

IT-03-69-T
D41700-041694
14 JUNE 2012

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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: 14 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: 14 June 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ DEFENCE REQUEST FOR
CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S IN-
COURT DECISIONS ON STANIŠIĆ DEFENCE SUBMISSIONS
REGARDING RULE 90 (H)(ii)**

Office of the Prosecutor
Mr Dermot Groome

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Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 19 October 2011, the Chamber issued guidance to the parties on Rule 90 (H)(ii) (“Guidance”).¹ On 13 December 2011, the Chamber issued its decision on the Stanišić Defence’s request for certification to appeal the Guidance (“Guidance Certification Decision”).² In the Guidance Certification Decision, the Chamber permitted the Stanišić Defence to request certification to appeal certain in-court decisions, provided that it identified instances where the Chamber gave “a concrete and direct impression” that the in-court decision would be followed by a written decision or guidance containing reasons for the decision.³ On 20 December 2011, the Stanišić Defence requested certification to appeal five in-court decisions related to Rule 90 (H)(ii) of the Tribunal’s Rules of Procedure and Evidence (“Certification Request” and “Rules”, respectively), and to exceed the word limit.⁴ On 3 January 2012, the Prosecution filed its response (“Response”), opposing the Certification Request.⁵

2. The Stanišić Defence submits that the Chamber gave a concrete and direct impression that reasons for the five in-court decisions in relation to its Rule 90 (H)(ii) objections raised in relation to the Prosecution’s cross-examinations of Witnesses Bosnić, DST-043, Knezević,⁶ Lemić,⁷ and Leković would be contained in a written decision or guidance.⁸ The Stanišić Defence further submits that the Chamber may have not, in fact, issued appealable decisions on the above objections, except for that relating to Witness Lemić.⁹ Based on this argument, the Stanišić Defence seeks to appeal the “non-decisions” on the ground that the Chamber’s approach deprives the Accused of the opportunity to challenge the legal principles applied to dismiss the Defence complaints.¹⁰ Alternatively, the Stanišić Defence submits that, if the Chamber’s in-court statements were implicit denials of Defence objections, they should be appealable upon the same basis, *i.e.* that the Chamber’s approach was arbitrary “inasmuch as the decisions were devoid of legal principle”.¹¹

¹ Guidance on Rule 90 (H)(ii) and Decision on Stanišić Defence Submissions on Rule 90 (H)(ii), 19 October 2011.

² 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), 13 December 2011.

³ Guidance Certification Decision, para. 13.

⁴ Stanišić Defence Request for Certification to Appeal the Trial Chamber’s In-Court Decisions on Stanišić Defence Submissions Regarding Rule 90 (H)(ii), 20 December 2011 (Confidential), paras 3-4, 36.

⁵ Prosecution Response to Stanišić Defence Request for Certification to Appeal the Trial Chamber’s In-Court Decisions on Stanišić Defence Submissions Regarding Rule 90 (H)(ii), 3 January 2012 (Confidential).

⁶ Witness Knezević testified provisionally with pseudonym DST-44. In a subsequent decision, the Chamber lifted the protective measure as to the witness’s identity. See Decision on the Republic of Serbia’s Motion for Protective Measures Concerning Three Witnesses, 17 April 2012, para. 26.

⁷ Witness Lemić testified provisionally with pseudonym DST-63. In a subsequent decision, the Chamber lifted the protective measure as to the witness’s identity. See Decision on the Republic of Serbia’s Motion for Protective Measures Concerning Three Witnesses, 17 April 2012, para. 26.

⁸ Certification Request, paras 7-25.

⁹ Certification Request, paras 27, 29, 32.

¹⁰ Certification Request, para. 31.

¹¹ *Ibid.*

Regarding the objection relating to Witness Lemić, the Stanišić Defence seeks certification to appeal the Chamber's in-court decision to deny the objection, based on its "arbitrary nature".¹²

3. Finally, the Stanišić Defence submits that, if the decisions are appealable, it has satisfied the two criteria of Rule 73 (B) of the Rules.¹³ Regarding the first criterion, the Stanišić Defence argues that granting certification to appeal will significantly affect the outcome of the trial since Rule 90 (H)(ii) is meant to ensure that the "beyond reasonable doubt" standard necessary to convict an Accused has been reached.¹⁴ The Stanišić Defence argues that, had the Defence witnesses been questioned by the Prosecution on its case, "irreparable damage would have been caused" to the Prosecution case, potentially leading to an acquittal.¹⁵ Regarding the second criterion, the Stanišić Defence argues that an immediate resolution by the Appeals Chamber will materially advance the proceedings because, if the decisions are not reviewed by the Appeals Chamber, the Stanišić Defence asserts it "is certain that the Prosecution will not put its case to remaining witnesses".¹⁶

4. The Prosecution submits that the Certification Request should be denied because it fails to satisfy either of the two criteria of Rule 73 (B).¹⁷ In this respect, it submits that Certification Request does not identify any instance that would significantly affect the outcome of the trial, nor does it substantiate the Stanišić Defence claim that the Prosecution "will not put its case to the remaining witnesses".¹⁸ Further, the submissions relating to the second criterion deal only with prospective future decisions, and not the five in-court decisions the Stanišić Defence is seeking to appeal.¹⁹ The Prosecution submits that, should the Chamber agree that the Stanišić Defence in fact requested specific reasoning for the in-court decisions, which the Chamber has not yet provided, the Certification Request should be denied as premature until the Chamber issues its reasoning, at which point the Defence would have the opportunity to request certification to appeal.²⁰

II. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing requests for certification to appeal pursuant to Rule 73 (B) and (C) of the Rules as set out in a prior decision.²¹

¹² Certification Request, para. 32.

¹³ Certification Request, paras 33-35.

¹⁴ Certification Request, paras 33-34.

¹⁵ Certification Request, para. 34.

¹⁶ Certification Request, para. 35.

¹⁷ Response, paras 2, 4, 17.

¹⁸ Response, paras 9, 13-15.

¹⁹ Response, para. 15.

²⁰ Response, paras 16, 18-19.

²¹ 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, paras 5-6.

6. Rule 127 (A)(ii) of the Rules provides that a Trial Chamber may, on good cause being shown by motion, recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.

III. DISCUSSION

7. The Chamber notes that the Certification Motion addresses multiple objections and, considering its instruction to the Stanišić Defence that it demonstrate its impression that a written decision or guidance would follow was based on a “concrete a direct impression”, considers it appropriate to grant the Stanišić Defence’s request to exceed the word limit.

A. Witnesses Bosnić and DST-043

8. On 14 July 2011, the Stanišić Defence submitted that the Prosecution had violated Rule 90 (H)(ii) in its cross-examination of Witness Bosnić.²² After further discussion, the Chamber invited the parties to make written submissions on the matter.²³ On 20 July 2011, the Stanišić Defence submitted that the Prosecution had again violated the Rule in its cross-examination of Witness DST-043.²⁴ In the context of the two objections, the Chamber invited the Stanišić Defence to file its consolidated complaints and any remedies in relation thereof.²⁵ In response, the Stanišić Defence stated to the Chamber that it would make detailed written submissions on the in-court objections pursuant to the Chamber’s instruction.²⁶ The Chamber set a two weeks deadline for the Defence to file the submissions, and a one week time limit for the Prosecution to respond.²⁷

9. On 3 August 2011, the Stanišić Defence filed its submissions on Rule 90 (H)(ii), which did not address the in-court objections related to Witnesses Bosnić or DST-043, but contained suggested general remedies for violations of the Rule (“Submissions”).²⁸ On 10 August 2011, the Prosecution responded.²⁹ On 17 August 2011, the Stanišić Defence filed a reply, which again did not address the objections related to Witnesses Bosnić or DST-043 (“Submissions Reply”).³⁰ The Stanišić Defence

²² T. 12873-12874.

²³ T. 12877-12878.

²⁴ T. 13141-13144.

²⁵ T. 13144-13145.

²⁶ T. 13141-13142. The Stanišić Defence stated, “[w]e submit the Prosecution violated 90 (H) in relation to the cross-examination [of] the witness we’ve just heard. The case of – *we will be making more detailed submissions on this point pursuant to Your Honour’s order that the parties file submissions*, but I put this very briefly on the record [...]”. (Emphasis added).

²⁷ T. 13145-13146.

²⁸ Stanišić Defence Submissions on Rule 90 (H)(ii), 3 August 2011. The Stanišić Defence explicitly stated, despite the inclusion of suggested remedies applied by other Trial Chamber, that “it has not suggested any remedy for its assertion that the Prosecution has thus far failed to adequately put its case to Defence witnesses”. See para. 24.

²⁹ Prosecution Response to Stanišić Defence Submissions on Rule 90 (H)(ii), 10 August 2011.

³⁰ Stanišić Defence Reply to the Prosecution Response to Stanišić Defence Submissions on Rule 90 (H)(ii), 17 August 2011 (Confidential).

requested that the Chamber adopt a “remedy analysis” for violations of the Rule, however, it made clear that the proposed remedies were a general “remedy analysis”, not linked to any specific in-court objection, nor was any particular remedy discussed in relation to a specific alleged violation.³¹

10. Despite stating that it intended to make written submissions on the in-court objections, as instructed by the Chamber, the Stanišić Defence did not do so within the deadline set by the Chamber. To the extent that the Stanišić Defence now, through its Certification Request, wishes to make a submission on these objections for which the Chamber had set a deadline, the Chamber finds that the Certification Request contains no showing of good cause, as required by Rule 127(A)(ii) of the Rules, for the filing of submissions after the expiry of the Chamber’s deadline. Accordingly, the Chamber will not further consider the merits of the Certification Request in relation to these two witnesses.

B. Witnesses Lemić, Knezević, and Leković

11. Witnesses Lemić, Knezević and Leković testified after the parties had made their submissions on the general application of Rule 90 (H)(ii) of the Rules and prior to the issuance of the Guidance. On 23 August 2011, the Stanišić Defence submitted that the Prosecution had violated Rule 90 (H)(ii) in its cross-examination of Witness Knezević, and the Chamber implicitly denied the objection in-court.³² On 31 August 2011, the Stanišić Defence submitted that the Prosecution had violated Rule 90 (H)(ii) in its cross-examination of Witness Lemić.³³ In court, the Chamber denied the objection.³⁴ On 12 October 2011, the Stanišić Defence submitted that the Prosecution had violated Rule 90 (H)(ii) in its cross-examination of Witness Leković and the Chamber implicitly denied the objection in-court.³⁵

12. The Stanišić Defence did not request certification to appeal these decisions within seven days as required by Rule 73 (C) of the Rules, submitting that the Chamber gave a concrete and direct impression that the then-upcoming Guidance would contain reasons for this decision.³⁶ The Response did not address the time limit of Rule 73 (C).

³¹ Submissions Reply, para. 4. The final sentence of paragraph 4 of the Reply states: “[a]t this stage the Defence limits its submissions to proffering its interpretation of the object and purpose of Rule 90 (H)(ii) and suggesting that the aforementioned analysis/remedy is logical and ought to be followed”.

³² T. 13525-13526.

³³ T. 13703-13707.

³⁴ T. 13708.

³⁵ T. 14338-14340.

³⁶ Certification Request, paras 17-18, 20-21.

13. While the Chamber at times made reference to the then-upcoming Guidance, it did not state that reasons for these three decisions would be provided.³⁷ The Chamber considers that merely mentioning a related guidance when issuing a decision does not mean that reasons for the decision will later be provided. However, the Chamber also considers that the Stanišić Defence could reasonably have the impression that reasons for the in-court decisions would follow and thus, awaiting these reasons, it did not request certification to appeal. The Chamber will, therefore, recognize the Certification Request as it relates to these three witnesses as validly filed.

14. As the two criteria of Rule 73 (B) are cumulative and both must be satisfied, the Chamber will first address the second criterion. In relation to this criterion, that an immediate resolution by the Appeals Chamber may materially advance the proceedings, the Stanišić Defence argues that the Prosecution will not put its case to future Defence witnesses.³⁸ The Chamber considers that the Stanišić Defence has not provided any support for its broad conclusory assertion regarding future cross-examinations by the Prosecution or Chamber decisions on any objections in relation thereto, nor has it identified a specific issue related to the decisions in question for which the Appeals Chamber's immediate resolution would materially advance the proceedings. Further, the Stanišić Defence focuses on future, hypothetical occurrences (the Prosecution's cross-examination of future Defence witnesses). In this respect, the Chamber considers that any future objections and Chamber decisions would necessarily be of a specific and topically-based nature. Therefore it is not clear how an Appeals Chamber's resolution of an issue related to the *present* decisions would materially advance the proceedings in relation to any future potential Prosecution conduct on cross-examination or Chamber decision in relation thereto.. Finally, the Chamber will consider any future objections on a case by case basis, and any decisions on future objections can be certified for appeal if the two criteria of Rule 73 (B) are met.³⁹ The Chamber therefore considers that the Certification Request does not satisfy the second criterion of Rule 73 (B). In light of the Chamber's conclusion that the second criterion has not been satisfied, and the two criteria being cumulative in nature, the Chamber will not address the arguments of the Stanišić Defence in relation to the first criterion.

³⁷ See, for example, T. 13708.

³⁸ Certification Request, para. 35.

³⁹ See 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), 13 December 2011, para. 8; See Guidance, para. 32.

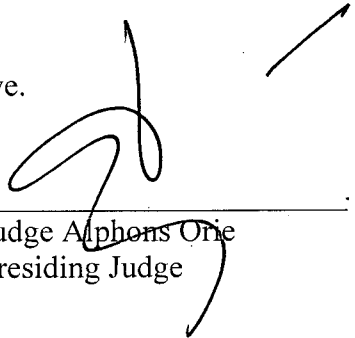
IV. DISPOSITION

15. For the foregoing reasons, pursuant to Rules 73 (B) and (C), 90 (H)(ii), and 127 (A)(ii) of the Rules, the Chamber

GRANTS the Stanišić Defence request to exceed the word limit; and

DENIES the Stanišić Defence Certification Request.

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



Judge Alphons Orie
Presiding Judge

Dated this fourteenth of June 2012
At The Hague
The Netherlands

[Seal of the Tribunal]