IT-95-16-A
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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: 8 May 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: **8 May 2001**

PROSECUTOR

v.

ZORAN KUPREŠKIĆ
MIRJAN KUPREŠKIĆ
VLATKO KUPREŠKIĆ
DRAGO JOSIPOVIĆ
VLADIMIR ŠANTIĆ

DECISION ON THE MOTIONS OF DRAGO JOSIPOVIĆ, ZORAN KUPREŠKIĆ AND VLATKO KUPREŠKIĆ TO ADMIT ADDITIONAL EVIDENCE PURSUANT TO RULE 115 AND FOR JUDICIAL NOTICE TO BE TAKEN PURSUANT TO RULE 94(B)

Counsel for the Prosecutor:
Mr. Upawansa Yapa

Counsel for the Defence:
Mr. Ranko Radović, Mr. Tomislav Pasarić for Zoran Kupreškić
Ms. Jadranka Sloković-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 ("International Tribunal") is seized of three further motions filed by Drago Josipović on 21 March 2001 ("the Josipović Motion"),[1] Zoran Kupreškić on 21 March 2001 ("the Zoran Kupreškić Motion")[2] and Vlatko Kupreškić on 6 April 2001 ("the Vlatko Kupreškić Motion").[3]

2. The Office of the Prosecutor ("the Prosecution") filed separate responses to the Josipović and Zoran Kupreškić Motions on 2 April 2001, and a response to the Vlatko Kupreškić Motion on 12 April 2001.[4] Zoran Kupreškić and Vlatko Kupreškić filed replies to the Prosecution responses on 9 April 2001[5] and 23 April 2001[6] respectively; both of which were filed beyond the expiry date of the time-limit for filing a reply prescribed by the *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal* (IT/155).[7] In respect of both replies, the Appeals Chamber considers that good cause has been shown to enlarge the time-limits, and therefore the Appeals Chamber takes account of these filings.

3. Before turning to the substance of the motions, the Appeals Chamber feels compelled to communicate a strong word of caution to the parties involved in this appeal. At the last status conference held on 10 April 2001, it was brought to the attention of the parties that this appeal is advancing towards its concluding phase and that the Appeals Chamber firmly intends to recommence the briefing schedule in the very near future, so that briefing can be completed and oral argument heard in time for a judgement to be rendered within the next several months. During

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[1] Proposal of Drago Josipović for Derivation of Additional Proofs, filed confidentially and *ex-parte*.
[2] Motion No. 5 of the Counsel of Zoran Kupreškić with which he Proposes the Derivation of New Proofs According to the Rule 115 of the Rules and Proposal for the Insight in the ICTY Verdict in the Case Prosecutor v. Dario Kordić and Mario Cerkez, and the Insight in the Verdict in the Case Prosecutor v. Anto Furundzija Based on the Rule 94B of the Book of Rules and Procedure, filed confidentially.
[3] Confidential Second Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant, Vlatko Kupreškić.
[4] Prosecution Response to "Proposal of Drago Josipović for Derivation of Additional Proofs"; Prosecution Response to "Motion No. 5 of the Counsel of Zoran Kupreškić with which he Proposes the Derivation of New Proofs According to the Rule 115 of the Rules and Proposal for the Insight in the ICTY Verdict in the Case Prosecutor v. Dario Kordić and Mario Cerkez, and the Insight in the Verdict in the Case Prosecutor v. Anto Furundzija Based on the Rule 94(B) of the Book of Rules and Procedure"; Prosecution Response to "Confidential Second Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant, Vlatko Kupreškić".
[5] "Motion [sic] of the Counsel of Zoran Kupreškić with which he Answers to the Motion of the Prosecutor from 2.4.01.
[6] Ex Parte Confidential Reply to the "Prosecution Response to Confidential Second Motion Pursuant to Rule 115 for Admission of Additional Evidence on Appeal by the Appellant Vlatko Kupreškić".

the course of this appeal, the Appeals Chamber has been inundated with motions for the admission of additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence ("the Rules"). While the right to a full appeal process is of the utmost importance, this right must be carefully balanced against the equally important requirement that an appeal be dealt with expeditiously; it is patently contrary to the interests of justice for the appeals process to become overly-long and protracted or to deteriorate into a second trial in which the old trial strategies and omissions can be revisited. This appeal has now reached a stage where it must move forward; the Appeals Chamber has decided (or will decide in the immediate future) 20 separate motions for the admission of additional evidence, and will have conducted two hearings on these motions. To avoid further delay, the Appeals Chamber emphasises to the parties at this point that only the gravest of circumstances will justify further motions to admit additional evidence; unless such motions make out a strong case that the "interests of justice" require admission, the Appeals Chamber will deal with them in a summary fashion.

II. THE MOTIONS

The Josipović Motion

4. Drago Josipović makes the following requests:

(a) that Witness AT "be questioned before the Appeals Chamber as witness, considering" Rule 115 of the Rules ("First Josipović Request");

(b) that the Judgement of the Trial Chamber in *Prosecutor v. Kordić and Cerkez* be admitted into the appeal proceedings pursuant to Rule 94(B) and Rule 115 of the Rules ("Second Josipović Request");

(c) that the Order of Milivoj Petković, dated 18 April 1993, be admitted into evidence pursuant to Rule 115 ("Third Josipović Request");

5. As to the First Josipović Request, the Appeals Chamber understands the appellant to be requesting on the basis of Rule 115 that Witness AT, from the *Kordić and Cerkez* trial proceedings, be called as a witness by the Appeals Chamber to testify in this appeal. The Appeals Chamber is satisfied that it has the authority to summon a witness, in appropriate circumstances, to testify before the Chamber so as to facilitate the effective conduct of appeal proceedings, and especially Rule 115's power to admit additional evidence unavailable at trial and in the interests of justice.

[7] In respect of Josipović, the time-limit expired on 6 April 2001, for Vlatko Kupreškić, the time-limit expired on 16 April 2001.

But, so far as Josipović's request is founded upon Rule 115, he has misunderstood the purpose of that Rule, which deals with the situation where a party is in possession of material that was not before the court of first instance and which is additional evidence of a fact or issue litigated at trial. The Rule does not permit a party to simply request that a particular person be summoned to give evidence at the appellate stage. Furthermore, in this instance, Josipović was not in possession of any material relating to Witness AT when he filed his motion, although he is now in possession of such material. Therefore at the time this motion was filed he was unable to determine whether any of the material relating to Witness AT could have assisted his appeal. Josipović, along with all the other appellants, has now filed a motion to admit the material relating to Witness AT into the appeal proceedings,[8] which will be decided by the Appeals Chamber in due course. Only in the event that the material relating to Witness AT is admitted into evidence under Rule 115 will it be necessary to consider whether he should be called to testify in person. The Appeals Chamber, thus, dismisses the First Josipović Request.

6. As to the Second Josipović Request, that the Appeals Chamber take judicial notice of the trial judgement in *Prosecutor v. Kordić and Cerkez*, Rule 94(B) of the Rules provides that: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matters at issue in the current proceedings". Rule 107 of the Rules provides that rules of procedure and evidence applicable to the Trial Chambers of the International Tribunal also apply *mutatis mutandis* to proceedings in the Appeals Chamber, thus there appears to be no reason in principle why Rule 94(B) should not apply in these appeal proceedings. In order for a Chamber to take judicial notice pursuant to the Rule, however, certain pre-conditions are applicable: (i) the Appeals Chamber must have received a request from a party, and (ii) the Chamber must have heard from the parties. In this case, both pre-conditions have been fulfilled – Josipović has filed his request, and the Prosecution has filed its response in which it objects to the Second Josipović Request. The Rules are silent on this point of whether a judgement of a Trial Chamber can amount to either "adjudicated facts" or "documentary evidence" within the province of Rule 94(B). The Appeals Chamber notes that the judgement in *Prosecutor v. Kordić and Cerkez* is currently being appealed by both the accused and the Prosecution. Since the Appeals Chamber may in the course of that appeal revise the findings of the Trial Chamber, the Appeals Chamber thinks it unwise to assume that the facts contained in the Trial Chamber's judgement are "adjudicated". Only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have

[8] Request of the Counsel of Drago Josipović filed on 1 May 2001.

concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B). As to Rule 94(B)'s authorisation for judicial notice of "documentary evidence" in a different set of proceedings, the Appeals Chamber believes this Rule envisioned permitting a Chamber to take judicial notice of discrete items of evidence such as the testimony of a witness or a trial exhibit, not an entire judgement. The Second Josipović Request is dismissed.

7. As to the Third Josipović Request to admit the Order of Milivoj Petković, this document relates to additional mobilisation of HVO forces. The Appeals Chamber has already considered similar documents presented in the previous motions of Drago Josipović and Zoran and Mirjan Kupreškić to admit additional evidence, and rejected those documents. This document was recently obtained by the defence following disclosure by the Prosecution and therefore was "not available" at trial within the meaning of Rule 115(A). The first requirement of Rule 115 is thus fulfilled. As to Rule 115(B), Josipović is required to show that it is in the "interests of justice" to admit the document, namely that it is relevant to a material issue, credible and probably shows that the conviction or sentence is unsafe. The document – an order dated 18 April 1993 (2 days after the Ahmići attack) orders additional mobilisation of forces due to the open aggression of Muslim forces. In its Judgement, the Trial Chamber found that prior to 16 April 1993 Drago Josipović was a member of the HVO, based upon his being a member of the village guard and being seen in uniform and bearing a rifle. Evidence was also presented, an HVO mobilisation report, showing that the appellant was mobilised between 16 and 28 April 1993.[9] Thus, the proposed evidence is not inconsistent with material already before the Trial Chamber or with its consequent findings. The Appeals Chamber is not satisfied that had the document been presented to the Trial Chamber during trial, that it would have affected the Trial Chamber's decision, and thus rejects the request that the document be admitted into evidence.

The Zoran Kupreškić Motion

8. The Zoran Kupreškić Motion requests:

(a) the admission into evidence under Rule 115 of the following documentation: (i) Report of the Croatian Intelligence Service "Massacre in Ahmići"; (ii) Report of Dr. Karla Pospisil-Zavrski and (iii) 13 documents relating to the family of Zoran Kupreškić ("First Zoran Kupreškić Request");

(b) that the Appeals Chamber question (i) Witness SA and (ii) Asim Dzambasović ("Second Zoran Kupreškić Request");

(c) the admission into evidence under Rule 115 of two documents: (i) Order of Milivoj Petković dated 18 April 1993; and (ii) Press Release dated 16 April 1993 issued by the Operations Zone Central Bosnia Command Forward Post Vitez ("Third Zoran Kupreškić Request");

(d) that the judgement of the Trial Chamber in *Prosecutor v Kordić and Cerkez* and *Prosecutor v. Furundzija* be admitted into the appeal proceedings pursuant to Rule 94(B) of the Rules ("Fourth Zoran Kupreškić Request");

9. As to the First Zoran Kupreškić Request, the appellant is seeking to admit into evidence the documentation originally filed before the Appeals Chamber with Zoran Kupreškić's Appellant's Brief. By the Orders of the Appeals Chamber of 1 and 29 August 2000, Zoran Kupreškić was ordered that, if he wished to admit the documentation attached to his Appellant's Brief into evidence, he had to file a motion under Rule 115. The latter Order set the deadline for filing such a motion as 11 October 2000; he did not do so. The Appeals Chamber's Decision of 26 February[10] rejected the documentation on the basis that the defence had "completely failed" in its obligation to adhere to the court's deadline. Now, the defence is requesting by way of a Rule 115 motion that the documentation be admitted into evidence. The Appeals Chamber considers this as tantamount to an invitation to the Appeals Chamber to reconsider its Decision of 26 February. So viewed, the Appeals Chamber finds that the appellant has still failed to put forward any valid reasons to why he could not have abided by the Appeals Chamber's Order of 29 August 2000. Alternatively, he has not demonstrated that the Decision of 26 February was based on an erroneous premise, and that he has been subjected to an unjust procedure. Consequently, the Appeals Chamber is not satisfied that any circumstances exist to justify reconsidering its decision. The First Zoran Kupreškić Request is dismissed.

10. As to the Second Zoran Kupreškić Request, the appellant seeks to call two witnesses, Witness SA, who was due to give evidence in the *Kupreškić* trial, but was never called, and Asim Dzambasović, who did testify during the trial. No arguments have been advanced by the defence suggesting the legal basis relied upon to require the Appeals Chamber to call these witnesses, it merely proposes that the Chamber "interrogates" the witnesses. The Prosecution, in its response, has assumed the defence to be relying upon Rule 115. While the failure of the defence to articulate the legal basis for calling these witnesses is enough to justify rejection in itself, the Appeals Chamber wishes to emphasise that Rule 115 is not an adequate basis for calling these witnesses. Applications to admit additional evidence under Rule 115 can result in the Appeals Chamber

[9] See paras. 473 and 502 of the Trial Judgement.

ordering a witness to attend to give evidence, but that is in the very different situation where a party has taken a statement from a person who is cooperating with the defence and willing to testify during the appeal, and the maker of the statement is called in order to test that person's veracity. The defence therefore has no material from the witnesses that they can legitimately seek to admit as "additional evidence" under Rule 115. Concerning Witness SA, it is clear from the trial transcript that this witness could have been called during the course of the *Kupreškić* trial as part of the defence case, had the defence wished to call her. Furthermore, it is clear from the transcript that the defence did not object at the time to the Trial Chamber's decision not to call the witness, or even challenge it by way of appeal. It appears that the defence was content for the Trial Chamber to deal with the evidence of this witness on the basis of the six statements admitted into evidence. As was stated by the Appeals Chamber in its Decision of 11 April,[11] the defence has no right to assume what a Chamber will or will not accept in making its findings; it must put forward its best case in the first instance. If the defence had wanted to emphasise a particular issue in relation to Witness SA during the trial, then it ought to have called Witness SA during the course of the defence case, or objected to the Trial Chamber's decision not to call Witness SA at the time. That failure cannot be rectified at the appeals stage. As to Asim Dzambasović, the defence argues that this witness could answer any questions about Witness AT's testimony. Quite simply, as there is no evidence relating to Witness AT before the Appeals Chamber at this stage, it is unnecessary for the Appeals Chamber to consider calling additional witnesses to deal with evidence that has not yet been admitted. This request is dismissed.

11. As to the Third Zoran Kupreškić Request to admit two documents recently disclosed by the Prosecution to the defence, the Order of Milivoj Petković dated 18 April 1993 and the Press Release dated 16 April 1993, the Appeals Chamber is satisfied that as the appellant did not have access to either document at trial, the requirement of Rule 115(A) is satisfied. Concerning the requirements of Rule 115(B), the Order of Milivoj Petković is the same document that Josipović sought to admit in the Josipović Motion, and the conclusion expressed earlier applies equally here, that is, the document does not satisfy the "interests of justice" requirement. As to the Press Release dated 16 April 1993, this document states that on the 16 April 1993 it was the Muslim forces that started the attack on HVO forces in the Lašva valley. The Trial Chamber heard similar evidence during the trial that it was the Muslims that started the conflict on that day and held that the evidence was inconclusive as it could prove either the Muslims were preparing for an attack or that Croat forces

[10] Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence issued by the Appeals Chamber on 26 February 2001.
[11] Decision On The Admission Of Additional Evidence Following Hearing Of 30 March 2001.

were creating misinformation and propaganda.[12] The document may provide background information as to the events on 16 April 1993, but it certainly does not demonstrate that there was not a Croat attack upon Ahmići village nor that the appellant was not involved in the events. This document does not probably show that the conviction or sentence is unsafe, and thus is rejected.

12. Finally, as to the Fourth Zoran Kupreškić Request to take judicial notice of the two judgements. First, concerning the *Kordić and Cerkez* judgement, the conclusion expressed earlier with regard to the Second Josipović Request applies equally here, that is, as that judgement is subject to an appeal, it cannot be considered to contain "adjudicated facts". Regarding the request to take judicial notice of the *Furundžija* judgement, in that case the appeal proceedings have concluded. In the Zoran Kupreškić Motion, the defence does not, however, specify any facts of which it wishes judicial notice to be taken. The Appeals Chamber considers that a vague and generalised request to take notice of an entire judgement is insufficient to invoke Rule 94(B). A request must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to *facts*, as found by the Trial Chamber. Equally, as expressed earlier with regard to the Second Josipović Request, an entire judgement may not be the object of judicial notice. This request is dismissed.

The Vlatko Kupreškić Motion

13. The appellant seeks to admit the evidence of a further proposed witness to whom the defence has ascribed the pseudonym AVK 9. The defence suggests that AVK 9 can give evidence relevant to the appellant's alibi and other matters relating to the actual 15 April 1993 date. The motion is accompanied by a further statement from Ljubica Kupreškić, the appellant's wife, who explains how this fresh evidence has come to light.

14. This motion has been filed at a late stage in the appeal proceedings. The Appeals Chamber has already spent a great deal of time considering Vlatko Kupreškić's proposed additional evidence, and this motion post-dates the oral hearing at which these issues were fully litigated. Notwithstanding that fact, the Appeals Chamber considers this new motion in the light of Rule 115 setting the final date for filing additional evidence as 15 days prior to the appeal hearing. At the outset, the Appeals Chamber notes that there is no evidence or information from former counsel to say whether they were aware of this potential witness and made a decision, reasoned or otherwise,

[12] See para. 70 of the Trial Judgement.

not to approach AVK 9 during the course of their investigations, or whether they were simply unaware of the witness. The Appeals Chamber must determine the motion based upon the material before it. In this case, there is only the statement of AVK 9, and what is described as the "facilitating statement" of Ljubica Kupreškić.

15. As to Rule 115's requirement that the evidence was "not available at trial", the defence submits that AVK 9 was genuinely unavailable due to various difficulties in calling the witness to testify.[13] The defence explains that AVK 9 left Ahmići village on 16 April 1993, returning several years later, and that due to tense relations between the Muslim and Croat communities, AVK 9 had no contact with the Kupreškić family upon return. The defence also points out that had any of the Muslims in Ahmići found out that AVK 9 had spoken to Vlatko Kupreškić or his lawyers, AVK 9 would have been thrown out of the village. On the material before the Appeals Chamber, it appears that former counsel either was aware of AVK 9 and made a reasoned decision not to approach and investigate that potential witness, or could have discovered this witness had reasonable diligence been exercised. Considering who AVK 9 was, where the witness lived and the surrounding circumstances – the appellant and counsel at trial must have been aware that this witness was potentially a person who could have provided probative evidence as to the events surrounding the attack on Ahmići. Indeed, the statement of Ljubica Kupreškić supports the proposition that the defence at trial actually was aware of AVK 9 and considered the possibility of approaching this witness with a view to AVK 9 testifying on behalf of the defence – she states "I felt that AVK 9 would be unlikely to be a helpful witness" and "a direct approach, even by the lawyers, did not seem a very sensible way forward as it may have caused AVK 9 and [AVK 9's] family problems within their own community".

16. The Appeals Chamber takes account of the unfortunate breakdown in relationships between the inhabitants of Ahmići that occurred as a result of the conflict, and accepts that this factor must have afforded significant difficulties to defence counsel in investigating and gathering potential evidence. However, it is the view of the Appeals Chamber that where defence counsel are gathering evidence in support of an accused's defence, either at a pre-trial stage or during the course of a trial, and are aware of a potential witness and decide not to approach that person, for whatever reason, whether because counsel believe that the potential witness will not cooperate, or the witness may be

[13] In his reply, the appellant abandons the argument raised in the Vlatko Kupreškić Motion that former counsel was grossly negligent in failing to call AVK 9, see para. 4.

placed in an invidious position, when the accused is subsequently convicted by the Trial Chamber, the defence cannot claim that the witness was "not available" at trial within the meaning of Rule 115, or ask for that witness to be called at the appellate stage.

17. It follows that the testimony of AVK 9 is not admitted into evidence.[14] The Appeals Chamber does not consider it necessary to decide whether the proposed evidence could have satisfied the requirement of Rule 115(B) in any case. Furthermore, the Chamber has decided that the admission of the evidence of this proposed witness is not necessary to avoid a miscarriage of justice.

III. DISPOSITION

18. **FOR THE FOREGOING REASONS**, the Appeals Chamber **ORDERS** that the Josipović Motion, Zoran Kupreškić Motion and Vlatko Kupreškić Motion are dismissed.

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

Patricia Wald
Presiding Judge

Dated this 8th day of May 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[14] The Appeals Chamber consequently also dismisses the "Confidential Motion and Confidential Key Pursuant to Rule 75 for Measures to be Taken for the Protection of the Witness AVK/9, Referred to in the Second Rule 115 Motion on Behalf of Vlatko Kupreskic".