

IN THE TRIAL CHAMBER

Before: Judge Antonio Cassese, Presiding

Judge Richard May

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 21 September 1998

PROSECUTOR

v.

**Zoran KUPRESKIC, Mirjan KUPRESKIC, Vlatko KUPRESKIC,
Drago JOSIPOVIC, Dragan PAPIC, Vladimir SANTIC, also known as "VLADO"**

DECISION ON COMMUNICATIONS BETWEEN THE PARTIES AND THEIR WITNESSES

The Office of the Prosecutor:

**Mr. Franck Terrier
Mr. Albert Moskowitz**

Counsel for the Accused:

**Mr. Ranko Radovic, for Zoran Kupreskic
Ms. Jadranka Glumac, for Mirjan Kupreskic
Mr. Borislav Krajina, for Vlatko Kupreskic
Mr. Luko Susak, for Drago Josipovic
Mr. Petar Puliselic, for Dragan Papic
Mr. Petar Pavkovic, for Vladimir Santic**

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 ("International Tribunal");

NOTING the objections raised by Defence Counsel at the hearings of 16 and 17 September 1998 to evidence being adduced in court as a result of out-of-court communications between the Prosecutor and its witnesses during breaks in the witnesses' testimony;

CONSIDERING that Defence Counsel has raised a genuine issue of importance since the aforementioned instances have posed a problem for Defence counsel in that it has led to their being confronted during the trial with evidence which had not previously been disclosed to them;

NOTING that this is not to imply in any way that the Prosecutor has on any occasion acted with

impropriety or exerted any influence on the witnesses in question and that the Chamber fully accepts the Prosecutor's explanation that on each occasion the witness in question has volunteered the information, during the break, which was later the subject of a tender of evidence,

CONSIDERING that the importance of the issue raised by the Defence transcends the specific question to which the Defence has drawn attention, and that it appears crucial to the proper administration of international criminal justice that the Chamber rule on the whole matter of contacts between witnesses and the Party which called him or her to testify,

HAVING HEARD the submissions of both the Prosecutor and Defence counsel on this subject;

CONSIDERING that:

- (i) There is nothing in the Statute or Rules of Procedure and Evidence which expressly addresses this subject;
- ii. However it should be noted that the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting;
 - (iii) a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90(B) of the Rules of Procedure and Evidence, is a witness of truth before the Tribunal and, inasmuch as he or she is required to contribute to the establishment of the truth, not strictly a witness for either party;
 - (iv) permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the Tribunal,
- v. the Victims and Witnesses Unit, established pursuant to Article 22 of the Statute and Rule 34 of the Rules of Procedure and Evidence, is mandated to treat all witnesses equally and to assist and accompany all witnesses during their stay in The Hague, and to manage the practical aspects of their appearance before the Tribunal, and that this fact obviates the need for the Prosecution or the Defence to be in communication with a witness during his or her testimony in order, among other things, to provide him or her with psychological support.

CONSIDERING Rule 89(B) which provides, "In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".

CONSIDERING Rule 90(G) which provides, "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time".

CONSIDERING that, while undoubtedly it would be more coherent and judicious that any practice regarding communication between the Parties and their witnesses be consistently applied in all the cases brought before the various Chambers; nevertheless, pursuant to the aforementioned Rules, this Trial Chamber is warranted in ruling on this matter in the instant trial.

CONSIDERING, on the one hand, the need to avoid the above-mentioned problem while, on the other hand, the need to allow for the situation in which a witness wishes *proprio motu* to communicate certain information to the Prosecution – or Defence as the case may be – once the witness in question has begun

testifying;

CONSIDERING, finally, that this Decision will take effect after the Prosecution has conducted the examination-in-chief of several of its witnesses – and has been permitted with respect to those witnesses, there being no decision to the contrary in force until the present Decision, to communicate with them during breaks in their testimony – and that the Chamber will therefore apply this Decision with due regard and consideration for the rights of the Defence;

PURSUANT to Rules 54, 89(B) and 90(G) of the Rules of Procedure and Evidence;

HEREBY ORDERS that

(1) The Prosecution and Defence henceforth must not communicate with a witness, once he or she has made the Solemn Declaration provided for in Rule 90(B) and commenced testifying, on the subject of the content of the witness's testimony except with the leave of the Chamber.

(2) If a witness wishes to contact the Party which called him or her, he or she shall inform the competent staff of the Victims and Witnesses Unit who will then report the matter to the relevant Party. This Party may then decide whether or not to request, orally or in writing, the leave of the Chamber and will to this effect provide reasons for the request. The Chambers, when granting leave, may, whenever it deems it appropriate, decide that the contact between the requesting Party and the witness must take place in the presence of an official of the Victims and Witnesses Unit.

(3) The Chamber may further direct that a member of the Victims and Witnesses Unit be present in court during the testimony of a given witness to provide the necessary moral and psychological support to compensate the withdrawal of this support from the Prosecution or the Defence during the period that the witness testifies, as required by this Order.

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

Antonio
Cassese

Presiding
Judge

Dated this twenty-first day of September 1998

At The Hague

The Netherlands

[Seal
of
the
Tribunal]