



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-95-14/2-AR73.6

Date: 18 September 2000

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Rafael Nieto-Navia, Presiding
Judge Lal Chand Vohrah
Judge Patricia Wald
Judge Fausto Pocar
Judge Liu Daqun

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 18 September 2000

PROSECUTOR

v.

**DARIO KORDIĆ
MARIO ČERKEZ**

**DECISION ON APPEAL REGARDING THE ADMISSION INTO EVIDENCE OF SEVEN
AFFIDAVITS AND ONE FORMAL STATEMENT**

Counsel for the Prosecutor:

Mr. Geoffrey Nice
Mr. Kenneth Scott
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Mr. Božidar Kovačić
Mr. Goran Mikulić

I. INTRODUCTION

1. 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 Tribunal") is seized of an appeal filed by the accused Dario Kordić on 17 March 2000 ("the Appellant") to which the Appellant's co-accused Mario Čerkez has joined, against an oral ruling made by Trial Chamber III on 10 March 2000.

2. Having considered all of the written submissions filed by the Appellant and the Office of the Prosecutor ("the Prosecution") the Appeals Chamber hereby renders its decision pursuant to the Statute and the Rules of Procedure and Evidence of the Tribunal ("the Statute" and "the Rules" respectively) as follows.

II. BACKGROUND

3. The Appellant is currently on trial for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war and crimes against humanity, based on an alleged campaign to persecute and terrorise Bosnian Muslims in the area of the Lašva valley, Bosnia and Herzegovina.

4. This appeal arises as a result of the decision rendered by the Trial Chamber on the Prosecution's application to admit into evidence seven affidavits and one Formal Statement by a Col. Morsink (when referred to as a group, "the Statements").¹ Although the seven affidavits were filed under Rule 94ter,² the Prosecution submitted that the Formal Statement should be admitted under either Rule 94ter or under the general provision in Rule 89(C), as

¹ Six affidavits were delivered to the Appellant on 25 February 2000 with the seventh delivered on 7 March 2000. The Formal Statement was delivered on 1 March 2000.

² The Prosecution did however respond to the Appellant's argument that Rule 94ter provides the only authority for the admission of the affidavits, by referring to Rule 89(C) and the Trial Chamber's discretion to admit affidavits outside the scope of Rule 94ter provided they constitute "relevant evidence" of "probative value." *Prosecutor's Response to Dario Kordić's Objections, Pursuant to Rule 94 ter, to Six "Affidavit Statements" and One "Formal Statement" Submitted by the Prosecution*, filed confidentially on 7 March 2000, para. 8. In addition, during the hearing on 10 March 2000 the Prosecution stated that "in the event that [the] Chamber considered that the timing requirements for 94 ter are essential, the Chamber will still have the power to admit these affidavits under Rule 89(C)." (Transcript p. 16482).

it was not intended to corroborate testimony but rather, “was collected pursuant to an express suggestion from Judge Bennouna...to supplement Col. Morsink’s own testimony.”³

5. Having heard from the parties both orally on 10 March 2000 and in writing⁴ and pursuant to Rule 94*ter* of the Rules, Trial Chamber III rendered an oral decision on 10 March 2000, admitting the Statements into evidence (see below).

6. Following this decision the Appellant filed an application for leave to appeal,⁵ to which the Appellant’s co-accused Mario Čerkez subsequently filed a notice to join.⁶ The Prosecution filed its response on 27 March 2000⁷ and the Appellant replied on 31 March 2000.⁸ On 28 April 2000, a Bench of the Appeals Chamber granted leave to the parties to pursue the interlocutory appeal, finding that pursuant to Rule 73(B)(ii), “the Trial Chamber’s authority in relation to the admission of affidavit evidence in this case constitutes an issue of general importance to proceedings before the International Tribunal or in international law generally.”⁹

³ *Prosecutor’s Response to Dario Kordić’s Objections, Pursuant to Rule 94 ter, to Six “Affidavit Statements” and One “Formal Statement” Submitted by the Prosecution*, filed confidentially on 7 March 2000, para. 7.

⁴ *Dario Kordić’s Objections, Pursuant to Rule 94 ter, to Six “Affidavit Statements” and One “Formal Statement” Submitted by the Prosecution*, filed confidentially on 3 March 2000 and *Prosecutor’s Response to Dario Kordić’s Objections, Pursuant to Rule 94 ter, to Six “Affidavit Statements” and One “Formal Statement” Submitted by the Prosecution*, filed confidentially on 7 March 2000.

⁵ *Accused Dario Kordić’s Application for Leave to Pursue an Interlocutory Appeal of Trial Chamber III’s March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One Formal Statement in Contravention of the Provisions of Rule 94 ter*, filed 17 March 2000.

⁶ *Accused Mario Čerkez’s Notice of Joinder in Accused Dario Kordić’s Application for Leave to Pursue an Interlocutory Appeal of Trial Chamber’s [sic] III March 10, 2000 Ruling to Admit into Evidence Seven “Affidavit Satatements [sic]” and One “Formal Statement” in Contradiction of the Provisions of to [sic] Rule 94 ter*, filed 17 March 2000. Since filing this Notice of Joinder, Mario Čerkez has filed no further briefs on the merits of the appeal with the Appeals Chamber.

⁷ *Prosecutor’s Response to Accused Dario Kordić’s Application for Leave Pursuant [sic] an Interlocutory Appeal of Trial Chamber III’s March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One Formal Statement Under Rule 94 ter*, filed 27 March 2000. Although the Prosecution also filed, partly confidential, the *Prosecutor’s Request for Leave to File a Supplementary Response to New Facts Raised by the Accused’s [sic] Dario Kordić in his Reply* on 6 April 2000, this was declared inadmissible by the Appeals Chamber in its *Decision on Application for Leave to Appeal and on Request for Leave to File a Supplementary Response*, issued 28 April 2000.

⁸ *Reply to the Prosecutor’s Response to the Accused Dario Kordić’s Application for Leave to Pursue an Interlocutory Appeal of Trial Chamber III’s March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One Formal Statement in Contravention of the Provisions of Rule 94 ter*, filed 31 March 2000.

⁹ *Decision on Application for Leave to Appeal and on Request for Leave to File a Supplementary Response*, p. 3.

7. On 8 May 2000, the Appellant filed a brief setting out his arguments on the appeal.¹⁰ The Prosecution responded on 18 May 2000¹¹ and the Appellant filed his reply on 22 May 2000.¹² In their submissions, both parties also rely on the arguments made in their respective filings in the recently decided interlocutory appeal, regarding the admission into evidence of the statement of the deceased witness, Mr. Midhat Haskić (“the Previous Filings”).¹³

III. RELEVANT PROVISIONS OF THE RULES

8. Initially, we set out the relevant parts of the Rules applicable to this appeal.

Rule 89 – General Provisions

- (A) [...]
- (B) 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.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) [...]
- (E) [...]

¹⁰ *Brief of the Accused Dario Kordić Seeking Reversal of Trial Chamber III’s March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One “Formal Statement” in Contravention of the Express Provisions of Rule 94 ter*, filed 8 May 2000 and marked confidential by the Registry (“the Appellant’s Brief”).

¹¹ *Prosecutor’s Response to the Brief of the Accused Dario Kordić Seeking Reversal of Trial Chamber’s [sic] III March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One “Formal Statement” in Contravention of the Express Provisions of Rule 94 ter*, filed confidentially on 18 May 2000 (“the Prosecution Response”).

¹² *Reply Brief of the Accused Dario Kordić Seeking Reversal of Trial Chamber III’s March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One “Formal Statement” in Contravention of the Express Provisions of Rule 94 ter*, filed 22 May 2000 and marked confidential by the Registry (“the Appellant’s Reply”). The Appellant also filed *Accused Dario Kordić’s Summary of Affidavits he has Filed to Date*, on 24 May 2000.

¹³ This appeal was decided by the Appeals Chamber in the *Decision on Appeal Regarding Statement of a Deceased Witness*, issued 21 July 2000 (“the Decision of 21 July 2000”). The Previous Filings referred to are: *Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront nor Cross-examine*, filed 6 April 2000; *Prosecutor’s Response to the Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III to Admit into Evidence a prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront nor Cross-examine*, filed 17 April 2000; *Reply Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront nor Cross-examine*, filed 25 April 2000.

Rule 94ter – Affidavit Evidence

To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed. These affidavits or statements are admissible provided they are filed prior to the giving of testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.

IV. TRIAL CHAMBER DECISION

9. The Trial Chamber considered the admissibility of both the seven affidavits and the Formal Statement under Rule 94ter and found that: (1) the requirement that the affidavits should be taken “in accordance with the law and procedure of the State” in which they are signed, does not breach the principle of equality of arms by preventing the defence from availing itself of such a procedure, as it is open to it to obtain such affidavits if necessary by application to the Trial Chamber for assistance¹⁴; (2) Rule 94ter must be interpreted to give it “useful effect” and that in doing so the fact that the seven affidavits and Formal Statement were not supplied before the principal witness testified, as required on the face of Rule 94ter, is a technical breach only, since the timing requirement is a formal, procedural requirement which, if interpreted otherwise, “would certainly lead to or may lead to a defeat to the interests of justice”¹⁵; (3) no prejudice was caused to either the Appellant or Mario Čerkez by the admission of the Statements at this stage¹⁶; (4) the procedure of allowing witnesses to validate their original witness statements did not breach the Rule¹⁷; (5) all the Rule requires is that there should be some confirmation or support of evidence in a very general sense and therefore the term “facts in dispute” should be given a very broad interpretation¹⁸ and; (6) although cross-examination of the witnesses is not necessary or required, as “the matter is covered by the affidavit[s] being on oath,” when the Trial Chamber considers the evidence it will “bear in mind that it was not given subject to cross-examination.”¹⁹

¹⁴ Transcript p. 16486.

¹⁵ Transcript p. 16487.

¹⁶ *Ibid.*

¹⁷ Transcript p. 16488.

¹⁸ Transcript p. 16489.

¹⁹ Transcript pp. 16491-16492.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant's Arguments

10. The Appellant argues that the Trial Chamber's decision to admit the Statements into evidence was in contravention of the express provisions of Rule 94*ter* and was erroneous for the following reasons.

11. First, with regard to cross-examination of the witnesses, he submits that in admitting the Statements over his objections without requiring that the makers be made available for cross-examination, the Trial Chamber deprived the Appellant of the opportunity to confront the witnesses against him in violation of his fundamental rights protected under Article 21(4) of the Statute²⁰ which provides *inter alia*, that an accused shall have the right "to examine, or have examined, the witnesses against him..."²¹ In addition, he argues that Rule 94*ter* does not authorise the admission of an affidavit into evidence, if a party has objected, when the affiant is then not made available for cross-examination. He interprets Rule 94*ter* to mean that either the affidavit is admitted into evidence and the affiant produced to give live testimony (should the opposing party so request) or the affidavit is not admitted at all.²²

12. Secondly, he argues that by admitting the Statements in derogation of the plain terms of Rule 94*ter*, the Trial Chamber abrogated its responsibility to ensure that trial proceedings are conducted in accordance with the Rules. He submits that none of the Statements satisfied the specific requirements of Rule 94*ter*.²³ In particular, none of the Statements were filed prior to the testimony of a live witness whose testimony they supposedly corroborated nor were they provided in corroboration of specific facts to be introduced through such a live witness who had yet to testify.²⁴ He states that such an interpretation of the Rule violates its intent and essential purpose, as the timing requirement intended to afford the opposing party the opportunity to test not only the credibility of the

²⁰ Appellant's Brief, p. 9.

²¹ Article 21(4)(e). With regard to this argument, the Appellant refers to his more detailed submissions set out in his Previous Filings, which are summarised in paras. 7-10 of the Decision of 21 July 2000.

²² Appellant's Brief, p. 14.

²³ Appellant's Brief, pp.10-13.

²⁴ Appellant's Brief, pp.4, 16-17. The Appellant also referred to a chart which the Prosecution had attached to the *Prosecutor's Response to Dario Kordić's Objections, Pursuant to Rule 94 ter, to Six "Affidavit Statements" and One "Formal Statement" Submitted by the Prosecution*, filed 7 March 2000 in which he stated that the Prosecution attempted to illustrate that the six affidavits addressed matters on which previous

subsequent live witness but also the truthfulness and accuracy of the statements contained in the affidavit.²⁵ He further submits that because it is an exception to the general preference in Rule 90 for live testimony, the requirement that an affidavit should corroborate a live witness's testimony as to a specific "fact in dispute" should be interpreted restrictively and that hence the expansive interpretation of the Trial Chamber was erroneous.²⁶

13. In general, the Appellant argues that the Trial Chamber's interpretation of Rule 94*ter* did not, as it asserted, give it "useful effect," but rather removed the specific protection for an accused which the Rule intended to offer and "accommodate[d] the Prosecution's perceived needs at the expense of [the Appellant's] fundamental rights...to confront the witnesses against him [and] to be tried in accordance with the Tribunal's Rules..."²⁷

B. The Prosecution's Arguments

14. The Prosecution submits that resolution of the practical difficulties it encountered in complying with the precise terms of Rule 94*ter*, in particular the absence of domestic procedures in the former Yugoslavia which would enable the Prosecution to obtain a statement in conformity with the letter of Rule 94*ter*, took almost one year. It submits that although it worked diligently to solve these problems, and kept the Trial Chamber informed of its efforts from the start, the problems were such that it was impossible to meet the timing requirements laid down in Rule 94*ter*.²⁸ Additionally, the Prosecution argues that, as found by the Trial Chamber, the Appellant suffered no prejudice from the admission of the Statements; in particular, the Appellant had been aware of the content of the proposed Statements for several months and therefore could make detailed submissions in respect of them.²⁹ Further, the Appellant could have presented its own evidence attacking the reliability of the Statements or contradicting their contents.³⁰

witnesses had testified. He submitted that it revealed that some of the live witnesses whose testimony the affidavits supposedly corroborated, had testified as much as 10 months earlier (pp 5-6).

²⁵ Appellant's Brief, p. 16.

²⁶ Appellant's Brief, pp. 17-18.

²⁷ Appellant's Brief, p. 20.

²⁸ Prosecution Response, paras 5-11.

²⁹ Prosecution Response, para. 35.

³⁰ Prosecution Response, para. 36.

15. The Prosecution submits that the interpretation by the Trial Chamber of the timing requirement as being of a technical nature was correct and that the main purpose of the Rule was to provide a procedure whereby relevant evidence could be introduced in an efficient and simplified manner without the need to call a witness, in the absence of any material prejudice to the Appellant.³¹

16. With regard to the Formal Statement, the Prosecution submits that it differs from the affidavits and was obtained following a directive of the Trial Chamber. Therefore it could also have been admitted under either Rule 98 or Rule 89(E).³²

17. It submits that the scope of the powers granted by Rule 94*ter* to a Trial Chamber allows the admission of affidavits into evidence despite the objections of the opposing party and that, contrary to the Appellant's submissions, in doing so it does not have to call the witness in question for cross-examination. It submits that such an interpretation reflects the ordinary meaning of the terms of the provision³³ and that otherwise merely an objection by an opposing party would be enough to force the Trial Chamber to either call the affiant or dismiss the affidavit.³⁴

18. With regard to the right of an accused to confront a witness provided in Article 21(4) of the Statute, the Prosecution submits that under the practice of the International Tribunal, national practice and the jurisprudence of the European Court of Human Rights, reasonable and justified limitations to the rights of an accused to confront witnesses are generally admitted.³⁵

19. The Prosecution agrees with the broad interpretation of the terms of Rule 94*ter* given by the Trial Chamber, in particular with regard to the terms "fact in dispute" and

³¹ Prosecution Response, paras. 34-38. As an example of another case, the Prosecution relied on *Prosecutor v. Zoran Kupreškić et al., Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition*, Case No. IT-95-16-AR73.3, 15 July 1999 ("Kupreškić"), in which the Appeals Chamber stated that in circumstances in which both parties had been present and had been allowed to make representations in relation to an issue raised by a motion, "the non-compliance with the requirement embodied in Sub-rule 71(B) [was] merely of a technical nature and ha[d] no adverse effects upon the integrity of the proceedings or the rights of the accused (para. 15, footnote removed).

³² Prosecution Response, para. 12. As seen above, the Prosecution previously submitted before the Trial Chamber that the Formal Statement could also be admitted under Rule 89(C).

³³ Prosecution Response, para. 24, referring to *Prosecutor v. Duško Tadić, Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 282.

³⁴ Prosecution Response, para. 26.

“corroboration” and argues that such a broad interpretation is particularly necessary in view of the nature and complexity of the facts underpinning the cases being prosecuted and that too restrictive an interpretation would render Rule 94*ter* ineffective.³⁶ In short, it submits that the Trial Chamber’s interpretation of Rule 94*ter* was correct and should remain undisturbed.³⁷

VI. DISCUSSION

20. The question confronting the Appeals Chamber in this appeal is whether the Trial Chamber correctly interpreted Rule 94*ter*, in reaching its decision to depart from the precise terms of the Rule and admit the Statements into evidence. The Appeals Chamber will initially consider the admissibility of the seven affidavits before proceeding to consider the admissibility of the Formal Statement, which the Appeals Chamber finds can be distinguished.

A. The seven affidavits

21. The Appeals Chamber finds that there are three distinct issues raised by the Appellant relating to the admissibility of the seven affidavits: (1) the Trial Chamber’s interpretation of the timing requirement in Rule 94*ter* and its finding that it was merely a technical procedural requirement; (2) the effect of an objection raised by an opposing party if an affiant is not then made available for cross-examination; and (3) the interpretation of the phrase “fact in dispute.” Each of these issues will be addressed separately.

1. Interpretation of the timing requirement in Rule 94*ter*

22. As a general principle, interpretation of the Rules of Evidence should “best favour a fair determination of the matter” and be “consonant with the spirit of the Statute and the

³⁵ Prosecution Response, para. 28. With regard to this argument, the Prosecution refers to the more detailed submissions set out in the Previous Filings, which are summarised in paras. 11-17 of the Decision of 21 July 2000.

³⁶ Prosecution Response, paras. 29-33, also incorporating the arguments on this point raised in *Prosecutor’s Response to Dario Kordić’s Objections, Pursuant to Rule 94 ter, to Six “Affidavit Statements” and One “Formal Statement” Submitted by the Prosecution*, filed 7 March 2000.

³⁷ Prosecution Response, para. 39.

general principles of law.”³⁸ In interpreting a particular Rule, a Trial Chamber should ensure that it is interpreted in accordance with its “ordinary meaning” and “in the light of [the] object and purpose” of the Statute and Rules.³⁹

23. The Trial Chamber relied on the principle of effectiveness (*interprétation par la méthode de l'effet utile* or *ut res magis valeat quam pereat*) in finding that “the Rules must be interpreted to give them useful effect.”⁴⁰ The question arises as to whether or not the Trial Chamber’s interpretation achieved this, without contravening the rights of the Appellant and the need to ensure a fair trial both of which requirements underline the object and purpose of the Statute and the Rules. As the International Court of Justice has stated:

The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions...a meaning which ...would be contrary to their letter and spirit.⁴¹

24. The Decision of 21 July 2000 re-confirmed that there is a general preference for live, in-court testimony before the International Tribunal, to which Rule 94*ter* constitutes one of four exceptions.⁴² There is therefore no absolute right to confront a witness.⁴³ Testimony other than live testimony, may fall within one of these four exceptions, or alternatively, as is also firmly established, hearsay evidence can be admissible if it satisfies Rule 89(C) and presents sufficient indicia of reliability: “relevant out of court statements

³⁸ Although this is the wording provided in Rule 89(B) of the Rules, which relates to “cases not otherwise provided for” in Section 3 of the Rules (the title of Section 3 being: “Rules of Evidence”), nevertheless the general principle is important.

³⁹ In interpretation, the Tribunal is guided by the principles which may be drawn from Article 31(1) of the Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” These principles are considered today as general principles to be applied in the interpretation of all international instruments. See also *Prosecutor v. Duško Tadić, Decision on the Prosecutor’s Motion requesting protective measures for victims and witnesses*, Case No. IT-94-1-T, 10 August 1995, paras. 18 *et seq.*, and *Prosecutor v. Zejnil Delalić et al., Judgement*, Case No. IT-96-21-T, 16 November 1998, para.158 *et seq.*

⁴⁰ Transcript p. 16487. The Trial Chamber referred to *Case Concerning the Factory at Chorzów*, (1927) P.C.I.J. Series A, Vol 2, No.8 at p. 2 and *The Corfu Channel Case*, 1949 I.C.J. Rep., at p.4. In the former, the Court held that in interpreting a provision of a particular convention, “account must be taken not only of the historical development of arbitration treaties, as well as the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision.” (p. 24).

⁴¹ *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, I.C.J. Reports, 1950 p. 221, at p. 229.

⁴² Para. 19. In *Kupreškić* at para.19, the Appeals Chamber found: “The Rules...provide for four exceptions to this general rule of direct evidence in the form of 1) deposition evidence (Rule 71), 2) the receipt of testimony via video-conference link (Sub-rule 90(A), 3) expert witness statement (Rule 94*bis*) and 4) the submission of affidavit evidence in corroboration of witness testimonies (Rule 94*ter*).”

⁴³ Although there is no absolute right to confront a witness, as seen *infra.*, the other three so-called exceptions to live, in-court testimony (i.e., excluding Rule 94*ter*), in fact generally envisage a right of cross-examination in some form.

which a Trial Chamber considers probative are admissible under Rule 89(C)...Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence.”⁴⁴ The Prosecution submits that the seven affidavits fall under Rule 94^{ter}⁴⁵ and it was on this basis that they were admitted by the Trial Chamber.

25. The purpose behind Rule 94^{ter} was the desire to contribute to the expedition of cases before the International Tribunal, by providing a mechanism whereby affidavit evidence could be brought before a Trial Chamber in certain circumstances, avoiding the need to call every witness relied upon in relation to a fact in dispute especially when the testimony is cumulative.⁴⁶ This desire for expedition is however, constrained by the need to protect the rights of an accused.⁴⁷ As was explained in the Sixth Annual Report, Rule 94^{ter}:

was added to the Rules...[as] part of the ongoing commitment of the Tribunal to speeding up the trial process whilst providing for the proper protection of the rights of the accused and the obligation of the Tribunal to the international community to conduct trials fairly and expeditiously.⁴⁸

26. “[P]roper protection of the rights of the accused,” is overriding and the Rule must not be interpreted so that this protection is lost. Again, this need for protection has been clarified in the Decision of 21 July 2000, which determined that Rule 94^{ter} allows for departure from the principle of hearing live, in court testimony, only if certain safeguards are provided:

Rule 94^{ter}, which governs the use of affidavits or formal statements to corroborate live witness testimony, **includes strict procedural protections**. First, Rule 94^{ter} statements are to be used to corroborate a fact in dispute contained in the live testimony of another witness. Second, Rule 94^{ter} statements must be executed “in accordance with the law and procedure of the State in which such affidavits or statements are signed.” Third, Rule 94^{ter} provides that “if the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.”⁴⁹

27. It is specifically noted that Rule 94^{ter} provides “strict procedural protections”. If the provision is interpreted to the extent that a Trial Chamber may nevertheless admit evidence

⁴⁴ *Prosecutor v. Zlatko Aleksovski, Decision on Prosecutor’s Appeal on Admissibility of Evidence*, Case No. IT-95-14/1-AR73, 16 February 1999, para. 15.

⁴⁵ *Supra.*, note 2.

⁴⁶ Rule 94^{ter} was adopted at the Nineteenth Plenary session on 17 December 1998.

⁴⁷ It is envisaged that Rule 94^{ter} may also be invoked by the Defence. In such circumstances the need for expedition will naturally be constrained by the need to protect the interests of the Prosecution.

⁴⁸ *Sixth Annual Report 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*, (U.N. Doc. A/54/187, S/1998/846, 25 August 1999), para. 116.

⁴⁹ Decision of 21 July 2000, para. 21 (Emphasis added).

in contravention of these protections, the intent of the Rule becomes distorted. The Appeals Chamber recalls in this regard that:

[i]t is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.⁵⁰

28. In the instant case, the Trial Chamber stated that the Rule must be interpreted to give it “useful effect”. This useful effect is therefore only achieved if a satisfactory balance is struck between protection of the rights of the accused preserved by the safeguards in the provision and the need to ensure that trial proceedings are properly and expeditiously conducted. In striking this balance, the Appeals Chamber is also aware of the function which Trial Chambers must perform. In *Kupreškić*, the Appeals Chamber determined:

The Appeals Chamber is also alive to the need to avoid an overly restrictive interpretation of the Rules so as to allow the Trial Chambers to respond to the varied circumstances with which they are faced and to ensure the efficient functioning of the Tribunal. Notwithstanding these considerations, the Appeals Chamber takes the view that Rule 71 must be construed strictly and in accordance with its original purpose of providing an exception, with special conditions, to the general rule for direct evidence to be furnished, especially in the context of a criminal trial.⁵¹

29. The *Kupreškić* court stressed that in accordance with Article 20 of the Statute, “apart from charging the Trial Chambers to make sure that the trial is fair and expeditious [Article 20] prescribes that the Trial Chambers shall also ensure that the proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.”

30. Similarly, Rule 94*ter* must be construed in such a way that the intent of the Rule to admit affidavit evidence under prescribed conditions is not defeated, while at the same time ensuring “full respect for the rights of the accused.” To achieve this end, Rule 94*ter*, as an exception to the general rule for direct evidence, prescribes a precise and specific sequence of events. This sequence ensures that, an accused has the opportunity to consider the proposed affidavit evidence before the live testimony of a witness on a fact in dispute and thereafter, if so desired, to apply to the Trial Chamber⁵² for the right to cross-examine the affiant at the conclusion of the principal testimony of the witness, in support of whose testimony the affidavit was submitted. Affidavit evidence under Rule 94*ter* is therefore

⁵⁰ *Prosecutor v. Duško Tadić*, *Judgement*, Case No. IT-94-1-A, 15 July 1999, para. 284.

⁵¹ *Kupreškić*, para. 19.

⁵² See *infra*.

admissible only in support or corroboration of live testimony. It is not intended that it should substitute for the live testimony.

31. The affidavits in the instant case were submitted at the end of the Prosecution case, and in some cases months after the live testimony which they were supposed to corroborate had concluded. Contrary to the interpretation by the Trial Chamber of the timing requirement and the finding that it is a “technical procedural requirement”,⁵³ the Appeals Chamber finds that this is an integral and fundamental part of the Rule. It ensures that a party is informed of the facts in question and in doing so enables them to cross-examine the future live witness as to the disputed fact on the basis of the affidavit evidence, challenging both the credibility of the live witness together with the truthfulness and accuracy of the statements contained in the affidavits. If a party fails to comply with this requirement, material prejudice may be caused as the timing requirement is not only a technical requirement but also upholds the rights of the opposing party.

32. As seen above, it is accepted that the Rules must be interpreted with some degree of flexibility, the primary object being “to achieve justice, not to delay it, and not to permit mere technicalities to intrude where there has been no material prejudice caused by a non-compliance.”⁵⁴ Indeed, the Appeals Chamber has, in some other types of cases, accepted non-compliance with the precise terms of a Rule, provided it has no adverse effect upon the integrity of the proceedings or the rights of the accused.⁵⁵ But departure from the precise terms of Rule 94*ter* in this case was more than of a technical procedural nature.

33. The Appellant was deprived of the opportunity to challenge and cross-examine a live witness on the facts alleged in the seven affidavits. The terms of Rule 94*ter* should not be extended so that it becomes a general mechanism by which a party may file unchallenged affidavit evidence to support oral testimony which has already concluded.

⁵³ Transcript, p. 16487.

⁵⁴ *Kupreškić*, Separate Opinion of Judge Hunt, para. 18.

⁵⁵ Examples are: *Kupreškić*, wherein the Appeals Chamber found *inter alia*, that although a decision had been rendered based on an oral motion for the taking of a deposition and although Rule 71(B) stipulated that such a motion should be in writing, this was “merely of a technical nature and ha[d] no adverse effects upon the integrity of the proceedings or the rights of the accused” (para. 15); while in *Prosecutor v. Goran Jelisić, Order*, Case No. IT-95-10-A, 21 March 2000, the Appeals Chamber, *inter alia*, rejected a request to strike out the Prosecution’s Notice of Appeal because it had not been served by the Prosecution itself (which a plain reading of Rule 108 would suggest is required) but rather through the Registry, finding that this was the standard practice of the Tribunal and that the Appellant in that case had “suffered no material prejudice.” These cases are however not comparable to the instant case as it is clear that on their particular facts the non-compliance found was indeed “merely of a technical nature” (*Kupreškić*, para. 15).

Departure from the terms of the Rule deprived the Appellant of the right to consider the affidavit evidence before the testimony of the live witness, to cross-examine that witness on the issues raised and thereafter to make his submissions as to whether or not he needed to cross-examine the makers of the supporting affidavits.

34. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in its interpretation of the timing requirement in Rule 94*ter* as being merely a “technical procedural requirement” and that on the contrary this requirement is an integral part of the Rule protecting the rights of the accused. This departure from the terms of Rule 94*ter* caused the Appellant material prejudice and on this basis this appeal should be granted and the seven affidavits excluded from evidence.

2. Effect of an objection by a party if the affiant is not made available for cross-examination

35. The last sentence of Rule 94*ter* provides: “If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.” The Appellant submits that this sentence should be interpreted to mean that a Trial Chamber has no discretion to admit an affidavit into evidence where an opposing party has raised an objection to its admission and the affiant is not produced for cross-examination. The Prosecution submits that on a plain reading, Rule 94*ter* authorises a Trial Chamber to admit an affidavit despite an objection by an opposing party. Although the Appeals Chamber has found, for the reasons set out above, that the seven affidavits should not have been admitted into evidence under Rule 94*ter*, it also finds that contrary to the Appellant’s submissions, the last sentence of Rule 94*ter* does not automatically entail that an affidavit must be excluded if a party objects to its admission and the Trial Chamber does not order that the affiant be called for cross-examination. Therefore in principle the Appeals Chamber finds no error in the exercise of the Trial Chamber’s discretion to deny a request that the affiants be made available for cross-examination in the instant case. However, this finding does not affect the overall ruling of the Appeals Chamber in this decision.

36. The intention behind Rule 94*ter* was to assist in the expedition of proceedings and avoid the unnecessary duplication of evidence before a Trial Chamber. This is limited by the need to protect the rights of the accused. The rights of the accused are protected by

adherence to the “strict procedural protections” contained within the Rule. The interpretation suggested by the Appellant of this phrase would defeat the intention of the Rule and render a Trial Chamber constrained by the absolute right of an opposing party to demand that an affiant be made available for cross-examination. As seen above, there is no absolute right to cross-examine a witness and the Appeals Chamber finds that a Trial Chamber’s discretion should not be limited in this way.

37. On the contrary, the final sentence of Rule 94*ter* should be interpreted to mean that, a party has the right to apply to the Trial Chamber for an order that the affiant shall be called for cross-examination. Although a Trial Chamber is obliged to consider the application it remains within its discretion to make a decision based on the merits. Such a decision will be made on a case by case basis.

38. At the same time, even if a Trial Chamber decides that an affiant is not required for cross-examination and that an affidavit is nevertheless admitted under Rule 94*ter*, this does not mean that the affidavit goes unchallenged. This is because it is envisaged that a party always has the right to challenge the affidavit evidence through cross-examination of the live witness, as the affidavit will have been submitted prior to his or her live testimony. (Again this emphasises the importance of the timing requirement). Therefore, the affiant need only give evidence in person if, following an application to the Trial Chamber, the Trial Chamber considers it appropriate. An alternative interpretation would mean that a Trial Chamber is always obliged to accede to such an application despite the fact that it could be wholly without merit and frivolous. In this regard, Rule 94*ter* is in fact distinct from the other three so-called exceptions to the general principle in favour of direct testimony, each of which generally envisage cross-examination of a witness. In this case, the evidence is intended to add to live testimony and not substitute for it.⁵⁶ The Appeals

⁵⁶ Rule 71 *bis* provides for testimony via a video-conference link. In effect this is the same as live testimony, but transmitted via a video link and therefore cross-examination will take place in the same way it would if the witness were in person. Rule 71 provides for the taking of a deposition for use at trial, if it is in the interests of justice. When taking the deposition, the other party has the right to attend and to cross-examine the person from whom the deposition is being taken. This exception to the general rule is distinct and in fact arguably does not constitute such a clear cut exception, as the intention is still for the witness to give ‘primary’ evidence in person, but simply not in the formal environment of a Trial Chamber. Otherwise the procedure largely resembles that for live testimony in that it must be taken in accordance with the Rules, a record must be made, cross-examination permitted and objections transmitted for decision by the Trial Chamber. Its purpose is mainly to alleviate resource and time pressures on a Trial Chamber. Similarly, Rule 94*bis* (which deals with the testimony of expert witnesses) is intended to avoid unnecessary prolongation of proceedings so that if the opposing party accepts the written statement of an expert witness, it can be admitted into evidence by the Trial Chamber without calling the witness to testify in person. Again the evidence in question could be the only

Chamber finds that the protections afforded by the Rule are sufficient to alleviate any concerns should the affiant not be called for cross-examination by ensuring that in any event, the evidence is not unchallenged.

3. Interpretation of “fact in dispute”

39. Rule 94ter provides for affidavit evidence to corroborate live evidence. As the live evidence is called to “prove a fact in dispute,” the fact in dispute must be clear, as the affidavit evidence is intended specifically to support “testimony on that fact.” The Appeals Chamber agrees with the Trial Chamber generally that this phrase should not be interpreted too narrowly. But the affidavit evidence must support the testimony of some live witness on some fact in dispute and cannot simply be filed in a general way without such a reference. Therefore the Appeals Chamber finds that the standard endorsed by the Trial Chamber, “that all that is required is that there should be some confirmation or support of evidence in a very general sense and that the term ‘facts in dispute’ should be given a very broad interpretation,”⁵⁷ is too open-ended.

40. We do not suggest that the affidavit evidence must mirror the proposed live testimony as to every detail. Clearly some flexibility must be accorded. At the same time, a clear link must be established between the testimony and the affidavit and the corroborating evidence must be focused on the facts contained in the live testimony and not on the surrounding events of the case in general. This line should be drawn on a case by case basis. Furthermore, where the opposing party objects to the admission of affidavit evidence pursuant to Rule 94ter, and the Trial Chamber is of the view that the fact in dispute is not of a minor nature, the Trial Chamber may order the party seeking to rely on the affidavit evidence to call the relevant witness for cross-examination. What amounts to a minor fact in dispute should be determined on a case by case basis.

41. As the Appeals Chamber has already found that the Trial Chamber failed to comply with the timing requirements of Rule 94ter and for that reason the appeal should be granted, it is not necessary to consider whether each affidavit individually met these requirements.

evidence on the facts in question and therefore the right to cross-examine, if needed, is preserved. As noted above, the evidence under Rule 94ter is intended to be in corroboration.

⁵⁷ Transcript, p. 16489.

B. The Formal Statement of Col. Morsink

42. Col. Morsink gave live evidence before the Trial Chamber in October 1999. On 19 January 2000, Judge Bennouna stated on behalf of the Trial Chamber, that with regard to a proposal to recall the witness to deal with the issue of a list of detainees in the cinema, the Trial Chamber suggested that it was preferable to deal with that specific point (the authentication of the list, or a statement regarding how the list was obtained) through a simple affidavit. This was subsequently agreed, and counsel for the Appellant's co-accused stated that "[t]he practical solution is obviously the one you suggest: for Morsink to make an affidavit." However he asked for the right to recall the witness, if necessary, after the affidavit was submitted, to which the Trial Chamber replied: "we have in mind your application. In due course we'll receive the affidavit, and then, if you've got submissions about it, of course we'll hear them."⁵⁸ Therefore it is clear that the right to apply to cross-examine this witness was preserved until the affidavit had been submitted.

43. The Appeals Chamber agrees with the Prosecution and finds that the Formal Statement constitutes a different case from the other seven affidavits as it was obtained, through agreement, pursuant to a suggestion by the Trial Chamber, to supplement live testimony. The Prosecution initially argued before the Trial Chamber that the Formal Statement could be admitted under either Rule 94*ter* or Rule 89(C).⁵⁹ Subsequently, before the Appeals Chamber, it stated that as it simply complied with a directive of the Trial Chamber, "[i]n this sense, th[e] [F]ormal [S]tatement could also have been appropriately characterized and admitted under Rule 98...or Rule 89(E)."⁶⁰

44. Although the Formal Statement was considered by the Trial Chamber under Rule 94*ter*, given its history and the circumstances under which it was brought before the Trial Chamber, including the Trial Chamber's suggestion to the Prosecution, it appears to the Appeals Chamber that it was not properly filed under Rule 94*ter*. Therefore in admitting the Formal Statement under Rule 94*ter*, the Trial Chamber erred.

⁵⁸ Transcript, pp. 12689-12695. The Trial Chamber also stated that they did not wish to have Col. Morsink testify on the contents itself but simply on the source of the document.

⁵⁹ *Supra.*, note 3.

⁶⁰ *Supra.*, para. 16 of this decision. See also, *Prosecutor's Response to Accused Dario Kordić's Application for Leave Pursuant [sic] an Interlocutory Appeal of Trial Chamber III's March 10, 2000 Ruling to Admit into Evidence Seven Affidavits and One Formal Statement Under Rule 94 ter*, filed 27 March 2000, footnote 28.

45. If the evidence contained within the Formal Statement is admitted in this form, i.e., as an affidavit, it would have to fall within one of the other exceptions to the general principle of live, in-court testimony outlined above. Alternatively, it might be admitted under Rule 89(C), that is, as “relevant evidence which [the Trial Chamber] deems to have probative value.” Once before the Trial Chamber, the Formal Statement must be considered with regard to the relevant criteria under that Rule and the Trial Chamber should in that context consider any application by a party to cross-examine the witness on the contents.⁶¹

46. In the instant case, when considering the right to cross-examine on the affidavits and the Formal Statement as a whole, the Trial Chamber determined:

we have to consider, in light of the Defence objections, whether there should be cross-examination of the witnesses. We have considered that. We do not think that that is required or necessary in this case. We think that the matter is covered by the affidavit being on oath. But when we come to consider this evidence, we will, of course, bear in mind that it was not given subject to cross-examination.⁶²

47. The Appeals Chamber finds that the Trial Chamber failed to properly consider the admissibility of the Formal Statement under the relevant criteria and improperly denied the Appellant’s request for cross-examination. In this case, the only way the Trial Chamber could admit the Formal Statement was under Rule 89(C), after considering the relevant criteria recently confirmed in the Decision of 21 July 2000.⁶³ The Prosecution both before the Trial Chamber and the Appeals Chamber did not make detailed submissions on the admissibility of the statement on this basis. The Trial Chamber reasoned the admissibility of the Formal Statement solely under Rule 94*ter* and on that basis found that it should be admitted.

48. The Appeals Chamber accordingly finds that the Trial Chamber erred in admitting the Formal Statement under Rule 94*ter*.

VII. DISPOSITION

49. For the foregoing reasons the Appeals Chamber **ALLOWS** the appeal and:

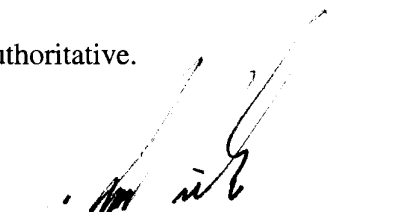
⁶¹ In this case, the Trial Chamber assured the Appellant and his co-accused that if they had such submissions, it would hear them at that time. *Supra.*, note 58.

⁶² Transcript, pp. 16491-2.

⁶³ See also, *Prosecutor v. Zlatko Aleksovski*, *Decision on Prosecutor’s Appeal on Admissibility of Evidence*, Case No. IT-95-14/1-AR73, 16 February 1999, para. 15.

1. **DIRECTS** the Trial Chamber to exclude the seven affidavits from evidence;
2. **FINDS** that the Formal Statement should not have been admitted into evidence under Rule 94*ter* and accordingly **DIRECTS** the Trial Chamber to re-evaluate its admissibility under Rule 89(C), considering if necessary any further submissions by the Parties.

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



Rafael Nieto-Navia,
Presiding Judge

Dated this eighteenth day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]