidence of his desire or intent that these crimes be carried out in furtherance of the ultimate, desired outcome of Operation Storm. The Brioni meeting was pivotal to the Prosecution’s case, and the Tribunal’s ultimate guilty verdict against Gotovina. Gotovina’s active participation of the planning of Operation Storm expressed a specific intent on the part of Gotovina that the end goals of Operation Storm—eviction and depopulation of non-Croat civilians—should be carried out, and implicated him as a driving force behind creating the situation in which war crimes and other crimes were able to be carried out with impunity. Thus, Gotovina was personally held responsible for crimes that were mostly physically carried out by persons other than himself.

¶67 The Court did find a few instances where Gotovina did directly participate in crimes against the non-Croat populations. The Court found that Gotovina specifically ordered the artillery shelling of areas in the region that were purely residential, and had no direct military purpose other than to drive out civilian residents of said regions. In an interesting interpretation of “deportation,” the Court found that this shelling, along with other crimes and intimidations against the resident populations, amounted to deportation and forcible transfer of persons. The Croatian forces did not “round up” or physically deport non-Croat populations from the area. In the strictest sense of the word, the Serbs’ evacuation was “voluntary,” and some did stay behind. But the Court found that purposeful creation of a dangerous and chaotic situation, in which staying behind put resident populations at great peril, amounted to deportation. The actions of the Croat military forces created an environment in which staying behind became impossible and not really a choice, but for those people, generally the elderly and sick, who could not leave. The environment created by Gotovina’s command was specifically meant to drive Serbs and others out of the region, and because it did so, the actions leading to it qualified as deportation.

5. Markač:

¶68 The Court’s reasoning against Markač followed much of the same logic as that used against Gotovina. Markač was Assistant Minister of the Interior in charge of Special Police

matters, and as such had effective control over the on-the-ground operations of the special police operating in the Krajina region. It was found during the course of the trial that the Croatian special police forces were involved in many of the on-the-ground crimes against Serbian and other non-Croat populations. The Court found that Markač was also involved in the Brioni meeting, and knew about the commission of crimes by those under his control during Operation Storm. His participation in the planning of Operation Storm, as well as his failure to prevent or punish crimes arising from Operation Storm, showed the Court that he implicitly intended that these crimes be committed in furtherance of Operation Storm's ultimate goal of an ethnically clean Krajina. Additionally, the Court found that Markač had an express duty to prevent war crimes from occurring, and to investigate and punish those who did carry out crimes contrary to international humanitarian and military laws. That he failed to do so, said the Court, created an environment where such activities were implicitly condoned. For these reasons, he was convicted as personally implicated in the actions of his subordinates.

6. Čermak:

¶69 The Court acquitted Čermak based on the fact that, during Operation Storm, he had very little effective control over the situation on the ground, and therefore could not prevent the crimes from occurring. As Commander of the Knin Garrison, Čermak held some responsibility over the local police and military. The Court found, however, that he did not have any legal authority to command or punish the forces engaged in Operation Storm. He was only in charge of his own garrison troops and the Court found that there was no evidence linking his own troops to any of the crimes against the Serb population, and that he could not have prevented the actions committed by troops not under his direct command.

¶70 The Court found that Čermak's primary role during Operation Storm was to provide relief and infrastructure in the wake of Operation Storm, to see to it that areas were de-mined, to reinstate electricity and water, etc. He was also in charge of providing information about the situation on the ground to international observers of the situation. The Court found that Čermak provided misleading statements to the international community that crimes against Serbs and other non-Serb civilians would be investigated and halted, and he deliberately concealed certain specific crimes committed on August 25, 1995. The Court found, however, that despite these misleading statements there was no evidence suggesting Čermak intended that his actions to go further than the goals of Operation Storm, or crimes committed in its name. Rather, the Court found that Čermak, in making representations to the international community, overstated his authority as garrison commander, and probably could not have prevented or punished the crimes being committed by other military and police forces. His misrepresentation of the situation on the ground, however, did not amount to the commission of the crimes for which he had been indicted.

7. Post-Trial and Appeals

¶71 The trial of Gotovina, et al. has now closed. The case against Gotovina and Markač are now pending in the Appeals Chamber of the Tribunal. From reading the few motions Gotovina's defense team has brought to the Court, it seems that Gotovina is challenging certain aspects of his conviction – notably, the Court's finding of forcible deportation of non-Croat populations. The Defense argues that the Trial Court erred in both law and fact in finding that there were no other reasonable explanations for the shelling of targets in Knin, other than to forcibly remove

Serbs from the area. In particular, the Defense argued that the Trial Court's finding that 94.5 percent of the shelling done in and around Knin was directed towards military targets was inconsistent with their finding of a deliberate attack on civilian, non-combative populations. The Defense cited reports by the U.N. and U.S. that purported to claim to find no evidence of unlawful shelling. Gotovina's Defense also suggested that the Trial Court erred in law and fact when it found that he was part of the JCE and contributed to its execution. The Defense specifically took issue with the Trial Court's finding that Gotovina specifically agreed to commit the crimes for which he has been convicted. The Defense also challenged the Lower Court's finding that Gotovina failed to take the necessary steps to prevent and punish crimes committed by subordinates, and as such expressly contributed to their commission.

¶72 More interestingly, the Markač Defense Team challenged the notion that there even was a JCE in its appellant brief. Markač's position suggested that the Trial Court erred in law and fact when it found that the Brioni meeting established an understood program of Serbian elimination as part of Operation Storm. Markač contended that the Trial Court's conclusion that the goals of Operation Storm amounted to ethnic cleansing were drawn from faulty inference, and claimed that the available evidence did not suggest that such an understanding amongst Croatian leadership existed. In the alternative, however, the Markač Defense claimed that even in the event of the existence of a JCE, the Trial Court misapplied legal standards to the case, and drew inferences and conclusions that were prejudicial to Markač and were unsupported by the evidentiary record.

¶73 Gotovina's defense team has submitted requests to the Court to force the government of Serbia to turn over certain documents pertaining to why the Serbs left the Krajina region during Operation Storm. However, because the Appeals Chamber found that the Defense failed to provide a compelling reason as to why new evidence was needed, the Appeals Chamber rejected this motion and noted that the Appeals Chamber was not the locale for a trial de novo of fact.

¶74 On January 6, 2012, the Appeals Court issued a scheduling order to the parties, requesting that they appear before the bench on January 26, 2012, for a status conference.

*H. Tolimir (IT-05-88/2) "Srebrenica"*⁸

1. Background and Indictments

¶75 Zdravko Tolimir was the Commander for Intelligence and Security of the Bosnian Serb Army (VRS) during the Bosnian-Serb war of 1992-1995, which occurred in present-day Bosnia and Herzegovina. Tolimir reported directly to General Ratko Mladić of the VRS. Tolimir has been implicated in an effort by Serb forces during the struggles to ethnically cleanse Bosnia of its Muslim population. The Tribunal indicted Tolimir for genocide by acts or omissions to destroy the Bosnian Muslim Population, through planned summary executions and forced movements. He has also been indicted for conspiracy to commit genocide, forcible transfer and deportation, and persecution on racial, religious, or political grounds. Lastly, he has been indicted under articles 3 and 5, crimes against humanity and violations of the laws and customs of war, for extermination and murder.

⁸ ICTY, Prosecutor v. Tolimir, IT-05-88/2, <http://www.icty.org/case/tolimir/4>.

2. Legal Highlights and Theories

¶76 This year, the Prosecution filed a motion with the Court to allow written testimony against Tolimir by “Witness 39,” in place of the physical presence of Witness 39 at cross-examination by the Defense. The Prosecution claimed in their motion that Witness 39 suffered from post-traumatic stress disorder (PTSD), resulting from his or her experiences during the Bosnian war. The Prosecution asserted that Witness 39 as functionally unable to testify in person at trial, as having to testify in person about the events in question would lead the witness to relive the experience, and trigger an episode of his or her PTSD. The Prosecution contended that for all purposes the witness was disabled such that they were unable to testify by reason of a psychological condition.

¶77 The Court, noting that Witness 39’s testimony was relevant and probative of the existence of a JCE against Bosnian Muslims, denied the Prosecution’s motion. The Court held that the Prosecution’s assertion that the witness suffered from PTSD was not enough to bar an in-person cross-examination. The Court noted that the Prosecution did not provide medical certification attesting to the witness’s condition and unfitness to testify, and stated that the Prosecution’s inability to “prevail upon” or convince the witness to come forward was not enough to prevent the Court’s compelling said witness to the stand.

¶78 The Court relied on a standard of objective unavailability in reaching its decision. This standard stems from Rule 92 quarter, which defines an “unavailable person” as someone who is “by reason of bodily condition unable to testify orally.” The Court held that in the present case, it did not appear that Witness 39 was actually, physically incapable of testifying orally or coherently due to a mental condition. While perhaps testifying would cause the witness to experience an elevated “emotional state” due to their PTSD, the Court did not find that this condition made the witness objectively incapable of testifying. “Incapable” as used by the Court suggests actual physical or mental impairment that would literally, physically prevent them from attending a Court hearing and testifying, or a mental incapacity such that a witness literally cannot respond to the questions put to him in a coherent manner. The Court thus distinguished a mental, arguably emotional, disorder and an actual incapacitation of a witness for testimony. The former, weighed against the concerns of the Tribunal for a fair trial for the Accused and the aptness of Witness 39’s testimony, did not amount to a sufficient reason to bar testimony, and the Court refused the Prosecution’s motion. However, on November 4, 2011, the Prosecution filed a motion asking the Court to admit Witness 39’s written testimony in lieu of presence, under Rule 92*bis*. Rule 29*bis* allows the admission of written evidence in place of oral testimony in cases where the information therein does not disclose specific acts of the Accused. The Court granted the motion on the grounds that Witness 39’s testimony would be redacted of any information going directly to the actions of the Accused during the indictment period.

¶79 In another witness-driven motion, the Court established a new criterion for determining whether a witness’s prior testimony in other cases can be admitted as evidence in the relevant case at hand. The Prosecution filed a motion to admit testimony from seven witnesses from other related cases pending before the Tribunal, charging that they contained information directly related to the case against Tolimir. In considering whether this type of evidence should be admitted, the Court established that it would consider four key factors:

¶80 The amount of time proposed to be saved by admitting the prior testimony, the volume of the prior testimony, the degree of overlap between the topics covered in the prior testimony and the topics anticipated to be covered during the witness’s examination in the instant case, and the

timing of the witness's testimony i.e. the amount of time the Accused will have to review the evidence proffered by the Prosecution through its motion.

¶81 In weighing the Prosecution's contentions against these factors and in light of the concerns about a fair trial, the Court granted the admission of testimony from only two of the seven witnesses called forth by the Prosecution.

¶82 The trial of Tolimir commenced on February 26, 2010, and the Prosecution has since rested its case. On December 16, 2011, the Trial Court issued an order, setting the date of the commencement of the Defense's case for January 23, 2012.

I. *Momčilo Perišić (IT-04-81)*⁹

1. Judgment Summary

¶83 On September 6, 2011, the Trial Court issued its judgment. By a two-to-one majority, the Court convicted Perišić on charges of aiding and abetting war crimes committed by the Army of the Republika Srpska ("VRS") in the siege of Sarajevo and the Srebrenica massacre. Judge Moleto based his dissent on his belief that the assistance Perišić provided to the VRS was remote and his contention that in cases of remote assistance, the assistance must be specifically directed to perpetuate the crimes to support a conviction for aiding and abetting. The majority, citing *Blagojevic*, held that specific direction was not required. They found that the commission of war crimes was part of VRS strategy and that the VRS depended on the assistance of Perišić to operate, and thus that assistance was enough to convict Perišić of aiding and abetting.

¶84 Also by a two-to-one majority, Judge Moleto dissenting, the Court convicted Perišić of failing to punish subordinates for crimes relating to the shelling of Zagreb by the Army of the Serbian Krajina ("SVK"). Moleto believed the evidence was insufficient to establish that Perišić had effective control over the troops involved.

¶85 The Court unanimously acquitted Perišić of aiding and abetting extermination in Srebrenica on the grounds that he could not have foreseen the scale of the crimes there. The Court also acquitted him of superior responsibility for failing to prevent or punish the crimes in Sarajevo and Srebrenica on the grounds that he lacked the requisite effective control over the perpetrators.

2. Background

¶86 The charges stem from Perišić's decision, as Chief of General Staff of the Yugoslav Army ("VJ"), to provide support to the VRS and SVK through the creation of Personnel Centres (PCs) and other logistical assistance.

¶87 The Personnel Centres were created by Perišić to facilitate the transfer members of the VJ to the VRS and SVK. They allowed for the VJ to continue paying salary and benefits of those serving in the other armies. Members of the 30th Personnel Centre, serving in the VRS, organized and participated in a shelling and sniping campaign directed at civilians in the VRS' siege of Sarajevo between August 1993 and November 1995. Troops from the 30th Personnel Centre had a similar role in the VRS's attempts to eliminate the Muslim enclave of Srebrenica in July 1995. Finally, on May 2, 1995, General Celeketic, a member of the 40th Personnel Centre serving in the SVK, ordered his troops to fire rockets into Zagreb, killing civilians.

⁹ ICTY, *Prosecution v. Momčilo Perišić*, IT-04-81, <http://www.icty.org/case/perisic/4>.

¶88 Perišić, through his creation of these Personnel Centres and the provision of additional logistical support to the VRS, was accused of having personally aided and abetted crimes in Sarajevo and Srebrenica and, as members of the Personnel Centres were still part of the VJ, was accused of failing to prevent or punish the crimes of his subordinates for all three incidents.

3. Judgment

¶89 On September 6, 2011, the Trial Court issued its Judgment on the above charges. By a two-to-one majority, Judge Moleto dissenting, the Court found Perišić guilty, under article 7(1) personal responsibility, of aiding and abetting:

1. Murder as a crime against humanity in relation to Sarajevo.
2. Murder as a violation of the laws or customs of war in relation to Sarajevo.
3. Inhumane acts (injuring and wounding civilians) as a crime against humanity in relation to Sarajevo.
4. Attacks on civilians as a violation of the laws or customs of war in relation to Sarajevo.
5. Murder as a crime against humanity in relation to Srebrenica.
6. Murder as a violation of the laws and customs of war in relation to Srebrenica.
7. Inhumane acts (inflicting serious injuries, wounding, forcible transfer) as a crime against humanity in relation to Srebrenica.
8. Persecutions on political, racial or religious grounds as a crime against humanity in relation to Srebrenica.

¶90 Also by a two-to-one majority, Judge Moleto dissenting, the Court found Perišić guilty, under article 7(3) superiority for failing to punish his subordinates for:

1. Murder as a crime against humanity in relation to Zagreb.
2. Murder as a violation of the laws or customs of war in relation to Zagreb.
3. Inhumane Acts (injuring and wounding civilians) as a crime against humanity in relation to Zagreb.
4. Attacks on Civilians as a violation of the laws or customs of war in relation to Zagreb.

¶91 The Court unanimously found Perišić not guilty of aiding and abetting extermination as a crime against humanity in relation to Srebrenica and not guilty of all superior responsibility for failure to punish subordinates relating to the crimes in Sarajevo and Srebrenica.

4. Reasoning

¶92 The judgment began by establishing that the VRS and the SVK, with members of the 30th and 40th Personnel Centres participating and in leadership roles, did in fact commit the crimes alleged.

¶93 The issue then became whether Perišić's actions constituted aiding and abetting of the crimes in Sarajevo and Srebrenica and whether he had sufficient authority to be held responsible for failure to punish those crimes along with the shelling of Zagreb.

5. Regarding the Article 7(1) Crimes for Aiding and Abetting

i) Required Elements

¶94 By finding Perišić guilty of aiding in abetting, the majority found he 1) provided practical assistance, encouragement, or moral support to the principal perpetrator of the crime, which 2) had a substantial effect on the perpetration of the crime, and that 3) he knew that his acts assisted

the commission of the crime by the principal perpetrator. To satisfy the third element it is necessary that Perišić was aware of the state of mind of the perpetrators, but not that he shared the *mens rea* required for the crime.

a) Element 1: Provision of Assistance

¶95 The majority found that, while the VJ had provided logistical assistance prior to Perišić's appointment, he "efficiently continued" that assistance, particularly the provision of personnel, weapons, ammunition, technical experts, training, medical support, fuel, and operational support.

b) Element 2: Substantial Effect on the Perpetration of the Crime

¶96 Importantly, the majority conceded that there was little to no evidence that the specific weapons used in the crimes were provided by Perišić's assistance, but held that the acts of an "aider and abettor need not have been specifically directed to assist the crimes." Rather, the majority found that the commission of crimes was a vital part of VRS strategy and that the VRS's general war efforts were dependent on the assistance provided by Perišić and held that the assistance thus had the necessary substantial effect on the commission of the crimes. Judge Moleta disagreed with the holding that specific direction was not necessary (discussed in dissent section below.)

¶97 The majority first examined the VRS' war strategy, and concluded that it encompassed the commission of crimes. The majority wrote that the VRS made "no clear distinction between military warfare against BiH forces and crimes against civilians and/or persons not taking active part in hostilities. To the contrary, these crimes were inextricably linked to the war strategy and objectives of the VRS leadership." The Court noted in particular that one of the six published "strategic objectives" of the VSR was the partition of Sarejevo into separate Serbian and Muslim sectors.

¶98 Beyond finding that the crimes were a part of the VRS' war strategy, the majority found that the VRS was dependent on the assistance provided by Perišić.

¶99 The majority cited statements from Karadžić and Mladić that the VRS would be unable to operate without assistance from the VJ and Perišić's own comments that both the VRS and SVK obtained logistics mostly from the VJ to determine that both the VRS and SVK were "dependent" upon the assistance Perišić arranged.

¶100 The majority rejected the argument that because the overall proportion of VRS military personnel in the PCs was small, the assistance did not facilitate crimes. The Court held that it must assess the *qualitative* aspects of the assistance instead of the *quantitative* and that qualitatively, many of the individuals from the PCs held key positions in the VRS and the specific units that committed the crimes. Thus the majority concluded the payment of salaries and benefits, combined with the provision of other assistance and supplies, were vitally necessary to the very function of the VRS. As the crimes were a part of VRS strategy, the majority concluded they were facilitated by such assistance.

c) Element 3: Knowledge

¶101 Citing media reports, diplomatic cables, and U.N. reports, the majority was also satisfied beyond a reasonable doubt that Perišić was or should have been aware of the VRS's criminal strategy and knew his actions provided practical assistance to those crimes. In his dissent, Moleta argued that this evidence was insufficient to establish Perišić's knowledge of VRS strategy beyond a reasonable doubt.

¶102 The Court unanimously found that the Prosecution did not establish, beyond a reasonable doubt, that Perišić knew or should have known the massive scale of the Srebrenica killing. Thus, they found the mental element was not established regarding the charge of aiding and abetting extermination in Srebrenica and acquitted him of that count.

6. Judge Moleto's Dissent Regarding the Article 7 (1) Convictions.

¶103 Judge Moleto argued that Perišić's assistance was too general to constitute aiding and abetting the crimes in Sarajevo and Srebrenica. He agreed with the majority's conclusion that the VRS was dependent upon the assistance of the VJ, but argued it was "inappropriate to infer *ipso facto* on the notion of dependence that Perišić's assistance had a substantial effect on the commission of crimes." He argued that no superior has been charged with aiding and abetting the crimes of his soldiers merely because he supplied them with arms, sent them to war and they committed crimes. He reasons that if no superior has been charged under such conditions Perišić should not be, especially in light of the fact that he supplied not his own soldiers, but the soldiers of another army.

¶104 Moleto claimed that, by convicting Perišić for aiding and abetting based on his knowledge of the strategic objectives of the Bosnian Serb leadership, the majority conflated aiding and abetting with JCE.

¶105 Judge Moleto noted that the majority relied on the ruling of the Appeals Chamber in *Blagojevic* in reaching its conclusion that "specific direction" is not an essential element of aiding and abetting. He, however, noted that *Blagojevic* further held specific direction "will often be implicit in the finding that the [A]ccused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime." He interpreted these statements to mean "there is no *additional* requirement in the notion of aiding and abetting beyond the requirement that the assistance had a substantial effect on the crimes." Moleto contended that a direct link must "be established between the conduct of the aider and abettor and the commission of the crimes." Thus, Moleto argued, in cases of remote or general assistance, specific direction must be an integral and explicit element of aiding and abetting. Moleto found the conclusion that the "assistance provided was directed at supporting the war effort and not to the commission of crimes" was an alternative reasonable explanation and that Perišić should not be found guilty of the 7(1) accusations.

¶106 Judge Moleto also argued that the mental element had not been fulfilled. He argued the evidence presented did not establish as the only reasonable inference that Perišić was aware of the commission of crimes by the VRS in Sarajevo and Srebrenica.

7. Regarding the 7(3) Superior Responsibility Claims

¶107 In convicting Perišić under article 7(3) responsibility the Court found "that a superior-subordinate relationship existed between Perišić and the perpetrators of the crimes; that Perišić knew or had reason to know that the crimes were about to be, or had been, committed; and finally, that he failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof. The existence of whether a superior-subordinate relationship existed depends on an affirmative answer to: 1) whether at the time of the commission of the crimes the perpetrators were subordinates of the superior; and 2) whether the latter exercised effective control over them." It was established that Perišić knew that the crimes had been

committed and that he had taken no action to punish the perpetrators and the discussion focused on whether a superior-subordinate relationship existed.

¶108 The majority, Moletto dissenting, found that Perišić had such a relationship with the 40th Personnel Centre, which committed the crimes in Zagreb. The Judges unanimously found that no such relationship existed with the 30th Personnel Centre, which committed the crimes in Sarajevo and Srebrenica.

i) *Element 1: That the Perpetrators were Subordinates of the Accused*

¶109 The Defense argued that the perpetrators were not subordinates of Perišić because the VRS and SVK constituted separate entities from the VJ. The Court, however, found that many of the perpetrators of the crimes in question were members of the 30th and 40th PCs and that members of the PC were *de jure* members of the VJ and thus Perišić's subordinates.

ii) *Element 2: Effective Control*

¶110 The Court then turned to analyzing whether Perišić had effective control over the 30th and 40th PCs. They stressed that the *de jure* authority previously established provides only some evidence of effective control and then outlined 7 indicators of effective control:

1. Whether Perišić had the ability to discipline and to punish the 30th and the 40th PC members.
2. Whether Perišić had the authority to issue binding orders to the 30th and the 40th PC members, including both transfer/appointment orders and command orders.
3. Whether Perišić was involved in the payment of salaries and provision of other benefits for the 30th and the 40th PC members.
4. Whether Perišić had the capacity to promote members of the 30th and the 40th PC members.
5. Whether Perišić had the authority to terminate the professional military service of the 30th and the 40th PC members.
6. Whether the SVK and the VRS depended on VJ logistical support.
7. Whether the SVK and VRS reported to the VJ General Staff.

8. 40th PC- Zagreb

¶111 A weighing of these factors led the majority to conclude that Perišić had effective control over, and a superior-subordinate relationship with, members of the 40th PC who were involved in the shelling of Zagreb. Perišić's ability to order VJ members in the 40th PC to specific posts within the SVK bore little weight because it was control he had before the soldiers entered the SVK's chain of command and not at the time of the crimes. Similarly, even though Perišić ordered transfers of 40th PC personnel back to the VJ and these orders were obeyed, they required at least formal consent from the SVK and this also carried little weight. However, the majority found that Perišić could initiate disciplinary proceedings against 40th PC members and it was only Perišić's own policy of secrecy that caused such proceedings to be infrequent. The majority also found that, while he actually did so infrequently, Perišić had the authority to issue orders to members of the 40th PC. The Court conceded there were some instances of non-compliance with Perišić's orders, but that this occurred when there was a conflicting parallel order from SVK leadership and that these instances did not show a lack of authority. Perišić's ability to make independent recommendations with respect to verification of promotions and to

terminate the professional contracts of VJ soldiers serving in the 40th PC also weighed in favor of finding effective control.

9. 30th PC Sarajevo and Srebrenica

¶112 The Court found that the evidence did not establish that Perišić could issue binding orders to members of the 30th PC serving in the VRS, pointing to a divergence of views between him and the VRS commander Mladić. The Court also found that while Perišić could initiate disciplinary proceedings against 30th PC members, the initiation was conditioned on a decision from officers in the VRS and that Perišić's role was auxiliary. The Court found that Perišić could influence redeployment, promotional, and termination decisions but distinguished this influence from effective control and found that his material ability to prevent or punish subordinates was called into question by his secondary role in the disciplinary process. They thus found that effective control was not present, a superior-subordinate relationship did not exist, and that Perišić was not guilty for failure to prevent or punish perpetrators of the Srebrenica or Sarajevo crimes.

10. Judge Moletto's Dissent

¶113 Judge Moletto disagreed with the majority's finding that Perišić could issue command orders to members serving in the 40th PC. He argued the only evidence as a single written order given by Perišić that was expressly written on the authority of Slobodan Milošević. Further, he noted that one of the addressees of the order was Milan Martić who was not a member of the 40th PC, that reasons were provided for the issuance (inconsistent with an order), that one of the reasons for the issuance was that Martić had made a promise (implying that it was more of a reminder of a promise than an order), and that one of the recipients addressed his response to Milošević and not Perišić. From these facts Judge Moletto concluded that this was not evidence of the ability to issue orders. Further, he found that existence of a parallel chain of command in SVK leadership undermined a finding of effective control. Finally, he pointed out that one of Perišić's ignored orders was his command that Celeketic cease the shelling in Zagreb. Judge Moletto found Celeketic's disregard of this order a "clear demonstration" of the lack of effective control.

J. Karadžić (IT-95-5/18-I)¹⁰

¶114 The trial began in 2009 and is expected to last until 2014. 2011 has produced a few different points of legal contention, some of which remain unresolved.

1. Standard of Review for Reconsideration of Protective Measures

¶115 Karadžić argued that when an order for protective measures as granted *ex parte* and the Defense was not given an opportunity to oppose the motion, a subsequent motion to reconsider the order should be evaluated *de novo* instead of the "clear error" standard the Trial Chamber used.

¶116 The Tribunal has not ruled on the merits of the appeal. The Trial Chamber denied the application for interlocutory appeal on the grounds that the issue failed both prongs of the two-

¹⁰ ICTY, Prosecutor v. Karadzic, IT-95-5/18-I, <http://www.icty.org/case/karadzic/4>.

pronged test for interlocutory appeal of 1) whether the resolution of the dispute would affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and 2) whether an immediate resolution by the Appeals Chamber would materially advance the proceedings.

2. Declaratory Relief in Disclosure Violation Motions

¶117 The Prosecution filed an application for certification for interlocutory appeal regarding the required elements for the granting of a disclosure violation motion. On March 29, 2011, the Court ruled on Karadžić's 37th to 42nd disclosure violation motions. Despite finding that Karadžić was not prejudiced by any of the violations, the Court granted, by majority, five of the six motions and declared that the Prosecution violated Rule 68 regarding disclosures.

¶118 Judge Kwon dissented from the ruling on the motions, arguing that prejudice was an essential element to grant a disclosure violation motion, and in its absence "it is unnecessary, moot or even frivolous to issue a declaratory finding that the Prosecution has violated Rule 68."

¶119 In its application for certification of appeal, the Prosecution repeated Judge Kwon's arguments. The Trial Chamber found, however, that that issue did not satisfy the two-prong test and denied the opportunity for interlocutory appeal.

3. Motion to Subpoena Miroslav Tuđman/Immunity for Intelligence Officials

¶120 On July 14, 2011, the Trial Chamber granted Karadžić's motion to subpoena Miroslav Tuđman. Tuđman declined an invitation to voluntarily submit to be interviewed by Karadžić's defense team and argued that intelligence officials were immune from subpoenas or binding orders under the Tribunal Appeals Chamber decision in *Krstić*

¶121 The Court found that the requirements for issuing a subpoena were met and ruled that "functional immunity" was clarified in *Krstić* as limited to applications of production of state documents and that it was "not apt in relation to a state official who can give evidence of something he saw or heard."

4. Monitoring of Phone Calls

¶122 The President of the Tribunal denied Karadžić's request for an amicus curiae investigation into the inappropriate disclosure of Slobodan Milošević's monitored phone calls on the grounds that Karadžić had no standing to bring such a request.

¶123 The President also denied Karadžić's request that detention center officials submit statements regarding whether any information obtained from Karadžić's phone calls was revealed to third parties. The President reasoned that it was unreasonable to infer from violations regarding disclosure of information relating to Milošević that disclosures of a similar nature regarding Karadžić may have occurred.

5. Case Background and Indictment

¶124 The indictment alleged that, from at least October 1991 until November 30, 1995, Karadžić participated in an overarching JCE to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of Bosnia and Herzegovina claimed as Bosnian Serb territory. It further alleged that between April 1992 and November 1995, Karadžić participated in a JCE to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, the primary purpose of which was to spread terror among the civilian population. This

objective involved the commission of the crimes of terror, unlawful attacks on civilians, and murder charged in the indictment. The indictment further alleged that from July 11, 1995, to November 1, 1995, Karadžić participated in a JCE to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some elderly men from Srebrenica. Karadzic is also charged on the basis of individual criminal responsibility and superior criminal responsibility with genocide under article 4, crimes against humanity under article 5, including persecutions, extermination, murder, deportation, and inhumane acts, and war crimes under article 3, including murder, unlawful attacks on civilians, acts of violence the primary purpose of which was to spread terror among the civilian population, and taking of hostages.

K. Popović et al. (IT-05-88) “Srebrenica”¹¹

1. 2011 Developments

¶125 The judgment against Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević came down on June 10, 2010. Vujadin Popovic, Ljubisa Beara, Drago Nikolić, and Radivoje Miletić have all filed notices of appeal. Borovčanin decided not to appeal and on November 10, 2011, he was transferred to Denmark to serve his 17-year sentence. As of now, only Beara and Nikolić have filed their appellate briefs.

2. Pre-2011 Background

i) Indictment and Charges

¶126 All of the Defendants were charged in connection with the Srebrenica Massacre that took place in July 1995. Beara, Popović and Drago Nikolić were charged on the basis of their individual criminal responsibility (article 7(1) of the Statute) with:

- Genocide (article 4)
- Conspiracy to commit genocide (article 4)
- Extermination, murder, persecutions, forcible transfer and deportation (crimes against humanity, article 5)
- Murder (violations of the laws or customs of war, article 3)

¶127 Pandurević and Borovčanin are charged on the basis of their individual criminal responsibility (article 7(1) of the Statute) and on the basis of their superior criminal responsibility (article 7(3) of the Statute) with:

- Genocide (article 4)
- Conspiracy to commit genocide (article 4)
- Extermination, murder, persecutions, forcible transfer and deportation (crimes against humanity, article 5)
- Murder (violations of the laws or customs of war, article 3)

¹¹ ICTY, Prosecutor v. Popovic et al., IT-05-88, <http://www.icty.org/case/popovic/4>.

¶128 Miletić and Gvero are charged on the basis on their individual criminal responsibility (article 7(1) of the Statute) with:

- Murder, persecutions, forcible transfer and deportation (crimes)

3. Judgment

¶129 The Trial Chamber found that there was a JCE to murder and a JCE to forcibly remove. The Chamber further found that some members of the JCE had genocidal intent to murder and thus genocide was committed. It also found that members of both JCEs had the requisite special intent for the crime of persecution. It was also established beyond a reasonable doubt that there was a widespread and systematic attack against a civilian population. This attack commenced with the issuance of Directive 7 and had various components, including the strangulation of the enclaves through the restriction of humanitarian supplies, the gradual weakening and disabling of UNPROFOR and a planned military assault on the enclaves, and culminated in the removal of thousands of people from Srebrenica and Žepa. Therefore, applying the legal elements of the crimes charged in the indictment to the facts found to be proven, the Trial Chamber found that the following crimes were committed by members of the Bosnian Serb forces in various locations alleged in the indictment: genocide; conspiracy to commit genocide; extermination, a crime against humanity; murder, a crime against humanity and a violation of the laws or customs of war; murder, cruel and inhumane treatment, terrorizing civilians, and forcible transfer, as acts of persecution, a crime against humanity; and forcible transfer as an inhumane act, a crime against humanity. The Trial Chamber found that the elements of the crime of deportation had not been established. In addition, individual criminal responsibility was found against all defendants.

4. Sentences

- Popović- Sentenced to life imprisonment
- Beara- Sentenced to life imprisonment
- Nikolić- Sentenced to 35 years' imprisonment
- Borovčanin- Sentenced to 17 years' imprisonment
- Miletić- Sentenced to 19 years' imprisonment
- Gvero- Sentenced to 5 years' imprisonment (granted early release on June 28, 2010)
- Pandurević- Sentenced to 13 years' imprisonment

5. Arguments in Beara and Nikolic Briefs

¶130 Beara filed his brief on June 16, 2011, alleging 41 errors in the trial judgment. The vast majority are allegations that the Trial Chamber simply erred in conclusions of fact but some assert errors in law. Ground 22 alleges that the Trial Chamber erred in finding that conspiracy under the Genocide Convention necessarily implies a continuing crime and that by finding Beara guilty of conspiracy to commit genocide they violated the principle of *nullum crimen sine lege*, which prohibits retroactive application of law.

¶131 The brief acknowledged that conspiracy is treated as a continuing crime in common law countries but attempted to distinguish the specific crime of conspiracy to commit genocide. Pointing to the records of drafting meetings, the Defense argued that the “aim of the Convention

is to prevent genocide, rather than punish it” and that conspiracy was defined as “the agreement of two or more persons to commit an unlawful act” from which it concluded that it was unclear if the drafters intended for conspiracy to encompass the common law approach. The Defense attempted to further distinguish the charge of JCE by citing the decision in *Milutinović* that “criminal liability pursuant to JCE is not a liability for...conspiring to commit crimes.”

¶132 Ground 30 argued that Beara was convicted of persecutions through “opportunistic” killings but that persecution required an element of special intent that was not required for opportunistic crimes falling under the JCE III mode of liability under which he was convicted.

¶133 Nikolić’s brief contained 26 grounds of objection, the majority of which were also disputes of factual findings. Ground 3 argued that the Trial Chamber failed in the identification of the legal elements of genocide by finding that state policy was not an essential legal element of the crime of genocide. The Trial Chamber found that these arguments had already been considered by the jurisprudence of the ICTY and Nikolić disagreed. In particular, Nikolić argued that the Trial Chamber’s invocation of *Krstić* (“the offence of genocide...does not require proof of.... a widespread and systematic attack”) was flawed on the grounds that a widespread and systematic attack is not equated with state policy. The Court also relied on *Jelisić* in which the Appeals Chamber found “the existence of a plan or policy is not a legal ingredient” of genocide, but Nikolić countered that the context indicated that the conclusion was limited to manners of proving intent, not as a separate element.

¶134 Ground 7 was that the Trial Chamber violated its obligation to “specify the common criminal purpose of both the goal intend and its scope.” The Prosecution alleged that the JCE intended to murder all able-bodied Muslim men from Srebrenica but, in determining whether the record supported that purpose, the Chamber only found that Bosnian Serb forces executed “several thousand Bosnian Muslim males.” Nikolić argued that this finding merely describes ensuing events and did not specify the common purpose.

¶135 Ground 16 was that witness Acimovic, who was the only witness implicating Nikolić in crimes in Ročević, was not credible and that the manner in which he received orders was not peripheral. Acimovic made inconsistent statements regarding the receipt of an order including the manner in which he had received it and his knowledge of who signed the telegram in which he later claimed to receive it. The brief specifically focused on Acimovic’s claim that the telegram was coded despite the lack of capacity of his battalion to decode telegrams and on his claim to lack knowledge of the source of the telegram despite the fact that it was an official message. During trial, the Chamber gave the Prosecution leave to present rebuttal evidence because the issue of the telegrams was “significant” yet in the judgment they found the issue peripheral. Nikolić argued that it was not peripheral but undermined the credibility of Acimovic, who was the only witness that implicated him in crimes in Ročević, and was thus exculpatory in regards to those crimes.

*L. Šešelj – IT-03-67*¹²

1. Procedural Facts

¶136 The OTP has finished presenting its case in chief and the Trial Chamber denied Defense’s motion for acquittal under Rule 98*bis*. The Defense is currently presenting its case.

¹² ICTY, Prosecutor v. Šešelj, IT-03-67, <http://www.icty.org/case/seselj/4>.

2. Indictment

¶137 Vojislav Šešelj was a member of the Assembly of the Republic of Serbia. He founded and led the Serbian Radical Party. The third amended indictment was filed on December 7, 2007. The indictment alleged that Šešelj was involved in a JCE, which aimed at permanent removal of non-Serbian people from their original areas through criminal activity.

¶138 Šešelj was charged on the basis of individual criminal responsibility (article 7(1) of the Statute). Under article 5 (crimes against humanity), Šešelj was charged with persecutions on political, racial or religious grounds, deportation, inhumane acts (forcible transfer), and murder, torture, cruel treatment, wanton destruction of villages, or devastation not justified by military necessity, destruction or willful damage done to institutions dedicated to religion or education, plunder of public or private property under article 3 (violations of the laws or customs of war).

3. 2011 Decisions and Orders

¶139 The Trial Chamber denied Defense's motion for acquittal under Rule 98*bis*. The Chamber was convinced that there was sufficient evidentiary basis under Rule 98*bis* to continue the case so as to let a reasonable fact finder decide whether to convict the Accused. Judge Antonetti dissented, holding that the Accused should be acquitted for part of the indictments including crimes of murder, wanton destruction, plunder, torture, and cruel treatment under counts 4, 7, 8, 9, 12, 13, and 14.

¶140 The Trial Chamber issued numerous decisions on motions to reconsider the admissibility of evidence that were denied or partially granted before.

¶141 The Trial Chamber issued a decision with regard to when Šešelj's health examination report, written by a medical expert panel, would be filed. Also, the Trial Chamber denied Šešelj's request for access to the confidential internal memorandum of the Registry regarding the technicalities of appointing a panel of experts.

¶142 The Trial Chamber faced motions related to disclosure of confidential exhibits in the *Šešelj* case to other defendants who requested those exhibits to prepare their defenses, including *Radovan Karadzic, Mićo Stanišić, and Franko Simatović*. The Trial Chamber granted those motions, some partially, in reference to, *inter alia*, article 21 of the Statute of the Tribunal, Rule 68, and Rule 70. The Chamber approved the disclosure of confidential exhibits both admitted to evidence and not admitted in the *Šešelj* case to those moving parties, as long as there was sufficient nexus between those materials and they are indeed helpful for those parties to prepare their defense, if there is no other restriction such as confidential *ex parte* documents.

¶143 The Trial Chamber denied Mr. Šešelj's motion wherein he requested the Tribunal discontinue the proceedings due to process abuse. Šešelj claimed that as he has been detained for eight years and the trial has not reached the judgment stage, his right not to be subjected to a trial with undue delay was violated. However, Trial Chamber denied his motion. The Chamber was satisfied that the Accused was well represented and his rights were not violated during the process, and it failed to find any specific time limit beyond which the trial should be regarded as unduly protracted and unfair from the perspective of international and European case law.

*M. Stanišić and Simatović (IT-03-69)*¹³

¶144 On May 5, 2011, the Trial Chamber held, pursuant to Rule 98*bis*, that there was a cause of action, and dismissed Simatović's motion to dismiss. The Defense case is currently underway. The main issue at this stage is the admissibility of evidence presented by the Defense.

1. Indictment

¶145 Jovica Stanišić was the former Chief of the State Security Service (DB), and Franko Simatović was the former Commander of Special Operation Unit of the DB. They were charged on the basis of individual criminal responsibility (article 7(1) of the Statute of the Tribunal) for persecutions on political racial or religious grounds, murder, deportation, and inhumane acts (forcible transfer) under article 5, and for murder under article 3.

2. Trial

¶146 This case was protracted for a long time due to the poor health of defendants and the death of lead Defense Counsel. After the OTP concluded presenting its case, defendant Simatović filed a motion to dismiss, which the Trial Chamber denied.

3. 2011 Decisions and Orders

¶147 At trial, evidence admissibility has been very contentious. The Trial Chamber ruled on the admissibility of evidence from the Defense by considering three factors: authenticity, relevance, and probative value. The Trial Chamber remarked that it was indicia of authenticity where evidence was derived from a government or public institution of a state where the alleged crimes happened. All of the documents provided by the countries' government must reach the standard of authenticity.

¶148 On May 5, 2011, before the presentation of the Defense's case, the Trial Chamber denied the Defense's motion for acquittal through an oral order on the basis that it was satisfied that the OTP presented sufficient evidentiary basis for the alleged crimes and concluded that there was enough evidence to support that the Accused should be responsible for those alleged crimes.

¶149 The Trial Chamber granted the Prosecution's request to videoconference with witness JF-061 due to his son's and his own health conditions. After balancing the potential risks to the witness against the defendants' right to public trial, Trial Chamber granted protective measures for witness JF-061 by proceeding in closed session and using pseudonyms. The Chamber based this decision on articles 20 and 22 of the Statute of the Tribunal, and on Rules 75 and 81*bis*.

¶150 The Trial Chamber filed two decisions with regard to the Defense's request for certification to appeal.

¶151 The Trial Chamber granted Stanišić's motion to add witness DST-081 to his witness list.

¶152 The Trial Chamber granted in part the Simatović urgent motion for provisional release. The Chamber determined that the Defendant must be present during the Rule 98*bis* hearing, and the requested provisional release should be considered separately in two periods. The Chamber referred to governing law and approved the provisional release for the first period before the Rule 98*bis* hearing, which had been arranged, on the condition that the defendant would appear for trial again, would not threaten other people, and the release would be beneficial to the

¹³ ICTY, Prosecutor v. Stanišić and Simatović, IT-03-69, http://www.icty.org/case/stanistic_simatovic/4.

Defense preparation. The Chamber denied provisional release for the second stage holding that there were no compelling humanitarian grounds, which were necessary for a decision granting provisional release.

¶153 The Appeal Chamber dismissed Frano Simatović's appeal against the decision denying his urgent request for provisional release.

¶154 The Trial Chamber denied Stanišić's motion for equality of arms and immediate suspension of the trial.

¶155 The Registry made a decision to change assignment of Defense Counsel.

¶156 The Trial Chamber granted the Defense motion for leave to exceed the word limit, but denied Defense's request to provide remedy analysis for and considering as evidence the Prosecution's non-compliance with Rule 90(H) of the Rule of Procedure and Evidence when cross-examining Defense Witnesses.

¶157 The OTP filed a motion for submission on additional victims. The Trial Chamber granted the motion, but the Chamber held that the evidence did not require amending the operative indictment because the Accused were participating in the alleged crimes through planning, preparation and execution, and not physically. So, the specific names of victims have no effect the defendants' criminal liability.

*N. Milan Lukić & Sredoje Lukić (IT-98-32/1) "Višegrad"*¹⁴

1. Procedural Facts

¶158 The appeal from both the Defense and the OTP was heard on September 14 and 15, 2011. The Appeal Chamber remains in review.

2. Indictment

¶159 The operative indictment was filed on February 27, 2006, after being amended twice. The indictment alleges that Milan Lukić organized a group of local paramilitaries with ties to the Visegrad police and Serb military units, which were sometimes referred to as the "White Eagles" and "Avengers." Before the war, Sredoje Lukić was a Visegrad policeman and upon the war's commencement he joined a group of paramilitaries set up by Milan Lukić. They allegedly committed and aided and abetted crimes against humanity through the persecution of non-Serbian civilians on political, racial or religious grounds in Visegrad.

¶160 Milan Lukić and Sredoje Lukić, with specific intent to discriminate on political, racial or religious grounds, are alleged to have committed the crime of persecution and, with the awareness of the discriminatory intent of other perpetrators, aided and abetted in the execution of the crime of persecution.

¶161 Milan Lukić was charged on the basis of individual criminal responsibility (article 7(1) of the Statute of the Tribunal) with persecutions on political, racial and religious grounds; murder; inhumane acts; and extermination (crimes against humanity, article 5), and murder and cruel treatment (violations of laws or customs of war, article 3)

¶162 Sredoje Lukić was charged on the basis of individual criminal responsibility (article 7(1) of the Statute of the Tribunal) with persecutions on political, racial and religious grounds, extermination, murder; and inhumane acts (crimes against humanity, article 5), and murder and cruel treatment (violations of laws or customs of war, article 3).

¹⁴ ICTY, Prosecutor v. Lukić and Lukić, IT-98-32/1, http://www.icty.org/case/milan_lukic_sredoje_lukic/4.

¶163 The trial commenced on July 9, 2008, and a judgment was rendered on July 20, 2009.

3. Appeal

¶164 On August 19, 2009, both Defense teams filed their notices of appeal, and the Prosecution filed a notice of appeal with regard to Sredoje Lukić. On November 2, 2009, the OTP and defendant Sredoje Lukić filed their appeal briefs. On March 17, 2010, the Defense of Milan Lukić filed its appeal brief. The appeals hearing is scheduled to take place on September 14 and 15, 2011.

4. 2011 Decisions and Orders

¶165 The Appeals Chamber denied Milan Lukić's motion to admit additional evidence on appeal.

¶166 The Appeals Chamber issued an order instructing parties on what would be at issue at the appeal hearing.

¶167 The President issued two orders to revise the panel of appellate judges.

5. Issues for Appeal

¶168 Lukić submitted eight grounds of appeal, which predominantly focused on two issues. The first concerned the Trial Chamber's holding that witnesses at the crime scene recognized Lukić on the grounds that there was insufficient evidence supporting this recognition. Second is that the Chamber found that two crimes allegedly committed by Lukić constituted "killing on a large scale" so as to satisfy the requirement of extermination, and Lukić contended that those two crimes should not be regarded as "massive" or "on a large scale" based on international law and the Tribunal's case law.

¶169 Regarding the first issue, the Defense first criticized the Trial Chamber's lack of a rigorous and correct standard when considering and scrutinizing the evidence that purported to identify the perpetrator. Second, the Defense cast doubt upon the ability of witnesses to recognize the perpetrator years after the commission of the crimes. Third, the Defense pointed out that the Trial Chamber's holding that Milan Lukić was recognized by witnesses while the Prosecution conceded in closing argument that there was insufficient basis for recognition was made in error. Fourth, the Defense Counsel rebutted the Prosecution's argument that the Tribunal found recognition was more reliable than the identification. Fifth, the Defense claimed that they did not have the opportunity to exercise the right to cross-examine because neither of the two witnesses who testified to the recognition of Lukić appeared for cross-examination.

¶170 To the second issue, the Defense pointed out that "massiveness refers to the number of victims instead of character of the crime." The Trial Chamber, however, relied upon the character instead of number of victims to reach the extermination. The crime of extermination originated at Nuremberg. Pursuant to its origin, the threshold for the number of victims required to constitute extermination is 733 compared to the 60 killings in this case. The Defense requested the Appeal Chamber be guided by the Martić trial judgment decided by ICTY where the deaths of 165 victims could not even be a basis for extermination, and by the 2008 ICTR trial judgment of Zigiranyirazo. The Defense moved for a reversal of Milan's extermination conviction on the grounds that the limited number of the victims as not enough to amount to extermination and that there was no joint criminal enterprise.

¶171 In response to Milan Lukić’s submission, the Prosecution addressed the law regarding identification evidence and pointed out why Milan “failed to show error in the Trial Chamber’s approach to identification,” which was the key evidence in support of the Trial Chamber’s conviction. The Prosecution discussed at length how the witnesses could identify Milan Lukić at crime scenes. It also discussed the issue of extermination. The Prosecution contended that the number of the victims was on a large enough scale to amount to extermination, and the contextual factors surrounding each killing also qualified them as extermination.

¶172 Sredoje submitted five grounds of appeal. Sredoje Lukić’s appeal focused on his conviction of aiding and abetting, contending that he was neither present nor armed. The Defense contended that the Prosecution had neither proved Sredoje Lukić’s presence at Pionirska Street or during the transfer, nor his participation or aiding and abetting the commission of the crimes beyond a reasonable doubt. The Defense Counsel pointed out contradictions between the evidence and the witness testimonies that claimed to have identified the Defendant. The Defense counsel addressed the dual standard used by the Trial Chamber with respect to the previous jurisprudence governing the identification. The Defense Counsel further noted that the Prosecution and Chamber accepted the presence of the defendant at only two of the five stages of the crime. The Defense argued that no witness truly saw or had the ability to distinguish Sredoje Lukić at the scene of the robbery, and the Chamber, with Judge Robinson dissenting, found the Accused was present. Additionally, the defendant was unarmed at one of the two stages. Based on this factor the defendant could not be found guilty of the crime of aiding and abetting murder and inhumane acts because the conviction of the Chamber was based on the assumption that the defendant was present and armed at the crime scene.

¶173 In response to Sredoje Lukić’s submission, the Prosecution addressed the issues the defendant raised regarding his responsibility in aiding and abetting the crimes at Pionirska, particularly the issue of identification. The Prosecution contended that the witness could recognize the Defendant when he was present at the crime scene, that he was armed, and that the Defendant positively participated and contributed to the success of the crime.

¶174 Prosecution submitted two grounds of appeal against the judgment of Sredoje by the Trial Chamber.

6. Further Action

¶175 The Appeals Chamber heard the Defense on September 14 and 15, 2011. No decision has been rendered.

O. Đorđević (IT-05-87/1) “Kosovo”¹⁵

1. Procedural Facts

¶176 This case has completed its trial stage this year and Đorđević received the judgment from the Trial Chamber on February 23, 2011. Both the Prosecution and Defense filed appeals.

2. Indictment

¶177 Đorđević was the Assistant Minister of the Serbian Ministry of Internal Affairs (MUP) and Chief of the Public Security Department (RJB) of the MUP. His initial indictment was filed

¹⁵ ICTY, Prosecutor v. Đorđević, IT-05-87/1, <http://www.icty.org/case/djordjevic/4>.

October 2, 2003, and was finally decided on June 26, 2006, after having been amended four times. He was indicted for crimes against humanity including: deportation, forcible transfer, murder, and persecutions, and the war crime of murder against Kosovo Albanians.

3. Judgment

i) Issue 1

¶178 The Chamber found that evidence showed that Kosovo Albanian people were leaving due to the violent conduct of Serbian forces, and not for the reasons set forth by the Defense. Although the other reasons may have had affected some Kosovo Albanians, the main factor that caused the Kosovo Albanians to leave their homes was the Serbian forces' violent conduct against them. The Chamber was thus satisfied that the offences of deportation and forcible transfer were established by evidence.

ii) Issue 2

¶179 The Chamber was satisfied that the murder of civilians, who were neither armed nor in any form of armed conflict, was proven. The Chamber also found that the murders were mostly committed by the Serbian police forces, which the defendant was in charge of. The Chamber found that the Accused did not commit any crime himself. However, he was criminally responsible for the crimes because Serbian forces that committed those crimes were under his command.

iii) Issue 3

¶180 The Chamber held that persecution through sexual assault was not established since no evidence showed the perpetrators acted with the intent to discriminate.

iv) Issue 4

¶181 The Defense contended that there was no such plan and the crimes committed in the indictment were isolated incidents perpetrated randomly. Also, it contended that the actions by Serbian forces were aimed only at "terrorist forces," which therefore made their actions legal under customary international law. The Chamber held that the operations causing the deaths of civilian was under the guise of anti-terrorist operations, but the target of the operations was the Kosovo Albanian population, and not the KLA. Thus, the Chamber was convinced that the Accused participated in a JCE with the purpose of changing the ethnic balance in Kosovo.

v) Issue 5

¶182 The Chamber decided that the Defendant actively participated and played a key role in the JCE on account of his legal power and effective control over police in Kosovo. The Defendant was therefore found responsible for having implemented or contributed to the implementation of the plan.

vi) Issue 6

¶183 The Chamber rejected Defense's denial that there were Serbian paramilitary forces during the indictment period.

vii) Issue 7

¶184 The Defendant played a crucial role in MUP to conceal murders.

viii) *Issue 8*

¶185 The Accused failed to do anything to ensure the investigation of crimes. The Accused's conduct contributed to violence and terror by Serbian forces against Kosovo Albanian people, with the purpose of changing the ethnic composition in Kosovo. Therefore, the Chamber held that the defendant aided and abetted the crimes alleged in the indictment and participated in the JCE. Under article 7(3), he was also responsible for not preventing or punishing the crimes committed by Serbian forces under his effective control that time. However, the Chamber could not convict the Accused under article 7(3) due to the adverse findings from article 7(1).

4. Conviction

- Deportation under article 5
- Other inhumane acts under article 5
- Murder under article 5
- Murder under article 3
- Persecution under article 5

5. Sentence:

¶186 27 years' imprisonment.

6. Appeals Proceedings

¶187 On May 24, 2011, both Parties filed their notices of appeal against the judgment. They both later submitted a public redacted version of their appeal briefs—the Prosecution filed theirs on August 17, 2011, and the Defense filed theirs on September 30, 2011. The appeal has not been heard or scheduled yet.

7. Grounds for Appeals

¶188 The Defense's appeal set forth 19 grounds upon which it tried to prove that the Defendant's conviction and sentence were wrong. Those grounds focus on the existence of the JCE, various errors made by the Trial Chamber in findings of fact, and the approach through which the Trial Chamber reached their sentence. Additionally defense counsel attacked the Chamber's failure to consider mitigating factors, and identified error in law and facts as to the aggravating factors. The Prosecution's appeal raised two issues—the Defendant's responsibility under count 5 and an inadequate sentence.