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**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-03-69-PT**

**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson  
Judge O-Gon Kwon  
Judge Iain Bonomy

**Registrar:** Mr. Hans Holthuis

**Date filed:** 18 January 2005

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

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**DEFENCE PRE-TRIAL BRIEF**

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**DEFENCE PRE-TRIAL BRIEF**

**I - Introduction:**

1. On 19 July 2004, Prosecution filed the "Pre-Trial Brief".
2. Pursuant to the Order of the Pre-Trial Judge of ICTY<sup>1</sup>, whereby the Defence of Mr. Franko Simatović was ordered to file its Defence Pre-Trial Brief by not later than 18 January 2005, the Defence herewith respectfully submits its "Defence Pre-Trial Brief".
3. With this Brief, Defence intends to presents the defence concept, in general, as well its view with respect to the issues presented by the Prosecution in its Pre-Trial Brief. Defence wants, as a general point of introduction, to draw the attention of the Prosecution to its obligation to act within the meaning of Article 21(3) of the Statute, and Rule 87(A) of the Rules of Procedure and Evidence.
4. Defence also holds that the facts refuted by Mr. Simatović will also be a subject of establishment in the case Prosecutor v. Milošević (IT-02-54-T). The parts of the Milošević case in respect of Croatia and Bosnia are closely related with this case. To a large extent are the

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<sup>1</sup> Status Conference, 23.09.2004.

crime based allegations identical in both cases, and the accused are mentioned as members of the same joint criminal enterprise. The Prosecutor v. Milošević case proceedings are currently in defence phase which may also have an impact on the evidence disclosed in the Prosecutor v. Simatović case, as well as to application of Rule 89(f) and 92 bis. Further course of the proceedings in the Prosecutor v. Milošević may also guide the defence to make further investigations in this case. Defence wishes to notify the Chamber that it will be presenting its views on all factual and legal issues in further course of the proceedings, and particularly on the occasion of the Opening Statement at the outset of this case in the trial phase.

## ***II – The Law – Rule 65ter (F)***

5. Pursuant to Rule 65ter(F) of the Rules of Procedure and Evidence of this Tribunal, the Defence hereby submits its Brief. Rule 65ter(F) provides:

“After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and no later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

- (i) in general terms, the nature of the accused’s defence;
- (ii) the matters with which the accused takes issue in the Prosecutor’s pre-trial brief; and
- (iii) in the case of each such matter, the reason why the accused takes issue with it.”

## ***III - The Procedural History of the case and the Indictment***

6. The Accused was indicted on 1 May 2003. The Second Amended Indictment against the Accused was issued on 9 December 2003.

7. The Indictment charges the Accused with the following acts:

**COUNT 1:** From on or about 1 April 1991 until 31 December 1995, Jovica Stanišić and Franko Simatović, acting alone or in concert with members of the joint criminal enterprise, planned, ordered, committed or otherwise aided and abetted the planning, preparation or execution of

persecutions of Croats, Bosnian Muslims and Bosnian Croats and other non-Serbs within the SAO Krajina, SAO SBWS and the BiH municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanski Most and Zvornik.

**Persecutions on political racial or religious grounds, a crime against humanity, punishable under Articles 5(h) and 7(1) of the Statute of the Tribunal.**

**COUNT 2:**

From on or about May 1991 until 31 December 1995, Jovica Stanišić and Franko Simatović acting alone or in concert with other members of the joint criminal enterprise planned, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the murder and wilful killing of non-Serbs, principally Croats, Bosnian Muslims and Bosnian Croats. The murder and wilful killing were effected by the killing of Croats, Bosnian Muslims, Bosnian Croats and other non-Serbs in their towns and villages during and after the take-over of the SAO Krajina, SAO SBWS and territories in BiH in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanski Most and Zvornik.

**Murder, a crime against humanity, punishable under Articles 5(a) and 7(1) of the Statute of the Tribunal**

**COUNT 3:**

From on or about May 1991 until 31 December 1995, Jovica Stanišić and Franko Simatović acting alone or in concert with other members of the joint criminal enterprise planned, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the murder and wilful killing of non-Serbs, principally Croats, Bosnian Muslims and Bosnian Croats. The murder and wilful killing were effected by the killing of Croats, Bosnian Muslims, Bosnian Croats and other non-Serbs in their towns and villages during and after the take-over of the SAO Krajina, SAO SBWS and territories in BiH in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanski Most and Zvornik.

**Murder, a violation of the laws or customs of war, as recognized by Common Article 3 (1)(a) of the Geneva**

Conventions of 1949, punishable under Articles 3 and 7(1) of the Statute of the Tribunal.

**COUNT 4:**

From on or about May 1991 until 31 December Jovica Stanišić and Franko Simatović acting alone or in concert with members of the joint criminal enterprise, planned, committed or otherwise aided and abetted the planning, preparation or execution of the unlawful forcible transfer or deportation of thousands of Croats, Bosnian Muslims, Bosnian Croats and other non-Serb civilians from their legal domiciles in the SAO Krajina, SAO SBWS and territories of BiH in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanski Most and Zvornik to other countries or other areas outside their home municipalities.

**Deportation**, a crime against humanity, punishable under Articles 5(d) and 7(1) of the Statute of the Tribunal.

**COUNT 5:**

From on or about May 1991 until 31 December Jovica Stanišić and Franko Simatović acting alone or in concert with members of the joint criminal enterprise, planned, committed or otherwise aided and abetted the planning, preparation or execution of the unlawful forcible transfer or deportation of thousands of Croats, Bosnian Muslims, Bosnian Croats and other non-Serb civilians from their legal domiciles in the SAO Krajina, SAO SBWS and territories of BiH in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanski Most and Zvornik to other countries or other areas outside their home municipalities.

**Inhumane acts** (forcible transfer), a crime against humanity, punishable under Articles 5(i) and 7(1) of the Statute of the Tribunal

8. Pursuant to the afore indicated acts, alleged in the Indictment, the Accused is charged in terms of Articles 7(1) of the Statute of the Tribunal, because he is individually criminally responsible for the crimes referred to in Articles 3 and 5 of the Statute of the Tribunal as described in the Indictment, which he planned, ordered, committed or in whose planning, preparation or execution he otherwise aided and

abetted. By using the word "committed" in the Indictment, the Prosecutor does not allege that the accused physically committed any of the crimes charged personally. "Committed" in the Indictment includes participation in a joint criminal enterprise.

***IV - The Presumption of Innocence and Proof of Guilt beyond a Reasonable Doubt***

9. The accused Franko Simatović pleaded not guilty to all counts of the Indictment confirmed on 1 May 2003, and amended on 9 December 2003.
10. Article 21(3) of the Statute sets forth:  
"The Accused shall be presumed innocent until proved guilty according to the provisions of the present Statute"
11. The burden of proof is on the part of the Prosecution, and before convicting an accused of any criminal offence the Prosecution has to satisfy the Trial Chamber, beyond any reasonable doubt, about the accused's guilt<sup>2</sup>.
12. Rule 87 (A) sets forth:  
"A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt"
13. The standard of proof beyond a reasonable doubt is the standard set for the International Criminal Court in Article 66 ("Presumption of Innocence"), para 3: "In order to convict an accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt".
14. The Trial Chamber in Prosecution v. Delalić quoted invoked an example from English case law Miller v. Minister of Pensions.

Judge Denning J. provided the following opinion:

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<sup>2</sup> Prosecutor v. Kupreškić, Trial Chamber Judgement IT-95-16-T, 14.01.2000

“The degree of cogency as is required in a criminal case before an accused person is found guilty... is well settled... Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable”, the case is proved beyond reasonable doubt, but nothing short of will suffice<sup>3</sup>.

15. The general principle to be applied by the Trial Chamber is clearly, on the basis of this brief analysis, that the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.<sup>4</sup>

16. If at the conclusion of the proceedings, there is any doubt that the Prosecution has established the case against the Accused, the Accused is entitled to the benefit of the doubt and he must be acquitted.<sup>5</sup>

#### V - *Statement of the Nature of the Mr. Simatović Defence*

17. Mr. Simatović is charged in the Indictment under Articles 3, 5 and 7(1) of the Statute. Mr. Simatović asserts that he has no individual criminal responsibility and that he is not guilty of any allegation of the Indictment.

18. The Defence wishes to inform the Chamber that no agreement on undisputed facts has been reached with the Prosecution in the hitherto course of the proceedings. In relation to the allegations of the Indictment, Defence admits that Franko Simatović, aka “Frenki”, was born on 1 April 1950, in Belgrade, in the Republic of Serbia. Franko Simatović was employed with the Interior Ministry (MUP) of the Republic of Serbia – State Security Department on 15 July 1978. Franko Simatović retired on 7 December 2001.<sup>6</sup>

<sup>3</sup> Delalić Trial Judgment IT-96-21-T, para 600

<sup>4</sup> Delalić Trial Chamber Judgement IT-96-21-T, 16.11.1998., para 601

<sup>5</sup> Kupreškić Trial Chamber Judgement IT-95-16-T, 14.01.2000, p. 339 (a)

<sup>6</sup> Para 2 of the Indictment



19. The Defence holds that all other allegations of the Indictment are incorrect, not based on facts and disputable. Therefore, in further course of the proceedings the Defence will prove that:

20. Franko Simatović was not a commander of the Special Operations Unit of the DB at the time to which the Indictment relates.<sup>7</sup> Serbian DB neither established nor, consequently, assisted in illegal establishment of "secret units" mentioned in the Indictment. Accordingly, the accused Franko Simatović did not participate in this activity, either. Also, the accused did not assist in establishment of the training centre in Golubic near Knin in the SAO Krajina or participate in providing armaments for the units trained there. Franko Simatović did not participate in sending the trained units and individuals to other armed formations in the Republic of Croatia and Bosnia and Herzegovina.<sup>8</sup> Franko Simatović did not have any type of responsibility vis-à-vis the armed formations taking part in operations in Croatia and Bosnia.<sup>9</sup> In the same way, he did not organize, train, supply, provide armaments, and did not finance the paramilitary units or had any kind of responsibility with respect to the acting of any military formation and individuals with regard to the events mentioned in the indictment<sup>10</sup>. Franko Simatović is neither accountable for nor linked with the events in the municipalities of Bijeljina, Bosanski Šamac, Doboj, Mrkonjić Grad, Sanjski Most and Zvornik<sup>11</sup>.

21. Franko Simatović did not act within the joint criminal enterprise and, accordingly, did not participate in the forming, financing, supplying of, and in providing support to the special units of the Republic of Serbia; he did not manage DB members and agents in their possible participation in and preparation of the crimes referred to in the Indictment; Franko Simatović did not provide arms, funds, training, logistical support to "Special Units of the Republic of Serbia DB".<sup>12</sup>

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<sup>7</sup> Ibid

<sup>8</sup> Ibid. Para 3

<sup>9</sup> Ibid. Para 5

<sup>10</sup> Ibid. Para 6

<sup>11</sup> Ibid. Para 7

<sup>12</sup> Ibid. Para 13

22. Mr. Franko Simatović's defence will be that at the time to which the Indictment relates he was at a low level position in the Ministry of the Interior of the Republic of Serbia, and that he acted within his *de jure* authorizations. Franko Simatović was not a member of the Socialist Party of Serbia during the time relevant for the Indictment, and he did not belong to this Party either before or after the said time.<sup>13</sup> Franko Simatović did not act within the joint criminal enterprise and, accordingly, he could not be aware of the foreseeable consequences of such enterprise. Defence will prove that Franko Simatović is not individually criminally responsible within the meaning of Article 7(1) of the Statute for the crimes referred to in the Indictment – that he planned, ordered or otherwise aided and abetted in the planning, preparation and execution of these crimes.<sup>14</sup> Therefore, Franko Simatović acted in accordance with the Geneva Conventions of 1949, and did not commit the crimes against humanity and violations of the laws or customs of war.

***VI – Matters With Which Mr. Simatović Takes Issue in the Prosecution  
Pre-Trial Brief***

23. Mr. Simatović believes that the Prosecution did not credibly indicate the truthfulness of factual allegations made in the Indictment and in Pre-Trial Brief, except for the allegations in paragraph 18 of the Defence Pre-Trial Brief. Prosecution did not credibly indicate the authenticity of the evidence offered, either. Accordingly, it is the Prosecution's duty to prove each fact with respect to the charges against Mr. Simatović.

24. Mr. Simatović contests the truthfulness and correctness of all factual allegations of the Indictment and Pre-Trial Brief, and rejects the legal qualification of the facts as presented by the Prosecution. Mr. Simatović ascertains that he did not act as a member of the joint criminal enterprise, and that he did not plan, order, commit or

<sup>13</sup> Socialist Party of Serbia, SPS – The leading political party at the time the indictment refers to

<sup>14</sup> Para 14 of the Indictment

otherwise aid and abet in the planning, preparation, or execution of any crimes.

***Factual Allegations in Prosecution Pre-Trial Brief Rebutted by Mr. Simatović***

25. Mr. Franko Simatović contests that in the period between 1 August 1991 and 30 December 1995 and, in fact, earlier he was a commander of Special Units of Serbian DB and that he managed their operations in Croatia and Bosnia. The Prosecution allegations from the Pre-Trial Brief that Franko Simatović “was very close to Jovica Stanišić and reported directly to him”, do not point to the position of the accused in the period to which the Indictment relates.<sup>15</sup> Franko Simatović contests to have been a “key participant in the implementation of a common criminal plan to remove forcibly non-Serbs from targeted regions of Croatia and BiH, and the existence of such a plan<sup>16</sup>.”

26. Franko Simatović did not participate in the formation of SAO Krajina Police, and he contests the Prosecution allegations that Martić “would not have been in a position to form or run his police” without the “support and encouragement of Franko Simatović”.<sup>17</sup>

27. Franko Simatović contests the allegations of the Prosecution Indictment and those of the Pre-Trial Brief with respect to the formation and running of the “Golubić” camp near Knin. The Prosecution also mentions in its Pre-Trial Brief that Franko Simatović had an “active participation”, which does not provide enough information to the accused with respect to the Prosecution attitude about this specific fact.<sup>18</sup>

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<sup>15</sup> Para 3 of the Prosecution Pre-Trial Brief

<sup>16</sup> Ibid. Paras 5-18, 32-48

<sup>17</sup> Ibid. Para 19-23

<sup>18</sup> Ibid. Para 24

28. Franko Simatović also contests that he was providing an absolute support to local Serb TO and Martić's Police to "persecute non-Serbs within SAO Krajina".<sup>19</sup>

29. The allegations of the Prosecution Pre-Trial Brief with regard to the relations of the accused with Dragan Vasiljković, aka Captain Dragan, are rebutted by Mr. Franko Simatović as he considers them non correct.<sup>20</sup>

30. In accordance with the above, Mr. Simatović contests that he participated in JCE and also contests to have undertaken any action referred to in the Prosecution Pre-Trial Brief, as "accused's participation in the common plan"<sup>21</sup>. The allegations of the Prosecution Pre-Trial Brief that Franko Simatović was "directly subordinated to Jovica Stanišić at all times relevant to this Indictment" and that he was "a close associate and ally of Jovica Stanišić", do not provide enough information about the Prosecution's attitude with respect to the position of the accused Simatović. Mr. Simatović acted in accordance with his *de iure* position in the Serbian DB. Mr. Simatović contests all other facts pointing to his acting other than the one in line with his *de iure* position in the Serbian DB.<sup>22</sup>

31. Mr. Simatović contests all Prosecution allegations relating to the work of the Republic of Serbia DB before and after 1992.<sup>23</sup>

32. As already said, Franko Simatović contests all allegations of the Prosecution Pre-Trial Brief concerning the participation in the common plan, as well as all of the activities referred to in paragraph 49 of the Prosecution Pre-Trial Brief. In that respect Mr. Simatović contests to have been a "channel for communication between Slobodan Milošević and Croatian and Bosnian Serb political leaders"<sup>24</sup>, and notes that in further text of the Prosecution Pre-Trial

<sup>19</sup> Ibid. Paras 20 and 29

<sup>20</sup> Ibid. Para 30

<sup>21</sup> Ibid. Para 49

<sup>22</sup> Ibid. Para 54

<sup>23</sup> Ibid. Paras 50-65

<sup>24</sup> Ibid. Para 49i

Brief he is not denoted as a "channel of communication and influence between Slobodan Milošević and Bosnian Serb political leadership, in particular, Radovan Karadžić".<sup>25</sup>

33. Mr. Simatović contests the existence of, and his belonging to and acting within "military line of the MUP of Serbia"<sup>26</sup>. The Prosecution allegations in Pre-Trial Brief concerning the "participation of Franko Simatović in the relations with Serb leadership in SAO Krajina, SAO SBWS and Serb leadership in BiH" are not correct and not based on arguments<sup>27</sup>
34. The accused contests the existence of the Republic of Serbia DB units, and/or that the said units were formed during the time relevant to the Indictment, or earlier, and that he participated in the arming, supplying and financing of such units. The unit with the abbreviated name JSO (Special Operation Unit) was formed after the period relevant for the Indictment.<sup>28</sup>
35. Mr. Simatović also contests his participation in the formation and running of training camps, and contests the correctness of the quotations from the speech he read at the 1997 Ceremony at Kula<sup>29</sup>.
36. Mr. Simatović contests the allegations of the Prosecution Pre-Trial Brief relating to the participation of volunteers through political parties and satellite units of the Serbian DB. The accused did not have any relationship with the persons and organizations mentioned in that context and, accordingly, he did not participate in the financing of Serb forces operating in Croatia and Bosnia.<sup>30</sup>
37. According to the above, Mr. Simatović contests all allegations of the Prosecution Pre-Trial Brief relating to any form of his participation in the events in Bijeljina, Zvornik, Bosanski Šamac and Sanski

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<sup>25</sup> Ibid. Para 66

<sup>26</sup> Ibid. Para 67

<sup>27</sup> Ibid. Paras 68-76

<sup>28</sup> Ibid. Paras 77-90

<sup>29</sup> Ibid. Paras 91-94

<sup>30</sup> Ibid. Paras 95-128

Most.<sup>31</sup> Also, the accused contests that he was managing members and agents of the Serbian DB and coordinating Serb forces in SAO SBWS and BiH<sup>32</sup>.

38. Mr. Franko Simatović contests all factual allegations relating to the “examples of coordinated actions of Serb Forces”, and to operations in Drina valley, operations in Sarajevo and operations in Western Bosnia. The mentioned events are not mentioned and described under the charges which relate to SAO Krajina, SAO SBWS, Bijeljina, Bosanski Šamac, Doboj, Sanski Most and Zvornik.<sup>33</sup> The accused also contests all factual allegations with regard to crime base in Croatia and Bosnia, as well as any form of responsibility in accordance with Article 7(1) of the Statute with respect to the aforementioned events.<sup>34</sup>

39. Paragraph 33 of the Indictment relating to the events in Vukovar Hospital, paragraphs 34 and 35 relating to the events in SAO SBWS and paragraph 53 of the Indictment relating to the events in Mrkonjić Grad within the crime base, are not included in the Prosecution Pre-Trial Brief. Therefore, Defence is not going to present its views about them.

***Legal Allegations in Prosecution Pre-Trial Brief Rebutted by Mr. Simatović***

40. Mr. Franko Simatović is charged in the Indictment under Article 3; 5 and 7 of the Statute of the ICTY.

**Article 3 of the Statute ICTY**

41. Under Article 3, Mr. Simatović is charged with murder, a violation of the laws and customs of war, punishable under Article 3 of the Statute of the Tribunal and recognized by Article 3 (1)(a) of the Geneva Conventions of 1949.<sup>35</sup>

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<sup>31</sup> Ibid. Paras 129-147

<sup>32</sup> Ibid. Paras 148-159

<sup>33</sup> Ibid. Paras 160-172

<sup>34</sup> Ibid. Paras 173-272

<sup>35</sup> Count 3 of the Indictment

42. Article 3 of the Statute, points a) to e) lists the actings which account for the violations of the laws or customs of war. Article 3 of the Statute is not limited to the said listed actings only.<sup>36</sup>

43. Article 3 of the Statute of the Tribunal covers all violations of humanitarian law not falling under Articles 2; 4 or 5 of the Statute, specifically:

- a. violations of the Hague Law on International Conflicts,
- b. infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions,
- c. violations of common Article 3 of the Geneva Conventions and other customary rules on internal conflicts, and
- d. violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law.<sup>37</sup>

44. The Defence does not contest at this point in time, by reserving the right to present legal arguments later during the proceedings, the definition of the murder as a crime punishable pursuant to Article 3 of the Statute. Mr. Simatović asserts that he is not guilty of murder as alleged in the Indictment and he contests legal assessments made by the Prosecution in relation to the charge of murder pursuant to Article 3.

***Article 5 of the ICTY Statute:***

45. Mr. Simatović was charged pursuant to Article 5 of the Statute, crime against humanity, with:

- (a) Murder
- (b) Deportation
- (c) Persecutions on political, racial or religious grounds
- (d) Inhumane acts

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<sup>36</sup> Article 3 of the Statute: "The International Tribunal shall have the power to prosecute violating the laws or customs of war. Such violations shall include, but not be limited to..."

<sup>37</sup> Tadić Jurisdiction Decision, IT-94-I-AR72, para 89

46. In order for the conditions of Article 5 of the Statute to be in place, the following is necessary:

- there must be an attack
- the attack must be directed against any civilian population

Also, it is necessary that the attack must be widespread or systematic and that perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against civilian population and know that his acts fit into such a pattern.<sup>38</sup>

47. The Accused must have the intent to commit the underlying offence with which he is charged, and he must have knowledge that there is an attack against the civilian population and that his act comprises part of that attack.<sup>39</sup> The acts of the accused must not be isolated but form part of the attack, which means that the act, by its nature or consequence, must objectively be a part of the attack.<sup>40</sup>

48. Mr. Simatović emphasizes that he is not guilty of the crimes against humanity within the meaning of Article 5 and contests legal assessments of factual allegations made by the Prosecution in relation to the charge of crimes against humanity pursuant to Article 5 of the Statute.

#### **Murder:**

49. Mr. Simatović asserts that he is not guilty of murder as alleged in the Indictment pursuant to Article 5(a) of the Statute and he contests legal assessments of factual allegations made by the Prosecution in relation to the charge of murder pursuant to Article 5(a).

#### **Deportation:**

50. Mr. Simatović is charged with the deportation under Article 5(d) of the Statute. Mr. Simatović asserts that he is not guilty of deportation as alleged in the Indictment and he contests legal assessments of

<sup>38</sup> Prosecutor v. Kunarac et al., IT-96-23-A; IT-96-23/1-A, Kunarac Appeal Judgment, para 85

<sup>39</sup> Ibid. Para 102, 103

<sup>40</sup> Tadić Appeal Judgment T-94-1-A, para 248, 251, 271; Kunarac Appeal Judgment, para 99



factual allegations made by the Prosecution in relation to the charges of deportation pursuant to Article 5(d).

**Persecution on political, racial or religious grounds:**

51. Mr. Simatović is charged with the persecution under Article 5(h) of the Statute of the Tribunal. The Appeal Chamber in Blaškić case defined persecutions as a crime against humanity as:

(...) an act or omission which:

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus), and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)<sup>41</sup>

52. Appeal Chamber in Blaškić case further states that “although persecution often refers to a series of acts, a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.<sup>42</sup> Furthermore, the acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must constitute a crime of persecutions of gravity equal to the crimes listed in Article 5 of the Statute”.<sup>43</sup> The Appeals Chamber reiterates that the mens rea of the perpetrator carrying out the underlying physical acts of persecutions as a crime against humanity requires evidence of a “specific intent to discriminate on political, racial, or religious grounds”.<sup>44</sup>

53. Mr. Simatović asserts that he is not guilty of persecutions as alleged in the Indictment pursuant to Article 5(h) and he contests legal assessments of factual allegations made by Prosecution in relation to the charge of persecutions pursuant to Article 5(h) of the Statute of the ICTY.

<sup>41</sup> Blaškić Appeal Judgment IT-95-14-A, para 131; Krnojelac Appeal Judgment IT-97-25-A, para 185; Vasiljević Appeal Judgment, para 113

<sup>42</sup> Blaškić Appeal Judgment, para 135; Vasiljević Appeal Judgment, para 113

<sup>43</sup> Blaškić Appeal Judgment, para 135; Krnojelac Appeal Judgment, para 199, 221

<sup>44</sup> Blaškić Appeal Judgment, para 164; Krnojelac Appeal Judgment, para 184; Vasiljević Appeal Judgment, para 113

**Inhumane Acts (Forcible Transfer):**

54. Mr. Simatović is charged with inhumane acts (forcible transfer) under Article 5 (i) of the Statute of the Tribunal. Mr. Simatović asserts that he is not guilty of inhumane acts as alleged in the Indictment pursuant to Article 5(i) and he contests legal assessments of factual allegations made by the Prosecution in relation to the charge of inhumane acts under Article 5(i) of the Statute of the Tribunal.

**Article 7(1) of the Statute:**

55. Mr. Simatović is charged under Article 7(1) of the Statute that by acting alone or in concert with members of the joint criminal enterprise he planned, ordered, committed or otherwise aided and abetted the planning, preparation or execution with respect to counts 1 do 3 of the Indictment and that he planned, committed or otherwise aided and abetted the planning, preparation or execution with respect to counts 4 and 5 of the Indictment.

56. The Trial Chamber in Delalić Case<sup>45</sup> found that in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite actus reus for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the commission of the illegal act. The corresponding intent, or mens rea, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."<sup>46</sup>

<sup>45</sup> Prosecutor v. Delalić and others, IT-96-21-T

<sup>46</sup> Delalić Trial Judgment, IT-96-21-T, para 326; Tadić Judgment, para 689; Ibid, para 674

57. Mr. Simatović asserts that he is not guilty of planning pursuant to Article 7(1) and he contests legal assessments of factual allegations made by the Prosecution in relation to the charge of planning pursuant to Article 7(1).

58. Mr. Simatović is charged with committing pursuant to Article 7(1) of the Statute. This form of responsibility refers to participation in a joint criminal enterprise as a co-perpetrator. The concept of joint criminal enterprise and its application is a subject of establishment in other proceedings before the Trial Chamber and Appeals Chamber. Mr. Simatović reserves the right to make further submissions on these legal issues. Mr. Simatović asserts that he is not guilty for participating in a joint criminal enterprise as alleged in the Indictment pursuant to Article 7(1) and he contests legal assessments of factual allegations made by the Prosecution in relation to being a participant of a joint criminal enterprise pursuant to Article 7(1) of the Statute.

59. Mr. Simatović is charged for ordering under Article 7(1) of the Statute of the Tribunal. In the Vasiljević Appeal Judgment is stated:

“With regard to the extended form of joint criminal enterprise, what is required is the intention to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises “only if”, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk” – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.”<sup>47</sup>

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<sup>47</sup> Vasiljević Appeal Judgment, para 101; Tadić Appeal Judgment, para 228; Blaškić Appeal Judgment, para 33

60. The Appeals Chamber in Blaškić case, examining the issue of whether a standard of mens rea that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute, deemed it useful to consider the approaches of national jurisdictions. In common law systems, the mens rea of recklessness is sufficient to ground liability for serious crimes such as murder or manslaughter. In the United States, for example, the concept of recklessness in criminal cases has been defined in the Model Penal Code as follows:

...a conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from (the actor's) conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

According to the Model Penal Code, therefore, the degree of risk involved must be substantial and unjustifiable; a mere possibility of risk is not enough.<sup>48</sup>

61. Furthermore, in the United Kingdom, the House of Lords in the case R v. G and another considered the ambit of recklessness within the meaning of section 1 of the Criminal Damage Act of 1971. Lord Bingham's opinion, with which his colleagues agreed, was that

[A] person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk..

According to this opinion, the risk involved must be unreasonable; furthermore, with respect to a particular result, the actor in question must be aware of a risk that such a result will occur, not merely that it may occur.<sup>49</sup>

<sup>48</sup> Blaškić Appeal Judgment, para 34

<sup>49</sup> Blaškić Appeal Judgment, para 35

62. The Appeals Chamber in Blaškić case concludes that the knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law.<sup>50</sup>

63. Mr. Simatović asserts that he is not guilty of ordering as alleged in the Indictment pursuant to Article 7(1) and he contests legal assessments of factual allegations made by the Prosecution in relation to the charge of ordering pursuant to Article 7(1).

64. Mr. Simatović is charged with aiding and abetting pursuant to Article 7(1) of the Statute of the Tribunal. In Vasiljević case, the Appeals Chamber set out the actus reus and mens rea of aiding and abetting and stated:

- a. The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime...
- b. In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist (in) the commission of the specific crime of the principal.<sup>51</sup>

65. Following the above mentioned standard, the Trial Chamber in Furundžija case, held that the actus reus of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime". It further stated that the mens rea required is "the knowledge that these acts assist the commission of the offense".<sup>52</sup> The Appeals Chamber in Blaškić case reiterates that one of the requirements of the actus reus of aiding and abetting is that the support of aider and abettor has a substantial effect upon the perpetration of the crime.<sup>53</sup>

<sup>50</sup> Blaškić Appeal Judgment, para 41

<sup>51</sup> Vasiljević Appeal Judgment, para 102; Blaškić Appeal Judgment, para 45

<sup>52</sup> Furundžija Trial Judgment, para 249; Blaškić Appeal Judgment, para 46

<sup>53</sup> Blaškić Appeal Judgment, para 48

66.Mr. Simatović asserts that he is not guilty of aiding and abetting as alleged in the Indictment pursuant to Article 7(1) of the Statute of ICTY and he contests legal assessments of factual allegations made by Prosecution in relation to the charge of aiding and abetting pursuant to Article 7(1) of the Statute.

67.Mr. Simatović asserts that he is not guilty as alleged in the Indictment and requests that the Prosecution prove all of the allegations of the Indictment.

Zoran Jovanović  
Lead Counsel for Mr. Simatović  
