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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-05-88-T

Date: 6 March 2007

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. Hans Holthuis**

Order of: **6 March 2007**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

ORDER SETTING FORTH GUIDELINES FOR THE PROCEDURE UNDER RULE 90(H)(ii)

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Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS 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") hereby provides, pursuant to Rule 54 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the promised guidance on the procedure that must be followed pursuant to Rule 90(H)(ii):[1]

1. Rule 90(H)(ii) provides as follows:

> 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.

The central purpose behind this rule is to promote the fairness of proceedings by enabling the witness on the stand to appreciate the context of the cross-examining party's questions, and to comment on the contradictory version of the events in question.[2] When properly followed, the rule may assist the Trial Chamber in judging the credibility of the contradictory evidence.[3]

2. The threshold for satisfying Rule 90(H)(ii) is not particularly high. The cross-examining party fulfils the requirement to put to the witness "the nature of [its] case" by explaining the general substance of that portion of its case which conflicts with the evidence of the witness.[4] The party need not explain every detail of the contradictory evidence it intends to adduce, and it is allowed a certain flexibility depending on the circumstances at trial.[5] It also need not explain the provenance of the contradictory evidence.[6]

3. As this Trial Chamber stated orally on 21 November 2006,[7] where the cross-examining party fails to comply with its duty under Rule 90(H)(ii) by satisfactorily putting to the witness the nature of its case, it runs the risk of later being precluded from adducing contradictory evidence.

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[1] *See* T. 7953 (28 February 2007) (Trial Chamber stating that it would provide such guidance in due course).

[2] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, 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, 22 March 2002 ("*Brđanin and Talić* Decision"), paras. 13, 17; *Prosecutor v. Galić*, Case No. IT-98-29-T, T. 6465 (2 April 2002). *See also* Richard May and Steven Powles, *Criminal Evidence* (5th ed. 2004), p. 613 (discussing the purposes of the analogous rule in English law); I.H. Dennis, *The Law of Evidence* (1999), p. 451 (same).

[3] *Brđanin and Talić* Decision, *supra* note 2, para. 13.

[4] *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put Its Case to Witnesses Pursuant to Rule 90(H)(ii), 17 January 2006, pp. 1–2.

[5] *Ibid.*; *Brđanin and Talić* Decision, *supra* note 2, para. 14. *Cf. Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T, Decision on Use of Time, 9 October 2006, p. 6 (emphasising that "[i]t is not always necessary to put the defence case, in all its detail, to each and every witness called by the Prosecution, because such an approach risks being the 'needless consumption of time' censured by Rule 90(F)(ii)").

[6] *Brđanin and Talić* Decision, *supra* note 2, para. 17.

[7] T. 4255 (21 November 2006).

4. It is a further corollary of the Rule that where a case in contradiction is put to a witness, there is an expectation that the party putting the contradictory evidence will later adduce the evidence, if it is not otherwise before the Trial Chamber. In addition, where the cross-examining party, in the course of complying with the Rule, cites or refers to specific evidence—such as the statement of a particular witness it intends to call—that specific evidence should be adduced.[8]

5. However, the issue of disclosure of the details of that evidence is a separate matter. Aside from complying with the guidelines that have been issued regarding the use of documents in cross-examination,[9] where the cross-examining party is the Defence, there is no obligation under the Rules to disclose the identity of the witnesses it intends to call until after the close of the Prosecution's case, to the extent required by Rule 65 *ter*(G) and subject to any protective measures which may be granted.[10]

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

Carmel Agius
Presiding

Dated this sixth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

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[8] *Cf.* Prosecutor's Regulation No. 2, Standards of Professional Conduct for Prosecution Counsel, 14 September 1999, para. 2(e) (Prosecution counsel shall demonstrate candour before the Tribunal); *ibid.*, para. 2(h) (Prosecution counsel shall assist the Tribunal to arrive at the truth); Code of Professional Conduct for Counsel Appearing Before the International Tribunal, UN Doc. IT/125 Rev.2 (2006), Arts. 3(iii), 10(i) (setting forth the fundamental principle that Defence counsel shall act honestly in their role as advocates and representatives of their respective clients).

[9] Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings, 14 July 2006, para. 3(d).

[10] *Cf. Brđanin and Talić* Decision, *supra* note 2, para. 17.

PARTIALLY DISSENTING OPINION OF JUDGE O-GON KWON

1. While I concur with the majority that Rule 90(H)(ii) requires the cross-examining party to explain the general substance of that portion of its case which conflicts with the evidence of the witness on the stand, I cannot join the majority in its exposition of the consequences of the failure to comply with the Rule.

2. At this Tribunal, which has a hybrid system of the criminal procedures of common-law and the civil-law countries, the Rules of Procedure and Evidence should be interpreted in their own international context, even if a specific rule may have originated from a certain national legal system. Therefore, some typical aspects of common-law practice may sometimes have to be adapted to the Tribunal in the light of this "internationalisation", particularly considering that, at the Tribunal, there is no trial by jury and, as a principle, all relevant and probative evidence is admissible.[1] Rule 90(H)(ii) should also be read in this context.

3. I dissent on two grounds. First, since the primary rationale behind the Rule is to protect the witness from the confusion that results from failing to give him or her the proper context for understanding the cross-examining party's questions,[2] the Rule cannot be interpreted to mean that, where the cross-examining party fails to put to the witness the nature of its case, it would be precluded from adducing contradictory evidence later. Were the aim of the Rule to be such, it should have said so explicitly. My interpretation can find a basis in the literal terms of the Rule as well. Since the Rule only applies "*[i]n the cross-examination* of a witness who is able to give evidence relevant to the case for the cross-examining party,"[3] where a party decides not to cross-examine the witness at all, the Rule is never triggered and thus cannot tie the party's hands.

4. Second, even where a party does cross-examine a witness, and opts to comply with Rule 90(H)(ii) by referring to specific contradictory evidence it intends to adduce, a requirement that the party must later adduce that evidence would, in my opinion, unduly infringe the party's independence to present its case in the way it feels most effective. While ultimately omitting to adduce the evidence may have a negative effect on the Trial Chamber's opinion of the party's

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[1] *See* Rule 89(C) ("A Chamber may admit any relevant evidence which it deems to have probative value."). *Cf. Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15 (holding that hearsay evidence is admissible, even to prove the truth of its contents, as long as it is probative and reliable).

[2] *See Prosecutor v. Galić*, Case No. IT-98-29-T, T. 6465 (2 April 2002) (Trial Chamber stating that the purpose of Rule 90(H)(ii) is "to protect the witness rather than anyone else, to protect him against any confusion or any uncertainty as what he is confronted with").

[3] Rule 90(H)(ii) (emphasis added).

honesty and credibility, the Chamber exceeds its role in an adversarial system by dictating to a party what evidence it must put before the Chamber.

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

Judge O-Gon Kwon

Dated this sixth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]