

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-15-96-T

Date: 14 September
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

**URGENT PROSECUTION SUPPLEMENTAL SUBMISSION
REGARDING TESTIMONY OF EXPERT WITNESS JAKUB
BIJAK**

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. The Chamber should permit the Prosecution to lead Dr. Jakub Bijak's expert evidence regarding demographic change in Croatia during the Indictment period. His expert report was commissioned and filed at a time when the Prosecution could not have anticipated the Chamber's *proprio motu* limitation on new evidence, and replaces the evidence of Dr. Radić, who provided expert testimony on this topic during the ICTY Trial.¹

2. On 11 and 13 September 2017, the Prosecution informally enquired with the Defence teams to confirm they had no objection to the evidence of the Prosecution expert witness Dr. Jakub Bijak, who is scheduled to testify during the first week of October 2017.² Both Defence teams have indicated that they object to the evidence of Dr. Bijak, because he did not testify in the ICTY Trial. Accordingly, the Prosecution offers this Supplemental Submission in support of Dr. Bijak's evidence and requests the Chamber to issue an expedited ruling on the admissibility of Dr. Bijak's evidence so that he may begin testifying on 3 October 2017.

II. DISCUSSION

3. On 13 October 2016 the Prosecution filed the Expert Report of Dr. Jakub Bijak entitled "Pre-war ethnic composition of, and population displacement from war-affected areas of Croatia in the light of official Croatian data sources, 1 April 1991-31 December 1995"³, pursuant to Rule 116(A) of the MICT Rules of Procedure and Evidence and the Trial Chamber's Pre-Trial Work Order.⁴ Dr. Bijak is currently an associate professor and lecturer at the Department of Social Statistics and Demography, at the University of Southampton in the UK.

¹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T ("ICTY Trial").

² See Prosecution Witness Notification provided to the Parties, Chambers and registry on 11 September 2017 sent by email from Prosecution Case Manager; Email from Prosecution Senior Trial Attorney to defence counsel on 11 September 2017.

³ R70#83007 ("Expert Report").

⁴ Case No.MICT-15-96-T, Prosecution Notice of Compliance with Rule 116(A) Disclosure of Expert Reports, 13 October 2016, ("Rule 116 Notice"). All references herein are to Case No.MICT-15-96-T unless otherwise noted. MICT Rules of Procedure and Evidence, MICT/1/Rev.2, 26 September 2016 ("Rules"); Order Establishing a Pre-Trial Work Plan, 3 June 2016 ("Pre-Trial Work Order").

4. As the Prosecution's expert witness in the field of demographics for Croatia, Dr. Bijak's evidence directly pertains to Counts 1, 4 and 5 of the Indictment.⁵ His expert report contains his analysis of demographic change during the Indictment period, using the available pre-war data on the ethnic composition of war-affected locations in Croatia,⁶ the contemporaneous records of Croatia for the registration of displaced persons, and select materials from international and academic sources. His report relates to central issues in this case, i.e., the overall changes in the demographic composition of the population, highlighting particular periods of peak displacements in the territory of the SAO SBWS and SAO Krajina (later the Republic of Serbian Krajina).

5. Dr. Bijak testified as a demographic expert in the *Hadžić* trial in June 2013 and his report was admitted into evidence in that case.⁷ After the Appeals Chamber ordered the re-trial in this case, the Prosecution contacted Dr. Bijak with a view to commissioning him to prepare an expert report for this trial. He was formally retained on 31 May 2016. Given the significant geographic overlap (in Croatia) between this case and *Hadžić*, Dr. Bijak was able to update and modify his *Hadžić* report for this case by including additional locations of relevance and expanding the temporal scope of his analysis. He was thus able to produce a high-quality expert report for this Chamber without the expenditure of extensive additional time and resources. At the time that the Prosecution retained Dr. Bijak and commissioned his expert report, there was no indication that the Chamber might later limit the Prosecution's ability to call witnesses who did not testify during the ICTY Trial.

6. The Prosecution filed Dr. Bijak's report pursuant to Rule 116 and the Pre-Trial Work Order on 13 October 2016. Stanišić and Simatović each responded to the Rule 116 Notice, indicating that they wish to cross-examine Dr. Bijak.⁸ Neither Accused objected that Dr. Bijak was not the same demographics expert called during the ICTY Trial, nor did either Accused argue any prejudice arising from this fact.

⁵ *Prosecutor v. Stanišić and Simatović*, Case No.IT-03-69-T, Prosecution Notice of Filing of Third Amended Indictment, Case No. IT-03-69-T, 10 July 2008 ("Indictment").

⁶ The term "war-affected", used by the Croatian government, is described at Expert Report, p.3 and in the Glossary of the Expert Report, p.4.

⁷ *Prosecutor v. Hadžić*, Case No.IT-04-75, T.5308.

⁸ Stanišić Defence Notice pursuant to Rule 116(B), 15 November 2016, para.5 ("Stanišić Notice"); Simatović Defence Notice pursuant to Rule 116(B), 11 November 2016, para.4 ("Simatović Notice").

7. Dr. Bijak's evidence relates to the same issues covered by Croatian demographics expert Dr. Radić, who testified in the ICTY Trial.⁹ Because the Prosecution immediately retained Dr. Bijak for this role in its case, the Prosecution did not retain Dr. Radić to update her report or to testify as an expert in this case. The Prosecution never envisioned calling Dr. Radić to testify in this re-trial and has had no communication with her since the re-trial was ordered.

8. The expert evidence of Dr. Radić from the ICTY Trial is therefore unavailable for the re-trial. Dr. Bijak's expert testimony is replacement evidence for that provided in the prior proceedings.¹⁰ No undue prejudice or prolonging of the proceedings results from this replacement evidence¹¹ because similar and closely related evidence was led in the ICTY Trial and it has been nearly one year since Dr. Bijak's report was provided in accordance with the Chamber's Pre-Trial Work Order deadline for expert evidence.¹² Furthermore, the Chamber has recognised that "the use of replacement witnesses to cover expert testimony may be more flexible given the nature and limits of expert testimony and its discrete admission process."¹³

9. The issues of demographics and changes to the ethnic composition of the SAO Krajina, SAO SBWS and RSK in Croatia during the relevant period are central to this case. The Prosecution would be unduly prejudiced if Dr. Bijak was not permitted to provide evidence in these proceedings solely on the grounds that he did not testify in the ICTY Trial. To exclude Dr. Bijak's report would be to force the Prosecution to attempt to call Dr. Radić as its Croatian demographics expert simply because she testified in the ICTY Trial. At best this would substantially delay the proceedings. At worst it could jeopardise the Prosecution's ability to present such evidence at all. It would be unfair to require the Prosecution to submit an expert report written in 2008 without giving the expert an opportunity to update it. The Prosecution would thus be compelled to engage Dr. Radić to provide an updated expert report, which would take time to prepare before it could be disclosed to the Accused and presented in court.

10. The Prosecution acknowledges that the Trial Chamber has issued a series of decisions limiting the Prosecution's presentation of evidence in this re-trial, and has cited

⁹ ICTY Trial, T.5857-5908 (17 June 2010).

¹⁰ See e.g. 31 May Decision, para.17.

¹¹ 31 May Decision, para.14.

¹² Pre-Trial Work Order, Annex.

¹³ 31 May Decision, para.17.

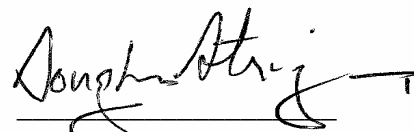
its discretion to manage the proceedings as authority for this limitation. However, a strict or literal interpretation of that limitation resulting in the rejection of Dr. Bijak's expert report and directing the Prosecution to retain Dr. Radić instead would mean that it is the Trial Chamber—not the Prosecution—that decides who the Prosecution's expert witness will be. Where, as here, neither the expeditiousness of the trial, fairness to the Accused nor the qualifications of the expert are implicated,¹⁴ the Trial Chamber's discretion must yield to the Prosecution's right as an independent body of the MICT to decide who its expert witness will be.

11. Dr. Bijak is scheduled to testify in the first week of October 2017. He has made arrangements to be available during that period. The Prosecution therefore requests an expedited ruling on this supplemental submission to enable all parties to proceed with their preparations for this witness to testify as scheduled.

III. CONCLUSION

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

Word Count: 1,407



Douglas Stringer
Senior Trial Attorney

Dated this 14th day of September 2017
At The Hague, The Netherlands

¹⁴ Neither Defence team has challenged Dr. Bijak's qualifications to provide this expert evidence.



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