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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-08-91-T
	Date:	12 May 2010
	Original:	English

IN TRIAL CHAMBER II

Before:	**Judge Burton Hall, Presiding** **Judge Guy Delvoie** **Judge Frederik Harhoff**
Registrar:	**Mr. John Hocking**
Decision of:	**12 May 2010**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

DECISION ON PROSECUTION'S MOTION SEEKING CLARIFICATION IN RELATION TO THE APPLICATION OF RULE 90(H)(ii)

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

1. The Trial Chamber II ("Trial 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 ("Tribunal") is seised of "Prosecution's motion seeking clarification in relation to the application of Rule 90(H)(ii)", filed on 5 February 2010 ("Motion"), whereby the Prosecution requests the Trial Chamber to:

a. clarify the application of Rule 90(H)(ii) of the Rules of Procedure and Evidence of the Tribunal ("Rules") in the present proceedings;

b. rule that it can direct the cross-examining party to put its case to a witness when it is apparent that the nature of the party's case is in contradiction with the evidence of the witness; and

c. specify the consequences of a breach of the obligation set out in Rule 90(H)(ii).[1]

2. The Defence for Mićo Stanišić ("Stanišić Defence") and the Defence of Stojan Župljanin ("Župljanin Defence" and together, "Defence") responded on 18 February 2010 ("Stanišić Response" and "Župljanin Response", respectively).[2] The Župljanin Defence adopts the arguments of the Stanišić Defence, which in turn adopts the arguments of the Župljanin Defence.[3] Both independently argue that the Trial Chamber should deny the Motion.[4] The Župljanin Defence alternatively requests that any clarification on the application of Rule 90(H)(ii) provided be based on submissions in its response.[5]

I. SUBMISSIONS

A. Prosecution

3. The Prosecution submits that the Motion is filed "as a consequence of the Trial Chamber's oral rulings of 1 February 2010 during the testimony of [Vitomir Žepinić] with regard to the obligation of a cross-examining party to put to a witness the nature of its case that is in contradiction to the evidence given by the witness" ("First Oral Ruling").[6] It submits that the "issues relating to the Defence's obligations arising from Rule 90(H)(ii) emerged on two occasions"

[1] Motion, paras 20, 24.
[2] Response by Mr. Stanišić to Prosecution's motion seeking clarification in relation to the application of Rule 90(H)(ii), 18 Feb 2010; Župljanin Response to Prosecution's motion seeking clarification in relation to the application of Rule 90(H)(ii), 18 Feb 2010.
[3] Stanišić Response, para. 2; Župljanin Response, para. 6.
[4] Stanišić Response, para. 10.
[5] Župljanin Response, para. 18.
[6] Motion, para. 1, citing Vitomir Žepinić, 1 Feb 2010, T. 5963-5968.

during the testimony of Vitomir Žepinić.[7] In the first instance, the Prosecution claims that "the Župljanin Defence failed to put to the witness its position that the witness incorrectly identified the voice of Župljanin on the recording of an intercepted telephone call". The Prosecution "objected on the grounds that the Defence ought to put its case to the witness" and merely stating that the Defence "contest all the intercepted conversations" was not sufficient ("First Objection").[8]

4. In the second instance, the Prosecution submits that the Stanišić Defence "failed to put to [Vitomir Žepinić] that the Defence disputes the witness' testimony that during the course of a meeting in April 1992, Stanišić pointed a gun at the witness and accused him of 'undermining the concept on which the parties had agreed about the splitting of the MUP and the splitting of the special unit'."[9] The Prosecution objected, stating that if the Defence suggests "that a witness is mistaken or lying, then that must be put to the witness" ("Second Objection").[10]

5. The Prosecution submits that in response to its objections, the Trial Chamber issued its First Oral Ruling,[11] in view of which the Prosecution states that "further submissions are essential to clarify the consequences of a breach of the obligation under Rule 90(H)(ii)".[12] A clear ruling on this matter, the Prosecution avers, would promote judicial economy,[13] alert the parties of the possible sanctions of such failure and "spare the Prosecution from having to recall witnesses (or call additional witnesses) in order to rebut unforeseen challenges to their prior evidence".[14]

6. The Prosecution concedes that the "Defence need not explain the provenance of the contradictory evidence" or put every detail of the Defence's position to the witness. The Prosecution also states that the Defence "need not waste time putting their case to a witness where it is obvious in the circumstances of the case that the witness' version of events is being challenged."[15] However, it maintains that the two episodes from the Vitomir Žepinić cross-examination breach Rule 90(H)(ii).[16]

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[7] Motion, para. 3.
[8] *Id.*, T.5890.
[9] Motion, para. 4.
[10] *Ibid.*, citing Vitomir Žepinić, 1 Feb 2010, T.5962.
[11] *Id.*, T.5968.
[12] Motion, para. 5.
[13] *Ibid.*, citing *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-T, Decision on motion to declare Rule 90(H)(ii) void to the extent that 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, 22 Mar 2002 ("*Brđanin* Decision") , para. 20.
[14] *Ibid.*
[15] *Ibid*, citing *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Judgement, 2 Feb 2009 ("*Karera* Appeal Judgement"), para. 26.
[16] Motion, para. 21.

7. The Prosecution proposes two possible remedies, from prior trials of this Tribunal.[17] One remedy would require the Trial Chamber to make an affirmative finding of failure, and based on factors such as the impact of the failure on the proper conduct of trial and the importance of the evidence, allow the Prosecution "to recall the witness to be examined on the issues that were not adequately put to the witness in cross-examination."[18] The other remedy is for the party failing to comply with its duty under the Rule to be potentially precluded from adducing contradictory evidence.[19] According to the Prosecution, these consequences make it "manifestly clear that a Trial Chamber can invite the cross-examining party to put its case to the witness in circumstances where the challenge is oblique."[20]

B. Stanišić Defence

8. The Stanišić Defence counters that there was no breach of Rule 90(H)(ii) with respect to the First Objection since the "matter was fully ventilated in court".[21] It submits that the Trial Chamber "correctly found that an Accused cannot be compelled to say whether his voice can be heard on an intercept since this would be contrary to the presumption of innocence, the right to remain silent and not be compelled to testify against himself."[22]

9. Conceding that it had "good faith basis to confront the witness" in relation to the Second Objection, the Stanišić Defence submits that "Mr. Stanišić should not be punished or limited in his ability to present a full and complete defence as a result of any failure or error on the part of his counsel to fulfil their obligation to him in this particular instance under Rule 90(H)(ii), as the Prosecution requests".[23]

10. The Stanišić Defence endorses the Trial Chamber's view that "it would be premature for it to make any determinations or to comment on the evidence at this stage of the proceedings."[24] It adds that the Trial Chamber "will only be in a position to make determinations on the weight, credibility and probative value of the evidence, when all the evidence presented by the Prosecution and the Defence in relation to these matters has been heard."[25]

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[17] Motion, paras 16-18.
[18] Motion, para. 16, citing *Prosecutor v. Strugar*, Case No. IT-01-42-T, T. 8065.
[19] Motion, para. 17, citing *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Order setting forth guidelines for the procedure under Rule 90(H)(ii), 6 Mar 2007 ("*Popović* Guidelines").
[20] Motion, para. 18.
[21] Stanišić Response, para. 3.
[22] *Id.*, para. 4.
[23] *Id.*, para. 8.
[24] *Id.*, para. 9, citing Vitomir Žepinić, 1 Feb 2010, T. 5961-5962.
[25] *Id.*, para. 9.

C. Župljanin Defence

11. The Župljanin Defence responds, as to the First Instance, that the "counsel clarified that all intercepted conversations are contested", following which the Trial Chamber ruled that it could not require the Defence to answer the question as put by the Prosecution.[26] It further submits that it is unnecessary, and perhaps even improper, for the Trial Chamber to issue a clarification or further guidance on the application of Rule 90(H)(ii).[27] The Župljanin Defence submits that the existing Guideline 20 provides sufficient guidance and the Trial Chamber can address issues such as these in the course of the trial on a case-by-case basis.[28]

12. The Župljanin Defence submits that specifying consequences of the breach of the obligation under Rule 90(H)(ii) "would be in direct contradiction [of] decisions by other Trial Chambers on this same issue" since "at least two Trial Chambers have, very properly, declined to answer this same question in past cases."[29]

13. In the alternative, if the Trial Chamber were to find it appropriate to grant the relief requested, the Župljanin Defence submits that Rule 90(H)(ii) must be applied with flexibility in complex trials such as the present one.[30] According to the Župljanin Defence, a flexible approach would not require obvious challenges to be put to witnesses.[31] The Župljanin Defence submits that of the two consequences proposed by the Prosecution, "the only proper consequence of a failure to comply with Rule 90(H)(ii) is for any such failure to affect the weight that can be given to the individual piece of evidence when it is ultimately being evaluated by the Chamber".[32]

II. APPLICABLE LAW AND DISCUSSION

A. Prior application of Rule 90(H)(ii) by the Trial Chamber

14. The Trial Chamber recalls that it pronounced orally on the application of Rule 90(H)(ii) on two occasions, on 1 February 2010 ("First Oral Ruling") and on 25 March 2010 ("Second Oral Ruling").[33]

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[26] Župljanin Response, paras 3, 14, citing Vitomir Žepinić, 1 Feb 2010, 5890-5898, 5902.
[27] Župljanin Response, paras 7-8, 10.
[28] Župljanin Response, para. 9. See also Revised procedural guidelines, 2 Oct 2009, para. 20.
[29] Župljanin Response, paras 11-12, citing *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on partly confidential Defence motion regarding consequences of a party failing to put its case to witnesses pursuant to Rule 90(H)(ii), 17 Jan 2006 ("*Orić* Decision"), p. 2; *Brđanin* Decision,, para. 20.
[30] Župljanin Response, para. 13, citing *Orić* Decision, p. 2.
[31] Župljanin Response, para. 14.
[32] Župljanin Response, paras 16-17.
[33] ST174, 25 Mar 2010, T. 8219-8223; Vitomir Žepinić, 1 Feb 2010, T. 5968-5970.

15. In the First Oral Ruling, addressing the First Objection and Second Objection, the Trial Chamber stated that it would have expected the Defence to address the matter with the witness "in their opportunity to cross-examine".[34] But, having failed to do so, Defence could not then be required by the Trial Chamber "before they close their cross-examination to challenge the witnesses on these two items". It added that:

> notwithstanding the clear obligation that the Defence has in the course of cross-examination to put [its] case, if it chooses to leave something there, then [...] the procedural advantage seems to be clearly in favour of the Prosecution.[35]

It went on to rule that:

> [having] taken the opportunity to refamiliarize ourselves with the reasoning of the Trial Chamber in the Brdjanin decision to which counsel for the Prosecution helpfully drew our attention, we respectively adopt in its entirety the reasoning as stated in that case, and as applied to the instant case, we repeat the decision that we gave earlier, and are of the view that there is – that this -- the two issues to which Ms. Korner has drawn our attention do not require the Chamber to make any ruling as to how the Defence should approach those issues.[36]

16. In the Second Oral Ruling, the Trial Chamber indicated that in its view:

> for whatever tactical or strategic reasons, the Defence chooses not to explore a avenue which it is obvious is fundamental to the case of the Prosecution, it is a decision which is theirs in the conducts of the case, of their case. And at the end of the day, the decision, of course, is that of the Trial Chamber's. As it always is [...] there are consequences, in other words, to whatever decision the Defence chooses to take. But the decision is theirs and is not for the Trial Chamber to tell them how to conduct their case.[37]

B. Discussion on Rule 90(H)(ii)

17. In order to fulfil the requirements of Rule 90(H)(ii), it is sufficient that the cross-examining party put the nature of its case to the witness, meaning the general substance of its case conflicting with the evidence of the witness, chiefly to protect the witness against any confusion.[38] There is no need for the cross-examining party to explain every detail of the contradictory evidence, and the Rule allows for some flexibility depending on the circumstances of the trial.[39] In particular, if it is obvious in the circumstances of the case that the version of the witness is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness.[40] It is a corollary

[34] Vitomir Žepinić, 1 Feb 2010, T. 5966.
[35] Vitomir Žepinić, 1 Feb 2010, T. 5962,5966-5967.
[36] Vitomir Žepinić, 1 Feb 2010, T. 5968.
[37] ST174, 25 Mar 2010, T. 8219-8223.
[38] *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeal Judgement, 17 Mar 2009 ("*Krajišnik* Appeal Judgement"), para. 368; *Karera* Appeal Judgement, para. 25; *Orić* Decision, pp 1-2; *Popović* Guidelines, para. 2; *Brđanin* Decision, paras 13, 17.
[39] *Krajišnik* Appeal, para. 368; *Karera* Appeal Judgement, para. 26; *Brđanin* Decision, para. 14; *Orić* Decision, pp 1-2; *Popović* Guidelines, para. 2.
[40] *Krajišnik* Appeal Judgement, para. 368, citing *Browne v. Dunn*, (1893) 6 R. 1894, 67, p. 71.

of the Rule that where a contradiction is put to a witness, the cross-examining party will later adduce the supporting contradictory evidence at trial, if it is not already before the Trial Chamber.[41]

18. According to the circumstances of the case, such as complexity or scope of the indictment, the facts and circumstances at hand, the Trial Chamber will adopt a flexbile approach allowing the Defence latitude in presenting evidence during the defence case that goes against particular aspects of a Prosecution witness's testimony, which it overlooked in its cross-examination.[42] This flexibility should not function to derogate from what Rule 90(H)(ii) seeks to secure and it must be ensured that either party knows *in a timely manner* what is being contested and what is not.[43] The Trial Chamber recalls that "[p]arties may make any argument as to the weight the Chamber should ascribe to the evidence in their final trial briefs and closing arguments."[44]

19. This understanding and application of the Rule, contrary to the assertion made by the Stanišić Defence, does not violate the rights of the Accused as protected by Article 21 of the Statute "since the purpose of Rule 90(H)(ii) is to control the procedure for presenting evidence.[45] It is comparable, in spirit, to Rules 65 *ter*(F) and 67(A)(ii), which mandate that the Defence contribute to the success of a fair trial and participate positively at all stages of the proceedings.[46]

C. Consequences of a breach of Rule 90(H)(ii)

20. The Trial Chamber does not consider Rule 90(H)(ii) as requiring it to compel the Defence to present the nature of its case in contradiction of the evidence of Prosecution witnesses.[47] However, the Trial Chamber holds that there will be consequences to a decision by the Defence to not put the nature of its case when contradictory to the evidence of the witness on the stand.[48]

21. The Trial Chamber affirms that where evidence is later presented to contradict a Prosecution witness, the nature of which was not put to that witness, it "will evaluate the circumstances and decide on a case-by-case basis" what weight should be attached to such evidence[49] and will take into account the fact that the Prosecution witness was not given the opportunity to comment on the

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[41] *Popović* Guidelines, para. 4.
[42] *Orić* Decision, pp 1-2; *Prosecutor v. Martić*, Case No. IT-95-11-T, Revised version of the decision adopting guidelines on the standards governing the presentation of evidence and the conduct of counsel in court, 19 May 2006, para. 10.
[43] *Brđanin* Decision, para. 20.
[44] *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Lukic Defence motions for admission of documents from bar table, 11 June 2008, para. 77.
[45] *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.7, Decision on interlocutory appeal against a decision of the Trial Chamber, as of right, 6 Jun 2002 ("*Brđanin* Appeal Decision"), p. 4.
[46] *Ibid.*
[47] First Oral Ruling.
[48] *Ibid.*
[49] *Brđanin* Decision, para. 20.

contradictory evidence.[50] The Trial Chamber could ascribe no probative value to contradictory Defence evidence the nature of which was not put to the Prosecution witness while on the stand.[51] Moreover, if the circumstances are sufficiently egregious, the Trial Chamber may preclude the Defence from adducing such contradictory evidence[52] and avoid recalling witnesses.[53]

22. The Trial Chamber declines to prescribe particulars as to how the Defence is to conduct its case according to Rule 90(H)(ii) during cross-examination of a Prosecution witness. When , in the interest of justice, the Trial Chamber is required to consider alleged violations of Rule 90(H)(ii), it will do so in line with the explanation provided here.

III. DISPOSITION

23. For the foregoing reasons and pursuant to Rule 90(H)(ii), the Trial Chamber **DENIES** the Motion.

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

Judge Burton Hall
Presiding

Dated this twelfth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

[50] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Judgement, 26 Feb 2009, paras 51-52.
[51] Popović Guidelines, para. 3.
[52] *Ibid.*
[53] *Brdanin* Decision, para. 20; *Orić* Decision, p. 2.