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13 December 2011

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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: 13 December 2011
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 13 December 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE REQUEST FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S
GUIDANCE ON RULE 90 (H)(ii) AND DECISION ON
STANIŠIĆ DEFENCE SUBMISSIONS ON RULE 90 (H)(ii)**

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 26 October 2011, the Stanišić Defence requested certification to appeal (“Request”) the Chamber’s “Guidance on Rule 90 (H)(ii) and Decision on Stanišić Defence Submissions on Rule 90 (H)(ii)”, filed on 19 October 2011 (“Guidance”).¹ On 9 November 2011, the Prosecution filed its response, requesting that the Chamber deny the Request (“Response”).² On 16 November 2011, the Stanišić Defence filed an application requesting leave to reply to the Prosecution’s Response (“Application”).³ On 22 November, in an informal communication, the Chamber granted the Application and set the deadline for the reply at 24 November 2011. On 23 November, the Stanišić Defence filed its reply (“Reply”).⁴

II. SUBMISSIONS OF THE PARTIES

A) Request

2. The Stanišić Defence submits that the Guidance will significantly affect the ultimate outcome of the trial because, in its view, the effect of the Guidance is that the Chamber has: 1) removed (or reduced to *de minimis*) the Prosecution’s obligations under Rule 90 (H)(ii), thereby rendering the ensuing obligations of the Rule unequal between the Defence and Prosecution, and 2) possibly indicated an erroneous approach to the Prosecution’s burden of proof.⁵ To this second point, it submits that “[h]ad the Defence witnesses been questioned by the Prosecution on matters where they contradict the Prosecution case, irreparable damage would have been caused to its case through that process. The effect of putting these questions to witnesses and them meeting that challenge could lead to a finding of acquittal [...]”.⁶ The Stanišić Defence further submits that granting certification may materially advance the proceedings because if the Guidance is not reviewed by the Appeals Chamber, the Prosecution will not put its case to the remaining Defence witnesses.⁷ Finally, it submits that an immediate resolution by the Appeals Chamber will ensure

¹ Stanišić Defence Defence Request for Certification to Appeal the Trial Chamber’s Guidance on Rule 90(H)(ii) and Decision on Stanišić Defence Submissions on Rule 90(H)(ii), 26 October 2011.

² Prosecution Response to Stanišić Defence Request for Certification to Appeal the Trial Chamber’s Rule 90(H)(ii) Guidance and Decision of 19 October 2011, 9 November 2011, paras 3, 6, 14.

³ Stanišić Defence Application for Leave to Reply to the Prosecution Response to Stanišić Defence Request for Certification to Appeal the Trial Chamber’s Rule 90(H)(ii) Guidance and Decision of 19 October 2011, 16 November 2011.

⁴ Stanišić Defence Reply to the Prosecution Response to Stanišić Defence Request for Certification to Appeal the Trial Chamber’s Rule 90(H)(ii) Guidance and Decision of 19 October 2011, 22 November 2011.

⁵ Request, paras 7-10.

⁶ Ibid.

⁷ Ibid.

that the Guidance's interpretation of Rule 90 (H)(ii) is correct and the purposes of the Rule are achieved.⁸

B) Response

3. The Prosecution submits that the Guidance consists of two parts: 1) a general guidance setting forth general guidelines and how the parties must comply with the Rule going forward and 2) a decision on the violations alleged by the Stanišić Defence and a denial of the Stanišić Defence request for relief.⁹ The Prosecution submits the Request should be denied so far as it seeks to appeal the general guidance portion of the Guidance because general guidances are not subject to interlocutory appeal.¹⁰ As for any decision on the Prosecution's alleged violation of Rule 90 (H)(ii), the Prosecution submits that the Stanišić Defence has neither identified an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor has it identified how an immediate review would materially advance the proceedings.¹¹ Specifically, the Prosecution submits that the Chamber cannot now know the weight it will attribute to the evidence of Defence witnesses given during cross-examination as this is a determination that will be made based on the entirety of the trial record.¹² Finally, the Prosecution submits that the Stanišić Defence's assertion that it will not put its case to remaining Defence witnesses is baseless.¹³ It argues that even if this contention were true, an interlocutory decision would not materially advance the proceedings because the Guidance specifically states that the Chamber will evaluate new Rule 90 (H)(ii) objections on a case-by-case basis and, therefore, any Appeals Chamber decision would not materially advance the proceedings in the future.¹⁴

C) Reply

4. The Stanišić Defence submits that the Guidance is not purely forward looking because the Guidance was issued after Defence objections had been raised and because the criteria announced in the Guidance were applied to the past decisions on those Rule 90 (H)(ii) objections as the Chamber did not state it was using different criteria.¹⁵ The Stanišić Defence alleges that the Guidance "had infected previous decisions and will continue to taint and undermine the fairness of the proceedings in the future".¹⁶ Finally, the Stanišić Defence argues that the Prosecution

⁸ Request, para. 11.

⁹ Response, para. 9.

¹⁰ Response, paras 3, 6-10.

¹¹ Response, paras 11-13.

¹² Response, para. 12.

¹³ Response, para. 13.

¹⁴ Ibid.

¹⁵ Reply, paras 3-5

¹⁶ Reply, para. 11.

interpretation of the first criterion of Rule 73 (B), that the Chamber cannot know at this time the weight it will attribute to the witnesses' evidence, is incorrect and submits that the correct interpretation is whether the evidence *could* have significant bearing on the criminal responsibility of the Accused.¹⁷ It submits that "requiring a dispositive demonstration" that evidence will significantly affect the outcome of the trial undermines the purpose of Rule 73 (B) and renders the right to interlocutory appeals on evidentiary issues "illusory".¹⁸

III. APPLICABLE LAW

5. Rules 73 of the Rules of Procedure and Evidence ("Rules") provides:

- (B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
- (C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
 - (ii) The Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from the filing of the written decision

IV. DISCUSSION

6. The Chamber considers that the Guidance consists wholly of a general guidance that identifies the purposes and ensuing obligations of the parties under Rule 90 (H)(ii). Further, the Guidance does not address any previous in-court objections or oral decisions given, but rather clearly states in the "Introduction" section that:¹⁹

The Chamber considers that the parties have divergent interpretations of Rule 90 (H), resulting in repeated objections and discussions during court proceedings [...] The Chamber carefully reviewed the objections in court by the Stanišić Defence. However, the Stanišić Defence's written submissions do not rely on these objections, but instead discuss the two Hypotheticals. *Therefore, the Chamber will refer to the Stanišić Defence Hypotheticals to clarify the application of Rule 90 (H)(ii) in practice.*

7. The Chamber has previously held that a general guidance which addresses future events in the proceedings "cannot be subject to appeal [...]" since it does not rule on any existing and concrete

¹⁷ Reply, paras 6-7.

¹⁸ Reply, para. 8.

¹⁹ Guidance, para. 13 (Emphasis added).

dispute”.²⁰ The Guidance does not address any existing or concrete dispute as it deals with hypothetical situations to clarify Rule 90 (H)(ii)’s purposes and the parties’ obligations under the Rule going forward in the trial. Therefore, pursuant to this Chamber’s prior holding, the Chamber considers that the disputed Guidance is not subject to appeal on an interlocutory basis.

8. However, the Chamber stresses that nothing in this decision nor in the Guidance itself prevents the Stanišić Defence from objecting if, in its view, the Prosecution does not comply with its obligations under Rule 90 (H)(ii) with any remaining Defence witnesses. The Chamber will consider any such future objections, when and if they arise, on a case-by-case basis.²¹ Further, any decisions on a future objection can be certified for appeal if the two criteria of Rule 73 (B) are met.

9. In its original submission to the Chamber on Rule 90 (H)(ii), the Stanišić Defence concluded:²²

The Defence understood this filing to be one that endeavours to assist the Trial Chamber in providing guidance to the parties on the interpretation of Rule 90 (H)(ii) of the Rules. It has attempted to do so. Consequently, it has not suggested any remedy for its assertion that the Prosecution has thus far failed to adequately put its case to Defence witnesses. *The Defence would be ready to file further submissions on these matters upon receiving guidance from the Trial Chamber on its interpretation of Rule 90 (H)(ii) of the Rules.*

10. In its reply to the Prosecution’s response to its submissions on the Rule, the Stanišić Defence nonetheless requested certain relief: specifically that the Chamber 1) adopt a general remedy analysis offered by the Defence and 2) that the Chamber “approach all evidence at the final judgement stage in light of the Prosecution’s failures to conform with the requirements of Rule 90 (H)(ii)”.²³ However, the aforementioned submissions did not connect the requested relief with particular witnesses or examples of alleged Rule 90 (H)(ii) violations by the Prosecution.²⁴ The only example of such an allegation that the Stanišić Defence *did* cite was, in fact, considered by the Chamber. With regard to that instance, the Chamber determined that the Stanišić Defence’s in-court objection had been resolved *in favour* of the Stanišić Defence and resulted in the Prosecution putting additional questions in cross-examination as requested by the Stanišić Defence.²⁵

²⁰ Decision on Stanišić Defence Request for Certification to Appeal the Trial Chamber’s Guidance on the Admission into Evidence of Documents Tendered by the Prosecution During the Defence Case and Reasons for Decisions on Past Admissions of Such Documents, 19 October 2011, para. 9.

²¹ See Guidance, para. 32.

²² See Stanišić Defence Submissions on Rule 90 (H)(ii), 3 August 2011, para. 24 (Emphasis added).

²³ Stanišić Defence Reply to the Prosecution Response to the Stanišić Defence Submissions on Rule 90 (H)(ii) (“Submission Reply”), paras 4, 23.

²⁴ See, for example, Submission Reply, paras 21-22. The general allegations of Prosecution violations of the Rule refer to “witnesses” and unspecified “Krajina witnesses”.

²⁵ Submission Reply, paras 14-20; T. 12550-12574.

11. In the Guidance, the Chamber stated that, “[s]ince the Chamber has not found that the Prosecution has violated its obligations under Rule 90 (H)(ii), it declines to adopt any specific remedies or a “remedy analysis”. The Chamber will continue to evaluate objections raised under Rule 90 (H)(ii) as they arise and decide on a case-by-case basis what, if any, the remedy should be”.²⁶

12. The Chamber hereby clarifies that it did not find any Prosecution violations based on *the submissions* of the Stanišić Defence. The Chamber acknowledges that the Stanišić Defence generally asserted and continues to assert that the Prosecution had not complied with its obligations under Rule 90 (H)(ii). The Chamber stresses that it will not engage in wholesale reviews of the entirety of cross-examinations to date, particularly where no in-court objection or written filing on the matter was ever made. The Chamber also does not and will not accept the Stanišić Defence’s hypothetical reframing of in-court occurrences as substitutes for the actual record of proceedings.

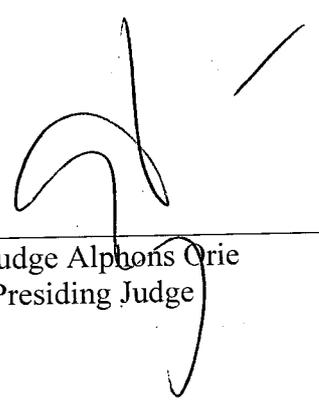
13. The Chamber also acknowledges that the Stanišić Defence may not have appealed certain in-court decisions within the timeframe provided by Rule 73 (C) if, as it submits, it was given a concrete and direct impression by the Chamber that an upcoming written decision or guidance would contain reasons for that particular in-court decision. With respect to these specific instances, if any, the Stanišić Defence may request certification to appeal within seven days of this decision, provided it identifies in detail the transcript portion where the Chamber gave a concrete and direct impression that the decision in question would be followed by a written decision or guidance.

V. DISPOSITION

14. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber

DENIES the Request.

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



Judge Alphons Orie
Presiding Judge

Dated this thirteenth of December 2011
The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ Guidance, para. 32.