IT-99-36-AR73.7
A5-1/126bis
13 JUNE 2002

5/12566bis

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-99-36-AR73.7

Date: 6 June 2002

Original: English / French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **6 June 2002**

THE PROSECUTOR

v.

RADOSLAV BRĐANIN
MOMIR TALIĆ

DECISION ON THE INTERLOCUTORY APPEAL AGAINST A DECISION OF THE TRIAL CHAMBER, AS OF RIGHT

The Office of the Prosecutor:
Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused Talić:
Mr. Slobodan Zečević
Ms. Natacha Fauveau Ivanović

Counsel for the Appellant Brđanin:
Mr. John Ackerman
Mr. Milan Trbojević

THE APPEALS CHAMBER of the 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 (hereinafter "the International Tribunal"),

NOTING the "Interlocutory Appeal against a Decision of the Trial Chamber, as of Right" filed on 16 April 2002 (hereinafter "the Interlocutory Appeal") by the accused Radoslav Brđanin (hereinafter "the Appellant") further to the certification to appeal given by the competent Trial Chamber on 10 April 2002 pursuant to Rule 73(C) of the Rules of Procedure and Evidence of the International Tribunal (hereinafter "the Rules"),

NOTING the "Prosecution's Response to the Pleading Entitled "Interlocutory Appeal against a Decision of the Trial Chamber, as of Right" filed by the Accused Radoslav Brđanin on 16 April 2002" filed on 18 April 2002 (hereinafter "the Prosecution's Response"),

CONSIDERING that the Appellant had not filed a reply by 22 April 2002 pursuant to Article 3 of the Practice Direction on the Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal (IT/155 Rev. 1),

NOTING the request of the Appellant supported by the Prosecution[1] in which he asks the Appeals Chamber to set a schedule for making brief presentations in court[2],

CONSIDERING, nonetheless, that this Chamber decided to continue examining the appeal without further submissions from the parties since they had provided it with sufficient information in writing for it to make a ruling,

NOTING the "Decision on "Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Article 21 of the Statute of the International Tribunal" by the Accused Radoslav Brđanin and on "Rule 90(H)(ii) Submissions" by the Accused Momir Talić" rendered in this instance by the Trial Chamber on 22 March 2002 (hereinafter "the Impugned Decision"),

CONSIDERING that Rule 90(H)(ii) of the Rules states that "[i]n the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party,

[1] Prosecution's Response, para. 8.
[2] Interlocutory Appeal, para. 8.

counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness",

CONSIDERING that the Appellant maintains that "the Trial Chamber erred when it determined that the provisions of Rule 90(H)(ii) are not in conflict with Articles 20 and 21 of the Statute of the Tribunal to the extent that such provisions would require counsel to reveal the content of privileged communications with his client"[3],

CONSIDERING that the Appellant requests the Appeals Chamber to reverse the Impugned Decision and enter a finding that to the extent that Rule 90(H)(ii) is inconsistent with Articles 20 and 21 of the Statute (as claimed by the Appellant), the Statute must control,

CONSIDERING that the Appellant contends that the applicability of Rule 90(H)(ii) should be limited to two scenarios, that is: (1) where Defence Counsel is in possession of an apparently authentic document which contradicts the testimony of a prosecution witness, and (2) where Defence Counsel has a signed and sworn statement from a witness who has agreed to testify which contradicts the testimony of the prosecution witness[4],

NOTING the Prosecution's contention that the Appellant did not demonstrate how the Trial Chamber had erred in rendering the Impugned Decision,

CONSIDERING that, by stating that Rule 90(H)(ii) of the Rules may be applied to only the two scenarios mentioned above, the Appellant is actually claiming that if it is applied to other situations the Rule will be in conflict with the other provisions of the Statute of the International Tribunal to the extent that in such circumstances, as an accused, he would be required to reveal confidential communications with his Counsel which are protected by the Statute of the Tribunal,

CONSIDERING that the Appellant's allegation, according to which Rule 90(H)(ii) violates his right to confidential communications with his Counsel, is based on an erroneous interpretation of the Rule since the Rule does not address the issue of a client's right to privileged communications with his Counsel, and **CONSIDERING** that the said Rule

[3] Interlocutory Appeal, para. 6.
[4] *Ibid.*, para. 7.

actually seeks to facilitate the fair and efficient presentation of evidence whilst affording the witness being cross-examined the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party's evidence, so saving the witness from having to reappear needlessly in order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more accurately owing to the explanation of the witness or his Counsel,

CONSIDERING that the argument which the Appellant originally put forward regarding the alleged conflict between Rule 90(H)(ii) and the right of an accused to remain silent is irrelevant since the purpose of Rule 90(H)(ii) is to control the procedure for presenting evidence; in the case in point, the source of the evidence is not relevant in the context of this procedure;

FURTHER CONSIDERING that the Defence is under the obligation to contribute to the success of a fair trial at the International Tribunal as is borne out, in particular, by Rule 65 *ter*(F)(i) of the Rules which instructs the Defence to specify in its pre-trial brief "in general terms, the nature of the accused's defence", and Rule 67(A)(ii) which requires it to notify the Prosecutor of its intent to offer the defence of alibi or any special defence, an obligation which in no manner violates the right of the accused to remain silent,

CONSIDERING, moreover, that the Impugned Decision, rendered after lengthy discussions between the parties and the Trial Chamber in trial, clearly indicates that the right of the accused to communicate with his Counsel, expressly protected under Rule 97 of the Rules, is not violated by Rule 90(H)(ii) "as the Trial Chamber will not be able to distinguish between what the accused may have revealed to counsel and what counsel may have learned from independent sources"[5],

CONSIDERING that, during the trial, the Appellant did not demonstrate that he was compelled to reveal privileged communications with his Counsel as a consequence of observing the requirements of Rule 90(H)(ii),

[5] Impugned Decision, para. 17. See also para. 18.

CONSIDERING, likewise, that the two scenarios discussed by the Appellant which he claims to be the only instances in which Rule 90(H)(ii) applies are purely theoretical cases and that there is no reason for the Appeals Chamber to examine them,

FOR THE FOREGOING REASONS,

DECIDES to dismiss the Interlocutory Appeal.

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

Done this sixth day of June 2002
At The Hague
The Netherlands

(signed)

Claude Jorda
Presiding Judge

[Seal of the Tribunal]