IT-03-69-T
D34764-D34752
19 October 2011

34764
SMS

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-03-69-T
		Date:	19 October 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: **Mr John Hocking**

Decision of: **19 October 2011**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

GUIDANCE ON RULE 90 (H)(ii) AND DECISION ON STANIŠIĆ DEFENCE SUBMISSIONS ON RULE 90 (H)(ii)

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 11, 14, 20, and 23 July 2011, the Stanišić Defence objected to the Prosecution's cross-examinations of Defence witnesses on the grounds that the Prosecution had failed to "put its case" to them in compliance with Rule 90 (H)(ii) of the Rules of Procedure and Evidence ("Rules").[1] The Prosecution contended that it had complied with the Rule's obligations in its cross-examinations and disputed the Stanišić Defence's interpretation of the Rule.[2]

2. On 14 and 20 July 2011, the Chamber invited the parties to make written submissions of: (a) their interpretation of Rule 90 (H)(ii); (b) how the Prosecution should conduct itself in accordance with the Rule; and (c) what remedies the parties suggest the Chamber adopt for any non-compliance with the Rule.[3]

3. On 3 August 2011, the Stanišić Defence filed its submission ("Submissions on Rule 90 (H)(ii)").[4] On 10 August 2011, the Prosecution responded ("Response").[5] The Chamber had previously granted the Stanišić Defence leave to file a reply.[6] On 17 August 2011, the Stanišić Defence filed its reply ("Reply"), requesting (a) leave to exceed the word limit, (b) that the Chamber adopt the remedy analysis of the *Stanišić and Župljanin* case ("*Stanišić and Župljanin* Decision")[7] for non-compliance with Rule 90 (H)(ii), and (c) that the Chamber consider the Prosecution's non-compliance with the Rule in its analysis of the evidence in the final judgment.[8]

II. SUBMISSIONS OF THE PARTIES

A. Stanišić Defence

4. The Stanišić Defence submits that the primary purpose of Rule 90 (H)(ii) is to require the parties "to provide (or act to elicit) sufficient detail to the Trial Chamber on facts in issue between the parties so that it can adequately resolve the innocence or guilt of an individual".[9] The Stanišić Defence contends that its interpretation furthers two other obligations found within the Rules: that the standard for conviction of "beyond reasonable doubt" is met and that the Prosecution comply

1 T. 12550-12561, 12873-12877, 13142-13144, 13525-13535. On 23 July 2011, the Simatović Defence agreed with the Stanišić Defence's in court objections, T. 13535.
2 T. 12553-12561, 12876-12877, 13532-13535.
3 T. 12877-12878, 13144.
4 Stanišić Defence Submissions on Rule 90 (H)(ii), 3 August 2011.
5 Prosecution Response to Stanišić Defence Submissions on Rule 90 (H)(ii), 10 August 2011.
6 T. 13145-13146.
7 *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case no. IT-08-91-T, Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90 (H)(ii), 12 May 2010.
8 Stanišić Defence Reply to the Prosecutions Response to Stanišić Defence Submissions on Rule 90 (H)(ii), 17 August 2011 (Confidential), paras 4, 12-13, 23.
9 Reply, para. 12.

with its duty to assist the Chamber in arriving at the truth.[10] The Stanišić Defence submits that, in issuing its Final Judgement, the Chamber should have heard every possible explanation or rebuttal of allegations against the Accused.[11] The Stanišić Defence submits that this can be accomplished if the Prosecution, in accordance with Rule 90 (H)(ii), puts its case to Defence witnesses.[12]

5. The Stanišić Defence submits that if the Prosecution does not cross-examine a witness on "facts in issue" between the parties, it gives the impression that it has accepted the witness's testimony.[13] To this, the Stanišić Defence poses the following hypothetical ("Hypothetical One"):[14]

> if the Prosecution in this case does not challenge a witness from SAO Krajina regarding the alleged role played by Stanišić in the alleged "parallel" military structure, are the Defence (and the witness) to understand that it does not rely upon this theory any longer? Is this no longer a "fact in issue"?

6. The Stanišić Defence submits that Rule 90 (H)(ii) places an obligation on the Prosecution to cross-examine witnesses on "facts in issue" between the parties.[15] The Stanišić Defence contends that the *Brđanin* Trial Chamber applied this standard to cross-examination by the parties.[16] The Stanišić Defence further submits that the Prosecution can meet its obligations under Rule 90 (H)(ii) by presenting contradictory evidence to Defence witnesses in an as exhaustive and detailed manner as possible, keeping in mind the need to conserve judicial resources.[17] It submits that challenging a witness in this manner is in line with the Prosecution's duty to seek the truth.[18] In addition, while the Stanišić Defence submits that a party "need not put its case to a witness who has not contradicted evidence in its case", it also suggests that a "sensible approach" should be taken to allow the witness to be confronted on facts in issue so that the evidence that emerges can be properly understood.[19] Finally, it submits that less flexibility in the requirements under Rule 90 (H)(ii) of putting one's case and as much specificity as possible are both necessary in complex trials to protect the Accused's rights and enhance the administration of justice.[20]

---

10 Submissions on Rule 90 (H)(ii), paras 12, 15; Reply, paras 6, 10-12.
11 Submissions on Rule 90 (H)(ii), para. 11.
12 Ibid.
13 Submissions on Rule 90 (H)(ii), para. 9.
14 Ibid.
15 Submissions on Rule 90 (H)(ii), paras 8, 13, 18; Reply, paras 8-9.
16 Reply, para. 8, citing *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* Trial Decision").
17 Submission on Rule 90 (H)(ii), para. 15; Reply, para. 6.
18 Ibid.
19 Reply, para. 9.
20 Reply, para. 13

7. The Stanišić Defence illustrates its understanding of the Rule and the obligations stemming from it by posing and answering the following hypothetical ("Hypothetical Two"):[21]

> If a Defence witness indicates that a hypothetical group of individuals committed a particular crime, but does not mention that Stanišić was part of this group, the Prosecution should ask the witness about Stanišić's involvement in this crime if its case involves allegations that Stanišić was a member of said group. This would allow the Trial Chamber to understand whether the witness is in fact able to implicate Stanišić within the group or conversely has evidence of his innocence despite his proximity to the group. Failing to confront represents a failure to explore and deprives the Trial Chamber of a real opportunity to understand the role of the Accused [...]
>
> But the true value of Rule 90 (H)(ii) is appreciated when one considers that, should the Prosecution rely on certain aspects of Defence witness testimony (a crime(s) was committed by a group of individuals) but not all of it (Stanišić was not involved), then it could be in grave violation of Rule 90 (H)(ii) and could serve to mislead the Trial Chamber when it makes its final determination on the guilt or innocence of the Accused.

8. The Stanišić Defence submits that the remedy analysis in the *Stanišić and Župljanin* Decision for non-compliance with Rule 90 (H)(ii) should be followed.[22] According to the Stanišić Defence, the potential remedies are: (i) a finding of "procedural advantage for the [examining] party", interpreted by the Stanišić Defence to mean a finding that the cross-examining party finds nothing in the witness's testimony to be contradictory to its case; (ii) in its final analysis, the Chamber attributes little to no probative value to contradictory evidence to which a witness did not have the opportunity to respond; and (iii) the Chamber precludes the cross-examining party from later adducing contradictory evidence or recalling witnesses.[23]

B. Prosecution

9. The Prosecution submits that the purpose of Rule 90 (H)(ii) is to ensure that a witness sufficiently understands the context of questions put to him in cross-examination so that the witness is able to comment on aspects of a party's case that the witness's evidence contradicts.[24] The Prosecution contends that Rule 90 (H)(ii) serves to protect witnesses from confusion by ensuring that the witness appreciates the areas in which his testimony conflicts with the cross-examining party's case when it is otherwise not clear that the witness's testimony is contested.[25] The Prosecution submits that Rule 90 (H)(ii) requires the cross-examining party to put to a witness the *general substance* of its case which conflicts with the witness's evidence.[26] In addition, the cross-examining party is required to contest general aspects of a witness's testimony if there are no other

---

21 Reply, paras 10-11; see also Submissions on Rule 90 (H)(ii), paras 13-14.
22 Reply, para. 4.
23 Submissions on Rule 90 (H)(ii), para. 19; Reply, para. 4.
24 Response, paras 3, 6, 9.
25 Response, paras 3, 9.
26 Response, paras 9, 19.

"unequivocal indicators" that the evidence is contested, so as not to confuse the witness, but is not required to give notice of every detail in dispute.[27]

10. In response to Hypothetical One, the Prosecution submits that the Stanišić Defence misinterpreted the Tribunal's case law by suggesting that an issue is no longer contested if the cross-examining party does not pursue the issue with a witness, when there are ample "unequivocal indicators" showing the issue remains disputed.[28] Specifically, the Prosecution submits that the inclusion in its Pre-Trial Brief of its allegation that parallel structures existed is an "unequivocal indicator" that this is a "fact at issue" and remains an integral part of the Prosecution's case.[29] In response to Hypothetical Two, the Prosecution submits that, while all parties can seek clarification of witness evidence that could be misconstrued, the cross-examining party is not required to clarify evidence that is given on direct examination.[30] The Prosecution acknowledges that it has a duty to assist the Tribunal in arriving at the truth, but submits that the interpretation of Rule 90 (H)(ii) given by the Stanišić Defence would deprive the Prosecution of its ability to conduct cross-examinations effectively.[31] Further, the Prosecution submits that the Rule should be applied flexibly, depending on the circumstances of each situation.[32]

11. The Prosecution submits that Tribunal case law does not require a Chamber to accept witness testimony as true because the testimony was not challenged on cross-examination; thus, it is contrary to case law to ask the Chamber to make a finding that a cross-examining party finds nothing in a witness's testimony contradictory to their case if the witness was not challenged.[33]

III. APPLICABLE LAW AND DISCUSSION

A. Introduction

12. Rule 90(H) provides:

> (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.
>
> (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.

---

27 Response, paras 3, 7, 9, 14, 16, 19.
28 Response, para. 16.
29 Ibid.
30 Response, para. 17.
31 Response, paras 11, 13.
32 Response, paras 9, 11-12, 19.
33 Response, paras 8, 11, 18.

13. The Chamber considers that the parties have divergent interpretations of Rule 90 (H), resulting in repeated objections and discussions during court proceedings. The Chamber considers the resolution of this issue to be important and, therefore, allows the Stanišić Defence's request to exceed the word limit in its Reply. The Chamber carefully reviewed the objections in court by the Stanišić Defence. However, the Stanišić Defence's written submissions do not rely on these objections, but instead discuss the two Hypotheticals. Therefore, the Chamber will refer to the Stanišić Defence Hypotheticals to clarify the application of Rule 90 (H)(ii) in practice.

B. Rule 90 (H)

14. In court discussions have highlighted fundamental differences between the parties as to the overall meaning of Rule 90 (H) and as to how 90 (H)(i) and (ii) are to be read together.[34] According to the Tribunal's case law, there is no absolute or general rule that requires a cross-examining party to put to a witness its version of events.[35] Rule 90 (H)(i) and (ii) are to be read conjunctively, not disjunctively. Rule 90 (H)(i) defines those topics upon which a party may cross-examine a witness: 1) the subject-matter of the evidence-in-chief; 2) the credibility of the witness; and 3) the subject matter of the cross-examining party's case, if the witness is able to give relevant evidence. Rule 90 (H)(i) is permissive and does not require cross-examination of witnesses on these topics or at all.

15. The Chamber considers that Rule 90 (H)(ii) is only applicable, and then only in limited circumstances, when a party cross-examines in category 3, on the subject-matter of its own case. In stating this, the Chamber stresses that the issue is not whether the evidence is contradictory to the cross-examining party's overall case. Rather, it is whether the witness's contradictory evidence, given while being cross-examined in category 3, is later going to be contested by the cross-examining party introducing contradictory evidence or otherwise challenging the credibility of the witness's version of events. Further, as will be discussed more fully below, the Chamber notes that no special concern exists for a witness to be confused or to be unaware of contestation of his evidence when he is cross-examined in category 1, which is on the subject-matter of the evidence he gave during the examination in chief by the party that called him.

16. The Chamber observes that the phrase "able to give evidence relevant to the case for the cross-examining party" appears in both (H)(i) and (ii). However, the repetition of this phrase does not mean that the party *must* cross-examine on its own case, under (H)(i), or put the nature of its case, under (H)(ii), to a witness *because* the witness is or may be "able to give evidence relevant to

---

[34] See T. 13525-13535.

[35] *Prosecutor v. Karera*, Case no. ICTR-01-74-A, 2 February 2009 ("*Karera* Appeal Judgement"), fn. 55, citing *Brđanin* Trial Decision, para. 14. In the footnote, the *Karera* Appeal Chamber noted that it "approves of the language used by the Trial Chamber in *Prosecutor v. Radoslav Brđanin and Momir Talić*" found in paragraphs 13-14. Rule 90 (G)(ii) of the ICTR Rules of Evidence and Procedure is identical to Rule 90 (H)(ii).

the case for the cross-examining party". The Chamber considers this language to be a threshold requirement for when the cross-examining party may cross-examine on the subject-matter of its case under (H)(i), essentially stating the evidence admissibility standard of Rule 89 (C) of the Rules. It thus allows cross-examination on this third category, the cross-examining party's own case, if the witness can give 'relevant' evidence.[36] Any other interpretation would conflict with Rule 90 (H)(i)'s overall permissive language, rendering one portion mandatory, while leaving the other two topics discretionary. Additionally, reading the Rule under any other interpretation would create a general rule requiring a cross-examining party to put its version of events (i.e. its case) to witnesses, in direct contradiction to the Tribunal case law that there is no such general or absolute rule.[37]

C. The Purposes And Ensuing Obligations of Rule 90 (H)(ii)

1) Introduction

17. Rule 90 (H)(ii)'s purposes are to: 1) ensure the efficient and fair presentation of evidence;[38] 2) assist the Chamber in judging the credibility of a witness;[39] and 3) protect the witness from confusion.[40] Rule 90 (H)(ii) derives from a common law principle first enunciated by the United Kingdom's House of Lords in its review of the *Browne v. Dunn* case ("*Browne v. Dunn* Decision").[41] The *Browne v. Dunn* Decision is instructive for understanding the genesis of Rule 90 (H)(ii). In *Browne v. Dunn*, the four Lords hearing the case all agreed on the following principle, now commonly referred to as the "Rule of *Browne v. Dunn*":[42]

> If in the course of a case *it is intended* to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation *is intended to be made*, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand *that there is an intention to impeach* the credibility of his story, or (per Lord Morris) the story is of an incredible and romancing character.

---

36 In cross-examining on the evidence-in-chief, the witness's evidence would have already been admitted as relevant during the direct examination and the credibility of a witness is relevant outside of either party's case, negating the need for the 'relevance' language to appear anywhere but for category 3, the cross-examining party's own case.

37 Karera Appeal Judgement, fn. 55.

38 See *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case. no. IT-99-36-AR73.7, Decision on the Interlocutory Appeal against a Decision of the Trial Chamber as of Right, 6 June 2002 ("*Brđanin* Appeal Decision"), p. 4; See *Karera* Appeal Judgement, fn. 55, citing *Brđanin* Trial Decision, para. 13.

39 See *Prosecutor v. Krajišnik*, Case no. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement"), para. 367 and *Karera* Appeal Judgement, para. 24, both citing *Brđanin* Appeal Decision, p. 4.

40 *Krajišnik* Appeal Judgement, para. 368.

41 6 R. 67 (H.L), 28 November 1893 (Lord Herschell, L.C, Lords Halsbury, Morris and Bowen), *dismissed, aff'g* the Court of Appeals Judgement. In *Browne*, the plaintiff brought a charge of libel for a legal document drafted by the defendant, an attorney retained to file a complaint against the plaintiff, pp. 67-68. The alleged clients testified that they had retained the defendant's services to bring proceedings against the plaintiff and that document was produced, shown to and signed by them for this purpose, ibid. They were either not cross-examined at all or not cross-examined on their actions or the authenticity of the document, ibid. In the closing speech, the plaintiff asked the jury to disbelieve the testimony of the witnesses on these points, pg. 71. The jury found for the plaintiff, p. 67.

42 *Browne* Decision, pp. 67, 70-71, 76-79 (emphasis added).

18. The predominant rationale of the principle was "fair dealing with witnesses".[43] The Chamber emphasizes language it considers of particular importance in the original Rule – to wit, that there is a present intention to impeach the witness on a particular point by the cross-examining party, but the impeachment is going to be introduced *at a later time* in the case, rather than *earlier* when the witness can respond directly. The *Brđanin* Trial Chamber summarized the Rule of *Browne v. Dunn* as, "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".[44]

2) Presentation of Evidence

(a) Purpose

19. Rule 90 (H)(ii) assists in the fair and efficient presentation of evidence by requiring a party to put the nature of its case to a witness on cross-examination, rather than later, during the presentation of its own case, introducing evidence contradicting the witness or challenging the credibility of his testimony. This results in: 1) the party bringing the witness to be on notice that the witness's evidence is contested and to adjust its presentation of evidence accordingly;[45] 2) avoiding recalling the witness, potentially delaying the proceedings, once it is clear that his testimony is being challenged;[46] and 3) the Chamber hearing the simultaneous presentation of the cross-examining party's contradictory evidence to which the witness can respond, rather than this evidence being presented later when the witness is no longer present to explain the contradiction.[47]

(b) Ensuing Obligations

20. To ensure the fair and efficient presentation of evidence, Rule 90 (H)(ii) requires the cross-examining party to contest only those witness statements that, if not taken up while the witness was on the stand and in the absence of other 'unequivocal indicators', would suggest to the calling party, the Chamber and the witness that the cross-examining party is not contesting the witness's statement.[48] The Rule allows for flexibility depending on the circumstances at trial.[49] In keeping

---

43 *Browne* Decision, pp. 70-71 (Lord Herschell, L.C.).
44 *Brđanin* Trial Decision, para. 12; See also id., fn. 5, 6, 7, 9, citing to the same interpretation and application of the Rule in criminal proceedings in England, Australia and Canada.
45 *Karera* Appeal Judgement, fn. 55, citing *Brđanin* Trial Decision, para. 13.
46 *Krajišnik* Appeal Judgement, para. 367 and *Karera* Appeal Judgement, para. 24.
47 *Karera* Appeal Judgement, fn. 55, citing *Brđanin* Trial Decision, para. 14.
48 Ibid.
49 *Krajišnik* Appeal Judgement, para. 368; *Karera* Appeal Judgement, para. 26.

with the Rule's purpose, there is no need for the cross-examining party to put its case to a witness if it is obvious in the circumstances of the case that the version of the witness is being challenged.[50]

21. If there are no 'unequivocal indicators' that the cross-examining party is contesting a witness's versions of events, the party calling the witness would not be on notice that the evidence will be contested, rendering the trial unfair and impeding the party's ability to effectively plan the presentation of its case. All Prosecution evidence admitted to date constitutes 'unequivocal indicators' of what the Prosecution is contesting and the current stage of proceedings is relevant to determining whether it is evident that a Defence witness's version of events is being challenged.

22. The Stanišić Defence submitted that "as the Prosecution's case has closed", its submissions were limited to the obligation of the Prosecution to comply with the Rule during cross-examination of Defence witnesses.[51] Additionally, the Hypotheticals relate to "facts in issue" that the Prosecution, in its case in chief, has already presented evidence on. The Chamber considers that requiring the repetitive presentation of evidence on cross-examination, which was in substance already introduced in the case in chief, does not advance the fair and efficient presentation of evidence. In fact, it would make the presentation of evidence considerably less efficient by necessitating the constant eliciting, during cross-examination, of evidence through numerous defence witnesses on matters which have already clearly been contested. A decision by the cross-examining party not to challenge a witness who testifies in contradiction to the cross-examining party's evidence already presented is a trial strategy. The Chamber can assess the credibility of the contradictory evidence, so long as the cross-examining party is not planning on introducing further evidence to contradict the witness or challenge his version of events. The cross-examining party could decide that the witness's testimony is not credible in light of evidence already presented or that the witness is going to repeat the same contradictory evidence and challenging him would be fruitless. Whether the cross-examining party's decision not to challenge the contradictory evidence and rely on its own evidence was a sound trial strategy is irrelevant to the Rule's purpose.

(c) Applied to the Current Case

23. In Hypothetical One, the Stanišić Defence asks: if the Prosecution does not challenge a witness from SAO Krajina on the role Stanišić allegedly played in a parallel military structure, "[i]s this *no longer* a "fact in issue"?"[52] As stated in paragraph 22, the Chamber considers that a decision not to challenge a witness on an aspect of the cross-examining party case to which evidence has

[50] Ibid., both citing the *Browne* Decision, p. 71.
[51] Submissions on Rule 90 (H)(ii), para. 6.
[52] Submissions on Rule 90 (H)(ii), para. 9 (Emphasis added).

already been presented in no way means, by virtue of Rule 90 (H)(ii) or otherwise, that the cross-examining party has abandoned that aspect of its case.

3) Assisting the Chamber

(a) Purpose

24. Rule 90 (H)(ii) can assist a Chamber in judging credibility by allowing it to hear the witness's explanation on those aspects of his testimony contradicted by the opposing party's evidence.[53] The Chamber draws attention to two parts of this statement: (i) the witness has testified to something that is contradicted by the opposing party's evidence, and (ii) the Rule assists the Chamber in better assessing the credibility of those parts of a witness's evidence that are disputed by the cross-examining party by allowing the witness to explain the contradiction. This is to be distinguished from the suggestion that the Chamber is assisted by requiring that contradictory evidence *should* be elicited. Additionally, while the Rule can assist the Chamber in judging the credibility of contradictory evidence, credibility can also be challenged by other evidence.[54]

(b) Ensuing Obligations

25. The text of Rule 90 (H)(ii) states that the witness must have testified in cross-examination to something in contradiction to the cross-examining party's case for the Rule to apply. The cross-examining party must also be intending, as a part of its case, to later introduce evidence contradicting that witness or to later challenge the credibility of the witness's evidence. If the cross-examining party has not contested (through earlier presenting its own evidence or by challenging the witness on the stand) the witness's evidence given in cross-examination, the witness's evidence, *at that point*, is not contradictory. It is only by the cross-examining party later introducing its evidence or later challenging the credibility of the witness's evidence that the witness's testimony becomes contradictory and the Chamber, in hindsight, has lost the opportunity to hear the witness's explanation of the contradiction. If the cross-examining party does not later introduce evidence or challenge the credibility of the witness's evidence, the witness's testimony remains noncontradictory to the opposing party's case and is thus outside of Rule 90 (H)(ii).

(c) Applied to the Current Case

26. In Hypothetical Two, the Stanišić Defence submits that if a Defence witness indicates that a group committed a crime, but does not mention if Stanišić was a part of the group, the Prosecution would be in "grave violation" of Rule 90 (H)(ii) if it does not ask if Stanišić was involved in the

[53] *Krajišnik* Appeal Judgement, para. 367 and *Karera* Appeal Judgement, para. 24.
[54] *Krajišnik* Appeal Judgement, para. 371.

crime and "relies on some aspects of this Defence witness's testimony (that a crime was committed by a group), but not all of it (that Stanišić was not involved)". It also submits the Prosecution should ask the witness about Stanišić's involvement in the crime to allow the Chamber to understand whether the witness is "able to implicate Stanišić" or "conversely has evidence of his innocence".

27. The Prosecution is not obligated under Rule 90 (H)(ii) to put its case to a witness who has not contradicted the Prosecution's case, nor is it obligated to elicit contradictory evidence if the witness has not testified to anything contradicting the Prosecution's case. The Prosecution is not required to clarify evidence given on direct examination, even if such clarification could lead to eliciting contradictory or confirmatory evidence. In the absence of the witness testifying to anything contradicting the Prosecution's case, the Chamber reiterates that the purpose of Rule 90 (H)(ii) is not the elicitation of new testimony, that may or may not be contradictory, on topics the witness has not commented on so that the Chamber can learn whether or not the Defence witness can implicate or exonerate the accused. Further, there is no obligation to do so under Rule 90 (H)(ii). Finally, if during cross-examination any matter is raised, which was not addressed in the examination in chief, the calling party is entitled to further elaborate on the matter in re-examination. Returning to the Hypothetical given by the Stanišić Defence, the cross-examining party may have no reason to assume that the witness has knowledge of the presence of the accused within the group or may consider that it has already proven the involvement of the accused in the events at issue. In this situation, the calling party may still elicit evidence in re-examination on those related aspects which the cross-examining party left untouched.

4) Protecting the Witness from Confusion

(a) Purpose

28. Rule 90 (H)(ii) is intended to protect the *witness* from confusion about the questions posed to him, to enable the *witness* to understand the context of the questions and to ensure that the *witness* understands that his evidence is being challenged.[55]

(b) Ensuing Obligations

29. In order to comply with the Rule 90 (H)(ii), it is sufficient for the cross-examining party to put the nature of its case to the witness.[56] "Putting the nature of its case" means a party must put the

[55] *Krajišnik* Appeal Judgement, para. 368.
[56] Ibid.

general substance of its case to the witness which conflicts with his evidence.[57] The cross-examining party need not explain every detail of the contradictory evidence.[58]

(c) Applied to the Current Case

30. In Hypothetical One, the Stanišić Defence asks: "[i]s *the Defence* to understand that [the Prosecution] does not rely upon this theory any longer?"[59] In paragraphs 22 and 23, the Chamber has already made clear that the absence of a question being posed to a witness does not result in the abandonment of any aspect of the cross-examining party's case. Additionally, the purpose of Rule 90(H)(ii) is not to protect the party calling the witness from confusion about a cross-examining party's case, the context of questions posed, or whether the witness's evidence is contested.[60] The Stanišić Defence is aware of the context of questions posed in cross-examination and the nature of the Prosecution's case, having been informed by the Indictment, the Prosecution's Pre-Trial Brief, witness lists, as well as the presentation of the Prosecution's case and submissions on Rule 98 *bis*. The Stanišić Defence may understand the theory of the Prosecution's case however it chooses to interpret it, but it should not rely on Rule 90 (H)(ii) or the absence of a particular question being posed to a specific witness as support for that understanding being shared by the Chamber. Additionally, Rule 90 (H)(ii) is not a proper mechanism for either party to litigate alleged inadequacies and/or vagueness in the Indictment, Pre-Trial Brief or other trial-related instruments.

31. The Prosecution is not obligated under Rule 90 (H)(ii) to cross-examine witnesses in an exhaustive and detailed manner.[61] The Prosecution does have a duty to assist the Chamber in arriving at the truth. However, this duty does not change the Prosecution's obligations under Rule 90 (H)(ii) from those established in the Tribunal's case law and the text of the Rule itself.

D. Remedies for Violation of Rule 90 (H)(ii)

32. Since the Chamber has not found that the Prosecution has violated its obligations under Rule 90(H)(ii), it declines to adopt any specific remedies or a "remedy analysis". The Chamber will continue to evaluate objections raised under Rule 90 (H)(ii) as they arise and decide on a case by case basis what, if any, the remedy should be.

---

57 Ibid.

58 *Krajišnik* Appeal Judgement, para. 368; *Karera* Appeal Judgement, para. 26.

59 Submissions on Rule 90 (H)(ii), para. 9 (Emphasis added).

60 See *Krajišnik* Appeal Judgement, para. 369-370; *Karera* Appeal Judgement, para. 27, stating that Rule 90 (H)(ii) does not apply to a testifying accused. The fundamental difference between an accused and other witnesses is that the accused is well aware of the context of the Prosecution's questions and case. Ibid. The Indictment, the Prosecution Pre-Trial Brief, and the witness lists as a whole inform an accused of the case against him. Ibid.

61 See *Krajišnik* Appeal Judgement, para. 368.

V. DISPOSITION

33. For the foregoing reasons, the Chamber

GRANTS the Stanišić Defence request for leave to exceed the word limit in its Reply; and

DENIES all other requests.

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

Judge Alphons Orie
Presiding Judge

Dated this nineteenth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]