

**MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS**

**Case No. MICT-15-96-T**

**IN THE TRIAL CHAMBER**

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

Registrar: **Mr. Olufemi Elias**

Date:

THE PROSECUTOR

v.

JOVICA STANISIC  
**FRANKO SIMATOVIC**

*-Public with Confidential Annex-*

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SIMATOVIC DEFENCE RESPONSE TO PROSECUTION SUPPLEMENTAL SUBMISSION  
REGARDING EXPERT WITNESS CHRISTIAN NIELSEN

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The Office of the Prosecutor  
Mr. Douglas Stringer

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

Counsel for Mr. Simatović  
**Mr. Mihajlo Bakrač**  
**Mr. Vladimir Petrović**

## INTRODUCTION

1. On 13 October 2016, the Prosecution filed their Notice of Compliance with Rule 116 (A) Disclosure of Expert Reports, including Christian Nielsen's Expert report "The State Security Service of the Republic of Serbia and Its Interaction with Ministries of Internal Affairs in Serb-Controlled entities 1990-1995." ("2016 Expert Report")
2. On 28 August 2017, the Prosecution filed their Supplemental Submission Regarding Expert Witness Christian Nielsen ("Supplemental Submission").
3. The deadline for the Response to the Supplemental Submission was 1 September 2017, however, the deadline was extended by two weeks. The Simatovic Defence hereby responds within the extended deadline.

## ARGUMENT

4. The Prosecution argues in its Supplemental Submission that the evidence of Christian Nielsen was unavailable during the ICTY trial.<sup>1</sup> On the 9 July 2007, the Prosecution submitted, pursuant to Rule 94*bis* of the ICTY Rules of Procedure and Evidence (ICTY RPE), the Expert Report of Nena Tromp and Christian Nielsen entitled "The Organisation of Internal Affairs within Serbian Entities in the Former Yugoslavia (1991-1995)" ("2007 Expert Report").<sup>2</sup> On 27 July 2007, the Prosecution provided a corrected version of the Report.<sup>3</sup> On 18 March 2008, the Trial Chamber ordered the Prosecution to call Christian Nielsen to appear for cross-examination.<sup>4</sup> On 28 March 2008, the Prosecution submitted an updated version of the Report dated 18 March

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<sup>1</sup> Supplemental Submission, para. 4

<sup>2</sup> *Prosecutor v. Jovica Stanisic & Franko Simatovic*, Case No. IT-03-69-T ("Stanisic & Simatovic"), Prosecution's Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94*bis* with Annexes A and B, 9 July 2007.

<sup>3</sup> Stanisic & Simatovic, Prosecution Submission of Corrigendum to Expert Report of Nena Tromp and Christian Nielsen with Annex A., 27 July 2007.

<sup>4</sup> *Stanisic & Simatovic*, Decision on Prosecution's Submission of the Expert Report of Nena Tromp and Christian Nielsen pursuant to Rule 94*bis*, 18 March 2007.

2008.<sup>5</sup> On 18 September 2009, the Prosecution submitted an Addendum prepared by Christian Nielsen (“Addendum”).<sup>6</sup>

5. On 30 November 2010, the Prosecution filed a Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, stating the reasons for withdrawal being that three out of four chapters of the Expert Report were not authored by Christian Nielsen. The first chapter of the Report was authored by Budmir Babovic and Nena Tromp, the second chapter was authored by Nena Tromp and the third chapter was authored by Ari Kerkanen and Nena Tromp.<sup>7</sup>
6. It was the Prosecution’s decision to withdraw Christian Nielsen’s testimony. The Prosecution could have withdrawn parts of the Report which were not authored by Nielsen and could have called him to testify. Since Christian Nielsen was primarily the author of solely chapter IV of the Report dealing with Ministry of Interior of Republika Srpska, the Prosecution stated that: “As chapter four has the least relevance to this case, the Prosecution takes the decision to not call him as a witness.”<sup>8</sup>
7. The Prosecution could have called Nena Tromp and Budmir Babovic to testify regarding the parts authored by them. As stated in the letter from the Senior Trial Attorney, Dermot Groome from 17 May 2011:

“Nena Tromp and Babovic could have been called to defend the composite report and I suspect they would have been able to set out in detail their observations and conclusions with respect to the documentation that they reviewed and referenced in the report. I suspect that they would have affirmed their conclusions and been able to explain how they arrived at these conclusions from the documents they studied. I am not aware of any information that would suggest otherwise.”<sup>9</sup>

Nevertheless, the Prosecution chose not to.

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<sup>5</sup> *Stanisic & Simatovic*, Second Prosecution Motion to Amend its Rule 65ter Exhibit List and Submission of Second Corrigendum to Expert Report of Christian Nielsen and Nena Tromp Pursuant to Rule 94 bis, 28 March 2008.

<sup>6</sup> *Stanisic & Simatovic*, Prosecution Submission of Addendum to Expert Report of Christian Nielsen Pursuant to Rule 94bis, 18 September 2009.

<sup>7</sup> *Stanisic & Simatovic*, Prosecution Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, 30 November 2010, para. 5.

<sup>8</sup> *Stanisic & Simatovic*, Prosecution Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, 30 November 2010, para. 6. ” In the e-mail from Senior Trial Attorney, 17 May 2011, Dermot Groome stated that the “..The only part of the report authored by Nielsen was from his report for Krajisnik and constituted the section with the least relevance to this case”, p. 1 (*See Annex A*)

<sup>9</sup> E-mail from Dermot Groome, 30 November 2010, p.2. (*See Annex A*)

8. The decision of withdrawal was neither influenced by the Defence nor by any circumstances beyond Prosecution's control. The Prosecution took its own independent decision and decided to withdraw Nielsen as expert witness, and limited its own case and seemingly indicating that Nielsen's testimony was superfluous to prove their case. The Prosecution subsequently never sought to add any other witness to cover the area of alleged expertise which Nielsen had been originally scheduled to testify on.
9. In its Decision from the 2 February 2017, the Trial Chamber limited the Prosecution's evidence primarily to that presented during the ICTY trial. However, the Prosecution may be allowed to present new evidence where evidence from the first trial has become unavailable or was unavailable at the first trial despite the exercise of due diligence.<sup>10</sup> The Prosecution's argument that the evidence of Nielsen was unavailable during the ICTY case,<sup>11</sup> is not in fact accurate. The 2016 Expert Report may not have been available by the mere fact it had not yet been written, however Nielsen was available and was able to produce a report for the ICTY trial, if the Prosecution had requested him to do so. The Simatovic Defence therefore asserts that there is no exceptional circumstance and the Prosecution were able to obtain this evidence if they exercised due diligence in the original trial. The Prosecution had the opportunity, if they wanted to obtain a new report from Nielsen in the original trial but chose not to.
10. The Simatovic Defence asserts that the documentary evidence that the 2016 Expert Report is based on was available at the time of the ICTY trial and fails to understand why the Prosecution is asserting otherwise, the material basis for the Report has not changed significantly since the ICTY trial.
11. The Simatovic Defence asserts that even if the Prosecution wanted to admit the original 2007 Expert Report, this would not be admissible according to the Trial Chamber's Decision of 2 February 2017 as it would be considered as new evidence as Nielsen never testified in the first trial and nor was the Report tendered as evidence. Nielsen for all intents and purposes is a new witness in the re-trial as he never testified during the first trial. He was available and the Prosecution chose not to call him,

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<sup>10</sup> *Stanisic & Simatovic*, Decision on Stanisic's Request for Stay of Proceedings, 2 February 2017, para. 23.

<sup>11</sup> Supplement Submission, para. 4.

therefore at this stage any discussion regarding his testimony must be viewed as wholly new evidence.

12. In the Prosecution's Supplemental Submission they state that it would be in the interests of justice to submit the new Report and call Nielsen to testify.<sup>12</sup> If Nielsen's testimony is vital for the interests of justice then the Prosecution surely should have ensured that his testimony was included during the first trial as the same interests of justice should have prevailed.
13. The Simatovic Defence asserts that if Nielsen's purported expertise was so imperative for the interests of justice then the Prosecution had full opportunity to call him during the ICTY trial, and they failed to do so.
14. If the Trial Chamber allows the admission of the 2016 Expert Report, the Simatovic Defence request the exclusion of Chapters I-XII, as well as parts of Chapter XIII as listed in paragraph 18 of this Response, as they constitute new evidence that falls outside the scope of the re-trial.
15. The Prosecution itself confirmed in its 30 November Notice of Withdrawal that Nielsen is the primary author only of chapter four of the 2007 Expert Report and subsequently withdrew the Report in its entirety.<sup>13</sup> Yet now, the Prosecution seeks to introduce a new Expert Report allegedly authored by Nielsen in its entirety. However, not only is this 2016 Expert Report comprised of fourteen chapters in comparison to the four chapters that the old Report included, but even Chapter XIII of the 2016 Expert Report that seems to partially resemble Chapter IV of the old 2007 Expert Report, the only chapter authored by Nielsen, contains numerous new material facts that amount to new evidence in this re-trial.
16. The 2007 Expert Report which was withdrawn totaled 70 pages with addendum of 10 pages. Nielsen's attribution to the Report (Chapter IV) is 27 pages with an Addendum of 10 pages making a total of 37 pages. The 2016 Expert Report is in total 280 pages, which adds 243 pages to the 2007 Expert Report.

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<sup>12</sup> Supplemental Submission, para. 10

<sup>13</sup> *Stanisic & Simatovic*, Prosecution Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, 30 November 2010, para. 6

17. The Simatovic Defence submits that the following sections listed below introduce new areas in the 2016 Expert Report which were not covered in the 2007 Expert Report, and therefore, in light of 2 February Decision, should be excluded<sup>14</sup>:

- Operational Action Tomson (p. 52);
- Special Units of the MUP and/or JATD (p. 60)
- Slobodan Medic Boca and the Scorpions (p. 83);
- The Fragmentation of the SRBiH MUP (P. 141)
- System of Reporting with the RS MUP (p. 204);
- The Relationship between the RS MUP and the VRS (p. 207);
- The RS MUP and the Rule of Law in the RS (p. 210);
- The RS MUP and Operation of Detention Facilities in the RS (p. 218);
- Deportations/Expulsions (p. 229);
- The Centralization of Internal Affairs in the RS (p. 232)
- The Relationship between RS MUP and paramilitary organizations (p. 241)
- The 1992 RS MUP Draft Annual Report (p. 247);
- The Significant Developments in the RS MUP after 1992 (p. 250);
- The Cooperation of the RS MUP with Authorities of the S(F)RJ and Serbia (p. 252)
- Sigma (p. 266).

18. Furthermore, while Chapter XIII of the 2016 Expert Report partially resembles Chapter IV of the 2007 Expert Report, there are many new facts that were either not mentioned in the 2007 Expert Report, or are changed in the 2016 Expert Report. Therefore, the Simatovic Defence submits that the section from 2016 Expert Report, as detailed in paragraphs 19-21 below, should be excluded from the scope of the re-trial as they form new material facts pursuant to the 2 February Decision

19. With regard to the section on “*The Origins of the Special Brigade of the Police and CSB Special Police Units,*” Nielsen included new material facts (page 207 para 674, pages 209-210, paras 682-685 and page 211, para 689) such as that all RS MUP employees who committed criminal acts were to be put at the disposal of VRS, or that CSB Banja Luka special police units was integrated into the special police structure of the RS MUP special police, as well as the fact that special police unit under Davidovic was in conflict with the military. These facts were omitted in the 2007 Report and therefore present new material facts.

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<sup>14</sup> *Stanisic & Simatovic*, Decision on Stanisic’s Request for Stay of Proceedings (2 February 2017), para. 23.

20. Regarding the section on “*The RS National Security Service*”, Nielsen added new material facts on pages 246-247, para 802 about the renaming of SNB to RDB and on page 252, para 814 about the fact that SNB had knowledge of violations of humanitarian law committed in the RS and their involvement in the interrogation of non-Serbs in the detention facilities.
21. With regard to the section on “*The Operation Pauk*”, in the 2016 Expert Report, on pages 282-283, paras 924-934, Nielsen talks about an operation diary that shows that Jovica Stanisic and Franko Simatovic were present at the command center of Pauk, giving orders also on choices of targets of military attacks. Nielsen also mentions a 7 November 1994 meeting of Bogojevic, Talic, Kesic, Simatovic, Stanisic, as well as a creation of a parallel command in the Kordun Area of the Krajina. Moreover, Nielsen mentions a 30 June 1995 meeting of Milosevic, Stanisic, Mladic and others with Abdic in Belgrade. None of these facts were mentioned in the previous 2007 Expert Report and therefore, the Simatovic Defence considers these facts as new material facts.
22. The Simatovic Defence reiterates that it is important to safeguard the rights of the Accused through means such as imposing a limitation on the new evidence<sup>15</sup> that the Prosecution may seek to introduce. The 2016 Expert Report that the Prosecution seeks to introduce amounts to new material facts and falls outside the scope of re-trial as it does not form evidence presented during the original ICTY trial and if allowed, would disrespect the fundamental rights of the Accused and render the re-trial unfair.

## CONCLUSION

23. For the foregoing reasons, the Simatovic Defence requests that the Trial Chamber dismisses the admission of Nielsen’s 2016 Expert Report and refuse the Prosecutions request to testify.

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<sup>15</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009 , Joint Dissenting Opinion of Judges Shahabuddeen and Meron, para 6; *Stanisic & Simatovic*, Decision on Stanisic’s Request for Stay of Proceedings, 2 February 2017, para. 22.

24. In the alternative should the Trial Chamber permit Nielsen to testify and admit his 2016 Expert Report, the Simatovic Defence request the Trial Chamber to limit the scope of his testimony, by ordering that the Chapters I-XII and parts of Chapter XIII be excluded as set forth in paragraphs 17 to 20 of this Response.
25. In the event that the Trial Chamber does not accept the objection of the Defence, the Simatovic Defence reiterates in terms of Rule 116 (B) it does not accept the 2016 Expert Report of Christian Nielsen, and notes that the Defence intends to cross-examine if he is called as a witness.

Respectfully submitted,

Counsel for the Accused:



Mihajlo Bakrač, Lead Counsel



Vladimir Petrović, Co-Counsel

The Hague, 15 September 2017

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