

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: 18 September 2017

THE PROSECUTOR

v.

JOVICA STANISIC
FRANKO SIMATOVIC

-PUBLIC-

SIMATOVIC DEFENCE RESPONSE TO PROSECUTION'S URGENT SUPPLEMENTAL
SUBMISSION REGARDING TESTIMONY OF EXPERT WITNESS JAKUB BIJAK

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 Jakub Bijak Expert Report, entitled, “*Pre-war ethnic composition of, and population displacements from war-affected areas of Croatia in the light of official Croatian data sources, 1 April 1991 – 31 December 1995*”.¹
2. On 14 September 2017, the Prosecution filed an Urgent Supplemental Submission Regarding Testimony of Expert Witness Jakub Bijak (“Supplemental Submission”).

ARGUMENT

3. In its Supplemental Submission the Prosecution seeks permission from the Trial Chamber to replace the evidence of Dr. Radic and instead lead Dr. Jakub Bijak’s evidence regarding the demographic change in Croatia during the Indictment period. The Prosecution argues that the Expert Report of Dr. Jakub Bijak was “commissioned and filed at the time when Prosecution could not have anticipated the Chamber’s *proprio motu* limitation on new evidence.”² The Simatovic Defence asserts that since the Appeals Chamber ordered the re-trial on 15 December 2015, it has been made clear that the re-trial, with some exceptions, means a presentation of evidence already presented before the ICTY. The Prosecution cannot argue that the 2 February 2017 Decision, on the limitation of evidence, was something which was unexpected or that it substantially limited the presentation of evidence in their case.
4. The Prosecution states that Dr. Bijak was contacted after the Appeals Chamber ordered a re-trial, and he was formally retained on 31 May 2016.³ The Prosecution did not immediately contact Dr. Radic, as they have done with all other witnesses from the ICTY trial, but instead contacted Dr. Bijak without first attempting to contact Dr. Radic. The Prosecution acted completely arbitrarily and without any evident reasons. Regardless of the 2 February Decision, the Prosecution would not have an unlimited right to choose

¹ *Prosecutor v. Jovica Stanisic & Franko Simatovic*, Case No. IT-03-69-T (“Stanisic & Simatovic”), Prosecution notice of compliance with Rule 116(A) disclosure of expert reports, 13 November 2016, p. 3.

² Supplemental Submission, para. 1.

³ Supplemental Submission, para. 5.

which witnesses to bring, as this is a re-trial and the rights of the Accused must be safeguarded.

5. The Prosecution argues that the evidence of Dr. Radic was unavailable.⁴ The Trial Chamber limited the Prosecution's evidence primarily to that presented during the original trial, however, the Prosecution may be allowed to present new evidence where evidence from the first trial has become unavailable.⁵ The Simatovic Defence asserts that the Prosecution, by its own admission, never contacted Dr. Radic after the order of a re-trial.⁶ No efforts were made to call Dr. Radic to testify at the re-trial and the Prosecution cannot now state that he is an unavailable witness.
6. The Prosecution argues that they would be unduly prejudiced if Dr. Bijak was not permitted to provide evidence and the Prosecution would be forced to attempt to call Dr. Radic which would result in a substantial delay to the proceedings.⁷ The Simatovic Defence asserts that there will be no substantial delay to proceedings, as according to the Prosecution their case will last at least until April 2018, and probably longer.⁸ As at least eight months still remain until the end of the Prosecution case, the Prosecution has sufficient time to organize and prepare the testimony of Dr. Radic.
7. In fact, taking into account that Dr. Radic could have been contacted, the Simatovic Defence does not consider Dr. Radic as "unavailable" and therefore, perceives Dr. Bijak and his testimony as new evidence.
8. As well as the Prosecution claims that it would be unfair to require submitting an expert report written in 2008 "without giving the expert an opportunity to update it".⁹ The Simatovic Defence asserts that the 2008 Expert Report of Dr. Radic was created 17 years after the events and that the documentary material was available in 2008 when the Report was created. The Prosecution fails to detail what new documents or materials are now available which would not have been available when the Report was written in 2008.

⁴ Supplemental Submission, para. 8.

⁵ *Stanisic & Simatovic*, No. MICT-15-96-PT, Decision on Stanisic's Request for Stay of Proceedings, 2 February 2017, para. 23.

⁶ Supplemental Submission, para. 7.

⁷ *Ibid.* para. 9.

⁸ E-mail from Senior Trial Attorney Douglas Stringer, 11 September 2017.

⁹ Supplemental Submission, para. 9.

9. The Simatovic Defence reiterates that it is important to safeguard the rights of the Accused through means such as imposing a limitation on new evidence¹⁰ that the Prosecution may seek to introduce. The Simatovic Defence reiterates that Dr. Bijak's testimony would amount to new evidence and pursuant to the 2 February Decision.

CONCLUSION

10. For the foregoing reasons, the Simatovic Defence requests that the Trial Chamber deny the Prosecution's Supplemental Submission for the replacement of Dr. Radic with Dr. Bijak as an expert witness.

Respectfully submitted,

Counsel for the Accused:



Mihajlo Bakrač, Lead Counsel



Vladimir Petrović, Co-Counsel

The Hague, 18 September 2017

Word Count: 960

¹⁰ *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.



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