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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-AR73.2
		Date:	2 April 2004
		Original:	English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision: 2 April 2004

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
AMIR KUBURA

DECISION ON INTERLOCUTORY APPEAL RELATING TO THE REFRESHMENT OF THE MEMORY OF A WITNESS

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

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

THE APPEALS 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 ("the International Tribunal"),

BEING SEIZED OF the "Prosecutor's Appeal from the Trial Chamber's Decision Relating to the Refreshment of the Memory of Witness and Relating to the Request for Certification Dated 19 December 2003" filed 29 December 2003 ("Interlocutory Appeal"), in which the Prosecution submits that the Trial Chamber erred by prohibiting the use of prior written statements to refresh the recollection of witnesses during examination-in-chief;

NOTING the "Joint Defence Response to Prosecutor's Appeal from the Trial Chamber's Decision Relating to the Refreshment of the Memory of a Witness and Relating to the Request for Certification Dated 19 December 2003" filed jointly on 5 January 2004 by Respondents Hadžihasanović and Kubura, which opposes the Interlocutory Appeal, *inter alia*, because showing the witness a prior statement during examination-in-chief is not a practice of the Tribunal, adopting this practice would allow the witness to correct his answers, and prohibiting this practice does not affect the fair conduct of the proceedings or the outcome of the trial;

NOTING the oral decision of 4 December 2003, in which Trial Chamber II ruled that because the proceedings must be oral and because the Prosecutor may seek to refresh the witness's memory prior to the proceedings or through its questions, the Prosecution is prohibited from refreshing the memory of a Prosecution witness by showing him his previous statement taken by a Prosecution investigator during examination-in-chief ("Oral Decision");[1]

NOTING the "Decision on the Refreshment of a Witness's Memory and on a Motion for Certification to Appeal" of 19 December 2003 ("Impugned Decision"), in which the Trial Chamber considered, *inter alia*, the following factors in upholding its Oral Decision:

1. The Rules of Procedure and Evidence ("Rules") are silent on this issue;

2. The Defence formally objected to the admission of the written statement;

3. The written statement was not taken in accordance with the legal guarantees laid down under Rules 92*bis* (B)(i) and (ii);

4. The witness was potentially a witness-suspect because he had been heard in the course of criminal proceedings in a national court and that, if he was not informed of

[1] Transcript, 4 December 2003 p. 531-532.

his right not to make self-incriminating statements pursuant to Rules 90(E) and 91(A) of the Rules, then leave to present documents during his oral testimony may be refused where such documents may later be used to prosecute him; and

5. The Prosecution failed to ask the witness specific questions without reference to the statement that were aimed at reducing discrepancies between the oral testimony and written statement; and

6. The Chamber may question a defaulting witness to refresh his memory;

NOTING that in the Impugned Decision the Trial Chamber also certified the Interlocutory Appeal;

CONSIDERING that the Appeals Chamber has already stated that a prior statement may be used to refresh the memory of a witness under cross-examination;[2] and that the same conclusion should apply to the question of refreshing a witness's memory during examination-in-chief;

CONSIDERING that, if refreshment is permitted, the Trial Chamber may consider the means and circumstances by which the memory was refreshed, when assessing the reliability and credibility of the witness's testimony;

CONSIDERING that because the Prosecution does not seek to admit the prior statement *in lieu of* oral testimony, but rather seeks only to elicit the oral testimony of the witness after the memory of the witness has been refreshed, the statement shown to the witness need not satisfy the requirements of Rule 92*bis* of the Rules;[3]

CONSIDERING that although it is possible for a witness to object to answering a question pursuant to Rule 90(E) on the grounds that it might require the witness to incriminate himself, this Rule has no bearing on the ability of a party to use a prior statement to refresh a witness's recollection;

HEREBY ALLOWS the Appeal and **REVERSES** the Impugned Decision which upheld the Oral Decision prohibiting the Prosecution from refreshing the memory of a Prosecution witness by showing him his previous statement taken by a Prosecution investigator during examination-in-chief.

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[2] *Prosecutor v. Simić et al.*, "Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92*bis* as a Basis to Challenge Credibility and to Refresh Memory" 23 May 2003, paras. 18, 20.
[3] *Id.*

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

Theodor Meron
Presiding Judge

Dated this 2nd day of April 2004,
At The Hague, The Netherlands.

Seal of the Tribunal