

**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-AR73.3

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: Judge Lal Chand Vohrah, Presiding
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge David Hunt
Judge Mohammed Bennouna

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 15 July 1999

THE PROSECUTOR

v.

**Zoran KUPREŠKIĆ, Mirjan KUPREŠKIĆ, Vlatko KUPREŠKIĆ,
Drago JOSIPOVIĆ, Dragan PAPIĆ, Vladimir ŠANTIĆ, also known as "VLADO"**

**DECISION ON APPEAL BY DRAGAN PAPIĆ AGAINST RULING TO PROCEED
BY DEPOSITION**

The Office of the Prosecutor:
Mr. Franck Terrier
Mr. Michael Blaxill

Counsel for the Accused:
Mr. Ranko Radović for Zoran Kupreškić
Ms. Jadranka Glumać for Mirjan Kupreškić
Mr. Borislav Krajina, Mr. Želimir Par for Vlatko Kupreškić
Mr. Luko Šušak, Ms. Goranka Herjević for Drago Josipović
Mr. Petar Pulišelić, Ms. Nika Pinter for Dragan Papić
Mr. Petar Pavković for Vladimir Santić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal") is seised of an appeal against an oral ruling of Trial Chamber II of 24 February 1999, filed by Counsel for the accused Dragan Papić ("the Appellant") on 25 February 1999.

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

I. INTRODUCTION

3. The six accused in the present case are charged with violations of the laws or customs of war and crimes against humanity in respect of alleged crimes of persecution on political, racial or religious grounds, murders, inhumane acts and cruel treatment. The trial against them commenced on 17 August 1998. After the conclusion of the presentation of the Prosecution's case, the Defence opened its case on 11 January 1999.

4. During the trial proceedings on 24 February 1999, the Presiding Judge informed the parties that one of the Judges of the Trial Chamber was ill and was unlikely to be able to attend the hearings during the remainder of the week. The Presiding Judge enquired whether, in order for time not to be wasted, either of the parties was prepared to request that depositions pursuant to Rule 71 be taken from the defence witnesses scheduled to be heard during this time-period.

5. After such a request was made orally by the Prosecution, Counsel for the Appellant intimated that the Appellant was opposed to the witnesses concerned being examined before only two Judges of the Trial Chamber because these witnesses were going to give evidence on specific facts relating to the actual charges against him.

6. The Presiding Judge made the following oral ruling:

We rule that in spite of the opposition of the Defence counsel and the accused, Rule 71 is fully applicable because according to this Rule the request of one party is sufficient, and we feel that we are confronted with exceptional circumstances and that the interests of justice command that a fair and expeditious trial be held.¹

7. In consequence, the evidence of defence witnesses Pero Papić and Goran Males were taken by way of deposition with the two Judges present acting as Presiding Officers. On the following day, 25 February 1999, the Trial Chamber issued a written decision confirming this oral ruling.² On the same day, the Presiding Officers proceeded to take the evidence of a third defence witness, Ljubica Milicević, by way of deposition but when they were informed that an application for leave to appeal had been filed by the Appellant under

¹ Provisional transcript pages 7188-7189.

² Decision on Prosecution Request to Proceed by Deposition, T. Ch. II, 25 Feb. 1999.

Rule 73, the deposition proceedings were discontinued.³ Trial proceedings resumed before the Trial Chamber on 1 March 1999.

II. THE APPEAL

8. On 12 March 1999, a Bench of three Judges of the Appeals Chamber pursuant to Sub-rule 73(B)(ii) granted the Appellant leave to appeal on the ground that the issues raised, namely the interpretation and application of Sub-rules 15(E) and 15(F) and Rule 71, were of general importance to the proceedings before the Tribunal. The Appeals Chamber on 25 March 1999 issued a scheduling order requesting the parties to submit written briefs. It also requested the Appellant to clearly indicate in its written brief the relief that he sought. The Prosecution filed its written brief on 1 April 1999 and the Appellant filed his written brief on 14 April 1999.⁴

A. The Appellant

9. In the present appeal the Appellant asks the Appeals Chamber to order appropriate relief by holding that “he has the right to the consistent application of the Rules”.⁵ The Appellant further states that he “is aware of the fact that in appeal procedure, if any, there is the possibility of repeated calling the witnesses who made their testimony contrary to the Rules”.⁶ Despite the direction to the Appellant to clarify the relief sought, the Appellant has not with sufficient preciseness stated the relief that he seeks from the Appeals Chamber. In the circumstances, the Appeals Chamber will consider the appeal and grant the relief that it deems appropriate in accordance with its findings.

10. The Appellant has impeached the ruling on four grounds, summarised as follows. First, the Appellant attacks the ruling on the ground that it was rendered by two sitting

³ Request of the Defence Counsel for Dragan Papić for the Leave to Appeal Against Oral Decision Dated 24th February 1999, filed on 25 February 1999.

⁴ Prosecutor’s Brief Filed in Response to the Trial Chamber’s Scheduling Order of 25th March 1999, filed on 1 April 1999 (“Prosecution’s brief”) and Defence Counsel Brief in Response to the Appeals [sic] Scheduling Order of 25th March 1999, filed on 14 April 1999, (“Appellant’s brief”).

⁵ Appellant’s brief, para. 11.

⁶ *Ibid.*

Judges, as opposed to a Trial Chamber comprising three Judges, and that, in consequence, Rule 71 was breached since it provides that only a *Trial Chamber* may order that a deposition be taken. Second, the Appellant contends that Rule 71 was further violated because the ruling was rendered in response to an oral request by the Prosecution and in respect of defence witnesses, whereas the provision stipulates that a motion for the taking of a deposition must be in writing and relate only to a party's own witnesses. Third, the Appellant appears to question the propriety of applying 71 in the present circumstances by arguing that (a) the requirements of the provisions were not met; and (b) in any event, to rely on Rule 71 to continue the proceedings by way of deposition, in spite of his express opposition thereto, was erroneous and constituted in effect a circumvention of the proper procedure to be followed for the situation arising in the present case, as specifically laid down in Sub-rules 15(E) and 15(F). Fourth, the Appellant asserts that the ruling was not in consonance with his right to have his witnesses examined under the same conditions as witnesses against him pursuant to Article 21(4)(e) of the Statute, given that the witnesses for the Prosecution were heard before the Trial Chamber in its full composition.

B. The Prosecution

11. In response, the Prosecution limits itself to submitting that any irregularity of procedure does not violate the rights of the Appellant as provided for in Article 21 of the Statute and that if the Appeals Chamber finds that invoking Rule 71 was inappropriate in the circumstances, a declaration to that effect would be an appropriate and sufficient remedy.

III. APPLICABLE PROVISIONS

12. The relevant parts of the applicable provisions of the Statute and the Rules are set out below.

The Statute

Article 12

Composition of the Chambers

The Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State, shall serve as follows:

- (a) three judges shall serve in each of the Trial Chambers

[...]

Article 20

Commencement and conduct of trial proceedings

(1) The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

Article 21

Rights of the accused

[...]

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

[...]

The Rules

Rule 15

[...]

(E) In case of illness or an unfilled vacancy or in any other circumstances, the President may authorise a Chamber to conduct routine matters, such as the holding of an initial appearance under Rule 62 or the delivery of decisions, in the absence of one or more of its members.

(F) If a Judge is, for any reason, unable to continue sitting in a part-heard case, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings; otherwise the Presiding judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused.

Rule 71

(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

(B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.

(D) Deposition evidence may also be given by means of a video-conference.

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decisions by the Trial Chamber. The Presiding Officer shall transmit the record to the Trial Chamber.

Rule 90

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 or where, in exceptional circumstances and in the interest of justice, a Chamber has authorised the receipt of testimony via video-conference link.

[. . .]

IV. DISCUSSION

A. First Ground of Appeal

13. As to the first ground of appeal, namely that the ruling was illegal since it was not rendered by a properly constituted Trial Chamber as required by Rule 71 but by two Judges, it is clear from the transcript that the decision to proceed by way of deposition was taken in direct response to the Prosecution's oral request, prompted by the Presiding Judge, and in

the face of the Appellant's express opposition to the granting of that request. The transcripts of the proceedings do not in any way indicate that the two sitting Judges had discussed the matter in advance with the absent Judge. On the basis of the record of proceedings, it must be concluded that the ruling was in fact rendered by only the two sitting Judges.

14. Rule 71 provides that a Trial Chamber may order that a deposition be taken, whilst Article 12 of the Statute stipulates that a Trial Chamber shall be composed of three Judges. Given the plain and ordinary meaning of the latter provision, a Trial Chamber is only competent to act as a Trial Chamber *per se* if it comprises three Judges. Consequently, the requirement in Rule 71 that an order for depositions to be taken may only be rendered by a Trial Chamber, has not been met. That a written decision confirming the ruling was issued by the Trial Chamber the following day could not *ipso facto* cure this illegality.⁷ Where the Statute or the Rules prescribe that a matter is to be decided by a *Trial Chamber*, two sitting Judges may not do so on the part of the Trial Chamber, save in the case where the Trial Chamber has received prior authorisation by the President. Such authorisation may, however, only be given in respect of routine matters pursuant to Sub-rule 15(E). In the present case, no such authorisation had been given by the President, and, in any event, the making of a decision to proceed by way of deposition with regard to the examination of witnesses giving evidence on facts relating to the specific charges made against an accused, thereby having a direct bearing on the determination of the guilt or innocence of the accused, does not, in the view of the Appeals Chamber, constitute "routine matters" within the meaning of Sub-rule 15(E). This is amply supported by the two examples provided in the provision having no bearing whatsoever on any determination of the culpability or otherwise of the accused. The Appeals Chamber, therefore, finds that the ruling was null and void since it was rendered without jurisdiction with regard to defence witnesses Pero Papić and Goran Males, both of whom were heard pursuant to the ruling.

B. Second Ground of Appeal

15. In relation to the second ground of appeal, the Appellant argues firstly that the ruling offends Rule 71 because it was rendered in response merely to an oral motion when Sub-

rule 71(B) stipulates that a motion for the taking of a deposition must be in writing. The second aspect of this ground, namely that the deposition request of the Prosecution concerned defence witnesses, is discussed below.⁸ It is not in dispute that the ruling was made in response to an oral request by the Prosecution. However, the Appeals Chamber agrees with the view put forward by the Prosecution that under the current circumstances, where both parties were present and were allowed to make oral representations in relation to the issue raised by the motion, the non-compliance with the requirement embodied in Sub-rule 71(B) is merely of a technical nature and has no adverse effects upon the integrity of the proceedings or the rights of the accused.⁹

C. Third Ground of Appeal

16. As to the third ground of appeal, the Appellant appears to be putting forward a two-pronged argument in which he questions the application of Rule 71 in the current circumstances by contending that a) the requirements of “exceptional circumstances” and “in the interests of justice” were not present; and b) to rely on Rule 71 to continue the proceedings by way of deposition, despite his express opposition thereto, was an unlawful circumvention of or deviation from the proper procedure to be followed in the case of illness or other short-term inability of a Judge, specifically provided for in Sub-rules 15(E) and 15(F). Accordingly, the second part of the Appellant’s argument raises the issue of whether a decision to proceed by way of deposition pursuant to Rule 71 may be considered as a legitimate response to the temporary inability of a Judge to participate in the work of a Trial Chamber or whether it should be viewed as an improper procedural device employed in order to in effect circumvent the stipulated procedure laid down in Sub-rules 15(E) and 15(F).

17. As previously mentioned, Sub-rule 15(E) provides that the President may authorise a Trial Chamber to conduct routine matters in the absence of one or more of the Trial Chamber’s members due to illness or an unfilled vacancy or “in any other exceptional circumstances”. As stated above, the making of a decision to proceed by way of deposition

⁷ See above para. 7, n. 2. .

⁸ See below para. 20.

with regard to the examination of witnesses testifying on facts relating directly to the specific charges made against an accused does not constitute “routine matters” within the meaning of Sub-rule 15(E). Thus, the relevance, if any, of this provision in respect of the determination of the present ground, is the inference which may be drawn from it, namely that the illness of a Judge constitutes an exceptional circumstance, the latter being one of the necessary requirements for the application of Rule 71. It is, however, questionable whether the expression “exceptional circumstances” attracts the same meaning for the purpose of the application of Sub-rule 15(E) as for that of Rule 71, given the different set of circumstances to which the two provisions apply.

18. In considering the issues raised by this ground of the appeal, the Appeals Chamber deems it necessary to recall one of the fundamental principles governing the giving of evidence before the Trial Chambers, namely the principle that witnesses shall as a general rule be heard directly by the Judges of the Trial Chambers. This principle is laid down in Article 21(4) of the Statute which grants to every accused person appearing before the Tribunal as one of the “minimum guarantees, in full equality”, the right to examine, or have examined, the witnesses against him and to obtain the *attendance* and examination of witnesses on his behalf under the same conditions as witnesses against him. Sub-rule 90(A) embodies that same principle and specifically prescribes that witnesses shall in principle be heard directly by the Chambers. Furthermore, this principle is a predominant feature in the criminal procedure of national legal systems, underpinned as it is by the compelling reason of facilitating the determination of the charges against an accused person. One of the consequences of this principle is the advantage that all three Judges of a Trial Chamber shall have of observing the demeanour of the witness in person while he or she is being examined by the parties, apart from their ability to put questions to the witness under solemn circumstances in order to best ascertain the truth in respect of the crimes with which an accused is being charged.

19. The Rules, however, provide for four exceptions to this general rule of direct evidence in the form of 1) deposition evidence (Rule 71), 2) the receipt of testimony via video-conference link (Sub-rule 90(A), 3) expert witness statement (Rule 94*bis*) and 4) the submission of affidavit evidence in corroboration of witness testimonies (Rule 94*ter*). The

⁹ See Prosecution’s brief, para. 4.

crucial question is then whether the present situation, arising from the fact that one of the sitting Judges is unable to participate in the work of the Trial Chamber due to illness, falls within the purview of one of these exceptions, that is to say Rule 71. In approaching this provision from a purely technical standpoint, it might not be unreasonable to construe the requirements that “a Trial Chamber may, in *exceptional circumstances* and *in the interests of justice*, order that a deposition be taken”¹⁰ to cover such a situation. The Appeals Chamber is also alive to the need to avoid an overly restrictive interpretation of the Rules so as to allow the Trial Chambers to respond to the varied circumstances with which they are faced and to ensure the efficient functioning of the Tribunal. Notwithstanding these considerations, the Appeals Chamber takes the view that Rule 71 must be construed strictly and in accordance with its original purpose of providing an exception, with special conditions, to the general rule for direct evidence to be furnished, especially in the context of a criminal trial. In the result, any relaxation of Rule 71 or deviation from the purpose for which it was originally designed must require the consent of the accused.

20. Rule 71 stipulates that in exceptional circumstances and in the interests of justice a deposition be taken for the use *at trial*. It prescribes that a motion for the taking of a deposition shall indicate the name and whereabouts of the persons whose deposition is sought, along with the date and *place* at which the deposition is to be taken. Furthermore, it states that the *requesting* party shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and to *cross-examine* the person whose deposition is being taken. From a reading of this provision as a whole and in the light of the fundamental principle that the best evidence must be made available, it is clearly envisioned that the taking of deposition from witnesses is to be effected away from the seat of the Tribunal only in cases where witnesses because of exceptional circumstances are unable to physically appear before the Trial Chamber to give evidence. Moreover, a request of a party for deposition(s) to be taken would normally relate to that party’s own witness(es).

21. In the present case, the witnesses concerned were at The Hague to give evidence directly before the Trial Chamber. Accordingly, there were no exceptional circumstances in regard to the witnesses which prevented them from appearing directly before the Trial Chamber. Instead, it was the Trial Chamber that was unable to directly receive their testimonies, due to the illness of one of its members. This is a situation that is certainly not

¹⁰ Rule 71. (Emphasis added.)

one to which Rule 71 was originally intended to apply. This conclusion is further supported by the fact that Sub-rule 15(F) specifically provides for a procedure to be followed when the short-term inability of a Judge prevents him or her from sitting in a part-heard case.¹¹ A Trial Chamber's commendable desire to discharge its obligation to ensure that a trial is expeditious does not justify departure from the general rule of direct evidence without express support in the Rules or the consent of the accused. In this context, the Appeals Chamber specifically notes that Article 20 of the Statute, apart from charging the Trial Chambers to make sure that the trial is fair and expeditious, prescribes that the Trial Chambers shall also ensure that the proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused.

22. Consequently, the Appeals Chamber finds that the ruling to proceed by way of deposition was contrary to the Rules. Accordingly, this ground is upheld. However, this is not to say that the deposition procedure established in Rule 71 may not be used in situations to which the provision does not directly apply – for example to facilitate the continuation of the proceedings by way of receiving deposition evidence when a member of a Trial Chamber due to illness is unable to participate in the work of the Chamber, in the case where the accused gives his consent.¹²

D. Fourth Ground of Appeal

23. As a fourth ground of appeal, the Appellant asserts that the ruling deprived him of his right to have his witnesses examined under the same conditions as witnesses against him pursuant to Article 21(4)(e) of the Statute, given the fact that all the prosecution witnesses testified in person before the full Trial Chamber.

24. Article 21 of the Statute, which finds its origin in the International Covenant of Civil and Political Rights (Article 14) and the European Convention on Human Rights (Article 6), sets out the rights of the accused. It prescribes, *inter alia*, the right of equality of all persons

¹¹ The present case has undoubtedly reached the stage of being part-heard.

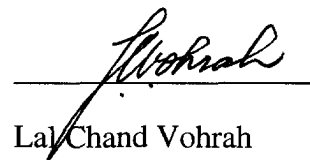
¹² See for example The Prosecutor v. Blaskić, Case No.: IT-95-14-T, Decision on Prosecutor and Defence Motions to Proceed by Deposition, T. Ch. I, 19 Feb. 1998; The Prosecutor v. Kupreskić and Others, Case No.: IT-95-16-T, Decision on Prosecution and Defence Requests to Proceed by Deposition, T. Ch. II, 11 Feb. 1999; and The Prosecutor v. Kordić and Čerkez, Case No.: IT-95-14/2-T, Decision on Prosecution Request to Proceed by Deposition, T.Ch. III, 13 April 1999.

before the Tribunal (Article 21(1)) and enlists certain minimum guarantees for the accused, of which the one directly relevant to this ground of appeal is the right of an accused to “examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” (Article 21(4)(e)). This provision serves to ensure that the accused is placed in a position of procedural equality in respect of obtaining the attendance and examination of witnesses with that of the Prosecution. In other words, the same set of rules must apply to the right of the two parties to obtain the attendance and examination of witnesses. It does not follow from Article 21(4)(e) that the application of the relevant rules has to result in the witnesses of the two parties giving evidence in exactly the same manner. Thus, the Appellant’s understanding of his right as embodied in Article 21(4)(e) of the Statute appears to rest on a misconception when he contends that, since all the witnesses for the Prosecution were heard directly before the Trial Chamber, that gives him an automatic right to have all his witnesses heard directly before the Trial Chamber as well. The Appeals Chamber finds this contention to be without merit.

V. DISPOSITION

25. For the foregoing reasons, the Appeals Chamber **ALLOWS** the appeal and **DIRECTS** the Trial Chamber to hear defence witnesses Pero Papić, Goran Males and Ljubica Milicević, should the Appellant so request.

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



Lal Chand Vohrah

Presiding Judge

Judge David Hunt appends a Separate Opinion.

Dated this fifteenth day of July 1999

At The Hague

The Netherlands

[Seal of the Tribunal]