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D 17486 - D 17481
29 June 2009

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 UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-03-69-T
		Date:	29 June 2009
		Original:	English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 29 June 2009

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR LEAVE TO BIFURCATE THE
TESTIMONY OF EXPERT WITNESS CHRISTIAN NIELSEN**

Office of the Prosecutor

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Counsel for Jovica Stanišić

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Mr Wayne Jordash

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Mr Zoran Jovanović
Mr Vladimir Domazet

I. PROCEDURAL HISTORY

1. On 18 March 2008, the Trial Chamber found an expert report of Christian Nielsen (“Expert Report”) relevant, of probative value and falling within Mr Nielsen’s field of expertise, and, while deferring its decision to admit it into evidence, called its author for cross-examination.¹
2. On 10 June 2009, the Prosecution filed a confidential motion seeking leave to bifurcate the testimony of its expert witness Christian Nielsen.² On 18 June 2009, the Stanišić Defence filed its response to the Motion.³ On 19 June 2009, the Prosecution asked for leave to reply to the Stanišić Response.⁴ On 23 June 2009, the Simatović Defence filed its response to the Motion.⁵ On 25 June 2009, the Chamber denied the Request and communicated its decision to the parties through an informal communication.

II. SUBMISSIONS

A. Prosecution

3. In its Motion, the Prosecution seeks leave to bifurcate the expert witness testimony of Christian Nielsen allowing him to appear early in the presentation of the Prosecution case to give evidence related to the Expert Report and appear a second time near the end of the presentation of the case to give evidence related to an addendum thereto concerning documentary evidence acquired after completion of the Expert Report (“Addendum”).⁶ The Prosecution submits that Mr Nielsen is in the process of assessing those documents and preparing the Addendum.⁷
4. The Prosecution argues that during the second appearance of Mr Nielsen, it does not intend to elicit any evidence related to the Expert Report or any of the evidence cited there.⁸ Moreover, the

¹ Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen Pursuant to Rule 94 *bis*, 18 March 2008 (“Expert Report Decision”).

² Prosecution Motion for Leave to Bifurcate the Testimony of Expert Witness Christian Nielsen, 10 June 2009 (“Motion”).

³ Defence Response to Prosecution Motion for Leave to Bifurcate the Testimony of Expert Witness Christian Nielsen, 18 June 2009 (“Stanišić Response”).

⁴ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion for Leave to Bifurcate the Testimony of Expert Witness Christian Nielsen, 19 June 2009 (“Request”).

⁵ Simatović Defence Response to Prosecution Motion for Leave to Bifurcate the Testimony of Expert Witness Christian Nielsen, 23 June 2009 (“Simatović Response”).

⁶ Motion, paras 1, 12.

⁷ Motion, para. 4.

⁸ Motion, paras 6-7, 10.

Prosecution submits that in dividing Mr Nielsen's testimony it will not exceed the overall time estimate for his examination-in-chief.⁹

5. Finally, the Prosecution argues that the proposed procedure is not prejudicial to the Defence as the latter will have ample opportunity to cross-examine Mr Nielsen on every aspect that in their view is relevant both in his first as well as in his second testimony.¹⁰

B. Stanišić Defence

6. The Stanišić Defence opposes the Motion.¹¹ It argues that the testimony of Mr Nielsen cannot be neatly divided between subject matters covered by the Expert Report and those in relation to the Addendum.¹² It submits that an analysis of the number of documents recently added to the Prosecution's Rule 65 *ter* exhibit list shows that the planned Addendum will deal with subjects that are inextricably linked to a full understanding of the "organisational structure of the MUP and the DB of the Republic of Serbia as well as the authority entrusted to the Accused", hence the subject matter of the Expert Report.¹³

7. The Stanišić Defence submits that the exact subject matter of the Addendum is still unclear and that it would be against the spirit and letter of Rule 94 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") to require that the Accused disclose his challenge to the testimony before the Addendum is even compiled.¹⁴ Furthermore, the Stanišić Defence points at the increased risk that the parties will be forced to engage in prolonged and repetitive cross-examination if bifurcation were to be granted.¹⁵

8. The Stanišić Defence also submits that granting the Motion would be prejudicial to the Defence. Accordingly, it argues that the witness obtains a forensic advantage from hearing the thrust and tenor of the Defence challenges prior to giving evidence on the second occasion and before drafting his Addendum.¹⁶ Moreover, it points out that prejudice always arises from cross-examining a witness without knowing the totality of the evidence to be provided.¹⁷

⁹ Motion, para. 8.

¹⁰ Motion, para. 9.

¹¹ Stanišić Response, paras 1, 15.

¹² Stanišić Response, paras 4-5.

¹³ Stanišić Response, paras 6-7.

¹⁴ Stanišić Response, para. 8.

¹⁵ Stanišić Response, para. 10.

¹⁶ Stanišić Response, para. 11.

¹⁷ Stanišić Response, para. 12.

9. Finally, the Stanišić Defence recalls that it is the Prosecution's submission that the Prosecution needs to discuss recently acquired documents with Mr Nielsen which did not form a basis for the Expert Report.¹⁸ Accordingly, the Stanišić Defence argues that having discussions with the witness after he has given sworn testimony on related subjects creates the risk that such discussions would cast doubt on the overall integrity of the proceedings.¹⁹

10. As an alternative remedy, the Stanišić Defence requests that it be permitted to cross-examine the witness after the totality of the evidence has been given in court.²⁰

C. Simatović Defence

11. The Simatović Defence opposes the Motion.²¹ It submits that it is impossible to treat Mr Nielsen's reports separately from any relevant documentary evidence.²² It further argues that in fact the Prosecution is asking for permission to continue its investigation throughout the case although the Chamber imposed time limits for submission of all expert reports and that as a consequence, if allowed, new reports would cause prejudice to the Defence creating uncertainty which undermines the Defence's ability to prepare a meaningful trial strategy.²³

12. Finally, the Simatović Defence points out that Mr Nielsen had already more than a year to include relevant documents in his reports or to prepare addendums.²⁴

III. DISCUSSION

13. The Chamber notes that Rule 94 *bis* of the Rules and well-established jurisprudence related thereto, introduce a very precise system governing the introduction of expert evidence.²⁵ The Rule 94 *bis* regime is focused on the written report prepared by the purported expert. Once prepared, such report should be submitted to the opposite party who in turn can either accept or challenge the report itself or the qualifications of its author and request a possibility to cross-examine the author of the report. The Chamber recalls that the Rules do not allow for introducing expert evidence by way of oral testimony only – i.e. without submission of the prior written statement and/or report.

¹⁸ Stanišić Response, para. 13.

¹⁹ Ibid.

²⁰ Stanišić Response, paras 14-15.

²¹ Simatović Response, paras 1, 5.

²² Simatović Response, para. 2.

²³ Ibid.

²⁴ Simatović Response, para. 3.

²⁵ See Rule 94 *bis* of the Rules and related jurisprudence as defined in Expert Report Decision, paras 5-12.

14. The Prosecution communicates its intention as to having prepared the Addendum and at the same time asks the Chamber to bifurcate the testimony of Mr Nielsen – first focused on issues relating to the Expert Report and second in relation to the future Addendum.

15. The Prosecution submits that the matters covered by the Expert Report and the Addendum are intrinsically separate and allow for the strict division between the litigation concerning the two. However, the Chamber notes that without seeing the Addendum it is unable to determine its scope and eventual lack of interconnection with the Expert Report.

16. The Chamber notes that if it were to grant the Motion, the testimony of Mr Nielsen would be separated by a period of time which the Prosecution intends to use for discussing with Mr Nielsen the facts and documents to be used in preparing the Addendum.²⁶ The Chamber finds that any interaction between the Prosecution and the witness taking place after the latter gave his testimony on the topic that could be related to his future appearance in court carries a risk of prejudice to the Defence.

17. Finally, in the absence of a clear showing that the subject matter of the Expert Report and that of the Addendum is incongruous, the Chamber finds that both the Expert Report and the Addendum, although in the form of separate documents, cannot be treated in any other way than together constituting the body of evidence that the Defence is entitled to challenge in court. As a consequence, the Chamber cannot exclude the possibility that any discussion, including the challenges posed to the Expert Report, would be necessarily repeated in the second appearance of Mr Nielsen. As such, the relief sought in the Motion can turn out to be contrary to the practice of judicial economy.

18. The Chamber is therefore of the view that the preferable solution and the one being more in accordance with the Rules would be to treat both Mr Nielsen's Expert Report and the future Addendum as one body of evidence that could be challenged by the Defence in its entirety.

19. Additionally, the Chamber recalls that the Addendum must fulfil the requirements of the Rule 94 *bis* procedure. Namely, before Mr Nielsen is allowed to testify as to its substance, it must be disclosed to the Defence. Only after receiving the potential Defence challenges and the text of the Addendum itself, will the Chamber be able to rule on any objections thereto raised by the parties and determine if the Addendum is admissible – i.e. if it is relevant, of probative value, and

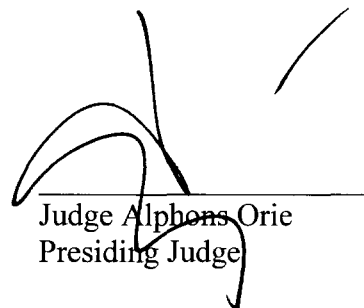
²⁶ See Motion, para. 10.

whether it falls within Mr Nielsen's field of expertise – and if Mr Nielsen can and/or should be called to testify.

IV. DISPOSITION

For the foregoing reasons, the Chamber **DENIES** the Motion.

Done in English and French, the English version being authoritative.



Judge Alphons Orie
Presiding Judge

Dated this twenty-ninth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]