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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-95-16-A

Date: 11 April 2001

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Decision of: **11 April 2001**

PROSECUTOR

v.

ZORAN KUPREŠKIĆ
MIRJAN KUPREŠKIĆ
VLATKO KUPREŠKIĆ
DRAGO JOSIPOVIĆ
VLADIMIR ŠANTIĆ

REDACTED VERSION

DECISION ON THE ADMISSION OF ADDITIONAL EVIDENCE FOLLOWING HEARING OF 30 MARCH 2001

Counsel for the Prosecutor:
Mr. Upawansa Yapa

Counsel for the Defence:
Mr. Ranko Radović, Mr. Tomislav Pasarić for Zoran Kupreškić
Ms. Jadranka Slokovic-Glumac, Ms. Desanka Vranjican for Mirjan Kupreškić
Mr. Anthony Abell, Mr. John Livingston for Vlatko Kupreškić
Mr. Luka Šušak, Ms. Goranka Herljević for Drago Josipović
Mr. Petar Pavković, Mr. Mirko Vrdoljak for Vladimir Šantić

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 International Tribunal"), in the appeal of *Prosecutor v. Kupreškić et al.*, is seized of motions for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") filed by the appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić ("the Appellants").[1]

A. Procedural Background

2. Between 31 August and 18 December 2000 nine motions were filed by the Appellants for the admission of additional evidence ("the Rule 115 Motions"). The Prosecution responded to the motions in three separate responses[2] and replies were filed by the Appellants thereafter.

3. On 26 February 2001, the Appeals Chamber issued its "Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence" ("Decision on the Motions") in which all the Rule 115 Motions that had been filed as of that date were addressed. The Decision on the Motions admitted into evidence, and rejected, certain items of proposed evidence without the need for further argument. It also held, however, that oral argument was necessary in order to determine whether certain categories of proposed evidence satisfied the requirements of Rule 115.

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[1] *Confidential Motion, Pursuant to Rule 115, for Admission of Additional Evidence on Appeal By the Appellant, Vlatko Kupreškić* filed by Vlatko Kupreškić on 5 September 2000 ("Vlatko Kupreškić's Rule 115 Motion"); *Motion for Additional Evidence* and *Request of the Counsel for Drago Josipović for the Derivation of Additional Proofs Considering Rule 115 of the Book of Rules and Procedure* filed by Drago Josipović on 31 August 2000 and 4 October 2000 respectively ("Drago Josipović's Rule 115 Motions"); and *Motion of the Counsel of Zoran and Mirjan Kupreškić for the Acceptance of Additional Evidence, Which Was Not Available At the Time of the Hearing Before the Trial Chamber (Rule 115 of the Rules of Procedure and Evidence)* and *Motion No. 3 of the Counsels of Zoran and Mirjan Kupreškić With Which They Request the Derivation of Additional Proofs, Based on the Rule 115 of the Rules of Procedure and Evidence* filed by counsel for Zoran and Mirjan Kupreškić on 4 October 2000 and 18 December 2000 respectively ("Zoran and Mirjan Kupreškićs' Rule 115 Motions").

[2] *Prosecution's Consolidated Response to the Motions by Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić and Drago Josipović to Admit Additional Evidence Pursuant to Rule 115* filed on 20 November 2000; *Prosecution Response to Motion Entitled "Request for Derivation of Additional Proofs" Filed 12 December 2000 by Drago Josipović to Admit Additional Evidence Pursuant to Rule 115* filed on 21 December 2000; and *Prosecution Response to "Motion No. 3 of the Counsels of Zoran and Mirjan Kupreškić With Which They Request the Derivation of Additional Proofs, Based on the Rule 115 of Rules of Procedure and Evidence"* filed on 22 January 2001.

4. A hearing was held on 30 March 2001 during which the Appellants were required to present oral arguments as to how their proposed additional evidence satisfied the requirements of Rule 115. The Appeals Chamber now determines the admissibility of the proposed evidence.

B. General Comments on Rule 115

5. The Appeals Chamber thinks it useful at the beginning to clarify several aspects of the application of Rule 115 in the context of other Rules and general principles of law. Although prior Appeals Chamber cases have discussed Rule 115 – principally *Tadić*,[3] none has actually applied it to such varied material as is involved in this case.

6. As stated in our earlier Decision on the Motions, Rule 115 was designed to govern the acceptance by the Appeals Chamber of additional evidence relevant to facts or issues that had been litigated at trial. It established two prerequisites for such acceptance: that the material was unavailable at trial and that its consideration by the Appeals Chamber is in the "interests of justice". The admission of evidence is in the "interests of justice" if it is relevant to a material issue, if it is credible and it is such that it would probably show that the conviction or sentence was unsafe. The Appeals Chamber has interpreted this latter criterion to mean that had the Trial Chamber had such evidence before it, it probably would have come to a different result. This is the standard we have applied in our earlier decision and which we will apply in this case.[4]

7. In *Jelisić* the Appeals Chamber also held that in situations where despite its availability at trial (so that Rule 115(A)'s requirements could not be met) a failure to consider new evidence would result in a "miscarriage of justice" an inherent power is maintained so that it may be considered.[5] Those situations will be rare and extraordinary.

8. The Appeals Chamber further notes that Rule 115(B)'s insistence that admission of new material be "in the interests of justice" is one that the Appeals Chamber should apply at a relatively

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[3] *Prosecutor v. Duško Tadić*, Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence, IT-94-1-A, 15 October 1998 ("the *Tadić* Decision").

[4] Other cases have however discussed admission into the appeals record of new material by other means. Those rulings are not in any way viewed as in any way diminishing the primary authority of Rule 115 as governing additional material relative to issues litigated at trial. In *Čelebići* evidence was held admissible under the residual authority of Rule 89(C) of the Rules which allows a Chamber ultimately to consider any evidence it finds relative and probative. That case however dealt with the quite different situation of material offered to show extrinsic circumstances which may have affected the outcome of the trial, i.e. the conduct or bias of a judge, which were matters other than the issues litigated in the Trial Chamber.

[5] *Prosecutor v. Jelisić*, Decision on Request to Admit Additional Evidence, IT-95-10-A, 15 November 2000.

early stage of the Appeal, that is before all the briefs have been received and argument taken place. That means in practical terms that the Appeals Chamber must give its best judgement as to the importance of the new material in light of its familiarity with the trial record at that time. This means that even after a finding that the material has satisfied the requirements of Rule 115(B) the Chamber on further consideration and in the light of briefs and arguments may decide that indeed it is not so important that it would have changed the result and requires the overturning of the verdict or the alteration of a sentence. This of course is why the word "probably" is used in defining the test of Rule 115(B). This cautionary note is included because in argument it seemed to the Appeals Chamber that some counsel assumed that because we had already stated that the new material met the "interests of justice" test, it would ensure a reversal of the verdict, if admitted. That is not true. New material will be considered alongside the material already in the trial record to see if the Trial Chamber's judgement is sustainable by the newly enlarged record on appeal and the usual deference will be given to a Trial Chamber's findings of fact insofar as they were based on the material before the court at the time. The job of the Appeals Chamber is thus to decide in a simulation of sorts: given the findings of the trial court made on the evidence before it (and assuming that they pass muster for if they do not the case must be reversed or sent back in any case, regardless of the new evidence) would the Trial Chamber have probably come to a different conclusion if this new evidence had been before it.

9. That is the lens the Appeals Chamber will apply to that material we admit into the record under Rule 115.

II. THE PROPOSED EVIDENCE OF THE APPELLANTS

A. Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić

(a) The Video-recordings Showing the Conditions of Visibility

10. Drago Josipović sought to admit one video-recording demonstrating the visibility conditions in Santići village on the morning of 16 April 2000. Zoran and Mirjan Kupreškić sought to admit two video-recordings showing the visibility conditions inside their father's house on the morning of 16 and 17 April 2000.

11. The appellants are required to satisfy Rule 115(A) and 115(B) i.e. the evidence was not available at trial; and the interests of justice require the admission of the evidence. As to non-

availability, counsel for Josipović essentially argues that the defence could not "have assumed" that the Trial Chamber would have concluded that Witness DD at trial could have recognised him and so could not have anticipated the need for this kind of video. Similarly, counsel for Zoran and Mirjan Kupreškić argue that they believed sufficient evidence had already been introduced to show that Witness H, who identified the appellants at trial, was not a credible witness.[6]

12. The Appeals Chamber does not accept these explanations. Evidence of this nature could have been presented at trial; counsel had no right to assume which witnesses the court would accept but must make the best case in the first instance; it follows that Rule 115(A) has not been satisfied. These items of proposed evidence are rejected. It is unnecessary to consider whether the video-recordings satisfy Rule 115(B). The Appeals Chamber has considered whether the exclusion of any of this evidence would lead to a miscarriage of justice, and is not satisfied that the rejection of the evidence would lead to this conclusion.

13. Incidentally, at the oral hearing, counsel for Josipović argued that his video-recording could also be admitted under Rule 89(C) of the Rules. This is not the case. In the Appeals Chamber's view, the jurisprudence of the International Tribunal clearly provides that Rule 115 is the controlling authority for the admission of new evidence relevant to facts or issues litigated at trial. The proposed evidence in question relates to an issue raised at trial - the identification of the appellant by Witness DD.

(b) The Documents from Croatian Archives Relating to the Massacre in Ahmići and the HVO Units Involved in the Attack

14. Originally, counsel for Josipović sought to admit four documents only recently available from Croatian archives; however, at the oral hearing he withdrew his request to admit three of the documents.[7] The remaining document that he seeks to have admitted is entitled "Massacre in Ahmići".[8] Counsel for Zoran and Mirjan Kupreškić seek to admit two documents relating to the identification of HVO units involved in the attack upon Ahmići.[9] Arguments were advanced that the documents should be admitted because they support the case put forward by the defence at trial that the attack on Ahmići was carried out only by units of the Military Police, with which the appellants had no connection.

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[6] Oral Hearing Transcript p. 69.
[7] Ibid., p. 48.
[8] The document is a Croatian Intelligence Service Report to Dr. Franjo Tudman dated 21 March 1994.
[9] Document headed "Operation Spider" dated 25 November 1993 concerning the involvement of the Jokers in the Ahmići attack; and document dated 3 May 1996 concerning the units participating in the attack on Ahmići.

15. The Appeals Chamber in its Decision on the Motions accepted that all of the documents from the Croatian archives were "not available" within the meaning of Rule 115(A); only Rule 115(B) is therefore required to be satisfied. The Trial Chamber found that the attack on Ahmići was carried out by military units of the HVO and members of the Military Police (the Jokers), and that able-bodied inhabitants of Ahmići provided assistance and support. The Appeals Chamber is not satisfied that these documents are inconsistent with those findings or that the documents probably show that the convictions or sentences are unsafe. Rule 115(B) is not satisfied, thus, the evidence is rejected. The Appeals Chamber has considered whether the exclusion of any of this evidence would lead to a miscarriage of justice, and is not satisfied that the rejection of the evidence would lead to this conclusion.

(c) Eight Documents from Croatian Archives Relating to Zoran Kupreškić's Command Role

16. It is accepted that these documents, from Croatian archives, were "not available" at trial. The appellants still, however, are required to satisfy Rule 115(B)'s standard that their admission is in the "interests of justice". The defence argues that the eight documents show that Slavko Papić was the local HVO commander of the Vitez Brigade of the HVO and was responsible for the area of Ahmići, and that, because Zoran Kupreškić is not mentioned in any of the documents which set out the names of all the sector, platoon and squad leaders within his sector of the Vitez municipality, he could not have been a commander even though the Trial Chamber labelled him as such and may have relied on that fact to increase his sentence. Zoran Kupreškić maintains that his role in the local village HVO guard unit was limited to assigning guard duties, and that role concluded in February 1993 – prior to the attack on Ahmići. It is the Prosecution's contention, on the other hand, that there is no contradiction between the proposed documents and the Trial Chamber's findings. It submits that Zoran Kupreškić was only a local HVO village guard leader and so not included in the formal roster of HVO regular army officers, and it relies upon the evidence adduced before the Trial Chamber to show that he did yield authority as an HVO representative: that Zoran Kupreškić admitted in his testimony that he played an active role in the aftermath of the October 1992 incident and signed a document as a local HVO representative; that Nenad Santić, the Vitez company commander of the Vitez home guard, instructed third parties to deal with Zoran Kupreškić; that Zoran Kupreškić had a military background and was included in a list of HVO reservists; and on Zoran Kupreškić's own admission to Witness JJ that he was a commander, which was corroborated by other witnesses. It argues that had the documents been adduced at trial, they would not have had

any bearing on the decision of the Trial Chamber, and so are incapable of meeting the requirements of Rule 115(B).

17. The Appeals Chamber has examined the record on appeal and considered the findings of the Trial Chamber, in which it found that Zoran Kupreškić was a local HVO Commander and that his activities were not limited to assigning village guard duties as he alleged.[10] The Appeals Chamber considers that, collectively, the eight documents are important and could show that the Trial Chamber's findings as to Zoran Kupreškić's station are incorrect. It is not clear from the findings whether the Trial Chamber was saying that Zoran Kupreškić was part of the formal HVO hierarchy or operated as part of an entirely different local HVO structure. The Appeals Chamber thus cannot be satisfied that had this evidence been before the Trial Chamber, it would not probably have led to a different result as to Zoran Kupreškić's command role and sentence. The Appeals Chamber considers that the requirements of Rule 115(B) have been met and the interests of justice require the admission of these eight documents. They are, therefore, admitted into the appeal proceedings without prejudice to the determination of the weight to be afforded to the evidence.

B. Vlatko Kupreškić

18. Counsel for Vlatko Kupreškić seeks to admit the evidence of 11 additional witnesses into the appeal proceedings: Marija Kupreškić, Ivan Cović, AVK 1, AVK2, AVK 3, AVK 7, AVK 8,[11] Miro Lazarević, ADA, ADB, ADC and various exhibits.[12] The Appeals Chamber in its earlier Decision on the Motions considered whether any of the proposed evidence met the requirements of Rule 115(B) and held that the interests of justice could require the admission of this evidence provided that Vlatko Kupreškić is able to satisfy the requirements of Rule 115(A): the reason why this evidence was not available at trial.

19. Counsel for Vlatko Kupreškić puts forward the following arguments:

[10] Paras. 422 and 773 of the Trial Judgement.
[11] Vlatko Kupreškić has ascribed the pseudonyms "AVK" to a number of his proposed witnesses.
[12] Additionally, in Annex 10 of Vlatko Kupreškić's Brief on Sentence is a report by Mr. T McFadden C.O. of U.N. Detention Unit dated 11 April 2000 entitled "Evaluation of Behaviour Mr. Vlatko Kupreškić". Vlatko Kupreškić's Rule 115 Motion makes no specific request to admit this document into the appeal proceedings. The report pertains to the appellant's behaviour from 17 December 1998 to the 11 April 2000. The Appeals Chamber has considered whether the report satisfies the requirements of Rule 115. The period the report covers is largely pre-conviction and hence the information contained in the report cannot be said to be "not available at trial" within the meaning of Rule 115(A). On that basis the report is rejected.

(a) Reliance is placed upon the *Tadić* Decision to argue that an exception to the strict application of Rule 115(A) exists where "gross negligence is shown to exist".[13] He argues that counsel at trial failed to exercise due diligence and that they were grossly negligent in their preparation and presentation of the defence on count one of the indictment, persecution, by failing to call a number of key defence witnesses during the trial.

(b) In the alternative, he argues that, if the prima facie case of gross negligence is not made out, witnesses AVK 2, 7 and 8 were genuinely not known to trial counsel at the time of the trial and the requirements of Rule 115(A) are satisfied. As to AVK 1, this proposed witness is not argued in the alternative, but exclusively on the ground of genuine unavailability at trial.[14]

(c) If gross negligence is not established, the evidence should be admitted as its exclusion would lead to a miscarriage of justice.

(a) Gross Negligence of Former Counsel

20. In order to demonstrate the gross negligence of former counsel, the appellant relies upon a variety of evidence.[15] In particular, emphasis is placed upon the Defence Closing Brief at trial, the Draft Appellant's Brief, the Draft Rule 115 Motion and the letter from former counsel to present counsel. He argues that this material demonstrates that former counsel were unaware of the ambit and subject-matter of the persecution count and so neglected to present any adequate defence to that count. Defence counsel cannot perform their functions if they are not clear as to what a defendant is charged with, the scope of that charge, and what the Prosecution needs to prove. Defence counsel should operate in a "pessimistic" mode and be careful not to over-estimate whether they have called sufficient evidence to establish a fact; thus, in this case, former counsel should not have refused to follow up all possible leads on key issues such as Witness L's credibility or the nature of Vlatko Kupreškić's police service. He submits that as a result of the previous counsel's gross negligence, the Trial Chamber did not have substantial evidence as to his alibi from witnesses actually in Ahmići on 15 April 1993 or evidence rebutting his alleged involvement in the higher levels of the police hierarchy.

[13] Vlatko Kupreškić relies upon paras. 48 and 50 of the *Tadić* Decision in arguing that there is an exception to Rule 115(A).
[14] See Oral Hearing Transcript p. 161.
[15] The Defence Closing Brief for the Accused Vlatko Kupreškić, Letter of Dr Krajina and Mr Par dated 28 July 2000 to present counsel, The Draft Appellant's Brief, Statement of Vlatko Kupreškić, Draft Rule 115 Motion prepared by former counsel, Statements of Ljubica Kupreskic, Statement of AVK 5, Statement of AVK 6, List of witnesses for defence at trial.

21. The Prosecution challenged the evidence presented by Vlatko Kupreškić to make out a prima facie case of gross negligence.[16] In its Order of Clarification, the Appeals Chamber decided that it would first consider whether a prima facie case of gross negligence had been made out based upon the material presented by Vlatko Kupreškić to the Appeals Chamber and that, if such a case were made out, it would listen to further evidence relating to the conduct of former counsel that the Prosecution presented prior to making a determination as to whether the requirements of Rule 115(A) had been met.

22. At the hearing, counsel for Vlatko Kupreškić raised another wrinkle in the application of Rule 115. He contends that if a prima facie case of gross negligence is made out as the reason for not admitting material which meets the "interests of justice" test, it is unnecessary to pursue the matter further since the *Tadić* test for admission "that there was gross professional negligence leading to reasonable doubt as to whether a miscarriage of justice resulted" (the standard set out in para. 49 of the *Tadić* Decision) will be met. The Prosecution maintains that even if a prima facie case of gross negligence is made out, it must be followed by a hearing in which that prima facie case can be rebutted or cross-examined.

23. The Appeals Chamber interprets the *Tadić* standard for admission of additional evidence based on unavailability at trial due to gross negligence to require that gross negligence must be shown to justify the unavailability that the first prong of Rule 115 requires and that in addition the Chamber must decide if that gross negligence resulted in the omission of evidence that meets the "interests of justice" test of Rule 115, i.e. that it would probably have changed the outcome of the trial. This is definitely not the same standard Vlatko Kupreškić advances in that he would allow the evidence to be admitted if it were shown to be "in the interests of justice" under Rule 115(B) and only a prima facie case made out that it was unavailable because of gross negligence. The Appeals Chamber thinks both the *Tadić* test and Rule 115 envisages a more stringent one: gross negligence must be proven in fact and its prejudice to the "interests of justice" shown. And unavailability – whether from justifiable lack of knowledge or ability to obtain new evidence earlier or, as in Vlatko Kupreškić's case an alleged gross negligence on the part of his former counsel – is a factual matter unlike the judgmental inquiry involved in a decision on the "interests of justice". Thus if the key components of unavailability are disputed, there may need to be a factual inquiry, otherwise parties would be invited to submit all kinds of dubious material to show unavailability, in safe knowledge that it would not be probed. Accordingly, troublesome as it may be to the expedition of trial, if

[16] See *Prosecution's Urgent Motion for a Re-scheduling of the Date of Oral Hearing and Variation of Order for Protection of Certain Witnesses.*

unavailability is contested and the Appeals Chamber initially finds that a prima facie case has been made out, but the opposition presents persuasive material to counter the factual basis for unavailability, the Appeals Chamber will conduct a specific hearing on that issue.

24. In determining whether a prima facie case of gross negligence exists the Appeals Chamber considers that there is a strong presumption that counsel at trial acted with due diligence, or putting it another way, that the performance of counsel fell within the range of reasonable professional assistance. In assessing whether trial counsel were "grossly negligent", the Chamber examining the allegation applies an objective standard of reasonableness. In determining whether the performance of counsel actually fell below that standard, an assessment must be made of counsel's conduct in the circumstances as they stood at that time. The Prosecution is correct when it argues that hindsight has no role to play in this assessment.

25. The appellant has identified the conduct that he alleges amounted to gross negligence. As to the suggestion that former counsel failed to comprehend the scope of the count of persecution, the Appeals Chamber notes that while this was not the first time that a Trial Chamber of the International Tribunal had to consider this offence, the Trial Chamber in this case placed considerable emphasis upon elucidating an authoritative legal definition of persecution. The consequence was that the precise contours and elements of that offence had to be discerned and developed by all parties during the trial, including the Prosecution. Viewing the legal findings of the Trial Chamber in reaching its decision to convict Vlatko Kupreškić on that count, it can be seen that former counsel either challenged the Prosecution evidence or called evidence to rebut the Prosecution case in relation to virtually all the factual issues that the Trial Chamber took into account in reaching its verdict. The Appeals Chamber states "virtually" because the finding as to the appellant's involvement with the police was not strenuously challenged, but the peculiar circumstances that led to that situation are set out later. The Appeals Chamber's view is that while the scope and ambit of the charge may not have been entirely clear to the participants in the trial, defence counsel's conduct in answering the charge is not so far out of the range of reasonable profession assistance as to constitute gross negligence.

26. As to the allegation that crucial evidence as to alibi and other matters relating to 15 April 1993 was not called, particularly evidence from witnesses who were in Ahmići, the Appeals Chamber notes that considerable evidence was called by the defence at trial to establish that Vlatko Kupreškić had travelled to Split, and the Prosecution evidence suggesting that the appellant had been seen in Ahmići on the afternoon of 15 April outside his store, and that there were troops in and

outside his house, was challenged. Particular importance is attached by counsel for Vlatko Kupreškić to the failure of former counsel to call witness ADA who would have testified that Vlatko Kupreškić was not outside his store on 15 April 1993, that he did not see Witness L pass by, and that there were no troops on the balcony of the appellant's home. It is apparent that former counsel originally intended to call this witness; however, they later changed their minds. While it is the duty of trial counsel to act first and foremost in the interests of their own client and not in the interests of the co-accused, the Appeals Chamber is satisfied that the failure to call ADA at trial did not amount to gross negligence. Former counsel were faced with a difficult situation in that several persons who have been described as "mutual" witnesses, i.e. they were scheduled to testify on behalf of all the accused, threatened to pull out of the case and refuse to testify if ADA were called. Former counsel have also explained that had ADA been called there was a possibility that Ivica Kupreškić, a key witness for Vlatko Kupreškić, could have been compromised. The Appeals Chamber is satisfied that, in these circumstances, former counsel adequately exercised professional judgement in deciding which witnesses to call to rebut the Prosecution case, and that former counsel's performance did not fall below the standard of reasonable professional assistance.

27. Finally, as to the allegation that former counsel failed to call evidence to rebut the Prosecution case as to Vlatko Kupreškić's involvement with the police, the Appeals Chamber has considered the events which led to the two Prosecution exhibits relating to the appellant's role with the police being admitted into evidence.[17] The Prosecution had not alleged involvement with the police in the indictment, nor were the exhibits introduced during the Prosecution's case. A brief reference was first made to Vlatko Kupreškić working for the police during the cross-examination of his wife, and some time later, it was raised again during the appellant's own testimony. It appears that the Trial Chamber attached more importance to the documents than either party could have anticipated. The Appeals Chamber is not satisfied that, in the particular circumstances that existed at the time, former counsel's failure to call the evidence that it had at its disposal (a statement had been taken from Miro Lazarević, police officer at the police station in Vitez) can be said to fall below the range of reasonable professional assistance.

28. The result is that the Appeals Chamber is not satisfied that a prima facie case of gross negligence has been disclosed on the material presented by counsel for Vlatko Kupreškić.[18]

[17] Prosecution exhibits 377 and 378.

[18] It follows that the outstanding requests of the Prosecution set out in *Prosecution's Urgent Motion for a Re-scheduling of the Date of Oral Hearing and Variation of Order for Protection of Certain Witnesses* are dismissed.

(b) Witnesses AVK 1, 2, 7 and 8 were genuinely not known to counsel at the time of the trial

29. As to the appellant's argument that if gross negligence is not made out then the witnesses AVK 2, 7 and 8 were in any event genuinely unavailable to counsel at trial, and in the light of his exclusive reliance upon genuine unavailability with regard to AVK 1, the Appeals Chamber has considered, first, who the proposed witnesses are, and secondly, what their relationship was to Vlatko Kupreškić and other witnesses who were approached by former counsel when gathering evidence. The Chamber is not satisfied that had due diligence been exercised by former counsel at trial these witnesses could not have been discovered. Without a persuasive explanation as to why former counsel could not have contacted this witness prior to or during the trial, it cannot be said that he was "not available" within the meaning of Rule 115(A). Similar reasoning applies to the other witnesses and accordingly it follows that the requirements of Rule 115(A) have not been satisfied; thus, this evidence is rejected.

(c) The evidence should be admitted as its exclusion would lead to a miscarriage of justice

30. The Appeals Chamber has considered all the proposed new evidence advanced by Vlatko Kupreškić and considers that in the exceptional circumstances of his case, if certain items were excluded the result could be a miscarriage of justice. First of all, it is the Appeal Chamber's view that ADA is an important witness, and while the circumstances are such that it did not amount to gross negligence for former counsel not to call this witness, the Chamber is concerned that due to the fact that this witness claims to have been in a position whereby he could see Vlatko Kupreškić's store and house for most of the day and that he neither saw Vlatko Kupreškić nor Witness L at any stage nor witnessed any troops at the home there is a risk that failure to hear this witness could result in a miscarriage of justice. Secondly, also due to the unusual circumstances by which the evidence leading to the finding of the Trial Chamber that Vlatko Kupreškić was an active operations police officer came to light, a question over the fairness of the trial arises and the Appeals Chamber thinks it right that Vlatko Kupreškić have an opportunity to call evidence to deal with this issue. The evidence of ADA, Miro Lazarević, ADB and ADC and exhibits AD4/3, AD5/3, AD 6/3, AD8/3, AD9/3 and AD11/3 will therefore be admitted into evidence without prejudice to the determination of the weight to be afforded to the evidence.

31. As to the status of the evidence admitted into the appeal proceedings, the Appeals Chamber wishes to reiterate that as yet there has been no determination as to the weight to be afforded to any of the new evidence. The Prosecution has maintained a right to call evidence in rebuttal and cross-examine any witness from whom statements have been proffered. The Appeals Chamber envisages

that an evidentiary hearing will be held in the near future to deal with these matters. A Scheduling Order will be issued setting out the procedure to be adopted.

III. DISPOSITION

32. FOR THE FOREGOING REASONS, the Appeals Chamber **ORDERS**:

1. That Drago Josipović's Rule 115 Motions are dismissed.
2. That Zoran and Mirjan Kupreškićs' Rule 115 Motions are granted in part insofar as the eight documents from Croatian archives relating to Zoran Kupreškić's command role are admitted into the appeal proceedings without prejudice to the determination of the weight to be afforded to the evidence, but otherwise dismissed.
3. Vlatko Kupreškić's Rule 115 Motion is granted in part insofar as the evidence of Miro Lazarević, ADA, ADB, ADC and exhibits AD4/3, AD5/3, AD 6/3, AD8/3, AD9/3 and AD11/3 are admitted into the appeal proceedings without prejudice to the determination of the weight to be afforded to the evidence, but otherwise dismissed.
4. That an evidentiary hearing be scheduled in the near future to consider the evidence admitted under part 3, above.

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

Patricia Wald
Presiding Judge

Dated this 11th day of April 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]