

**UNITED  
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-15-96-T

Date: 21 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***

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**PROSECUTION CONSOLIDATED REPLY TO DEFENCE  
RESPONSES TO PROSECUTION SUPPLEMENTAL SUBMISSION  
REGARDING EXPERT WITNESS CHRISTIAN NIELSEN**

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**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

1. In deciding whether to permit the Prosecution to call Dr. Christian Nielsen as an expert witness despite having withdrawn him days before he was to testify in the ICTY Trial,<sup>1</sup> the Chamber should decline the Accused's invitations to exclude portions of his expert report.<sup>2</sup> Excluding parts of the expert report on the basis that they are "new" would interfere with the expert's methodology and undermine his independence.

2. To be of any assistance to the Chamber, Dr. Nielsen must be permitted to rely on his expertise to provide analysis and offer his expert opinion to address the questions presented to him. It is axiomatic that "[a]n expert witness is expected to make statements and draw conclusions independently and impartially".<sup>3</sup> The soundness of an expert witness's methods and sources is critical to assessing and attributing weight to the expert's analysis and conclusions.<sup>4</sup> Excluding portions of Dr. Nielsen's analysis based on criteria unrelated to his expertise or the substance and reliability of the source documentation that he has independently selected would run afoul of these basic principles of expert evidence.

3. The Accused's arguments that portions should be excluded because they were not in the expert report in the ICTY Trial are counterintuitive at best.<sup>5</sup> It should be obvious from the Prosecution's Motion that the original report cannot be tendered.<sup>6</sup> To limit Dr. Nielsen in his retrial report only to analysis and sources included in the first, flawed report would seriously undermine his independence and taint his expert report with the methodological defects that led the Prosecution to withdraw the first report.

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<sup>1</sup> *Stanišić and Simatović*, Case No.IT-03-69-T ("ICTY Trial").

<sup>2</sup> See *Simatović* Defence Response to Prosecution Supplemental Submission Regarding Expert Witness Christian Nielsen, 15 September 2017 ("*Simatović* Response"), paras.14, 17-21; *Stanišić* Defence Response to Prosecution Supplemental Submission Regarding Expert Witness Christian Nielsen, 15 September 2017 ("*Stanišić* Response"), paras.6-7, 9.

<sup>3</sup> *Prosecutor v. Dragomir Milošević*, Case No.IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, para.9.

<sup>4</sup> See *Prosecutor v. Popović et al.*, Case No.IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para.29; *Prosecutor v. Gotovina*, Case No.IT-06-90-T, Decision on Disclosure of Expert Materials, 27 August 2009, para.10; *Prosecutor v. Karadžić*, Case No.IT-95-5/18-T, Decision on Prosecution Request to Exclude Portions of the Report of Expert Witness Radovan Radinović, 15 July 2013, para.16; *Prosecutor v. Popović et al.*, Case No.IT-05-88-T, Decision on the Admissibility of the Narratives of Expert Witness Richard Butler, 27 March 2008, paras.13-14. See also e.g. *Prosecutor v. Perišić*, Case No.IT-04-81-T, Decision on Admissibility of Expert Report of Patrick Treanor, 27 November 2008, paras.13-16; *Prosecutor v. Mladić*, Case No.IT-09-92-T, Decision on Defence Request to Disqualify Patrick Van der Weijden as an Expert and Bar the Prosecution from Presenting His Report, 9 January 2013, para.9.

<sup>5</sup> *Simatović* Response, paras.17-21; *Stanišić* Response, paras.6-7.

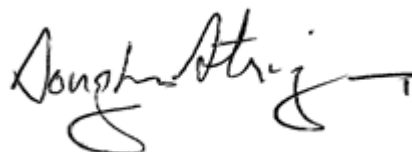
<sup>6</sup> See Prosecution Supplemental Submission Regarding Expert Witness Christian Nielsen, 18 August 2017 ("*Motion*"), paras.9-10.

4. Stanišić's suggestion that Dr. Nielsen's report should be limited to assertions "mentioned in either the Indictment or the Prosecution's Pre-Trial Brief"<sup>7</sup> is puzzling. To give effect to Stanišić's preferred reality, Dr. Nielsen would either have to write his report from the Prosecution's Pre-Trial Brief, or the Prosecution would have to write its Pre-Trial Brief from Dr. Nielsen's report. Surely the Accused would strenuously object if the Prosecution had instructed its expert to base his analysis on the Prosecution's own characterisation of the evidence in its Pre-Trial Brief. On the other hand, the Prosecution clearly is not required to incorporate the totality of its experts' evidence into its Pre-Trial Brief. The Chamber apparently agrees, having ordered the Prosecution to file its Pre-Trial Brief more than a month before the expert reports.<sup>8</sup>

5. Moreover, most of the matters Stanišić identifies for exclusion rely on evidence tendered in the first trial.<sup>9</sup> Annex A sets out the source documentation that Dr. Nielsen relies upon for every item that Stanišić seeks to exclude. Precluding the Prosecution's MUP expert, who independently chose these documents, from relying on them in his analysis would be inconsistent with the Chamber's directive that the evidence admitted during the retrial should be primarily limited to the evidence presented in the ICTY Trial.<sup>10</sup>

6. For the reasons set out in the Prosecution's Motion and above, the Prosecution requests the Chamber to permit Dr. Nielsen to testify, and decline to exclude portions of his report as requested by the Accused.

Word Count: 768



Douglas Stringer  
Senior Trial Attorney

Dated this 21<sup>st</sup> day of September 2017  
At The Hague, The Netherlands

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<sup>7</sup> Stanišić Response, para.7.

<sup>8</sup> Order Establishing a Pre-Trial Work Plan, 3 June 2016, Annex A.

<sup>9</sup> Annex A.

<sup>10</sup> Decision on Prosecution Submission in Relation to the Chamber's Limitation on New Evidence, 31 May Decision, para.15.

**Annex A:****Source documentation cited by Dr. Nielsen to support the portions of his Expert Report that Stanišić seeks to exclude**

<b>Stanišić Response para.</b>	<b>Nielsen Report para.</b>	<b>ERN (as cited in Nielsen Report)</b>	<b>R70#</b>	<b>Information from ICTY Trial</b>
Para.7(i)	Para.183, fn.312	0290-5948-0290-5949	R70#00431	P01069
Para.7(ii)	Para.186, fns.316, 317	Y037-0570-Y037-0574	R70#05595	P03251
Para.7(ii)	Para.187, fn.318	Y034-7332-Y034-7350	R70#09411	Provided to the OTP by Simatović
Para.7(iii)	Para.200, fn.343	0067-1843-0067-1843	R70#05366	P03238
Para.7(iv)	Para.216, fn.372	0214-1322-0214-1334	R70#02902 and R70#03538 combined	P01075
Para.7(v)	Para.222, fn.384	0214-1322-0214-1334	R70#02902 and R70#03538 combined	P01075
Para.7(vi)	Para.475, fn.834	0340-4860-0340-4861	R70#01292	P01077
Para.7(vi)	Para.475, fn.834	0214-3972-0214-3978	R70#08332	
Para.7(vi)	Para.475, fn.834	0340-4900-0340-4901	R70#01299	P01652
Para.7(vi)	Para.475, fn.834	0214-3992-0214-3993	R70#08566	
Para.7(vii)	Para.648, fn.1061	0025-5556-0025-5557	R70#01649	65ter#01949
Para.7(viii)	Para.778, fn.1331	0063-3256-0063-3256	R70#01674	65ter#02030
Para.7(ix)	Para.882, fns.1501, 1502	0426-7762-0426-7764	R70#03688	P02683
Para.7(x)	Para.884, fn.1509	0436-7556-0436-7557	R70#05248	P03120



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