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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-01-47-T
Date: 28 January 2004
Original: English
French

IN TRIAL CHAMBER II

Before: Judge Jean-Claude Antonetti
Judge Vonimbolana Rasoazanany
Judge Albertus Swart

Registrar: Mr Hans Holthuis

Decision of: 28 January 2004

THE PROSECUTOR

v.

**ENVER HADŽIHASANOVIĆ
AMIR KUBURA**

**DECISION ON DEFENCE MOTION FOR CLARIFICATION
OF THE ORAL DECISION OF 17 DECEMBER 2003 REGARDING
THE SCOPE OF CROSS-EXAMINATION PURSUANT TO
RULE 90 (H) OF THE RULES**

The Office of the Prosecutor:

Mr Ekkehard Withopf
Mr Daryl Mundis
Mr Chester Stamp
Ms Tekla Henry-Benjamin

Defence Counsel:

Ms Edina Rešidović and Mr Stéphane Bourgon
for Enver Hadžihasanović
Mr Fahrudin Ibrišimović and Mr Rodney Dixon
for Amir Kubura

Trial Chamber II ("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"),

BEING SEISED of the Joint Defence Motion for Clarification of the Trial Chamber Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination pursuant to Rule 90(H) of the Rules filed jointly by counsel for the two accused ("Defence") on 19 December 2003 ("Motion") in which the Defence requests the Trial Chamber to clarify its Oral Decision of 17 December 2003 and confirm that Rule 90(H) of the Rules of Procedure and Evidence ("Rules") will continue to govern its cross-examination;

NOTING the Prosecution Response to Joint Defence Motion for Clarification of the Trial Chamber Oral Decision of 17 December 2003 Regarding the Scope of Cross-Examination pursuant to Rule 90(H) of the Rules filed by the Office of the Prosecutor ("Prosecution") on 5 January 2004 ("Response")¹, in which the Prosecution requests the Trial Chamber to rule also on the admissibility of hearsay evidence, to state that Rule 90(H) of the Rules requires the cross-examining party to put to the witness the nature of its case, provided that it establishes the relevance and probative value of the evidence submitted, and to state also that the questions which the Defence sought to put to Franjo Križanac on the events at Ahmići were without relevance to the issues raised in this case;

NOTING the Joint Defence Reply to Prosecution Response filed jointly by Defence on 12 January 2004 ("Reply")²;

NOTING that, at Franjo Križanac's cross-examination on 17 December 2003, the Defence attempted to interview the witness on attacks allegedly committed by the HVO in central Bosnia against the Muslim civilian population;

¹ The Chamber accepts the late submission of the Prosecution Response, as requested in the confidential Prosecution Request for Extension of Time of 29 December 2003. The Chamber ordered that the Response be filed confidentially on 15 January 2004, see also T. 1523-1524.

² Despite the fact that Defence did not request leave from the Chamber to submit a reply, as set out in an order of the pre-trial Judge of 9 November 2001, the Chamber accepted this submission. See also T. 1401-1403. In its Reply, the Defence requested the Chamber to withdraw the Prosecution Response from the Tribunal's public records.

NOTING that the Prosecution objected to such a question, observing that any question raised at a cross-examination must be relevant to the evidence against the accused in that trial and stated that the Defence was attempting to use an inappropriate defence, that of *tu quoque*;³

NOTING the Chamber's Oral Decision of 17 December 2003;⁴

NOTING that, in its Motion,⁵ the Defence recalled the argument already raised in its Pre-Trial Brief⁶ and underscored the crucial significance of the historical, political and military context of the Accused's actions and decisions when command responsibility is being assessed pursuant to Article 7(3), and considers, thus, that questions relating to context are relevant in accordance with Rule 90(H)(i) of the Rules;⁷

NOTING that, in their submissions, both the Prosecution and Defence requested the Chamber to admit indirect or hearsay evidence;⁸

NOTING that, in its Reply, the Defence indicated that it does not intend to plead the *tu quoque* principle;⁹

CONSIDERING that Rule 90(H)(i) of the Rules does not limit the cross-examination to the subject-matter of the evidence-in-chief but also allows questions regarding the credibility of the witness and the case of the cross-examining party;

CONSIDERING that on the basis of Rule 90(H)(iii) the Chamber may also permit enquiry into additional matters;

³ T. 1127, 1128 and 1130.

⁴ The Chamber sustained the Prosecution's objection and ordered the Defence to "cross-examine the witness about issues raised in the course of the examination-in-chief. Their objection has therefore been sustained. And as we have seen, we shouldn't try to get the witness or to have the witness confirm facts that he was not personally aware of -- or rather, if he only has hearsay knowledge about these facts and as a result are not admissible in this case. So I would like to inform the Defence that the question put to the witness is not an admissible question. You can carry on with your cross-examination, but you must focus on issues that were raised in the course of the Prosecution's examination-in-chief." T. 1133.

⁵ Motion, paras. 18-23.

⁶ Pre-Trial Brief filed by Enver Hadžihasanović pursuant to Rule 65 *ter* (F) of the Rules, paras. 19-24.

⁷ T. 1131.

⁸ Response, paras. 4-7, and Reply, paras. 8-19.

⁹ Reply, para. 21.

CONSIDERING that, pursuant to Rule 89(C) of the Rules, all evidence must be relevant and have probative value, and that Rule 90(H)(ii) of the Rules requires that a party cross-examining a witness capable of giving evidence relevant to its case should present that witness with any elements of its case which contradict the evidence of the witness;

CONSIDERING that the case-law of the Tribunal does not accept the defence of *tu quoque*, the argument whereby the accused invokes as a valid defence the fact that the adversary has committed similar crimes;¹⁰

CONSIDERING, furthermore, that case-law has accepted – on non-repetitious and very circumscribed points – evidence relating to crimes allegedly committed by other parties to the conflict when they sought, *inter alia*, to refute the Prosecution’s factual allegations;¹¹

CONSIDERING that the same case-law requires that, before examining a witness on such a question, the Defence must clarify its purpose to the Chamber;¹²

CONSIDERING that Rule 90(F) of the Rules sets out that it is for the Chamber to exercise control over the mode of the witness examination in order that the truth may be established, while obviating any waste of time;¹³

CONSIDERING that the crimes of which the Accused are charged relate to their command responsibility pursuant to Article 7(3) of the Statute of the Tribunal and that the circumstances prevailing in the zones of operation of the Accused at the material time may be relevant;

CONSIDERING that the relevance of the question put to Franjo Križanac on the events at *Ahmići* was not clarified sufficiently at the hearing of 17 December 2003;

CONSIDERING that the Chamber will admit questions which seek to establish the historical, political and military context at the material time, on condition that the cross-

¹⁰ *The Prosecutor v. Kupreškić et al.*, Judgement, Case no. IT-95-16-T, 14 January 2000, paras. 515-520 and 765; *The Prosecutor v. Dario Kordić and Čerkez*, Judgement, Case no. IT-95-14/2-T, 26 February 2001, para. 520.

¹¹ *The Prosecutor v. Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of *tu quoque*, Case no. IT-95-16-T, 17 February 1999 (hereinafter “*Kupreškić Decision*”).

¹² *Kupreškić Decision*.

examining party informs the Chamber of the purpose and relevance of those questions before putting them to the witness;

CONSIDERING that those questions of “context” are likely to lead to testimony described as “hearsay” or “indirect” evidence;

CONSIDERING that it has been established that hearsay evidence is admissible on the basis of Rule 89(C) of the Rules, once the Chamber has accepted its relevance and value;¹⁴

CONSIDERING that Rule 89(C) of the Rules applies equally to direct or indirect evidence and that the indirect nature of testimony is only one of the numerous elements to be considered by the Trial Chamber in assessing the probative value of the testimony;¹⁵

CONSIDERING that, in order to assess its probative value, the Chamber wishes to know the source of the information, that is, insofar as possible, the identity of the initial source, how he might have learned of the facts and the number of intermediaries through which the testimony has passed;

¹³ *Kupreškić* Decision.

¹⁴ *The Prosecutor v. Zlatko Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case no. IT-95-14/1-T, 16 February 1999, para. 15; *The Prosecutor v. Blaškić*, Decision on the Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability, Case no. IT-95-14-T, 21 January 1998 (hereinafter “*Blaškić* Decision”).

FOR THE FOREGOING REASONS,

PURSUANT to Rules 89(C) and 90(F) and (H) of the Rules,

CLARIFIES its Oral Decision of 17 December 2003 by stating that:

1. questions of context are to be allowed at the cross-examination, pursuant to Rule 90(H) of the Rules, provided that, before asking its questions, the cross-examining party informs the Chamber of its objective in requesting to do so and the appropriateness and relevance of those questions;
2. hearsay or indirect evidence is, in principle, admissible provided that, insofar as possible, the cross-examining party informs the Chamber of any appropriate information which might shed light on its source.

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

Done this twenty-eighth day of January 2004

At The Hague

The Netherlands

/signed/

Presiding Judge

Judge Jean-Claude Antonetti

[Seal of the Tribunal]

¹⁵ *Blaškić* Decision, para. 10.