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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 Former Yugoslavia since 1991	Case No.	IT-99-36-T
		Date:	22 March 2002
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Decision of: **22 March 2002**

PROSECUTOR

v.

RADOSLAV BRĐANIN
and
MOMIR TALIĆ

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

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Ms. Milka Maglov, for Radoslav Brđanin
Mr. Xavier de Roux and Ms. Natacha Fauveau-Ivanović, for Momir Talić

TRIAL CHAMBER II 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 seized of the "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" filed by the accused Radoslav Brđanin ("Brđanin") on 27 February 2002 ("First Brđanin Motion") and of the "Rule 90(H) (ii) Submissions" filed by the accused Momir Talić ("Talić") on 4 March 2002 ("Talić Motion").

I. INTRODUCTION

1. On 21 February 2002, during trial proceedings, a lengthy discussion took place concerning the application of Rule 90(H) (ii).[1]

2. On 27 February 2002, counsel for Brđanin filed the First Brđanin Motion arguing that a literal application of Rule 90(H) (ii) of the Rules of Procedure and Evidence ("Rules") violates Articles 20 and 21 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("Statute"), and more in particular the accused's right to remain silent. The Motion argues that the application of Rule 90(H) (ii) may require counsel for the accused to reveal information that could only have come from the accused. Moreover, it is asserted that Rule 90(H) (ii) violates "firmly established international law if applied in the manner suggested by the Prosecutor"[2].

3. On 4 March 2002, during trial proceedings, counsel for Brđanin raised the issue that Rule 90(H) (ii) infringes upon Rule 97 (lawyer–client privilege) and the confidentiality of communications between the accused and counsel.[3]

4. On 4 March 2002 counsel for Talić filed the Talić Motion putting forward the position that there is an inconsistency between the French and English version of the Rule, as in the French version defence counsel is obliged to confront the witness with the elements in his possession, while the English version implies that counsel should put to the witness defence counsel's viewpoint which contradicts the witness' statement. It is submitted that the English version of Rule 90(H) (ii) violates Articles 21(2) and 21(4) (2) of the Statute.

[1] Transcript, pp. 2113-2132.
[2] First Brđanin Motion, para. 1.
[3] Transcript, pp. 2662-2673.

5. On 8 March 2002, the prosecution filed a response to the First Brđanin Motion, "Prosecution's Response to Pleadings Entitled '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' Filed by the Accused Brđanin on 27 February 2002" ("Prosecution Response"). The prosecution submits that the First Brđanin Motion should be denied and seeks the Trial Chamber to issue written guidelines on what is required of counsel for the prosecution and the defence in applying Rule 90(H)(ii).

6. In the Prosecution Response, it is argued that Rule 90 (H) (ii) does not infringe upon the right to remain silent, because this Rule in no way compels an accused to provide any material that could be used by the prosecution as incriminating evidence. Moreover, according to the prosecution the right to silence has certain common sense limitations and does not mean that the accused has a right to present a defence without giving the prosecution a fair opportunity to respond.

7. In addition, the prosecution asserts that Rule 90 (H) (ii) does not violate the confidentiality of the communications between the accused and counsel: it only requires the defence to "put his case" to the witness he/she is cross-examining, not to reveal the communications between the accused and counsel. According to the prosecution, it is clear that counsel is only required to "put his case" to the witness being cross-examined, that is to put to the witness that a particular statement was never made only if counsel plans to present some evidence of that denial or to argue that it was never made. Moreover, the prosecution is of the viewpoint that 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.

8. The Prosecution Response also indirectly addresses the issues raised in the Talić Motion. Although the Talić Motion is not considered in depth, the Prosecution Response considers it supports the First Brđanin Motion.

9. On 14 March 2002, counsel for Brđanin filed a reply to the Prosecution Response, "Reply to Prosecutor's Response to Brđanin 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", expressing uncertainty about the power of a Trial Chamber to declare that a Rule of the Tribunal void (as requested in the First Brđanin Motion), but otherwise maintaining the balance of the argument contained in the First Brđanin Motion.

II. DISCUSSION

10. The relevant provisions from the Rules and the Statute are:

Rule 90

Testimony of witnesses

(H) (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, 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.

Rule 97

Lawyer-Client Privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers ensure that a trial is a fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 21

Right of the accused

2. In the determination of charges against him, the accused shall be entitled to fair and public hearing, subject to Article 22 of the Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(g) not to be compelled to testify against himself or to confess guilt.

11. Rule 90(H) (ii) expressly requires counsel for the accused, when cross-examining those prosecution witnesses who are able to give evidence which is relevant to the case of the accused, to put to them the nature of that case in contradiction of their evidence. The Trial Chamber notes that

to its knowledge no judgment of the Tribunal has so far dealt with the alleged inconsistency of this Rule with Articles 20 and 21 of the Statute and with Rule 97.

12. The origins of Rule 90(H) (ii) are to be traced back to a corresponding or analogous rule of evidence in several common law jurisdictions. The Chamber, therefore, recognizes the utility of referring to the standard case law from these jurisdictions in trying to understand the rationale of this Rule. Indeed the equivalent of Rule 90(H) (ii) in common law jurisdictions, where it exists, is generally known as the rule of *Brown v. Dunn*[4]. Such a rule is followed in adversarial systems, like England[5], Australia[6] and Canada[7].[8] This rule emphasizes the importance of cross-examination in obtaining comment upon facts in issue. Where the cross-examining party intends to later contradict the testimony of a witness on a fact in issue (by introducing further evidence or by suggesting that the witness's testimony can be otherwise explained), the witness should be given the opportunity in cross-examination to comment upon the contradictory version. In *Archbold*[9], the rule is succinctly explained as follows:

> "If in a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness for the defence it is right and proper that the witness should be challenged when in the witness-box or, at any rate, that it should be made plain while the witness is in the box that this evidence is not accepted."

13. The Trial Chamber states without the least hesitation and stresses that Rule 90(H) (ii) was adopted to serve fairness in the conduct of trial and to expedite trial proceedings in this Tribunal. In addition, as will be shown, it is a Rule which combines with other rules of this Tribunal which have the same *raison d'être*. It is, indeed, a rule of fairness not only because it serves to enable the witness to comment upon the contradictory version, but also to give the trier of the fact (in this case the Trial Chamber) the opportunity to more accurately judge the credibility of the contradictory version. Moreover, it is obvious that if a situation were allowed to obtain whereby the cross-examining party is free not to indicate in cross-examination which particular aspects of that witness' testimony are being contested, this may lead the party calling the witness to believe that the opponent is not going to contest certain matters, and consequently would fail to call other corroborating evidence because there would be no apparent need for this. It is obvious, however, that this is not the way the criminal process before this Tribunal is conceived. In fact, the whole

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[4] This is a decision of the House of Lords of the U.K.: (1893) 6 R. 67.
[5] RICHARDSON, P.J. (ed.), *Archbold 2001: Criminal Pleading, Evidence and Procedure*, London, Sweet & Maxwell, 2001, p. 1097.
[6] LIGTERWOOD, A.L.C., *Australian Evidence*, Sydney, Butterworths, 1988, p. 318-319.
[7] SALHANY, R.E., *Criminal Trial Handbook*, Carswell, Thomson Professional Publishing, 1999, Release No. 2, 11-11.
[8] At first glance, that rule has never been adopted in the U.S.
[9] RICHARDSON, P.J. (ed.), *o.c.*, p. 1097.

concept of the criminal process before this International Tribunal is based on internationally recognized basic principles of fair trial and justice as well as on the principles of transparency and reciprocal disclosure. Therefore, the Trial Chamber has no difficulty in understanding why the cross-examining party in the circumstances described in Rule 90(H) (ii) is required to put the nature of the case, meaning the substance of the contradictory evidence, to the prosecution witness if this party contests the evidence of this witness.

14. The Trial Chamber acknowledges that Rule 90(H) (ii) requires counsel for the accused to contest statements made by the witness which if not taken up and in the absence of other unequivocal indicators would contend that defence counsel is not contesting his statement. It should be pointed out, however, that there is no absolute or general rule requiring defence counsel to put to the prosecution the accused's version of the events or to put the witness on notice of every detail that defence counsel does not accept. The Rule, as explained in *Brown v. Dunn supra,* allows for a certain flexibility and assumption to be made based on the general conduct of the trial.

15. The Chamber also points out that it is useful as well as relevant to consider the rationale of Rule 90(H) (ii) in juxtaposition with that of Rule 65 *ter* (F). Pursuant to the latter, the accused is required to set out in general terms the nature of his defence, indicating the matters on which he/she takes issue with the prosecution, and stating, in relation to each such matter, the reason why he/she takes issue with the prosecution. It is the firm conviction of this Chamber that in either case the importance and utility of the respective Rule in criminal trials such as the present one hardly requires any explanation; and the Chamber further fails to see how either Rule impinges, encroaches upon or diminishes the internationally recognized right of the accused to remain silent and not to be compelled to incriminate himself/herself. Similarly, the Chamber fails to see how the protection of confidentiality of communications between the accused and counsel can even be minimally threatened, let alone encroached upon or violated, if counsel does what is required from him by the Rule in question.

16. Moreover, the Trial Chamber disagrees with the suggestion that the advocate stands in the shoes of the accused in any absolute terms and therefore has the right not to be active when conducting the defence. As the concept of *ex officio counsels* suggests, defence counsel is appointed by a court or a tribunal in order to be active on behalf and in the interest of his client and this has never been considered to clash with the accused's right to remain silent and not to incriminate himself.

17. The Trial Chamber makes it clear that for the purposes mentioned and explained above, at one point or more in the course of cross-examination, defence counsel is required to put the nature of the case on relevant issues. In its simplicity this requirement, far from conflicting with Articles 20 and 21 of the Statute, and more precisely upon the accused right to remain silent and his right to have his communications with his counsel remain confidential, ensures that the trial proceeds fairly and in accordance with the spirit of transparency and reciprocal disclosure that underlie the criminal process before this Tribunal; and ensures that proceedings such as the present one do not end up being a hide-and-seek exercise or a fishing expedition or, worse still, a conjuring act. There is no inconsistency between the application of Rule 90(H) (ii) and Articles 20 and 21 of the Statute. In putting the nature of the case on a relevant issue pursuant to Rule 90(H) (ii), counsel for the accused does not have to reveal the source of his information. Nor does Rule 90(H) (ii), as the prosecution rightly points out, compel the accused to provide any material that could be used by the Prosecution as incriminating evidence. Moreover, Rule 90(H) (ii) is not in violation of Rule 97 and the confidentiality of communications between the accused and his counsel, 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.

18. All the above considerations are, in the opinion of the Chamber, sufficiently clear to provide an answer to the variety of scenarios put forward by accused Brđjanin.[10] In the opinion of the Chamber all the posited scenarios, irrespective of the alleged violations of the above-mentioned rights and of Articles 20 and 21 of the Statute are being suggested, are based on the wrong assumption that in each and every one of these cases, what is required from counsel by Rule 90(H) (ii) entails that he/she reveals what his/her client would have told him/her in confidence and/or that remaining silent would result in a kind of auto-inculpation by inference. This is not so. The said Rule requires only fairness and transparency and in no way the disregard of the mentioned rights of the accused which this Chamber has a duty to protect.

19. In addition, the Trial Chamber has carefully considered the argument that counsel for the accused Talić put forward about the difference between the English and French version of Rule 90(H) (ii).[11] Although there is an apparent discrepancy between the English and French versions, in reality, given the rationale of the Rule as explained above, the variance in the expressions used in the two texts is of little significance and therefore *de minimis* for the purpose of the decision. The Chamber holds that the principle expressed in the Rule is of common law origin and that the English language version more clearly reflects the true meaning of the Rule.

[10] First Brđanin Motion, paras 9-14.

20. The Trial Chamber has also been asked to define guidelines on the application of Rule 90(H) (ii).[12] The Trial Chamber does not think it appropriate to set out guidelines as required, and believes that it would suffice for the time being to affirm that it will apply this Rule according to and in the interest of justice and in line with the explanation given above, namely that a measure of flexibility will be allowed according to circumstances but certainly not in such a way as to derogate from what Rule 90(H) (ii) seeks to secure. What is important is that if a question arises such as the ones that have arisen so far in this case, namely whether counsel needs to proceed in accordance with the relevant provision, the decision may depend on a variety of facts, considerations and even inferences, but it must always be ensured that either party knows in a timely manner what is being contested and what is not. The Trial Chamber will then evaluate the circumstances and decide on a case by case basis. In addition this Chamber will certainly apply this Rule in a way to ensure the orderly progress of trial and the fair and transparent presentation of evidence, by eliminating such situations whereby a witness is excused and subsequently the cross-examining party brings forward evidence that tends to contradict the testimony of the witness in question, without giving that witness an opportunity to provide an explanation. Proper guidelines will be provided by this Chamber if and when the need arises.

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[11] Talić Motion, paras 1-3.
[12] Prosecution's Response, para. 17.

III. DISPOSITION

For the foregoing reasons,

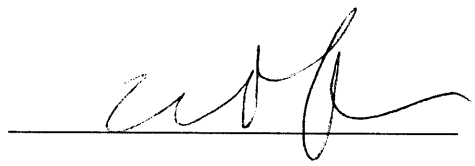
TRIAL CHAMBER II HEREBY rejects the motions of the accused Brđanin and Talić.

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

Dated this twenty-second day of March 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

Seal of the Tribunal