



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: 26 February 2001
Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: Mr Hans Holthuis

Decision of: 26 February 2001

PROSECUTOR

v

**ZORAN KUPREŠKIĆ
MIRJAN KUPREŠKIĆ
VLATKO KUPREŠKIĆ
DRAGO JOSIPOVIĆ
VLADIMIR ŠANTIĆ**

REDACTED VERSION

**DECISION ON THE MOTIONS OF APPELLANTS VLATKO KUPREŠKIĆ, DRAGO
JOSIPOVIĆ, ZORAN KUPREŠKIĆ AND MIRJAN KUPREŠKIĆ TO ADMIT
ADDITIONAL EVIDENCE**

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. Luko Šušak, Ms. Goranka Herljević for Drago Josipović
Mr. Petar Pavković, Mr. Mirko Vrdoljak for Vladimir Šantić**

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 seised of nine 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.

Procedural Background

2. Vlatko Kupreškić filed one motion on 5 September 2000 (“Vlatko Kupreškić’s Motion”).¹ In the motion, he seeks the admission of the statements of 19 witness and numerous exhibits and documentary evidence.

3. Drago Josipović has filed five motions:

(1) Motion filed 31 August 2000 (“Drago Josipović’s First Motion”).² This motion requests the admission of a video recording of visibility in Santići recorded on 16 April 2000.

(2) Second motion filed 2 October 2000 (“Drago Josipović’s Second Motion”).³ This requests the admission of the additional witness statement of Witness CA given on 15 September 2000.

(3) Third motion filed 4 October 2000 (“Drago Josipović’s Third Motion”).⁴ This requests the admission of four documents obtained from Croatian State archives. The appellant also requests that he be allowed to rely upon the documents sought to be admitted by Zoran and Mirjan Kupreškić, in their motion of 4 October 2000.⁵

(4) Fourth motion filed 4 October 2000 (“Drago Josipović’s Fourth Motion”).⁶ This document is a duplicate of Drago Josipović’s Second Motion.

(5) Fifth motion filed 12 December 2000 (“Drago Josipović’s Fifth Motion”).⁷ This requests the admission of a statement of witness Serdarević Abdulah.

¹ Confidential Motion, Pursuant to Rule 115, for Admission of Additional Evidence on Appeal By the Appellant, Vlatko Kupreškić.

² Motion for Additional Evidence.

³ Request for the Derivation of Additional Proofs.

⁴ Request of the Counsel for Drago Josipović for the Derivation of Additional Proofs Considering Rule 115 of the Book of Rules and Procedure.

⁵ Similarly, in his Motion of the Counsel of Drago Josipović filed 15 January 2001, Drago Josipović seeks to join Zoran and Mirjan Kupreškić’s Second Motion, and Zoran and Mirjan Kupreškić’s Third Motion.

⁶ Request for the Derivation of Additional Proofs.

⁷ Request for Derivation of Additional Proofs.

4. Zoran and Mirjan Kupreškić both attached documents to their Appellant's Briefs, which they seek to be admitted before the Appeals Chamber. Zoran Kupreškić attached 20 documents.⁸ Mirjan Kupreškić attached six documents.⁹

5. They have also filed three joint motions:

(1) Motion filed 4 October 2000 ("Zoran and Mirjan Kupreškićs' First Motion").¹⁰ This motion seeks the admission of 20 documents from Croatian archives and three video recordings.

(2) Second motion filed 15 November 2000 ("Zoran and Mirjan Kupreškićs' Second Motion").¹¹ The motion seeks the admission of three further documents from Croatian archives.

(3) Third motion filed on 18 December 2000 ("Zoran and Mirjan Kupreškićs' Third Motion").¹² The motion seeks the admission of a witness statement (that of Serdarević Abdulah which Drago Josipović also seeks to admit in Drago Josipović's Fifth Motion); and 20 documents from Croatian archives.

6. The Prosecution responded to the appellants' motions by filing three separate responses. On 20 November 2000, the Prosecution filed its confidential response dealing with all the motions filed up until, and including, 15 November 2000 ("Prosecution Response").¹³ On 21 December 2000, the Prosecution filed its response to Drago Josipović's Fifth Motion.¹⁴ On 22 January 2001, the Prosecution filed its response to Zoran and Mirjan Kupreškićs' Third Motion ("Third Prosecution Response").¹⁵

⁸ Attached to the Appellant's Brief of Zoran Kupreškić were 11 documents relating to the health of his family; four documents relating to his family; four *HIS* intelligence reports from Croatian archives; and a report of Dr. Posipisil Zavrski relating to post-traumatic stress disorder.

⁹ Attached to the Appellant's Brief of Mirjan Kupreškić were five documents relating to his family; and *HIS* intelligence report, "Report to President Tudman ref. Massacre in Ahmići", dated 21 March 1994. This is also one of Zoran Kupreškić's four reports.

¹⁰ *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)*.

¹¹ *Petition of the Counsels of Zoran and Mirjan Kupreškić for Derivation of Additional Proofs Before the Appeals Chamber, Which Proofs of the Counsels Were Not Available During the Trial Before the Hearing Chamber (Rule 115 of the Book of Rules)*.

¹² *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*.

¹³ *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*. This responded to Vlatko Kupreškić's Motion; Drago Josipović's First Motion, Drago Josipović's Second Motion, Drago Josipović's Third Motion and Drago Josipović's Fourth Motion; Zoran and Mirjan Kupreškićs' First Motion and Zoran and Mirjan Kupreškićs' Second Motion.

¹⁴ *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*.

¹⁵ *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"*.

7. Essentially, the Prosecution argues:¹⁶

- (i) That all of the appellants' motions for the admission of additional evidence should be denied.
- (ii) That the material attached to the Appellant's Briefs of Zoran and Mirjan Kupreškić should not be admitted because they have failed to include these documents in their motions for admission of additional evidence.
- (iii) In the event that any of the motions are granted, it expressly reserves its right to submit evidence in rebuttal and requests the right to cross-examine any witnesses from whom statements have been proffered.

8. On 18 December 2000, the appellants filed their replies to the Prosecution Response. Drago Josipović and Vlatko Kupreškić filed separate replies. Zoran and Mirjan Kupreškić filed a joint reply to the Prosecution Response ("Reply of Zoran and Mirjan Kupreškić to Prosecution Response").¹⁷ On 30 January 2001, Zoran and Mirjan Kupreškić filed a joint reply to the Third Prosecution Response ("Reply to the Third Prosecution Response").¹⁸

9. As an ancillary point, this latter reply was filed out of time, the four day time-limit expiring on 26 January 2001. The *Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155)* sets out the time-limits for the filing of documents (responses and replies) before the Appeals Chamber. Where a party cannot, or does not, file its document before the expiry of the time-limit, then the filing should be accompanied by an application for an extension of time, setting out the reasons why the party filing the document could not adhere to the prescribed time-limit. If the Appeals Chamber accepts the reasons set out therein, then the Chamber will take account of the information contained within the document. If the document is filed beyond the expiry of the time-limit, and unaccompanied by an application for an extension of time, the Appeals Chamber is not required to either accept the filing or place any reliance upon it.

10. Where a document is filed after the expiry of the time-limit, without application for an extension of time, it does not follow that it will be automatically rejected. The Appeals Chamber may exercise its discretion to accept the document where the information contained therein is of particular importance or significance. Parties filing a late document must not, however, presume

¹⁶ Prosecution Response, p. 81.

¹⁷ Reply to the Prosecution's Consolidated Response to the Motions by Zoran, Mirjan, Vlatko Kupreškić and Drago Josipović to Admit Additional Evidence Pursuant to Rule 115 by Zoran and Mirjan Kupreškić.

¹⁸ Reply to the Prosecution's Response to the Motion by Zoran and Mirjan Kupreškić to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence.

that their document will meet this standard. To avoid any risk of a late document not being accepted by the Appeals Chamber, an application for an extension of time should always be filed. In this instance, the Appeals Chamber has accepted the reply.

Application of Rule 115

11. Before dealing with the issues raised by the motions, the law relating to the admission of additional evidence will be considered. Rule 115 provides:

- (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.
- (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

12. The Appeals Chamber established important principles relating to the admission of additional evidence under Rule 115 in its decision of 15 October 1998 in the appeal of *Tadić* (“*Tadić* Decision”).¹⁹ In that case, the Appeals Chamber held that Rule 115 was applicable when the proposed additional evidence “is additional evidence of facts put in issue at trial.”²⁰ The Rule, therefore, concerns the admission of evidence *in addition* to evidence raised in respect of a particular fact or issue during the trial proceedings. The Rule is applicable where the underlying fact or issue which the additional evidence goes to prove was known and considered at trial, but there is now further evidence of that fact or issue.

13. Apart from Rule 115, evidence can be admitted before the Appeals Chamber by virtue of Rule 89(C) which provides that “a Chamber may admit any relevant evidence which it deems to have probative value”. In the appeal of *Čelebići*, it was held that “the Appeals Chamber is in the same position as a Trial Chamber, so that Rule 107 applies to permit the Appeals Chamber to admit any relevant and probative evidence pursuant to Rule 89(C).”²¹ When a party proposes to admit a piece of additional evidence before the Appeals Chamber, the Chamber must ascertain first whether Rule 115 is the applicable rule. In doing so, the Appeals Chamber is required to consider whether

¹⁹ *Prosecutor v Tadić*, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998.

²⁰ *Tadić* Decision, para. 32, p. 14.

²¹ See *Prosecutor v Delalić et al.*, Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, p. 2; and Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 Feb 2000, p. 3.

the proposed additional evidence relates to a fact or issue litigated at first instance. If it does, then the Appeals Chamber will proceed to consider the admission of the evidence under Rule 115.

14. As to Rule 115, it is comprised of two “limbs”; both must be satisfied in order for evidence to be admitted. The additional evidence must have been “not available to [the party applying to admit the evidence] at the trial” (Rule 115(A)); and the interests of justice must require the presentation of such evidence (Rule 115(B)). In considering each limb, the party applying for the admission of the additional evidence bears the burden of proof of establishing that such evidence should be admitted.²²

15. As to Rule 115(A), the prohibition on a party from adducing evidence that was available to it at trial means that the party must put forward its best possible case at trial and cannot hold back evidence in reserve until the appeal. Where a party applies to admit evidence pursuant to Rule 115, there is a requirement that due diligence was exercised at the trial stage. In the *Tadić* case, the Appeals Chamber held that the Statute of the International Tribunal has the “effect of imposing a duty to be reasonably diligent” upon a party to the trial proceedings.²³ Rule 44(C) of the Rules (Appointment, Qualifications and Duties of Counsel) sets out the duties relating to counsel expressly. It provides, “[i]n the performance of their duties counsel shall be subject to the relevant provisions of the Statute, Rules, [...] the Code of Conduct [...]”. The “code of conduct” referred to in the Rules is the *Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal* (IT/125), of which, Article 5 provides that “in providing representation to a Client, Counsel must...act with competence, skill, care, honesty and loyalty”. Article 6 provides “Counsel must represent a Client diligently in order to protect the Client’s best interests”. Consequently, defence counsel is under a duty, when representing an accused, to act with competence, skill and diligence when investigating a potential defence on behalf of an accused. The duty also applies when gathering and presenting evidence before the Tribunal. The counsel would not be required to do everything conceivably possible in performing these tasks, but would be expected to act with *reasonable* diligence in discharging the duty.

16. In relation to this duty, the *Tadić* Decision held that “unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed.”²⁴ The Appeals Chamber went on to hold, “[t]he determination which the Chamber has to make, *except in cases where there is evidence of gross negligence*, is whether the evidence was available

²² *Tadić* Decision, para. 52.

²³ *Ibid.*, para 44.

at trial. *Subject to that exception*, counsel's decision not to call evidence at trial does not serve to make it unavailable".²⁵ Thus, the decision suggests that if the party applying to admit additional evidence can demonstrate that counsel at trial were grossly negligent in the discharge of their duty to act with diligence, this can form an exception to the strict application of Rule 115(A).

17. What constitutes the "interests of justice" under Rule 115(B) was first considered by the Appeals Chamber in the *Tadić* Decision. Recently, in *Jelisić* the Chamber held that "the admission of evidence is in the interests of justice if it is relevant to a material issue, if it is credible and if it is such that it would probably show that the conviction or sentence was unsafe".²⁶

18. Finally, when the Appeals Chamber is deciding whether to admit additional evidence, it is necessary to bear in mind that if a piece of proposed evidence fails to satisfy the requirements of Rule 115, which would ordinarily lead to the rejection of the proposed evidence, the Chamber can, in any event, admit the proposed evidence to avoid a miscarriage of justice. In *Jelisić*, it was held that the Appeals Chamber "maintains an inherent power to admit such evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice."²⁷ It must be emphasised that only in wholly exceptional situations will the Appeals Chamber resort to such a course of action.

Application of the Law to the Motions

19. The Appeals Chamber will consider the motions in three separate groups:
- (I) Vlatko Kupreškić's Motion
 - (II) Drago Josipović's Motions
 - (III) Zoran and Mirjan Kupreškić's Motions

(I) VLATKO KUPREŠKIĆ'S MOTION

20. Vlatko Kupreškić's Motion states that, "central to the appellant's argument on this motion is the contention that his former lawyers, Dr Krajina and Mr Par, failed to exercise due diligence at the appellant's trial, and that they were grossly negligent in their preparation and presentation of the

²⁴ Ibid., para. 48.

²⁵ Ibid., para. 50 (emphasis added).

²⁶ *Prosecutor v Jelisić*, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3.

²⁷ *Prosecutor v Jelisić*, Decision on Request to Admit Additional Evidence, 15 November 2000, p. 3.

Defence case on Count 1.”²⁸ He asserts that former counsel either failed to interview, or call a number of key witnesses, with the consequence that the Trial Chamber was deprived of hearing crucial evidence,²⁹ and that former counsel did not understand the significance and ambit of the count.³⁰ The motion states that, with certain exceptions, all of the proposed witnesses were available at the appellant’s trial.³¹ It is the appellant’s case that the additional evidence explains, “neutralises”, or calls into serious doubt, the tenuous nature of the Prosecution evidence, upon which the conviction is based.³² The appellant invites the Appeals Chamber to consider the *cumulative effect* of the new evidence. His objective is to undermine as many aspects of the Prosecution case as possible, so that the weight of evidence tending to incriminate the appellant is reduced. The ultimate aim is to persuade the Appeals Chamber to conclude that there is insufficient evidence to sustain the conviction, and thus, lead the Chamber to reverse the conviction.

21. In his motion, Vlatko Kupreškić groups the proposed evidence into seven categories, as follows:

- (a) Alibi evidence, and other matters relating to the 15 April 1993.
- (b) Evidence as to the mental health of Witness L.
- (c) Evidence rebutting the Prosecution case as regards the appellant’s involvement with the police.
- (d) Evidence tending to cast doubt upon the testimony of Witness B.
- (e) Evidence rebutting the Prosecution case on the mobilisation records.
- (f) Evidence as to the normality of 15 April 1993, in Ahmići.
- (g) Evidence of damage to the front door of the appellant’s house, caused by soldiers forcing entry on 16 April 1993.

22. Within each category, the appellant sets out how the proposed evidence relating to that group demonstrates that former counsel was grossly negligent; and why the interests of justice require the presentation of the additional evidence.

23. Vlatko Kupreškić seeks to rely upon the exception to Rule 115(A) set out in the *Tadić* Decision by demonstrating that “there is evidence of gross negligence”. He seeks a preliminary determination on this issue, and requests that he be given the opportunity of making oral representations in relation to this issue.³³ He suggests that, if the Appeals Chamber found that that former counsel *were* grossly negligent, the exception would apply and Rule 115(A) would be

²⁸ Vlatko Kupreškić’s Motion, para. 9.

²⁹ Vlatko Kupreškić’s Motion, para. 9.

³⁰ Vlatko Kupreškić’s Motion, para. 10.

³¹ In Vlatko Kupreškić’s Motion, he states witnesses AVK/1, AVK/2, AVK/7 and AVK/8 only came to light after the trial, so were not available.

³² Vlatko Kupreškić’s Appellant’s Brief, p. 31.

³³ Vlatko Kupreškić’s Appellant’s Brief makes a cursory reference to this request. The first time this request was expressly made was at the status conference on 13 December 2000.

satisfied; the Appeals Chamber would then proceed to consider Rule 115(B). Alternatively, his argument is that if the Appeals Chamber determines that former counsel were *not* grossly negligent, Rule 115(A) would not be satisfied, and “the additional evidence would then be rejected” and “the failure to call that evidence would not be relevant to the subsequent appeal hearing”.³⁴ It is the appellant’s case that his argument as to gross negligence “only goes to the admissibility of [the] evidence and nothing else.”³⁵

24. For his proposed evidence to be admitted, the appellant must satisfy both requirements of Rule 115. The Appeals Chamber considers that it is necessary for the appellant to present oral arguments on the issue of Rule 115(A) at an oral hearing, to be scheduled in the near future. Prior to the determination of that issue it is appropriate for the Appeals Chamber to consider whether any or all of the proposed evidence could satisfy the requirements of Rule 115(B) at this stage of the proceedings.

(a) Alibi Evidence, and other Matters Relating to the 15 April 1993

25. The appellant seeks to admit the statements of Marija Kupreškić, Ivan (“Ivića”) Cović, AVK/1, AVK/2, AVK/3, AVK/7, AVK/8 and ADA.

26. The proposed evidence suggests, *inter alia*, that Vlatko Kupreškić was not at his store at any time during 15 April 1993 and did not return to his home that day until 7-7.30 pm. Also, that there were no soldiers outside the appellant’s store; no soldiers in or around the appellant’s house on that day; no soldiers on his balcony between 6-7 pm; and no signs of troops between 12-2 am on 16 April. The evidence suggests that Witness L, who testified at trial that on 15 April, between 5 and 6 pm, he saw 20-30 soldiers on the appellant’s balcony, and the appellant sitting outside his shop, is an unreliable witness. It suggests that Witness L had been working at the home of the proposed witness AVK/7 on 15 April, and had returned to his own home at 9.30 pm.

27. The Prosecution accepts that the evidence is relevant to a material issue,³⁶ but submits that the evidence is not credible due to inconsistencies between the statements provided,³⁷ and that the

³⁴ Reply on Behalf of Vlatko Kupreškić to Prosecution’s Response to Request for Oral Hearing of Appellant’s Motions to Admit Additional Evidence on Appeal, para. 8. This document was filed on 24 January 2001, one day out of time; there was no application for an extension of time accompanying the document. The Appeals Chamber has accepted this document.

³⁵ *Ibid.*, para. 7.

³⁶ Prosecution Response, para 4.49.

³⁷ *Ibid.*, 4.50-4.51.

proposed evidence would not render the conviction unsafe. The Prosecution argues that none of the proposed evidence can conclusively show that Vlatko Kupreškić was not in the Ahmići area in the early evening, nor rebut the presence of the soldiers at his house during the evening.³⁸ The Prosecution notes that Vlatko Kupreškić, in his own testimony at trial and in contradiction to the proposed evidence, said he returned to Ahmići at 18.30 from Split.³⁹

28. The Appeals Chamber is satisfied that the proposed evidence is relevant to a material issue. It relates to a number of issues raised before the Trial Chamber, such as Vlatko Kupreškić's alibi, the movement of troops on 15 April 1993, and the reliability of Witness L. As to the requirement that the evidence be credible, minor inconsistencies between the statements of the proposed witnesses will not render them incredible, as is suggested by the Prosecution in its response. What is important in deciding if a piece of evidence is credible is that it appears to be reasonably capable of belief or reliance. The Appeals Chamber is satisfied that the proposed evidence meets that requirement. Considering whether the evidence is such that it would probably show that the conviction or sentence is unsafe, the Trial Chamber found that Vlatko Kupreškić had "allowed his house to be used for the purposes of the attack and a place for troops to gather the night before",⁴⁰ and accepted the Prosecution evidence that troops were in the appellant's house on the evening of 15 April.⁴¹ It appears to the Appeals Chamber that if some of this proposed evidence had been presented to the Trial Chamber at trial, and had been accepted, it could have affected some of the Trial Chamber's findings leading to its decision to convict the appellant. The Appeals Chamber finds that the interests of justice could require the presentation of evidence within this category, provided that the appellant is able to satisfy the Appeals Chamber as to the requirements of Rule 115(A), the reasons why this evidence was not available at trial. This issue will be the subject of oral argument at the oral hearing.

(b) Evidence as to the Mental Health of Witness L

29. Vlatko Kupreškić seeks the admission of a report by a Doctor [redacted] dated 2 March 2000, medical notes, and the statement of witness AVK/3, all relating to Witness L. The relevance of Witness L's testimony at trial is noted by the Appeals Chamber in relation to category (a) above.
[REDACTED]-----

³⁸ Prosecution Response, para 4.55.

³⁹ Ibid., referring to Trial Transcript 11764-11766.

⁴⁰ *Prosecutor v Kupreškić et al.*, Judgement, IT-95-16-T, 14 January 2000 ("Trial Judgement"), para. 799.

⁴¹ Trial Judgement, para. 465.

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 -----] AVK/3 suggests that
 Witness L is untruthful, and states why, in his opinion, this might be so.

30. Concerning the report, the Prosecution submits that the evidence appears to be relevant, but is not credible. The documents upon which the report was based have not been accompanied by any type of foundation that could explain how the appellant has obtained the medical records, which are usually kept confidential unless disclosed by the patient. It argues that this renders the records and the opinion unreliable.⁴² Also, Dr [REDACTED]'s opinion is not based upon a direct examination of the patient, so its probative value is limited.⁴³ Moreover, it submits, Witness L's mental condition and its impact was fully litigated at trial. The Prosecution submits that the evidence of AVK/3 does not provide any new information regarding this fact, therefore, its relevance to a material issue is limited and its admission would not render the Trial Chamber's conviction unsafe.⁴⁴ It submits that, by requesting the admission of the statement of AVK/3, the appellant suggests that the Trial Chamber did not receive any evidence as to the alleged mental illness of the Witness L, however, the defence closing brief noted that numerous residents of Ahmići testified as to Witness L's health condition.⁴⁵

31. As to the relevance of the evidence to a material issue, the relevance of Witness L's testimony has already been considered. The proposed evidence relates to the reliability of that testimony; thus it is relevant to a material issue. Concerning the credibility of the proposed evidence, it can be noted firstly that the report of Doctor [REDACTED] is based upon the medical notes that the appellant is also seeking to admit. [REDACTED]-----
 -----] There is no accompanying information to say where the notes came from, how they were obtained, or from whom they were obtained. However, the documents appear to be from an official source, and there is nothing to suggest that they are inherently incredible. The report and notes appear to be reasonably capable of belief. As to AVK/3's statement, its credibility has already been considered. All the proposed evidence relating to this category is credible.

⁴² Prosecution Response, para. 4.95.

⁴³ Ibid., para 4.96.

⁴⁴ Ibid., para 4.94.

⁴⁵ Prosecution Response, para. 4.90, citing the Defence Closing Brief of Vlatko Kupreškić, 3 November 1999, para. 15.

32. Having satisfied the first two conditions, does the evidence probably show the conviction or sentence is unsafe? [REDACTED-----] The issue of Witness L's mental health was litigated at trial. A number of witnesses testified on the issue. Witness L testified before the Trial Chamber, which obviously was able to judge the demeanour of the witness. The defence also drew the issue of his mental condition to the attention of the Trial Chamber in its closing brief, yet the Chamber accepted his evidence. The Appeals Chamber is not satisfied that, had the Trial Chamber been aware of the information contained in Doctor [REDACTED]'s report or AVK/3's statement during the trial, it would have made any different findings in relation to this aspect of Witness L's reliability. It follows that the evidence does not probably show that the conviction or sentence is unsafe. The evidence related to this category of evidence is therefore rejected.

(c) Evidence Rebutting the Prosecution Case as Regards the Appellant's Involvement With the Police

33. Vlatko Kupreškić seeks the admission of the statements of Miro Lazarević, ADB and ADC, and a number of exhibits.⁴⁶ The three witnesses were policemen in Vitez in 1992-1993, and confirm that the appellant was not a full-time police officer, but was employed by the police only for a short duration for the purpose of making an inventory of supplies. At trial, the Prosecution adduced two reports of the Travnik police administration that described the appellant as "Operation Officer for the Prevention of Crimes of Particular State Interest", with rank as inspector first class.⁴⁷ The Trial Chamber accepted that he was an active operations officer and rejected the appellant's explanation.⁴⁸ He appellant argues that the proposed evidence would have affected the significance attached by the Trial Chamber to the two reports.

34. The Prosecution submits that the evidence does not render the conviction unsafe, as the appellant's role with the police was not an essential basis of his conviction.⁴⁹

⁴⁶ REDACTED.

⁴⁷ Exhibits P377 and P378.

⁴⁸ Trial Judgement, paras. 463, 796 and 799.

⁴⁹ Prosecution Response, para. 4.108.

Chamber, and the Chamber had accepted the evidence, then it could have issued different findings. The Appeals Chamber finds that the interests of justice could require the presentation of the evidence relating to this category of proposed evidence, provided the appellant is able to satisfy the requirements of Rule 115(A). This issue will be the subject of oral argument at the oral hearing.

(d) Evidence Tending to Cast Doubt Upon the Testimony of Witness B.

36. Vlatko Kupreškić seeks to admit the additional evidence of Blaz Kesić, a land surveyor who originally testified at trial, and exhibits.⁵⁰ The evidence relates to the testimony of Witness B, a witness at trial, who observed the appellant at the entrance to Hotel Vitez on 15 April 1993. The Trial Chamber accepted the evidence of this observation. The appellant argues that the chances of Witness B being mistaken in his identification are strong, because the witness was not challenged as to the identification by defence counsel, and evidence of the distance of the point where Witness B made the observation (the middle of the road) to the entrance to the hotel was not put before the Chamber. In the proposed statement of Blaz Kesić, this distance is stated as being 50 metres. The appellant argues that at distances over 40 metres the chance of recognising somebody accurately is only 50%,⁵¹ and that the evidence of the distance should be admitted so as to question the reliability of the observation.

37. The Prosecution submits that the appellant's argument is based on an assumption that it is known where the appellant was standing when the identification was made by Witness B. However, the evidence at trial was not clear as to precisely where the appellant was standing in front of the hotel.⁵² Witness B at trial, whilst looking at a photograph of the front of Hotel Vitez, Exhibit P9, pointed to where Vlatko Kupreškić was standing. The prosecutor stated, "For the record, you're pointing at the front door of the hotel. It's a little difficult to tell. How close to the front door do you estimate he was when you saw him?" Witness B replied "It's not very far. This distance is not 30 metres. In view of the fact that I was going from the direction of Stari Vitez, so I was going along this side of the road (indicating)".⁵³ The Prosecution submits the lack of clarity relates to the distance the appellant was standing from the front door, but not to the distance between Witness B and the appellant. It argues that if it were clear how far away from the entrance of the hotel the appellant was when he was identified by Witness B, then the measurements might be relevant.

⁵⁰ BK 1 and 2, plans of the district around the Hotel Vitez.

⁵¹ In connection with this argument the appellant relies upon the expert evidence of Professor Wagenaar, Professor of Experimental Psychology, University of Leiden, whose evidence was accepted by the Trial Chamber at trial.

⁵² Prosecution Response, para. 4.114.

⁵³ Ibid., para. 4.115, referring to Trial Transcript 24/8/98, pp. 780-81.

38. The evidence is relevant to a material issue; the identification of the appellant by Witness B was an issue that was a decisive factor in convicting the appellant, and the new evidence appears to be reasonably capable of belief, and is thereby credible. Whether the proposed evidence would probably show the conviction or sentence is unsafe is less certain. The evidence at trial as to where the appellant was standing in relation to the entrance, and also, in relation to Witness B, is confusing. His position in relation to neither can be stated with clarity. What can be said is that the Trial Chamber had photographic evidence showing the entrance of the hotel, was aware that the witness was travelling past in a motor car, and the road upon which the witness was travelling was some distance from the hotel entrance. The Trial Chamber must have been aware that the purported identification was made under what could be described as difficult conditions. However, it nonetheless held that there was no reason to think that the witness was mistaken during his evidence.⁵⁴ The Appeals Chamber is not satisfied that, if the Trial Chamber had been made aware of the distance between the middle of the road and the hotel entrance, as provided by this proposed evidence, it would have issued any different finding. This proposed evidence would probably not show that the conviction or sentence is unsafe. The evidence relating to this category is rejected.

(e) Evidence Rebutting the Prosecution Case on the Mobilisation Records.

39. The appellant seeks the admission of the statement of Stipo Zigonjić. The proposed witness was shown Exhibit P329 (from the trial), which is a certificate that describes Vlatko Kupreškić as an “Assistant Commander for Health”. The witness states that this role “exclusively means giving preventative medical help to the wounded soldiers and civilians on both sides”. The appellant argues that if the Trial Chamber had the Zigonjić statement before it, it could not reasonably have inferred from this certificate that Vlatko Kupreškić was in any way involved with the strategic planning of the HVO.⁵⁵

40. The Prosecution responds that it is not obvious from the Judgement that the certificate was relied upon.⁵⁶ It submits that an examination of the trial transcripts show that defence witnesses DA/5 and Zoran Drmić also gave evidence on this issue, and the appellant’s mobilisation records were comprehensively discussed.⁵⁷ It argues that this evidence would not render the conviction unsafe.

⁵⁴ Trial Judgement, para. 464.

⁵⁵ Vlatko Kupreškić’s Motion, para. 79.

⁵⁶ Prosecution response, para. 4.121.

⁵⁷ Ibid., 4.124.

41. The evidence is relevant to a material issue. The Trial Chamber held that Vlatko Kupreškić was “present and ready to lend assistance in whatever way he could to the attacking forces” and that “in this connection” he had been mobilised as a member of an HVO regiment on 16 April.⁵⁸ The evidence also appears to be reasonably capable of belief. As to whether the evidence would probably show that the conviction or sentence is unsafe, questions relating to Vlatko Kupreškić’s mobilisation were raised at trial, and the defence witnesses called were well suited to deal with them. The evidence of Stipo Zigonjić, as Chief of Section of Defence would not have added anything that was not known already. The Appeals Chamber is not satisfied that, if this evidence had been before the Trial Chamber at trial, it would have issued any different findings, and the evidence certainly would not have led to a different verdict. This proposed evidence does not probably show that the conviction is unsafe. The evidence relating to this category is rejected.

(f) Evidence as to the Normality of the 15 April 1993, in Ahmici.

42. Vlatko Kupreškić seeks the admission of the evidence of Muharem Pripoljac, an exhibit⁵⁹ and AVK/3. The significance of Pripoljac, he submits, is that the witness demonstrates that Mrs Kupreškić was acting in a normal manner on 15 April. The appellant argues that, if he had had prior knowledge of the attack, he would not have left his parents, wife and children to fend for themselves on 15 April.⁶⁰

43. With regard to witness AVK/3, the Prosecution submits that its remarks made in connection with this same witness in dealing with topic (a) alibi evidence, and other matters relating to the 15 April 1993, apply equally here.⁶¹ As to Muharem Pripoljac, at trial the appellant’s wife testified that she took her driving test on 15 April 1993. She produced a certificate to that effect.⁶² The Prosecution did not dispute the evidence, therefore, the calling of Muharem Pripoljac to testify was unnecessary and would have been redundant.⁶³ The evidence, it submits, is not relevant and would not show that the conviction is unsafe.

⁵⁸ Trial Judgement, para. 470.

⁵⁹ MP1, statement of this proposed witness dated 2 February 1999 confirming that Ljubica Kupreškić sat for an examination for a driver’s licence on 15 April 1993.

⁶⁰ Vlatko Kupreškić’s Motion, para. 83.

⁶¹ Prosecution Response, para. 4.131.

⁶² Exhibit D40/3.

⁶³ Prosecution Response, para. 4.133.

44. The Appeals Chamber notes that this category of evidence overlaps to a certain extent with category (a) alibi and other matters relating to the 15 April 1993. The proposed evidence of AVK/3 was considered in that earlier discussion; the Appeals Chamber does not propose to deal with it again. The Chamber will limit itself to consideration of the proposed evidence of Muharem Pripoljac. Considering the relevance of the proposed evidence to a material issue, the Trial Chamber made findings with regard to troop activity and events leading up to the attack on 16 April 1993, so the proposed evidence is relevant. The evidence appears to be reasonably capable of belief. As to whether the evidence would probably show that the conviction or sentence is unsafe, as the Prosecution did not dispute that Mrs Kupreškić had taken her driving test on 15 April, the evidence of Muharem Pripoljac cannot add anything. The Appeals Chamber is not satisfied that, if the evidence of this witness had been adduced before the Trial Chamber, it would have issued any different findings. The evidence certainly would not have led to a different verdict. It follows the evidence would not probably show that the conviction or sentence is unsafe. The evidence of Muharem Pripoljac and exhibit MP1 is rejected.

(g) Evidence of Damage to the Front Door of the Appellant's House, Caused by Soldiers Forcing Entry on 16 April 1993.

45. The appellant seeks the admission of the evidence of professional cameraman, Branko Bosnjak, who made a video recording in 1998 of damage to the front door. The appellant submits that the film gives graphic support to his contention that he did not allow the HVO to take over his house.

46. The Prosecution argues that the evidence is of negligible value due to the fact that it was recorded 5 years later. It argues that the issue of whether the taking of the house was forcible was raised at trial. A defence witness was called on this issue,⁶⁴ and a report describing the damage to the state of the house, including the front door, was adduced.⁶⁵ The Prosecution submits that the issue at trial was not whether the damage occurred, but when it occurred.⁶⁶

47. The proffered film shows traces of damage to a door. The Chamber presumes that it is the front door to the Vlatko Kupreškić's house that is depicted, although there is no statement or affidavit to that effect. The evidence is relevant to a material issue – the issue of whether the troops were permitted into the house, or entered without invitation. As to credibility, the Appeals Chamber

⁶⁴ Vlado Alilović, Official Chairman to the Municipal Committee gave evidence of the report of the damage.

⁶⁵ Report, Exhibit D12A/3.

has been told that the damage to the door was caused on 16 April 1993, and that the damage was filmed in 1998; the exact date is not stated. Due to the passage of time between the date of the purported damage to the door and the date the film of the damage was taken, the film does not appear to be reasonably capable of reliance.

48. In any event, as to whether the evidence would probably show that the conviction or sentence is unsafe, this issue was litigated at trial. The Trial Chamber rejected the appellant's explanation of the take-over of the house. The Appeals Chamber finds that even if the Trial Chamber had this piece of evidence before it, it would not have made any different findings. It follows that this evidence would not have lead to a different verdict. This proposed evidence does not probably show that the conviction or sentence is unsafe; it is accordingly rejected.

Conclusion

49. The Appeals Chamber has considered whether the interests of justice could require any of the proposed evidence to be presented, and finds that all the proposed evidence solely relating to categories (b), (d), (e), (f) and (g) does not satisfy that criterion, and rejects this evidence. In relation to the evidence relating to categories (a) and (c), this evidence could require presentation subject to the appellant satisfying the requirements of Rule 115(A), the reasons for its non-availability at trial. Vlatko Kupreškić's request for an oral hearing is granted as to this evidence only.

(II) DRAGO JOSIPOVIĆ'S MOTIONS

50. The Appeals Chamber finds that all of the proposed additional evidence sought to be admitted by Drago Josipović relates to a fact or issue litigated at first instance. Rule 115 is, therefore, applicable in determining its admissibility. The evidence can be grouped into four categories.

A) Video-recording of visibility in Santići village on 16 April 2000

⁶⁶ Prosecution Response, para. 4.142.
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51. This is a video-recording of Luka Susak, counsel for Drago Josipović, in Santići village on 16 April 2000 in front of the house of Nazif Ahmić with the purpose of demonstrating that it is not possible to recognise a person at 5.45 am due to the poor lighting conditions. The proposed evidence relates to an issue raised at trial involving the identification of the appellant by Witness DD.

52. The Appeals Chamber considers that the efficient conduct of this appeal requires an oral hearing to be held, prior to the appeal hearing, to enable the parties to present oral argument on the issue of availability of this evidence at trial and whether the interests of justice require its presentation.

B) Additional Statement of Witness CA

53. Additional Statement of Witness CA, who testified at trial, given on 15 September 2000 at the request of defence counsel for Drago Josipović. The contents of the additional statement relates to a telephone conversation with Witness DD (witness at trial) about two weeks after 16 April 1993, when Witness DD indicated to Witness CA that she did not know whether Nazif Ahmić and his son were alive. The Appeals Chamber finds that this proposed evidence relates to an issue raised at first instance - the reliability of Witness DD's identification of Drago Josipović as having participated in events at the home of Nazif Ahmić.

54. As to whether the evidence was not available at trial, Witness CA originally had been a Prosecution witness, and was brought to The Hague to testify during the trial. The Prosecution decided not to call her, but the Trial Chamber decided to call her as a court witness at the specific request of Drago Josipović. Counsel for the appellant cross-examined the witness. The appellant submits that "information that stems from the additional statement of Witness CA was never before known or available to the prosecutor," and the counsel of Drago Josipović was not in the position to question Witness CA before the hearing.⁶⁷

55. Where the Prosecution "makes" a person a Prosecution witness and at a late stage in the proceedings decides not to call that witness, leaving insufficient time or means to enable the defence to take steps towards making that person a defence witness in order to call the witness on its own behalf, and where subsequently, following the provision of testimony by the witness, that witness brings to the attention of the defence the fact that it could have provided further elucidation

upon an issue at trial, it would not be fair to say that the defence should have been aware of the existence of that further information at the time of the trial proceedings. In the circumstances of this case, the Appeals Chamber finds that the further information was “not available” for the purpose of Rule 115.

56. Turning to Rule 115(B), the defence suggests that the additional statement of Witness CA demonstrates that Witness DD was uncertain whether Nazif Ahmić and his son had been killed on 16 April 1993, and submits, “her statement given at the hearing is therefore very questionable”.⁶⁸ The Prosecution argues that knowledge of them being alive or dead is irrelevant to the issue of identification of the appellant; and the alleged comment contained in the additional statement is not inconsistent with the witness’s testimony at trial and the Trial Chamber’s findings.⁶⁹

57. The Prosecution evidence dealing with Drago Josipović’s participation in attacks upon the homes of his neighbours is set out in the Judgement of the Trial Chamber. At paragraph 485, Witness DD’s evidence of the attack on the house of Nazif and Senija Ahmić, during which Nazif and his 14 year old son, Amir, were killed, is related. It states “she saw Drago Josipović among the soldiers near Asim’s house, shooting at Nazif’s house” and “[a] soldier took Amir behind the house and a shot was heard”. At paragraph 504, the Trial Chamber found “that Drago Josipović participated in the attack on the house of Nazif Ahmić in which Nazif and his 14 year old son were killed”. Regarding Witness DD, the Trial Chamber held it was “satisfied that she accurately identified the accused”. Thus, whilst Witness DD did not say that she saw Nazif and Amir Ahmić being killed during that attack, that is the conclusion that the Trial Chamber drew from her evidence. At paragraph 811, the Trial Chamber notes that Josipović’s participation in the attack on the Ahmić house was not charged as a separate count, nor did the Prosecution seek leave to amend the indictment, but it did constitute relevant evidence for the charge of persecution.

58. The Appeals Chamber finds that the proposed evidence is relevant to a material issue, credible and, if true, would probably show that the conviction or sentence is unsafe. The Appeals Chamber finds that the interests of justice require the presentation of the evidence. It is admitted, without prejudice to a determination of the weight to be afforded to the proposed evidence.

C) Four Croatian archive documents

⁶⁷ Drago Josipović’s Second Motion, A2764-3.

⁶⁸ *Ibid.*, A2764.

59. The four Croatian archive documents are Croatian Intelligence Service (*Hrvatska Informativna Sluzba*) reports to President Tudman.⁷⁰ The documents are dated 17, 18 and 21 February 1994 and 21 March 1994 and relate to: the movement of HVO defence lines in the Vitez region (17.2.94); the struggle of high-ranking officers in the HVO for power (18.2.94); the difficult conditions for the HVO in Vitez due to, inter alia, shortage of men (21.2.94); and a document entitled "Massacre in Ahmići" which states that the massacre was executed by police unit JPN "Jokery" under the command of Vlado Cosić, and that prisoners from "Koanik" prison participated in the attack. It names some of the individuals involved in the attack. None of the documents refer to any of the appellants in this appeal, either directly or indirectly.

60. The fourth document relates to issues central to the trial. The first three relate to general issues that were raised during the trial. As to the availability of the documents at trial, the appellant states that "the counsels and the prosecutor have obtained the documents of the secret services of the Republic of Croatia, which were in the archives of the Office of the President or in the archives of secret services."⁷¹ No mention is made of when or how exactly the documents were obtained or whether any attempt was made to obtain such documents prior to or during the trial. The Prosecution notes that it was unable to access Croatian archives, and concedes that for the purpose of its response the documents were also not available to the appellants.⁷²

61. The new documents have been obtained as a consequence of the co-operation between the present Croatian authorities and the International Tribunal. Material is being provided from various State archives to the Prosecution and defence counsel that would, no doubt, have been adduced during the trial proceedings, had it been available. The Prosecution concedes that the material that defence counsel are seeking to adduce was not available to them during the preparation and trial stages of the case. In the light of the Prosecution's concession, the appellant has satisfied the Appeals Chamber that the proposed additional evidence was not available.

62. The Appeals Chamber considers that the efficient conduct of this appeal requires an oral hearing to be held, prior to the appeal hearing itself, to enable the parties to present oral argument on the issue of whether the interests of justice require the presentation of this evidence.

D) Statement of Serdarević Abdulah

⁶⁹ Prosecution Response, paras. 2.24-2.25.

⁷⁰ The four documents were also attached to the Appellant's Brief of Zoran Kupreškić.

⁷¹ Drago Josipović's Third Motion, A2799.

⁷² Prosecution Response, para. 2.30.

63. The statement of Serdarević Abdulah was given on 28 November 2000 to defence counsel for Drago Josipović, Zoran and Mirjan Kupreškić. This witness states that, before Witness CA was called to testify before the Tribunal, Witness KL from the trial came to her on several occasions and attempted to influence her to provide false testimony at the court. He attempted to influence her to testify that she saw Drago Josipović kill her son that day. The appellant argues that as Witness KL is the father of Witness EE who accused Drago Josipović in her testimony, the Appeals Chamber should question Serdarević Abdulah and Witness CA.

64. Witness EE gave evidence that Drago Josipović was present when Musafir Puscul was taken away, and she never saw him again (paragraph 479 of the Trial Judgement). The Trial Chamber accepted her evidence (paragraph 503). The suggestion of the defence is that Witness EE's father, Witness KL, might have influenced her. This evidence relates to an issue raised at first instance - the reliability of Witness EE.

65. With regard to Rule 115(A), the appellant puts forward no explanation as to how Serdarević Abdulah came to give a statement to the defence. The statement is recent, but there is no argument as to why the evidence could not have been given at trial. The onus is upon the appellant to show why it was not available. This has not been satisfied. It is rejected under Rule 115.

Conclusion

66. As to categories (A) and (C) of the appellant's proposed evidence the parties are required to present oral arguments at an oral hearing that will be scheduled to take place prior to the appeal hearing, concerning whether the interests of justice require the presentation of the evidence, and in relation to category (A) alone, the issue of non-availability of the evidence at trial. The proposed evidence at category (B) is accepted without a hearing without prejudice to a determination of the weight to be afforded to the proposed evidence. The proposed evidence at category (D) is rejected.

(III) ZORAN AND MIRJAN KUPREŠKIĆ'S MOTIONS

67. The Prosecution contends that the documents attached to the Appellant's Briefs of Zoran and Mirjan Kupreškić have not been included in their motions for the admission of additional evidence, contrary to the Appeals Chamber's Order of 29 August 2000, and are inadmissible.⁷³

68. The Appeals Chamber issued two orders relating to these documents. In the Order of 1 August 2000, the Appellants were required to provide, by 4 September 2000, an index of the documents attached to their Appellant's Briefs, specifying in respect of each document whether it was before the Trial Chamber or not; and where the documents were not presented at trial, to file a motion for additional evidence. The Order of 29 August, provided that "the documents referred to in the Appellants' Briefs of Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović, and Vladimir Santić will not be admissible under Rule 115 of the Rules unless a Motion for additional evidence is filed". This Order extended the filing date for the motion for additional evidence until 4 October 2000.

69. The obligation of the appellants was clear; in *addition* to filing a list of authorities and an index, they had to file a separate motion for additional evidence "including *all the additional evidence they seek to rely upon* for the purposes of Rule 115".⁷⁴ The appellants both filed an index on 14 September 2000. However, none of Zoran and Mirjan Kupreškić's three motions for the admission of additional evidence either refers to or mentions the documents attached to their Appellant's Briefs. Zoran and Mirjan Kupreškić have clearly failed to abide by the Order of the Appeals Chamber. In the Reply of Zoran and Mirjan Kupreškić to Prosecution Response, they state:

The Defence filed their Motions according to the Order of the Appeals Chamber issued on 29 August 2000 and by these Motions the Defence sought that the evidence attached to the briefs of Zoran Kupreškić and Mirjan Kupreškić be admitted as additional evidence. If in their motions this request was not directly expressed, it was the mistake due to the lack of experience of counsel in writing motions for additional evidence.

The documents relating to health problems in their families were presented to the Trial Chamber enclosed to the Motions to the provisional release.

Attached to the Appeals Briefs of Zoran and Mirjan Kupreškić were also four HIS intelligence reports. The Defence requests these documents to be admitted as additional evidence [...]

70. The point made in the first paragraph cited above is incorrect – the motions make no reference to the documents attached to the briefs so it cannot be said to be the case that "the

⁷³ Prosecution Response, p. 6.

⁷⁴ Order of 29 August (emphasis added).

Defence sought that the evidence [...] be admitted as additional evidence” – the request was not expressed at all, either directly or indirectly. The appellants ask that the Appeals Chamber admit the HIS intelligence reports, but this request is made in the Reply of Zoran and Mirjan Kupreškić to Prosecution Response – and fails to satisfy the requirement in the Orders that the appellants submit a motion seeking the admission of the documents. Moreover, ordinarily a reply is restricted to dealing with issues raised in an opposing party’s response. If a party raises a new argument or request for the first time in a reply then the opposing party is deprived of an opportunity to respond. This could harm the fairness of the appeal proceedings. In this case, when the Prosecution Response alerted the appellants to the fact that they may have failed to act correctly in seeking to admit the documents, they should have filed a new motion to rectify their error, rather than dealing with it in their reply. The appellants filed Zoran and Mirjan Kupreškić’s Third Motion on 18 December 2000, the same day as the Reply of Zoran and Mirjan Kupreškić to Prosecution Response was filed. They could have included in this application the request to admit the documents attached to the briefs – they chose not to. Counsel for the two appellants have completely failed in their obligation to file a *motion* requesting the admission of the documents attached to the briefs, and by requesting admission in a reply have failed to rectify their error.

71. In the next paragraph of the reply, the appellants refer to the documents relating to their families’ health problems. The appellants contend that these documents are already before the Appeals Chamber, having been admitted during their applications for provisional release during trial proceedings. The same point was made when Zoran and Mirjan Kupreškić filed their indices of documents attached to their Appellant’s Briefs on 14 September 2000.

72. In respect of documents relating to the health of the families, the Prosecution submits that these documents were not disclosed to the Prosecution, nor entered as evidence with the Trial Chamber for the purposes of guilt or innocence, or for sentencing. It states that certain of the documents attached to the Appellant’s Briefs may have been filed *ex parte* before the Trial Chamber.⁷⁵

73. Two written motions for provisional release were filed before the Trial Chamber during trial proceedings by Zoran and Mirjan Kupreškić.⁷⁶ Accompanying these two motions were certain documents, including the five documents relating to the family of Mirjan Kupreškić attached to his

⁷⁵ Prosecution Response, p. 7.

⁷⁶ *Motion of the Counsel fo [sic] Zoran and Mirjan Kupreškić for Temporary Release*, filed 3 September 1999; and *Defence Motion for Provisional Release of Zoran and Mirjan Kupreškić*, filed 15 December 1999.

Appellant's Brief. *None* of the documents attached to Zoran Kupreškić's Appellant's Brief were submitted before the Trial Chamber at any time during trial proceedings.

74. What then is the status of the five documents attached to Mirjan Kupreškić's Appellant's Brief concerning his family? Rule 109(A) of the Rules provides that the record on appeal shall consist of the parts of the trial record, as certified by the Registrar, nominated by the parties. Rule 109(D) provides that the Appeals Chamber shall remain free to call for the whole of the trial record. As these documents were submitted, albeit *ex parte*, before the Trial Chamber during the trial proceedings, they form part of the trial record and, as such, can be called for by the Appeals Chamber. The Appeals Chamber considers that these documents are already before the Chamber, and Rule 115 does not apply to them. Mirjan Kupreškić is able to rely upon these five documents during the course of the appeal.⁷⁷ The 20 documents that were attached to the Appellant's Brief of Zoran Kupreškić and the one Croatian archive document attached to the Appellant's Brief of Mirjan Kupreškić which were *not* filed before the Trial Chamber at any time are rejected.

75. As to the motions for the admission of additional evidence, as a preliminary point, the Appeals Chamber is satisfied that all of the proposed evidence contained in the motions of Zoran and Mirjan Kupreškić relates to a fact or issue litigated at first instance. Rule 115 is then applicable in determining admissibility. In order to deal with the evidence in an efficient manner, it is considered in four separate categories: (A) the Croatian archive documents; (B) the video-recordings of visibility on 16 and 17 April 1993; (C) the video-recording of the oath-taking ceremony at Vitez stadium; and (D) the statement of Serdarević Abdulah.

A) The Croatian Archive Documents

⁷⁷ The documents attached to Mirjan Kupreškić's Appellant's Brief that were also filed before the Trial Chamber are: Medical Findings dated 20 August 1999 relating to Luca Kupreškić; document dated 28 September 1999 relating to Marko Kupreškić; Findings and Opinion of an Educational Psychologist dated 6 May 1999; First Instance Expert Commission Findings and Opinion dated 27 May 1999; and Clinical Hospital Split Release Form dated 21 November 1999.

76. The documents from the archives of the Republic of Croatia relate to a variety of matters. The Prosecution has divided the documents up into six groups,⁷⁸ which are adopted in this memorandum for the purpose of dealing with the motions:

- (i) one document relating to the structure of the military police;
- (ii) four documents relating to the establishment of home guard units;
- (iii) eight documents concerning the command role of Zoran Kupreškić;
- (iv) four documents concerning the preparation of HVO combat operations;
- (v) 11 documents relating to the mobilisation of HVO forces in 1993;
- (vi) 16 documents relating to identification of HVO units in the Ahmići attack.

77. Before dealing with these groups of evidence, Zoran and Mirjan Kupreškićs' First Motion refers to a document bearing the reference 822/92, which is an order of 26 September 1992. The actual document does not accompany the motion, so its contents have not been disclosed. It follows that this document is excluded from the outset.

Was the evidence available?

78. The appellants state that "at the time of the trial before the Trial Chamber, the Archives of the secret services were not available neither [sic] to counsel nor prosecutor [...] after the elections in January 2000, these archives have been made available."⁷⁹ The Prosecution concedes that, whilst there is no evidence as to when the appellants obtained the documents or that earlier efforts to request such documents were futile, it acknowledges, on the basis that the Prosecution could not itself get access to the Croatian archives that the documents must also have been 'not available' to the defence.⁸⁰ The Appeals Chamber is satisfied that the appellants have established that the proposed additional evidence within this category was not available at trial.

Is the presentation of the evidence required in the interests of justice?

79. Dealing with each group of proposed evidence, the Appeals Chamber is required to decide if the presentation of the evidence is required in the interests of justice. To meet this requirement the evidence must be credible. All the documents appear to be from an official source, and it cannot be said that there is anything inherently incredible or unbelievable about them. All of the Croatian archive documents are reasonably capable of belief, and thus satisfy the requirement of credibility.

⁷⁸ Prosecution Response, para. 3.4. The appellants have accepted this categorisation, see Reply of Zoran Kupreškić and Mirjan Kupreškić to Prosecution response, p. 4.

⁷⁹ Zoran and Mirjan Kupreškićs' First Motion, para. 1.

⁸⁰ Prosecution Response, para. 3.8.

(i) Documents Relating to the Structure of the Military Police

80. Document (1) dated 15 February 1993 is from Commander Pasko Ljubicić of HVO Command of the 4th Battalion of the Military Police (“MP”), Vitez.⁸¹ This evidence goes to show the size of the 4th Battalion of the MP. The defence requests that the document be admitted to prove how large the 4th Battalion is.⁸² The Prosecution argues that, other than stating that the appellants assisted the MP and the HVO in the attack, the Trial Chamber made no findings as to the structure of the MP, therefore the proposed additional evidence is irrelevant to a material issue.

81. In its Judgement, the Trial Chamber makes no findings on the structure of the MP. The appellants have not satisfied the Appeals Chamber as how the proposed additional evidence is relevant to a material issue, or that it probably shows that the convictions or sentences of the appellants are unsafe. This evidence is rejected.

(ii) Documents Relating to the Establishment of the Home Guard Units

82. Document (2) dated 13 March 1993, Order issued to the Commanders of the Home Guard Units.⁸³ Document (3) dated 13 April 1993 from Anto Puljić, Chief of Travnik Defence Administration.⁸⁴ Document (4) dated 4 February 1994 from Tihomir Blaškić.⁸⁵ Document (5) dated 8 February 1994 from Tihomir Blaškić.⁸⁶

83. The documents relate to the duties of the Home Guard Units, and when they were formed. In the Judgement, the Trial Chamber made findings in relation to the existence of a local HVO village guard structure. It found that Drago Josipović was a member of the village guard,⁸⁷ and that Zoran Kupreškić was a local HVO Commander whose duties were not limited to assigning village guard duties.⁸⁸ The Appeals Chamber is not satisfied that if this evidence been presented before the Trial Chamber, its findings as to a “village guard” would have differed. The evidence is neither relevant to a material issue nor probably shows the conviction or sentence is unsafe. The evidence relating to this group of additional evidence is rejected.

⁸¹ Doc. Ref. No. 02-4/3-07-190/93, RP A3/2835- A1/2835.

⁸² Zoran and Mirjan Kupreškićs’ First Motion, para. 5.

⁸³ Doc. Ref. No.20-3-538/93, RP A2/2820bis- A1/2820bis.

⁸⁴ Doc. Ref. No. 02-11-0246/94, RP A2818bis.

⁸⁵ Doc. Ref. No. 01-2-87/94, RP A2/2810bis.

⁸⁶ Doc. Ref. No.01-2-181/94, RP A2808bis.

⁸⁷ Trial Judgement, para. 502.

(iii) Documents Relating to the Command Role of Zoran Kupreškić

84. Document (6) dated 23 April 1993 is an order from Mario Cerkez, Vitez Brigade Commander.⁸⁹ Document (7) dated 21 April 1993 is an order from Mario Cerkez, Vitez Brigade Commander, appointing sector commanders, and village commanders.⁹⁰ Document (8) dated 21 May 1993 is an order from Anto Bertović, Commander of Sectors I and II, setting out who is to be the Commander of Area III of Sector III, and who the Platoon and Squad Commanders of this area shall be.⁹¹ Document (9) dated 21 May 1993 is an order from Anto Bertović, Commander of Sectors I and II, setting out who is to be the Commander of Area III of Sector II, and who the Platoon and Squad Commanders of this area shall be.⁹² Document (10) dated 9 July 1993 to Central Bosnia Operative Zone command, Vitez from Gordana Badrov, Chief of Establishment and Personnel of the Vitez Brigade, concerning infantry officers engaged in the Vitez Brigade.⁹³

Document (11) dated 28 April 1993 in an Order from Mario Cerkez stating Slavko Papić, the commander of the Pirići-Ahmići area, shall have full authorisation to recruit and assign manpower in the area.⁹⁴ Document (12) dated 1 May 1993 is an Order from Mario Cerkez appointing Slavko Papić as commander of Pirići, Krc and Kuber area of Sector III at Slijvica.⁹⁵ Document (13) dated 28 October 1993 is information from the Commander of the 1st Battalion, Anto Bertović, to the Chief of Organisation and Personnel about various officers.⁹⁶

85. During the trial, Zoran Kupreškić denied that he was a local HVO Commander. The defence submits that if Zoran Kupreškić had been an HVO commander the documents would have shown that he was a commander for Sector III "Slijvica", or Nadioći village, or as a commander of a lower tactical unit. As he is not mentioned in any of these documents, this supports his version of events. The Prosecution argues that at no place in its findings of fact has the Trial Chamber held that the appellant was a commander in the Vitez Brigade before or after 16 April 1993. Absence of the appellants' name in any of the documents does not contradict or undermine the Trial Chamber's findings.⁹⁷

⁸⁸ Trial Judgement, para. 773.

⁸⁹ Doc. Ref. No. 01-147-2/93, A3/2829bis.

⁹⁰ Doc. Ref. No. 01-147-1/93, A2825bis.

⁹¹ A2/2831bis.

⁹² A2/2830bis.

⁹³ Doc. Ref. No. 10-611-2/93.

⁹⁴ Doc. Ref. No. 01-205-1/93.

⁹⁵ Doc. Ref. No. 01-220-1/93.

⁹⁶ Doc. Ref. No. 756/93.

⁹⁷ Prosecution Response, para. 3.21.

86. The Appeals Chamber considers that this evidence is relevant to the issue of Zoran Kupreškić's command role, and as the Trial Chamber made findings in relation to that issue which appear to have formed an aggravating feature in sentence, the interests of justice could demand the presentation of this evidence. The Appeals Chamber orders that oral argument be provided by the parties in relation to this category of evidence at an oral hearing to be held prior to the appeal hearing.

(iv) Documents Relating to the HVO Preparations for Combat Operations

87. Document (14) dated 17 April 1993, is an Order from Tihomir Blaskić.⁹⁸ Document (15) dated 16 April 1993 is an extraordinary report concerning the course of combat action and the readiness of Croatian forces.⁹⁹ Document (16) is entitled "MUP Report on the Events in Ahmići" prepared by the Ministry of the Interior of the Republic of Croatia.¹⁰⁰ This is not strictly an archived document having apparently been prepared relatively recently. The report sets out the events leading up to the events in Ahmići. It deals with where and how the attack was prepared, and the units taking part in the attack. Document (17) dated 25 May 1993, is a letter from Mario Cerkez, Commander of Vitez Brigade, to unknown persons.

88. The defence argues that the Trial Chamber found that Zoran and Mirjan Kupreškić knew of the attack on 16 April 1993, but that in fact maximum combat readiness was first ordered on 17 April 1993.¹⁰¹ Further, the decision for the massacre in Ahmići was made during the evening hours of 15 April 1993 in the house of Dario Kordić, and the Kupreškić brothers could not have known about the attack.¹⁰² The defence claims that the new evidence demonstrates that if members of the civil government of Vitez found out only at the last minute about the Ahmići plans, then the residents of Ahmići, including the Kupreškić brothers, could not have known about the attack before that.¹⁰³

89. The Trial Chamber was satisfied that Zoran and Mirjan Kupreškić "must have known that an attack was planned [on 16 April 1993] and were ready to play a part in it."¹⁰⁴ With respect to these four documents, the appellants have not established how the proposed additional evidence

⁹⁸ Doc. Ref. No. 01-4-323/93, 2/2837bis- 1/2837bis.

⁹⁹ Doc. Ref. No. 01-4-268/93, A3516.

¹⁰⁰ This document was not obtained from Croatian archives as it was created recently on a date unknown.

¹⁰¹ Zoran and Mirjan Kupreškićs' First Motion, para. 14, A3011.

¹⁰² Zoran and Mirjan Kupreškićs' Third Motion, para. 2.

¹⁰³ Zoran and Mirjan Kupreškićs' Third Motion, para. 13.

¹⁰⁴ Trial Judgement, para. 423.

contradicts any of the findings of the Trial Chamber. The Appeals Chamber is not satisfied that, if the Trial Chamber had had this evidence before it, its findings would have altered, and it would have issued any different decision. The proposed evidence does not probably show that the convictions or sentences are unsafe. The evidence relating to this group is rejected.

(v) Documents Relating to the Mobilisation of HVO Forces

90. Document (18) is an HVO war diary containing the observations of the Officer on Duty in the Central Bosnia Operative Zone, to which the appellants have referred to entries between 0735 and 1655 hours on 18 April 1993.¹⁰⁵ Document (19) dated 18 April 1993 is an Order from Tihomir Blaskić and Anto Puljić concerning the exhaustion of personnel on the defence line held by the 4th MP Battalion in the area of Vitez.¹⁰⁶ Document (20) dated 18 April 1993 is an Order from Tihomir Blaskić.¹⁰⁷ Document (21) dated 16 April 1993 is an Order from Tihomir Blaskić.¹⁰⁸ Document (22) dated 19 April 1993 is an Order from Anto Puljić, Chief of Travnik Defence Administration concerning complete mobilisation.¹⁰⁹ Document (23) dated 18 April 1993 is an Order from Anto Puljić, Chief of Travnik Defence.¹¹⁰ Document (24) dated 27 April 1993 is an order from Anto Puljić, Chief of Travnik Defence Administration.¹¹¹ Document (25) dated 30 April 1993 is an order from Anto Puljić, Chief of Travnik Defence Administration.¹¹² Document (26) dated 31 May 1993 is an IPD report by Anto Bertović to the 1st Battalion concerning mobilisation, which refers to low morale and that men were collected from streets or houses and directly brought to the front line.¹¹³ Document (27) dated 18 April 1993 is an Order from Milivoj Petković concerning the assessment of the potential for additional mobilisation.¹¹⁴

91. The defence argues that the documents demonstrate that Tihomir Blaskić sent a command to the commander of the Vitez Brigade and to the Defence Office, Vitez, requesting men to exchange the exhausted MPs at the front line. MPs were exchanged on the front line on 18 April 1993. It submits that the documents confirm the testimony of the appellants about the day on which they were mobilised,¹¹⁵ and also, that residents were mobilised to replace regular army units.¹¹⁶

¹⁰⁵ 83/3002bis- 75/3002bis.

¹⁰⁶ Doc. Ref. No. 01-4-344/93, A2838bis.

¹⁰⁷ Doc. Ref. No. 01-4-359/93, A2813bis.

¹⁰⁸ Doc. Ref. No. 01-4-281/93, A2/2812bis- 1/2812bis.

¹⁰⁹ Doc. Ref. No. 02-11-0269/93, A2/2817bis- 1/2817bis.

¹¹⁰ Doc. Ref. No. 02-11-266/93, A2806bis.

¹¹¹ Doc. Ref. No. 02-11-0310, A2805bis.

¹¹² Doc. Ref. No. 01-4-736, A2/2804bis.

¹¹³ A3507- 3506.

¹¹⁴ Doc. Ref. No. 02-2/1-01-649/93.

¹¹⁵ Zoran and Mirjan Kupreškićs' First Motion, para. 3, A3016-15.

According to the defence, the documents show that mobilisation took place on a number of occasions,¹¹⁷ and not by written call-up, but by gathering men from streets or houses where they were taken directly to the front-line as the defence had claimed at trial.¹¹⁸ The Prosecution submits that the documents relating to the timing of the mobilisation do not preclude the mobilisation of the appellants as found by the Trial Chamber; and the technical manner of mobilisation, either in a formal or informal way, was not the basis of the appellant's conviction.¹¹⁹

92. On the matter of mobilisation, the Prosecution's case was that both Zoran and Mirjan Kupreškić played a role in the events of 16 April 1993 in Ahmići. The Trial Chamber, as noted, found that Zoran Kupreškić "was a local HVO Commander" and Mirjan Kupreškić "was an active member of the HVO".¹²⁰ During the trial, both appellants denied participating in the crimes at Ahmići. Zoran Kupreškić testified that on 18 April 1993 some MPs told Zoran and Mirjan Kupreškić that they had to go to the line at Gornji Pirići, and they remained on the front-line for three or four months. Mirjan Kupreškić gave similar evidence.¹²¹ The Appeals Chamber understands the appellants to be inviting the Chamber to find that, if the appellants were mobilised for the first time on 18 April 1993, they were not members of the HVO prior to that date.

93. The Prosecution called evidence to show that the appellants had military experience. It was shown that both had completed their military service in the JNA; Zoran Kupreškić became a reserve officer and Mirjan trained in the infantry.¹²² Also both were listed in the Register of the HVO Vitez Brigade as being reservists between 8 April 1992 and 22 and 23 January 1996. In relation to Zoran Kupreškić, Witness JJ, Witness B and Abdulah Ahmić testified that he was an HVO member, and commander.¹²³ Additionally, several witnesses testified to having seen Zoran Kupreškić in uniform, one gave evidence of seeing Mirjan Kupreškić in uniform.¹²⁴ At paragraph 421 of the Judgement, the Trial Chamber held that it was "satisfied that both accused were active members of the HVO. In the case of Mirjan Kupreškić, this finding is based upon the HVO Register and is also inferred from his activities on 16 April 1993".

¹¹⁶ Ibid.

¹¹⁷ Ibid., para. 15, A3010.

¹¹⁸ Zoran and Mirjan Kupreškićs' Second Motion, A3519.

¹¹⁹ Prosecution Response, para. 3.25.

¹²⁰ Trial Judgement, para. 789.

¹²¹ Trial Judgement, paras. 417-419.

¹²² Trial Judgement, para. 377.

¹²³ Trial Judgement, paras. 378-379.

¹²⁴ Trial Judgement, para. 381 and connected footnote.

94. The Appeals Chamber is satisfied that the evidence is relevant to a material issue. As to whether it probably shows that the convictions or sentences are unsafe, even if the appellants were sent to the front-lines in the manner suggested, and hence were “mobilised”, this does not mean that they could not have been members of the HVO at the time of the attack on Ahmići. The Appeals Chamber is not satisfied that if the evidence within this category had been presented to the Trial Chamber during the trial, the Chamber would have issued any different decisive findings. The evidence related to this category is rejected.

(vi) Documents Relating to Identification of HVO Units in the Ahmići Attack

95. Document (28) dated 25 November 1993 from Operation Spider concerning the involvement of the Jokers in the Ahmići attack. It states that Pasko Ljubicić set up the Jokers, which attacked the village of Ahmići and looted property.¹²⁵

Document (29) dated 3 May 1996 concerning the identification of participants in the Ahmići attack of 16 April 1993.¹²⁶

Document (30) to (35) are certificates of casualty relating to men killed in Ahmići 16 April 1993.¹²⁷

Document (36) dated 26 June 1993 lists the names and members of the 1st Active Service Company of the 4th MP Battalion.¹²⁸ Document (37) dated 4 December 1993. List of MPs killed and certificates of membership of unit and circumstances of death.¹²⁹ Document (38) dated 5 March 1992. Claim for money to pay salaries of 4th MP Battalion.¹³⁰ Document (39) dated 23 February 1993. Request for the replenishment of the 4th MP Battalion with equipment.¹³¹ Document (40) dated 20 January 1993 is an Order of Pasko Ljubicić concerning checkpoints.¹³² Document (41) dated 11 October 1993. List of wounded MP members of the 1st Active Service Company and 2nd Platoon of the Novi Travnik 2nd MP Company.¹³³ Document (42) dated 13 February 1993. List of policemen recruited to reinforce 1st Active Service Company.¹³⁴ Document (43) dated 4 March 1993. Salary list for the 1st Active Service Company of the MP 4th Battalion for February 1993.¹³⁵

¹²⁵ Doc. Ref. No. 5512/93, A2815bis.

¹²⁶ Doc. Ref. No. 02-08-14-5821796, A3511-3510.

¹²⁷ Doc. Ref. No. 1730-01/94 2796-08; Doc. Ref. No. 1730-01/94 2796-10; Doc. Ref. No. 1730-01/94 2796-12; Doc. Ref. No. 1730-01/94 2796-14; Doc. Ref. No. 1730-01/94 2794-21; Doc. Ref. No. 02-4/3-04/1-478/93.

¹²⁸ Doc. Ref. No. 02-4/3-04/1-425/93.

¹²⁹ Doc. Ref. No. 02-4/3-15/1-666/93.

¹³⁰ Doc. Ref. No. 02-4/3-07-373/93.

¹³¹ Doc. Ref. No. 02-4/3-07-288/93.

¹³² Doc. Ref. No. 02-4/3-07-75/93.

¹³³ Doc. Ref. No. 02-4/3-07-1564/93.

¹³⁴ Doc. Ref. No. 02-4/3-04/1-181/93.

¹³⁵ Doc. Ref. No. 02-4/3-04/1-181/93.

96. The defence argues that documents (28) and (29) provide information about the perpetrators of the Ahmići attack. The Prosecution submits that the appellants appear to be asking the Appeals Chamber to infer that as Zoran and Mirjan Kupreškić are not mentioned in any documents, they were not involved in the attack. It argues that the documents contradict evidence called by the defence at trial, and submits that the two documents are not inconsistent with the findings of the Trial Chamber.¹³⁶ Concerning documents (30) to (43), the defence argues that they show that only MPs were involved in the attack on Ahmići and not members of the HVO or inhabitants of Ahmići.¹³⁷ The Prosecution submits that these documents are not relevant; they do not exclude the participation of units other than the MPs in the attack.

97. In its Judgement, the Trial Chamber found that a number of groups participated in the attack on Ahmići: military units of the HVO, members of the Jokers and able-bodied Croatian inhabitants of Ahmići.¹³⁸ In its findings, the Trial Chamber did not specify *exactly* which groups participated. None of the proposed additional evidence demonstrates that these findings are incorrect. None of the evidence shows that it was the MP that exclusively participated in the attack on Ahmići. The Appeals Chamber is not satisfied that if documents (30) to (43) had been adduced before the Trial Chamber it would have made any different decisive findings. The documents certainly would not have led to different verdicts. These documents do not probably show that the conviction or sentence is unsafe. Documents (30) to (43) are rejected.

98. As to documents (28) and (29) which concern identification of the parties responsible for the attack on Ahmići, the Appeals Chamber considers that the interests of justice could require the presentation of this evidence, and decides that the efficient conduct of this appeal requires an oral hearing to be held, prior to the appeal hearing, to enable the parties to present oral argument in connection with this issue.

B) The Video Recordings of the Visibility in Ahmići on 16 and 17 April 2000

99. The appellants have submitted two video recordings made in the house of the father of the Kupreškić brothers, recorded on the 16 and 17 April 2000. The motion describes how the camera is

¹³⁶ Prosecution Response, 3.31-3.36.

¹³⁷ Reply to the Third Prosecution Response, A3977.

¹³⁸ Trial Judgement, para. 334.

directed towards the window, so that the “visibility in the house in Ahmići on 16.4, during the time the Witness H spoke of” can be observed.¹³⁹

100. The videos show that the room is in darkness at 5.17 am on 16 April and 5.05 am on 17 April. The proposed additional evidence relates to the issue of the identification of the appellants by Witness H, who testified at trial that they participated in the murders and arson at the house of Suhret Ahmić, which was accepted by the Trial Chamber.

101. Concerning Rule 115(A), the defence submits that as the Trial Chamber accepted the evidence, “counsel had no other option than to film the visibility in the house in Ahmići on 16 April”.¹⁴⁰ The Prosecution argues that there is no reason why this evidence was not called at trial, except that the defence assumed that Witness H would not be believed.¹⁴¹

102. This aspect of the motion is very similar to Drago Josipović’s application to admit video-recording evidence. The Appeals Chamber considers that it would be appropriate for the efficient conduct of this appeal to hear submissions from defence counsel on the question of availability and whether the interests of justice require the presentation of this evidence.

C) The Video Recording of the Oath-taking Ceremony at Vitez Stadium

103. The video shows men wearing military uniform and bearing weapons in a sports ground, watched by a crowd of spectators. The proposed evidence relates to the issue of the reliability of Witness JJ who testified that Zoran Kupreškić was a member of the HVO prior to 16 April 1993, and an HVO commander.

104. As to Rule 115(A), the defence states that whilst filming the visibility in Vitez on 16 April 2000, counsel found out that the oath-taking ceremony had been filmed by the cameraman Branko Bosnjak. Defence counsel obtained the film from him and state that it shows seen that Zoran Kupreškić in the auditorium as a member of the audience.¹⁴² The Prosecution make no comments on the availability of the video recording. The Appeals Chamber is satisfied that the evidence was not available to the appellants at trial.

¹³⁹ Zoran and Mirjan Kupreškićs’ First Motion, p. 10.

¹⁴⁰ Ibid.

¹⁴¹ Prosecution Response, 3.41.

¹⁴² Zoran and Mirjan Kupreškićs’ First Motion, para. 2.

105. Concerning Rule 115(B), the defence states that, in relation to Zoran Kupreškić, an essential reason for the Trial Chamber finding that he was an active member of the HVO was the testimony of Witness JJ, who stated that Zoran Kupreškić took part in an oath-taking ceremony at the town stadium in Vitez. The appellant had denied this in his testimony, and stated that the witness was mistaken because he was not taking the oath, but was only among the viewers of the ceremony. The appellants submit that this evidence confirms his testimony. The Prosecution submits that even if the video recording were considered to be relevant and credible, it would not constitute evidence that would render the conviction unsafe, because the Trial Chamber also accepted the evidence of Witness B and Abdulah Ahmić on this point.¹⁴³

106. Upon an initial viewing of this video, it is impossible to discern whether Zoran Kupreškić is “present in the auditorium” as the appellants suggest. If the appellants are correct in this assertion that this video depicts the same oath-taking ceremony referred to by Witness JJ in her testimony, and indeed Zoran Kupreškić is a spectator rather than a participant, then this evidence could have had an affect upon the Trial Chamber’s findings at trial. The Appeals Chamber provisionally admits this evidence, subject to defence counsel for the appellants providing further information to enable the Appeals Chamber and the Prosecution to identify which portions of the video-recording purport to show Zoran Kupreškić.

D) The Statement of Serdarević Abdulah

107. The admission of this evidence has already been considered in relation to Drago Josipović’s motion. In Zoran and Mirjan Kupreškićs’ Third Motion it states Abdulah Serdarević gave a statement on 28.11.00 that Witness CA was on several occasions visited by Witness KL who tried to talk her into false testimony.¹⁴⁴ This motion adds nothing new to Drago Josipović’s request to admit the statement. In the Reply to the Third Prosecution Response the appellants state that as Witness H (at trial) is the granddaughter of Witness KL, it “can be concluded that her testimony was influenced by her grandfather”.¹⁴⁵

108. Additionally, in that reply, the appellants state with regard to non-availability that “Mr Serdarević was not in Vitez till the end of last year and Defence was not able to find him before”. This information has not satisfied the Appeals Chamber that defence counsel exercised reasonable

¹⁴³ Prosecution Response, para. 3,48-3.50.

¹⁴⁴ Zoran and Mirjan Kupreškićs’ Third Motion, para. 1.

¹⁴⁵ Reply to the Third Prosecution Response, A 3979.

diligence in trying to obtain this evidence for the trial. There is insufficient detail: counsel do not state where the witness was until the end of last year, or how they came into contact with him. The burden of showing that the evidence was not available at trial has not been satisfied. This evidence is rejected.

Conclusion

109. As to category (A) of the appellants' proposed evidence, documents (1) to (5), (14) to (27) and (30) to (43) inclusive are rejected. Documents (6) to (13) inclusive and (28) and (29) will be the subject of oral argument at an oral hearing, to be scheduled prior to the appeal hearing, concerning the issue of whether the interests of justice require the presentation of this evidence. As to category (B), oral argument on the question of availability and whether the interests of justice require the presentation of this evidence will be presented at the oral hearing. Concerning category (C), this evidence is provisionally admitted, subject to the appellants providing further information identifying which portions of the video recording purport to show Zoran Kupreškić. As to category (D), this evidence is rejected.

DISPOSITION

FOR THE FOREGOING REASONS, the Appeals Chamber ORDERS :

1. That an oral hearing be scheduled to take place;
2. (i) Vlatko Kupreškić's Motion is dismissed in part insofar as the proposed evidence relating solely to categories (b), (d), (e), (f) and (g) is rejected;
 (ii) the admissibility of categories (a) and (c) of the proposed evidence will be determined following oral argument on the issue of Rule 115(A) at the oral hearing;
 (iii) Vlatko Kupreškić's request for an oral hearing is granted as to this proposed evidence only;
3. (i) Drago Josipović's First Motion will be determined following oral argument at the oral hearing on the issues of Rule 115(A) and Rule 115(B);
 (ii) Drago Josipović's Second Motion is granted and the evidence of Witness CA is admitted before the Appeals Chamber without prejudice to the determination of the weight to be afforded to the proposed evidence;
 (iii) Drago Josipović's Third Motion will be determined following oral argument at the oral hearing on the issue of Rule 115(B);
 (iv) Drago Josipović's Fourth Motion is dismissed;
 (v) Drago Josipović's Fifth Motion is dismissed;
4. Rule 115 does not apply to the five documents relating to the family of Mirjan Kupreškić that were attached to his Appellant's Brief and the appellant may rely upon these documents in the course of his appeal; the Croatian document attached to his Appellant's Brief is rejected;
5. All the documents attached to the Appellant's Brief of Zoran Kupreškić are rejected;
6. (i) Zoran and Mirjan Kupreškić's First Motion and Zoran and Mirjan Kupreškić's Third Motion are dismissed in part insofar as category (A) the Croatian archive documents (1) to (5), (14) to (27), and (30) to (43) inclusive and category (D) the statement of Serdarević Abdulah are rejected;
 (ii) the admissibility of category (A) the Croatian archive documents (6) to (13) inclusive and (28) and (29) of the proposed evidence will be determined following oral argument on the issue of Rule 115(B) at the oral hearing;
 (iii) the admissibility of category (B) the video-recordings of visibility will be determined following oral argument on the issue of Rule 115(A) and 115(B) at the oral hearing;
 (iv) Zoran and Mirjan Kupreškić's First Motion is allowed in part insofar as category (C) the video-recording of the oath-taking is provisionally admitted, subject to the appellants providing

further information identifying which portions of the video recording purport to show Zoran Kupreškić within 14 days from this decision;

(v) Zoran and Mirjan Kupreškićs' Second Motion is dismissed.

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

Judge Mohamed Bennouna
Presiding

Dated this 26th day of February 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]