

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-15-96-T

Date: 18 August 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

THE PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**PROSECUTION SUPPLEMENTAL SUBMISSION REGARDING
EXPERT WITNESS CHRISTIAN NIELSEN**

The Office of the Prosecutor:
Mr. Douglas Stringer

Counsel for Jovica Stanišić:
Mr. Wayne Jordash QC
Mr. Iain Edwards

Counsel for Franko Simatović:
Mr. Mihajlo Bakrač
Mr. Vladimir Petrović

I. INTRODUCTION

1. On 13 October 2016 the Prosecution filed the Expert Report of Dr. Christian Nielsen, entitled “The State Security Service of the Republic of Serbia and Its Interaction with Ministries of Internal Affairs in Serb-Controlled Entities 1990-1995”¹ pursuant to Rule 116(A)² of the MICT Rules of Procedure and Evidence.³ In November 2016 Stanišić⁴ and Simatović⁵ filed their notices pursuant to Rule 116(B) stating they wish to cross-examine Dr. Nielsen.

2. Dr. Nielsen is currently a professor of Eastern European Studies at Aarhus University, School of Society and Culture, in Denmark. The Prosecution has tentatively scheduled his evidence for 14-23 November 2017. Noting that Dr. Nielsen did not give evidence in the ICTY Trial,⁶ the Prosecution submits this supplement to the Rule 116 Notice in light of the Chamber’s Decisions on the limitations on evidence and witnesses.⁷

3. Dr. Nielsen was meant to provide expert testimony during the ICTY Trial, but extenuating circumstances required the Prosecution to withdraw his evidence only six days before he was to testify, rendering his evidence “unavailable” within the meaning of the Chamber’s Decisions.⁸ Dr. Nielsen is an expert historian with specialist knowledge of the MUP structures in Serbia and the Serb-claimed regions of Croatia and BiH.⁹ His evidence is critical to the Prosecution’s case against high level

¹ R70#R70#83004 (“Expert Report”).

² Prosecution Notice of Compliance with Rule 116(A) Disclosure of Expert Reports, 13 October 2016 (“Rule 116 Notice”).

³ MICT Rules of Procedure and Evidence, MICT/1/Rev.2, 26 September 2016 (“Rules”).

⁴ Stanišić Defence Notice [*sic*] Pursuant to Rule 116(B), 14 November 2016 (“Stanišić Notice”), para.5.

⁵ Simatović Defence Notice Pursuant to Rule 116(B), 11 November 2016 (“Simatović Notice”), para.4.

⁶ *Prosecutor v. Stanišić and Simatović*, Case No.IT-03-69-T (“ICTY Trial”).

⁷ Decision on Stanišić’s Request for Stay of Proceedings, 2 February 2017 (“2 February Decision”); Decision on Requests for Certification to Appeal Decision on Stanišić’s Request for Stay of Proceedings, 1 March 2017 (“1 March Decision”); Decision on Prosecution Submission in Relation to the Chamber’s Limitation on New Evidence, 31 May 2017 (“31 May Decision”) (collectively, “Decisions”). This Submission notwithstanding, the Prosecution maintains its position that the Chamber’s *proprio motu* restriction on new evidence, originally set out in the 2 February Decision and developed in the subsequent Decisions, amounts to legal error and contravenes (1) the order of the Appeals Chamber remanding this case for a full retrial; (2) the ICTY and ICTR jurisprudence on the scope of re-trials; and (3) the Rules of Evidence and Procedure. See Prosecution Reply to Stanišić Defence Consolidated Response to Prosecution Motions for Admission of Evidence of (1) Juraj Jerneić (2) RFJ-108 (3) Ana Bićanić and (4) Vlado Vuković Pursuant to Rule 111, 15 June 2017, paras.6-9.

⁸ See 2 February Decision, para.23; 31 May Decision, para.18 (in exceptional circumstances, the Chamber will admit evidence that was unavailable during the original proceedings where the evidence is deemed critical, does not fundamentally change the nature of the case, and results in minimal prejudice).

⁹ Retrial Report, Curriculum Vitae of Christian Axboe Nielsen, p.277.

officials within Serbia's MUP, who helped to establish, arm and support Serb MUP structures, police and state security units in Croatia and BiH. Dr. Nielsen's expertise provides invaluable insight into the structure and functioning of *inter alia* the Serbian Ministry of the Interior, its State Security Service and special units, and the *de facto* and *de jure* authority of the Accused vis-à-vis these structures and units. Permitting him to testify during this retrial would not unduly prejudice the Accused¹⁰ but would result in considerable prejudice to the Prosecution's case.¹¹ The Chamber should exercise its discretion¹² to permit this vital witness to testify and admit his Expert Report into evidence.

II. DR. NIELSEN'S EVIDENCE IS ADMISSIBLE UNDER THE DECISIONS

4. Dr. Nielsen's evidence is critical to the Prosecution's case and fulfils the Chamber's criteria for admissibility of new evidence: the evidence was unavailable to the Prosecution during the ICTY Trial and does not unduly prejudice the Accused.¹³ Admitting this evidence would therefore be in the interests of justice.¹⁴

1. As a MUP expert, Dr. Nielsen's evidence is critical to this MUP case

5. As the Prosecution's only MUP expert witness, the importance of Dr. Nielsen's evidence to the Prosecution's case cannot be overemphasized.¹⁵ His Expert Report is relevant to all counts and paragraphs of the Indictment because understanding the MUP structures is fundamental to ascertaining the Accused's liability in this case.¹⁶ Dr. Nielsen's expertise goes to the crux of the Prosecution's case, the parameters of authority and influence of the Accused, both *de jure* and *de facto*, within these MUP structures, and particularly with regard to the Serbian DB and its special units.

¹⁰ See 2 February Decision, para.21; 31 May Decision, para.14.

¹¹ See 2 February Decision, para.22 (the Chamber's limitation on new evidence will be carefully calibrated not to result in prejudice to the Prosecution).

¹² See 1 March Decision, para.10.

¹³ 31 May Decision, para.18; 2 February Decision, paras.21, 23.

¹⁴ 2 February Decision, para.23; 1 March Decision, para.10; 31 May Decision, para.18.

¹⁵ 31 May Decision, para.18.

¹⁶ See Prosecution Notice of Rule 70(E) Filings, 5 September 2016, Confidential Annex B, p.24 (Rule 70 Summary of the anticipated evidence of Christian Nielsen).

6. The “specialised knowledge” of an expert witness would assist the Chamber in understanding the various complexities of the structure and functioning of multiple MUP, police and state security organs and units (federal and republican) operating in three different republics, including: how these organs and units changed and evolved over the course of nearly five years; developments in the interrelationships among these organs and units during this period; the individuals occupying key positions in each of these organs and units during various stages; the relationship of the Accused and various JCE members to these structures; the lines of reporting and authority within and among these organs and units in all three republics, including any apparent consistencies or differences between the *de jure* and the *de facto*.¹⁷

7. Also, Dr. Nielsen’s evidence is critical to assist the Chamber in assimilating the large number of documents relating to the MUP structures in this case. Through his analysis of a substantial number of relevant and probative documents, Dr. Nielsen presents a “comprehensive picture” of the MUP organs and units to assist the Chamber in understanding the context in which the events in this case unfolded.¹⁸ In particular, Dr. Nielsen has analysed the voluminous collection of personnel files of members of the Unit and the collection of lengthy JATD per diem payment lists. He has also analysed *inter alia* official Serbian MUP and DB personnel files, official orders and reports, legislation of Yugoslav institutions and their successor organisations, and communications between JCE members. His analysis of these documents and their significance is critical to the Prosecution’s case.

2. Dr. Nielsen was unavailable in the ICTY Trial

8. Dr. Nielsen was unavailable to the Prosecution in the ICTY Trial and should be permitted to testify during the retrial. The Prosecution filed a notice withdrawing him as a witness on 30 November 2010,¹⁹ six days before he was scheduled to begin

¹⁷ See *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Notice re Defence Expert Witness Radomir Milašinović, Aleksandar Pavić, and Zoran Stanković, 24 March 2010 para. 6 (an expert witness’s “specialized knowledge” can assist the Chamber in adjudicating issues in dispute); *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002 p. 2; *Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, Case No. IT-05-88-AR73.2, 30 January 2008, para.27 (expert testimony may assist the fact finder to understand the evidence presented); *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para.303 (an expert’s testimony is testimony intended to enlighten the judges on specific issues of a technical nature).

¹⁸ See *Gotovina et al.*, Case No. IT-06-90-T, Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens, 17 November 2008, para.27.

¹⁹ ICTY Trial, Prosecution Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, 30 November 2010.

his testimony on 6 December 2010.²⁰ The Prosecution had scheduled six hours of direct examination for Dr. Nielsen.

9. The Prosecution withdrew this crucial witness after information came to light during the Prosecution's final preparations, which made it untenable to tender the MUP expert report that Dr. Nielsen had co-authored with Nena Tromp, a former OTP analyst.²¹ Specifically, the Prosecution trial team learned that the portion of the report authored by Ms. Tromp contained text from reports of other individuals without attribution, including unattributed analysis of an expert external to the OTP. The Prosecution considered that tendering the report in these circumstances would have been a breach of its professional ethics. Because this occurred in the latter stages of the Prosecution's case, it was not possible for the Prosecution to commission a new MUP expert report untainted by Ms. Tromp's analysis. The Prosecution case concluded without the Prosecution's MUP expert witness.

10. The exceptional circumstances requiring the Prosecution to withdraw its MUP expert effectively rendered his evidence unavailable to the Prosecution during the ICTY Trial. This Chamber should not further penalize the Prosecution by excluding its MUP expert from testifying in the retrial, which would be against the interests of justice. The new Expert Report tendered in the retrial was authored exclusively by Dr. Nielsen. It was commissioned by the OTP after this re-trial we ordered (and prior to the issuance of the Trial Chamber's 2 February 2017 Decision on new evidence). It is composed entirely of his own research, analysis and drafting. While relying on much of the same primary documentation and fundamentally covering the same areas as the ICTY Trial Report,²² Dr. Nielsen did not draw on any of the analysis contained in portions of the ICTY Trial MUP report that he did not author. Moreover, Dr. Nielsen is not implicated by the issues arising from the portions of the ICTY Trial Report that he did not draft. There are no questions over his expert credentials or professional integrity.²³ Litigation of this issue in the *Stanišić and Župljanin* case—during which

²⁰ See ICTY Trial, T.9424 (lines 17-25).

²¹ R70#80639 and R70#80638 (collectively the "ICTY Trial Report"). See R70#80624 (memorandum regarding a telephone conversation with Christian Nielsen on 30 November 2010, disclosed to the Stanišić and Simatović Defence teams on 28 March 2011).

²² General background and political development (Retrial Report, pp.18-31, ICTY Trial Report, pp.6-11); Serbia (Retrial Report, pp.31-83, ICTY Trial Report, pp.12-29); Croatia (Retrial Report, pp.83-140, ICTY Trial Report, pp.30-44); Bosnia (Retrial Report, pp.140-271, ICTY Trial Report, pp.45-71).

²³ *Prosecutor v. Mico Stanišić and Župljanin*, Case No.IT-08-91-T, T.19288-19289 (the Trial Chamber held that the "material which the Defence seeks to have admitted into evidence does not challenge the

Dr. Nielsen had testified previously²⁴—culminated with that Trial Chamber’s conclusion that the reliability of his evidence in that case was not affected.²⁵ Subsequent to the ICTY Trial, the witness testified in the trials of Goran Hadžić²⁶ and Radovan Karadžić,²⁷ where both Trial Chambers accepted his evidence as a MUP expert.²⁸ Dr. Nielsen has also since testified in an expert capacity in Canadian and German national proceedings.²⁹

3. Admitting Dr. Nielsen’s evidence will not unduly prejudice the Accused

11. While Dr. Nielsen did not testify in the ICTY Trial, allowing him to testify and admitting his Expert Report would not unduly prejudice to the Accused. The “lack of prejudice to the Defence in connection with the admission” of Dr. Nielsen’s evidence weighs in favour of its admission in the interests of justice.³⁰

12. Dr. Nielsen’s evidence is fundamentally consistent with the Prosecution’s case in the ICTY Trial and relies largely on documents admitted in the ICTY Trial.³¹ He will be available to be comprehensively cross-examined, as Stanišić and Simatović have both filed notice under Rule 116(B) expressing their intention to cross-examine him.³²

13. Permitting Dr. Nielsen to testify will not require prolonging the proceedings to allow for Defence investigations.³³ Since Dr. Nielsen was withdrawn as a witness only six days prior to his scheduled testimony in the ICTY Trial, the Accused would have been in the advanced stages of preparation for cross-examining his expert evidence, placing them in virtually the same position with respect to their

credibility of Christian Nielsen or the reports which he has authored”); *Prosecutor v. Goran Hadžić*, Case No.IT-04-75-T, T.2561.

²⁴ *Prosecutor v. Mico Stanišić & Župljanin*, Case No.IT-08-91-T, T.4702-4782, T.4789-4844, T.4846-4921, T.4924-5002, T.5418-5491, T.5498-5578, T.5577-5647.

²⁵ *Mico Stanišić & Župljanin*, Oral Decision, 19 April 2011, T.19829. See *Prosecutor v. Mico Stanišić & Župljanin*, Motion by Mr. Mico Stansic [sic] Pursuant to Rule 68 bis Regarding Prosecution Failure to comply with Disclosure Obligations in Relation to Christian Nielsen, 15 April 2011 (confidential), Confidential Annexes A-E.

²⁶ *Prosecutor v. Hadžić*, Case No.IT-04-75 (“*Hadžić*”), T.2401-2492, T.2496-2598, T.2927-3036.

²⁷ *Prosecutor v. Karadžić*, Case No.IT-95-5-18 (“*Karadžić*”), T.16229-16254, T.16256-16357, T.16358-16458, T.16459-16552, T.553-16602.

²⁸ *Hadžić*, Decision on Prosecution Motion for Admission of Exhibits Cited in Expert Report of Christian Nielsen, 9 May 2013, para.16; *Karadžić*, Judgement, 24 March 2016 para.19. Dr. Nielsen testified 6-7, 12-14 July 2011.

²⁹ Retrial Report, XIV. Curriculum Vitae of Christian Axboe Nielsen, pg.277.

³⁰ 31 May Decision, para.14.

³¹ See 31 May Decision, para.18.

³² Stanišić Notice, para.5; Simatović Notice para.4.

³³ See 2 February Decision, para.21; 31 May Decision, para.11.

investigations as if Dr. Nielsen had testified.³⁴ His new Expert Report covers the same substance as the ICTY Trial Report he co-authored.³⁵ Thus the Accused necessarily have “some organic familiarity” and a sufficient “basic threshold of investigation” regarding Dr. Nielsen’s evidence.³⁶

14. Moreover, the Accused have now been in possession of the Expert Report since October 2016.³⁷ By the time Dr. Nielsen testifies, they will have had his materials for over a year. In their notices regarding their intention to cross-examine Dr. Nielsen, the Accused did not object to his evidence on the basis that he had not testified in the ICTY Trial, or that his Expert Report was not identical to the ICTY Trial Report.³⁸ Indeed, Stanišić included the Expert Report in his notification of documents to be used for the cross-examination of RFJ-066,³⁹ a strong indication of his familiarity with the scope of the Expert Report.

15. While examining Dr. Nielsen in court will necessarily require court time, the Prosecution’s request to examine him for 4.5 hours is modest in light of the significance of his evidence. This is less than the six hours the Prosecution had estimated for his direct examination in the ICTY Trial.⁴⁰ This would not prolong the proceedings in a way that unduly prejudices the Accused.⁴¹ On the contrary, allowing an expert witness to explain the complexities of the MUP structures and related documents would be more efficient and expedient than any attempt by the parties to piece this evidence together through fact witnesses and bar table motions.

16. The Chamber should not decline to hear this witness solely because he did not testify in the ICTY Trial. In light of the critical nature of this witness, such a drastic measure would not be “carefully calibrated” to avoid “prejudice to the Prosecution”.⁴²

³⁴ See 31 May Decision, paras.11, 15 (the fact that evidence was disclosed in the original trial may be a relevant factor in assessing the degree of prejudice); 2 February Decision, para.22. Mr. Jordash, Counsel for Stanišić across both proceedings, and Mr Bakrač, Counsel for Simatović across both proceedings, had already informed the ICTY Trial Chamber about how much time they required to cross-examine Dr. Nielsen: ICTY Trial, T.8988 (Counsel for Stanišić), T.8990 (Counsel for Simatović).

³⁵ See *above* footnote 23.

³⁶ 31 May Decision, para.16.

³⁷ Rule 116 Notice.

³⁸ Stanišić Notice, para.5; Simatović Notice para.4.

³⁹ Stanišić Defence Announced Documents for RFJ-066, 10 July 2017. This Announcement also includes Dr. Nielsen’s expert reports from the *Hadžić* case (R70#80633) and Corrigendum from the ICTY Trial (R70#80638).

⁴⁰ ICTY Trial, T.9423.

⁴¹ See 2 February Decision, para.21; 31 May Decision, paras.8, 11.

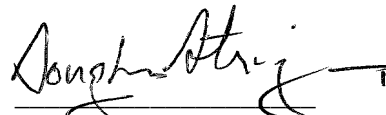
⁴² 2 February Decision, para.22.

The Prosecution has tentatively scheduled Dr. Nielsen to testify during 14-23 November 2017, and Dr. Nielsen has begun making the arrangements necessary to be available during that period. The Prosecution would therefore welcome the Chamber's ruling on the admissibility of Dr. Nielsen's evidence as soon as possible to enable all parties to proceed with their preparations. This will also allow the Prosecution to provide as much notice as possible to Dr. Nielsen, whose professional responsibilities have the potential to create scheduling difficulties without sufficient notice.

III. CONCLUSION

17. For the reasons set forth above and in the Prosecution's Rule 116 Notice, the Prosecution requests that Dr. Nielsen be permitted to testify as an expert witness, and requests the admission of his Expert Report in accordance with Rule 116.

Word Count: 2,766



Douglas Stringer
Senior Trial Attorney

Dated this 18th day of August 2017
At The Hague, The Netherlands



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