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**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-15-96-T

Date: 3 July 2017

Original: English

IN THE TRIAL CHAMBER

Before: Judge Burton Hall, Presiding
Judge Joseph E. Chiondo Masanche
Judge Seon Ki Park

Registrar: Mr. Olufemi Elias

Decision of: 3 July 2017

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON DEFENCE ORAL MOTION REQUESTING THE
EXCLUSION OF PORTIONS OF JOHN WILSON'S EVIDENCE**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Douglas Stringer

Counsel for the Defence:

Mr. Wayne Jordash and Mr. Iain Edwards for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

1. The Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively)¹ is seised of a request from Jovica Stanišić and Franko Simatović (collectively, “Accused”), seeking the exclusion of portions of Witness John Wilson’s evidence.² The Prosecution responded on 28 June 2017.³

I. BACKGROUND

2. On 2 February 2017, the Trial Chamber issued a decision limiting the Prosecution’s evidence primarily to that presented during the original trial.⁴ The Trial Chamber indicated however that it may allow the Prosecution to present new evidence in certain limited instances, including where new evidence may be necessary as evidence presented during the original trial has become subsequently unavailable due to circumstances outside of the Prosecution’s control.⁵ In a subsequent decision, the Trial Chamber indicated that it expects any such replacement evidence to closely relate to the issues and incidents covered by the evidence that is no longer available.⁶

3. On 18 April 2017, the Prosecution requested the admission, pursuant to Rule 111(A) of the Mechanism’s Rules of Procedure and Evidence (“Rules”), of the amalgamated written statement of Wilson, together with associated exhibits.⁷ The Prosecution submitted that Wilson’s evidence partially replaced the evidence of Charles Kirudja, who testified in the original trial but had refused to testify in the retrial.⁸ On 1 June 2017, the Trial Chamber granted the Prosecution’s request, finding that the proposed evidence was appropriate for admission subject to the fulfillment of the conditions set forth in Rule 111 of the Rules when the witness appears in court.⁹ Wilson began his testimony before the Trial Chamber on 27 June 2017, and the same day the amalgamated written statement and the associated exhibits, including those portions that are subject to the current Request, were admitted into evidence.¹⁰

¹ Order Replacing a Judge in a Case Before a Trial Chamber, 21 February 2017, p. 1.

² John Wilson, T. 28 June 2017 pp. 18-26; Informal Communication of 28 June 2017; Stanišić Defence Supplementary Submissions to Oral Motion to Exclude Evidence of John Wilson, 29 June 2017 (“Supplementary Submissions”).

³ John Wilson, T. 28 June 2017 pp. 26, 27; Prosecution Response to Defence Motion to Exclude Parts of the Evidence of General Wilson, 28 June 2017 (“Response”).

⁴ Decision on Stanišić’s Request for Stay of Proceedings, 2 February 2017 (“Decision of 2 February 2017”), para. 23.

⁵ Decision of 2 February 2017, para. 23.

⁶ Decision on Prosecution Submission in Relation to the Chamber’s Limitation on New Evidence, 31 May 2017 (Decision of 31 May 2016”), para. 17.

⁷ Prosecution Motion for Admission of Evidence of John Wilson Pursuant to Rule 111 (public with confidential Annexes A and B), 18 April 2017 (“Motion”), paras. 1, 19.

⁸ Motion, paras. 3, 15.

⁹ Decision on Prosecution Motion for Admission of Evidence of John Wilson Pursuant to Rule 111, 1 June 2017, para. 14.

¹⁰ See John Wilson, T. 27 June 2017 pp. 5 (admitting Wilson’s amalgamated written statement as Exhibit P67), 58-61 (admitting documents with Rule 70 numbers 07059 and 07060 as P164 and P165).

II. SUBMISSIONS

4. The Accused request the exclusion of portions of Wilson's evidence pertaining to the Red Berets,¹¹ Mostar,¹² Sarajevo,¹³ and Bijeljina¹⁴ (collectively, "Request"). In particular, the Accused argue that: (i) Kirudja did not testify in relation to the Red Berets, Mostar, Sarajevo, and Bijeljina and, therefore, Wilson's evidence on these four issues cannot be considered as replacing Kirudja's evidence;¹⁵ and (ii) Mostar, Sarajevo, and Bijeljina are outside the scope of the Indictment.¹⁶ Specifically in relation to Bijeljina, the Accused submit that during the original trial, the Prosecution dropped paragraphs 41 and 42 under Counts 2 and 3 of the Indictment, which relate to an attack in April 1992 in Bijeljina, and was ordered by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") not to lead any evidence relating to these paragraphs.¹⁷ The Accused add that allowing the Prosecution to lead during the retrial evidence in relation to incidents in Bijeljina for the purposes of other counts in the Indictment would render the ICTY Trial Chamber's order ineffective.¹⁸ Finally, the Accused argue that the Request is timely and should be considered.¹⁹

5. The Prosecution responds that the Request should be dismissed in its entirety.²⁰ Specifically, the Prosecution submits that the Request is untimely, as it effectively seeks reconsideration of the Trial Chamber's decision to admit Wilson's evidence, causes unjustified delays in the proceedings, and prejudices the Prosecution's ability to present its case.²¹ Regarding the four specific issues challenged by the Accused, the Prosecution argues that: (i) Wilson's evidence will necessarily

¹¹ John Wilson, T. 28 June 2017 pp. 18-20, 25; Informal Communication of 28 June 2017, referring to Exhibit P67, paras. 216-218; John Wilson, T. 27 June 2017 p. 21, lines 3-7, 14-20; p. 57, lines 4-25; pp. 58-63; p. 64, lines 1-7; Exhibits P164, P165. See John Wilson, T. 28 June 2017 pp. 25, 26, referring to Exhibit P67, para. 174.

¹² John Wilson, T. 28 June 2017 pp. 18, 21, 23. The Trial Chamber notes that, subsequently, Stanišić indicated that he no longer pursues the exclusion of Wilson's evidence on Mostar. See Informal Communication of 28 June 2017.

¹³ John Wilson, T. 28 June 2017 pp. 18, 21, 23, 25; Informal Communication of 28 June 2017, referring to Exhibit P67, paras. 95-97, 106, 108, 109, 114, 117-119, 121, 123, 128, 131, 133, 134, 136, 138, 141, 143, 153; John Wilson, T. 27 June 2017 p. 64, lines 9-25; p. 65, lines 1-3.

¹⁴ John Wilson, T. 28 June 2017 pp. 18, 21, 23-25; Informal Communication of 28 June 2017, referring to Exhibit P67, para. 89; John Wilson, T. 27 June 2017 p. 73, lines 7-25, p. 74, lines 1, 2.

¹⁵ John Wilson, T. 28 June 2017 pp. 18-23; Supplementary Submissions, para. 4.

¹⁶ John Wilson, T. 28 June 2017 pp. 21, 23-25. See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008 ("Indictment").

¹⁷ John Wilson, T. 28 June 2017 pp. 23-25, referring, *inter alia*, to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision Pursuant to Rule 73bis(D), 4 February 2008 ("ICTY Decision of 4 February 2008"), paras. 28, 29; Supplementary Submissions, paras. 6-10, referring to ICTY Decision of 4 February 2008, para. 5.

¹⁸ Supplementary Submissions, paras. 7, 10 (arguing that even if Bijeljina remains a crime base under Counts 1, 4, and 5 of the Indictment, it is "inherently unlikely" that the ICTY Trial Chamber would have allowed evidence of the April 1992 in Bijeljina for purposes of Count 1, 4, and 5 of the Indictment).

¹⁹ John Wilson, T. 28 June 2017 p. 19; Supplementary Submissions, para. 5.

²⁰ Response, paras. 1, 7.

²¹ Response, paras. 2, 3 (indicating that granting the Accused a last opportunity to seek exclusion of portions of admitted evidence and testimony after the examination-in-chief brings risks that the Prosecution will waste its allotted court time pursuing lines of questioning that may later be redacted from the record).

differ from Kirudja's evidence due to their different experiences;²² (ii) Wilson's spontaneous reference to Mostar during his testimony as well as his evidence on Sarajevo are contextual;²³ and (iii) Wilson's evidence on crimes committed in Bijeljina is relevant to Counts 1, 4, and 5 of the Indictment.²⁴

III. DISCUSSION

6. The Trial Chamber is mindful that, prior to the commencement of Wilson's testimony and the admission into evidence of his amalgamated written statement and associated exhibits, Counsel for Stanišić indicated that he "will be objecting to certain exhibits and perhaps to certain aspects of the evidence" following his examination-in-chief.²⁵

7. In relation to the Accused's first argument that Wilson's evidence pertains to issues which were not covered by the evidence of Kirudja, the Trial Chamber recalls that it expects that any replacement evidence closely relate to the issues and incidents covered by the evidence that is no longer available.²⁶ However, the Trial Chamber does not expect the replacement evidence to be identical to the evidence presented in the original trial, as the account of witnesses will necessarily differ in certain aspects on the basis of their personal experiences and individual knowledge. Rather, as the Trial Chamber has indicated, the determination of whether replacement evidence is appropriate demands some measure of nuance and flexibility.²⁷ Accordingly, the fact that the replacement evidence covers an issue that the unavailable evidence did not cover does not *per se* make it inadmissible. Therefore, the Trial Chamber does not find that portions of Wilson's evidence pertaining to the Red Berets, Mostar, Sarajevo, and Bijeljina should be excluded on the basis that they were not part of Kirudja's evidence.

8. The Trial Chamber turns next to the Accused's argument that allegations concerning Mostar, Sarajevo, and Bijeljina fall outside the scope of the Indictment. In relation to Mostar, Wilson's amalgamated written statement and oral testimony contain a brief reference to the risk of ethnic conflict in the area, the intense fighting in Mostar in the period from March until mid-May 1992 and early 1993, and the agreement in September 1992 for the concentration of Serbian heavy weapons in certain locations, including around Mostar.²⁸ The Trial Chamber considers that these

²² Response, para. 5.

²³ John Wilson, T. 28 June 2017 p. 27; Response, para. 6

²⁴ John Wilson, T. 28 June 2017 pp. 26, 27; Response, para. 6.

²⁵ John Wilson, T. 27 June 2017 p. 2.

²⁶ See Decision of 31 May 2017, para. 17.

²⁷ See Decision of 31 May 2017, paras. 12, 19.

²⁸ Exhibit P67, paras. 82, 165; John Wilson, T. 27 June 2017 p. 64.

portions of Wilson's evidence provide background and context and, therefore, do not warrant exclusion.

9. In relation to Sarajevo, the Trial Chamber notes that the Accused are not charged with crimes committed in the area and, therefore, any evidence presented specifically to support such allegations may not be the basis for conviction. The Trial Chamber notes, however, Wilson's statement that he has "provided some information related to significant events in Sarajevo in order to explain the context of [his] interactions with key individuals" mentioned elsewhere in his amalgamated statement and "the impact of these events" on the mission of the United Nations Protection Force.²⁹ To the extent that such evidence provides context, the Trial Chamber sees no need to exclude it.

10. With regard to Bijeljina, the Trial Chamber notes that, under Counts 2 and 3 of the revised second amended indictment, the Accused were charged with murder, as a violation of the laws or customs of war, and murder, as a crime against humanity, allegedly committed in Bijeljina in April 1992.³⁰ Specifically, the Prosecution alleged that:

41. On or about 31 March 1992, acting at the request of local Serb leaders in Bijeljina Željko Ražnatović, members of Arkan's Tigers, other Serb forces and special units of the Serbia [State Security Service], attacked and took control of Bijeljina.

42. In the early days of April 1992, members of Arkan's Tigers and the other special units of the Serbia [State Security Service] terrorized the civilian population by killing non-Serb civilians.

11. On 4 February 2008, the ICTY Trial Chamber exercised its discretion, under Rule 73bis(D) of the ICTY Rules of Procedure and Evidence, to fix the number of incidents included in Counts 2 and 3 of the Revised Second Amended Indictment, thereby barring the Prosecution from presenting evidence in respect of the incidents described in paragraphs 41 and 42 therein.³¹ However, allegations in relation to crimes committed in Bijeljina remained part of the Prosecution's case under Counts 1, 5, and 6 of the Revised Second Amended Indictment and the third amended indictment, which is the operative Indictment in this case.³² In particular, under Count 1 of the Indictment, the Prosecution alleges that, from no later than 1 April 1991 until 31 December 1995, special units of the Serbia State Security Service, acting alone or in conjunction with other Serbian forces, committed persecutions through forcible transfer and deportation of non-Serbian civilians as

²⁹ Exhibit P67, para. 93; John Wilson, T. 27 June 2017 p. 64.

³⁰ See *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Revised Second Amended Indictment, 15 May 2006 ("Revised Second Amended Indictment").

³¹ ICTY Decision of 4 February 2008, pp. 8, 9.

³² The Trial Chamber notes that, in the original trial, evidence regarding crimes committed in Bijeljina during the relevant period was admitted and considered by the ICTY Trial Chamber. See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement, paras. 583-589.

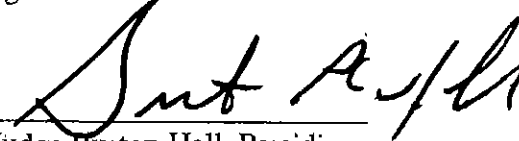
described in paragraphs 64 and 65 under Counts 5 and 6 of the Indictment.³³ Counts 5 and 6 of the Indictment, charging the Accused with deportation and inhumane acts (forcible transfer) as crimes against humanity, explicitly refer to Bijeljina.³⁴ Accordingly, the Trial Chamber considers that the Prosecution should not be prevented from presenting evidence in support of allegations of crimes committed in Bijeljina as charged under Counts 1, 5, and 6 of the Indictment. Wilson's evidence regarding the situation in Bijeljina in May 1992, including the aftermath of the fighting and the signs of "ethnic cleansing", falls squarely within these allegations.³⁵

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the Request.

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

Done this 3rd day of July 2017,
At The Hague,
The Netherlands.



Judge Burton Hall, Presiding

[Seal of the Mechanism]

³³ Indictment, paras. 22-25.

³⁴ Indictment, paras. 64-66.

³⁵ See Exhibit P67, para. 89; John Wilson, T. 27 June 2017 pp. 73, 74.