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12 June 2012

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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: 12 June 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 12 June 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SUBMISSIONS BY STANIŠIĆ DEFENCE
REGARDING PROSECUTION'S RULE 90 (H)(ii)
OBLIGATIONS DURING CROSS-EXAMINATION OF
DEFENCE WITNESS BORISLAV PELEVIĆ**

Office of the Prosecutor
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Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 26 January 2012, the Stanišić Defence (“Defence”) submitted that the Prosecution violated its obligations pursuant to Rule 90 (H)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) during the cross-examination of Simatović Defence witness Borislav Pelević (“In-Court Submission”).¹ The Prosecution maintained that it had not violated the Rule.² The Chamber informed the parties that it would further consider the matter, and proceeded to put several questions to the witness in relation to the Prosecution’s case, in order to avoid the situation where further questions would want to be raised, but the witness would have already finished his testimony and no be longer available.³

2. On 31 January 2012, upon inquiry by the Chamber, the Defence stated that, without prejudice to any future submissions on the matter, it did not seek an immediate ruling as to the Prosecution’s alleged violation of the Rule.⁴ On 28 March 2012, the Chamber set a deadline of 13 April 2012 for the filing of any motions on this matter, and informed the parties that it would consider the matter closed if no motion was filed by that date.⁵

3. On 13 April 2012, the Defence filed a motion (“Motion”), alleging that the Prosecution had violated Rule 90 (H)(ii) and requesting that little to no weight be given to witness Pelević’s evidence and certain other portions of the Prosecution’s evidence already adduced in support of the Prosecution case.⁶ On 27 April 2012, the Prosecution responded, requesting that the Chamber deny the Motion (“Response”).⁷ The Simatović Defence made no submissions on the matter.

II. SUBMISSIONS OF THE PARTIES

4. In its In-Court Submission, the Defence argued, *inter alia*, that: 1) the Prosecution cross-examined on the subject matter of its case; 2) witness Pelević gave evidence contradictory to the Prosecution case; 3) the Prosecution will later contest witness Pelević’s evidence, through contradicting evidence or by challenging his credibility; and 4) the Prosecution did not, during cross-examination, put its case to witness Pelević regarding the relationship between the Serbian

¹ T. 16636-16638, 16641-16442.

² T. 16638-16642.

³ T. 16643-16646

⁴ T. 16659-16662.

⁵ T. 18675.

⁶ Further Submissions by the Stanišić Defence Regarding Prosecution’s Rule 90 (H)(ii) Obligations During Cross-Examination of Defence Witness Borislav Pelević (DFS-9), 13 April 2012, paras 7, 12-14.

⁷ Prosecution Response to Stanišić Defence Further Submissions Regarding Rule 90 (H)(ii) and the Testimony of Borislav Pelević with Annex A, 27 April 2012.

SDB and Arkan's Tigers, or between Mr Stanišić ("Accused") and Arkan.⁸ Specifically, the Defence alleges that the Prosecution put Serbian SDB payment records of five men to the witness without making clear the import of these documents to its own case.⁹ In its Motion, the Defence further asserts that the Prosecution, in seeking to elicit evidence relevant to its case during the cross-examination of witness Pelević, was under an "affirmative obligation" to "crystallise" and put its case to the witness.¹⁰ The Defence asserts this "affirmative obligation" applies in regard of the relationship between the Serbian State Security Services ("Serbian SDB") and the paramilitary organization led by Željko Ražnatović ("Arkan"), aka Arkan's Tigers.¹¹ In more specific terms, the Defence submits that the Prosecution would meet its obligation by "testing" various portions of its Indictment and Pre-Trial Brief with the witness, namely that the Accused was "in control of Arkan", that Arkan and special units of the Serbian SDB were involved in the attack on the municipality of Zvornik, and that the Accused and Arkan were "close collaborators" during the conflict in the Former Yugoslavia (jointly "Arkan Case").¹²

5. As a remedy, the Defence requests that the Chamber place limited probative value upon Prosecution witnesses's evidence in support of its Arkan Case and upon Pelević's evidence when used by the Prosecution to draw conclusions adverse to the Accused's interests.¹³

6. In relation to the payment records, the Prosecution argues that it did not violate the Rule when it used materials, which the Simatović Defence had indicated it might use with the witness, to test the witness's knowledge of payment records with regard to five individuals.¹⁴ Specifically, the Prosecution submits that the witness repeatedly stated that he had no knowledge regarding their payment or employment.¹⁵ The Prosecution submits that it acted in compliance with Rule 90 (H)(ii) of the Rules, and that the testimony of witness Pelević was either not credible and/or biased or did not directly challenge the evidence led by the Prosecution and that it therefore decided "not to waste court time regurgitating" its evidence already adduced at trial.¹⁶ In this respect, the Prosecution submits that the Chamber can sufficiently evaluate witness Pelević's evidence based on the totality of his statements and the evidence presented throughout the case.¹⁷ To the extent that the Prosecution challenged witness Pelević's statements, it submits that it sought to determine whether

⁸ T. 16636-16637. See also Motion, para. 1.

⁹ T. 16642.

¹⁰ Motion, paras 7-9, 11.

¹¹ Ibid.

¹² T. 16641; Motion, paras 2, 6-7, 12-14.

¹³ Motion, paras 8-9, 11, 14.

¹⁴ Response, paras 17-18.

¹⁵ Response, para. 19.

¹⁶ Response, paras 6, 8-9, 12-15; T. 16639.

¹⁷ Response, para. 15.

the witness had any direct information or knowledge on those matters¹⁸ and that, upon cross-examination, witness Pelević “no longer claimed to have personal observations or knowledge of events”.¹⁹ Accordingly, the Prosecution argues that it is not obligated to put its entire case related to Arkan to the witness, as he “was unable to give relevant evidence due to his admitted lack of knowledge”.²⁰ The Prosecution further submits that the Chamber’s questions to the witness make clear that witness Pelević was not confused and knew the Prosecution’s case related to Arkan.²¹ Finally, the Prosecution submits that it does not intend to rely on witness Pelević’s testimony to prove its case.²²

7. Regarding the requested relief that the Chamber ascribe little to no weight to evidence already adduced by the Prosecution’s witnesses, the Prosecution submits that this is inconsistent with the Chamber’s guidance on Rule 90 (H)(ii).²³

III. APPLICABLE LAW

8. The Chamber recalls and refers to the applicable law governing Rule 90 (H)(ii) as set out in its prior guidance.²⁴

IV. DISCUSSION

9. In relation to the Prosecution’s cross-examination of witness Pelević regarding the Serbian SDB payment records, the Chamber has reviewed the transcript and finds that the witness did not contradict the Prosecution’s case on this matter. Rather, the witness stated repeatedly that he had no knowledge as to other employment of the five individuals in question.²⁵ In this regard, the Chamber clarifies that, while the Prosecution may choose to put its case directly to a witness in advance of posing a question, Rule 90 (H)(ii) does not require that it does so. In line with the text of Rule 90 (H)(ii), the witness must testify, during cross-examination, to something in contradiction to the cross-examining party’s case for the Rule to apply.²⁶ Absent any contradictory evidence from the witness, there is no obligation to further explore the issue or “put” one’s own case on the matter to

¹⁸ Response, para. 10; T. 16639.

¹⁹ Response, para. 10, Annex A.

²⁰ Response, para. 11.

²¹ Response, para. 16.

²² Response, para. 23. The Chamber notes that, in relation to the Prosecution relying on or challenging the witness’s version to prove its case, the Prosecution’s submission is different from that which was stated in the Response to the In-Court Submission. See T. 16640-16441.

²³ Response, para. 27.

²⁴ See Guidance on Rule 90 (H)(ii) and Decision on Stanišić Defence Submissions on Rule 90 (H)(ii), 19 October 2011 (“Guidance”).

²⁵ T. 16601-16602.

²⁶ See Guidance, para. 25.

the witness. The Chamber therefore finds that the Prosecution did not violate Rule 90 (H)(ii) in relation to its cross-examination of witness Pelević on the Serbian SDB payment records.

10. In relation to the Defence's assertion that the Prosecution was obliged to put the whole of its Arkan Case to the witness when cross-examining on this portion of its case, the Chamber notes that the Defence cites to its own examination of witness Pelević to show evidence contradicting the Prosecution's Arkan Case.²⁷ In this respect, the Chamber recalls that the Prosecution is not required to clarify evidence given on direct examination, even if such clarification could lead to eliciting contradictory or confirmatory evidence.²⁸

11. The Chamber reiterates the Tribunal's case law, which states that there is no absolute or general rule that requires a cross-examining party to put its version of events to a witness.²⁹ It follows that the Prosecution is not required to put every aspect of its case to a witness, even when it cross-examines on a discrete portion of its overall case. The Chamber finds that there is no support under the Rule or in the Tribunal's case law for the creation of an "affirmative obligation" to cross-examine a witness on matters upon which the opposing party has chosen not to cross-examine, and to which the witness has not testified in contradiction during cross-examination. In the present situation, the Prosecution was not obligated to "test" additional portions of its Indictment or sections of its Pre-Trial Brief with a witness, because it cross-examined on a different, discrete portion of its own case. Accordingly, the Chamber finds that the Prosecution did not violate Rule 90 (H)(ii) during its cross-examination of witness Pelević as alleged by the Defence.

12. Having found no violation of the Rule, the Chamber will not address the requested remedies.

²⁷ See, for example, T. 16475, 16486-16488.

²⁸ Guidance, para. 27.

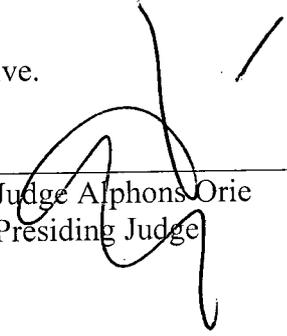
²⁹ See Guidance, para. 14, and jurisprudence cited therein.

V. DISPOSITION

13. For the foregoing reasons, pursuant to Rule 90 (H)(ii) of the Rules, the Chamber

DENIES the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twelfth of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]