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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-14/2-AR73.5

Date: 21 July 2000

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **21 July 2000**

PROSECUTOR

v.

DARIO KORDIĆ
MARIO ČERKEZ

DECISION ON APPEAL REGARDING STATEMENT OF A DECEASED WITNESS

Counsel for the Prosecutor:
Mr. Geoffrey Nice
Mr. Kenneth Scott
Mrs. Susan Somers
Mr. Patrick Lopez-Terres

Counsel for Dario Kordić:
Mr. Mitko Naumovski
Mr. Turner T. Smith, Jr.
Mr. Robert A. Stein
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Counsel for Mario Čerkez:
Mr. Božidar Kovačić
Mr. Goran Mikulićić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal") is seized of an appeal against an oral ruling made by Trial Chamber III on 21 February 2000, filed by counsel for the accused Dario Kordić ("the Appellant" or "the Defence") on 28 February 2000. [1]

2. On 28 March 2000, the Appeals Chamber granted leave to pursue this interlocutory appeal.[2]

3. Having considered all the written submissions of the Appellant and the Office of the Prosecutor ("the Prosecution" or "the OTP"), 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. Proceedings in the Trial Chamber

4. The Appellant, Dario Kordić is currently on trial for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, and crimes against humanity, based on an alleged campaign of persecution committed by Bosnian-Croat forces in the Lašva Valley.

5. The Prosecution first indicated that it would try to introduce the statement of Mr. Midhat Haskić on 20 May 1999. This statement had been taken by a Prosecution investigator in 1995. Mr. Haskić had since died, and the Prosecution contended that it was in the interests of justice to admit this statement into evidence. In the statement, Mr. Haskić claimed to have seen Kordić in the village of Donja Večerska in the company of soldiers from the Croatian Defence Council ("the HVO") including members of the "Jokers," one of the units most closely associated with alleged wrongdoing in the area, on the night before an HVO attack on the village. After hearing arguments from the parties, the Trial Chamber declined to admit the statement on 16 June 1999, leaving open the possibility that it might be admitted after further argument at a later date.

6. On 21 February 2000, after hearing further arguments of the parties, Trial Chamber III decided to admit the statement. In its oral ruling, the Trial Chamber held that Rule 89(C) gave it

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[1] *Accused Dario Kordić's Application for Leave to Pursue an Interlocutory Appeal of a February 21, 2000 Ruling of the Trial Chamber to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront Nor Cross-Examine*, 28 February 2000.

[2] *Decision on Application for Leave to Appeal and Scheduling Order*, 28 March 2000. The co-accused, Mario Čerkez, asked to join in Kordić's appeal in his *Notice of Joinder in Accused Dario Kordić's Application for Leave to Pursue an Interlocutory Appeal of a February 21, 2000 Ruling of the Trial Chamber to Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront Nor Cross-Examine*, dated 29 February 2000. Although Čerkez's motion was untimely, the Appeals Chamber nonetheless allowed him to join in the appeal in its 28 March 2000 order. However, he filed no further briefs on the merits of the appeal.

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discretion to admit the statement, and that the fact that the statement had not been subjected to cross-examination and was not made under oath were factors that went to the weight to be given to the statement, and not its admissibility.[3] The Trial Chamber noted, however, that pursuant to European Court of Human Rights jurisprudence cited by the parties, "it would not be possible to convict the accused on the basis of this statement alone if that evidence was uncorroborated" without violating his fundamental rights.[4]

II. The Appeal

A. The Appellant's Arguments

7. On appeal, Kordić contends that the Trial Chamber's decision to admit the Haskić statement was erroneous in several respects.[5]

8. First, he argues that the out-of-court statement of this deceased witness could not be admitted without violating his right "to examine, or to have examined, the witnesses against him," as guaranteed by Article 21(4) of the Tribunal's Statute.

9. In addition, he argues that admission of a statement that is not subject to cross-examination is at odds with decisions of the European Court of Human Rights, and of various common and civil law jurisdictions. For example, he points to decisions interpreting Article 6(3)(d) of the European Convention on Human Rights,[6] which also gives the accused the right to "examine or have examined the witnesses against him." Kordić contends that the European Court of Human Rights has generally deemed permissible the use of out-of-court statements in evidence only if the accused has at some point been given the opportunity to question the witness. When exceptional circumstances have compelled the use of such statements without cross-examination, he argues, the European Court has held that the conviction cannot be solely or mainly based on the uncross-examined statement.[7] In addition, Kordić submits that an unsworn, uncross-examined statement taken by an investigator in the field (and not by an investigating

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[3] Transcript p. 14701.
[4] Transcript p. 14702.
[5] *Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III To Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront Nor Cross-examine* [hereinafter "Appellant's Brief"], 6 April 2000; *Reply Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III To Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront Nor Cross-examine* [hereinafter "Appellant's Reply Brief"], 25 April 2000.
[6] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 U.N.T.S. 222 (Council of Europe) (entered into force 3 September 1953).
[7] See Appellant's Brief at p. 12 (citing, e.g., *Unterpertinger v. Austria*, 24 November 1986, Series A, No. 110, at para. 33 (conviction reversed); *Saidi v. France*, 20 September 1993, Series A, No. 261-C, at para. 44 (conviction reversed)).

judge) would be inadmissible in both civil and common law countries, citing as examples the laws of the United States, Germany, and the Netherlands.[8]

10. More generally, Kordić contends that the Trial Chamber here construed Rule 89(C) so broadly as to allow it to admit any evidence, so long as it gives such evidence only the proper "weight" in its final decision.[9] This construction, he submits, is contrary to both the plain language and the overall structure of the Tribunal's Rules. In this regard, he points to Rule 90(A), which provides that "[s]ubject to Rules 71 and 71*bis*, witnesses shall, in principle, be heard directly by the Chambers." Rules 71 and 71*bis* set out the circumstances and conditions in which testimony may be taken by deposition or video-conference, and both allow for cross-examination.

B. The Prosecution's Arguments

11. The Prosecution argues that "'the exercise of the rights of the accused in each case is not absolute, but is subject to the control of the Trial Chamber to ensure a fair and expeditious trial in the interests of justice.'"[10] The right of the accused to examine the witnesses against him, the Prosecution argues, must yield in appropriate circumstances in the interests of considering the maximum amount of relevant evidence.

12. Accordingly, the Prosecution contends, Rule 89 gives extremely broad powers to the Trial Chambers to admit all relevant evidence, with only two exceptions: (1) "if its probative value is substantially outweighed by the need to ensure a fair trial;"[11] or (2) if the evidence was obtained by methods which cast substantial doubt on its reliability.[12] In the Prosecution's view, the Haskić statement does not fall within either of these categories.

13. The fact that evidence was not subject to cross-examination, the Prosecution contends, should therefore go to its weight and not its admissibility.

14. The Prosecution notes that the prior out-of-court statement of this witness was admitted in the *Blaškić* case at the request of the accused,. In that case, the Trial Chamber considered "the need

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[8] See Appellant's Brief at pp. 13-17.
[9] Rule 89(C) provides that "A Chamber may admit any relevant evidence which it deems to have probative value."
[10] *Prosecutor's Response to the Brief of the Accused Dario Kordić Seeking Reversal of a February 21, 2000 Ruling of Trial Chamber III To Admit into Evidence a Prior Unsworn, Uncorroborated Witness Statement Whose Maker Mr. Kordić Could Neither Confront Nor Cross-examine* [hereinafter "Prosecution Brief"], 17 April 2000, at p.7, quoting Prosecutor v. Delalić, et al, *Decision on the Alternative Request for Renewed Consideration of Delalić's Motion for an Adjournment until 22 June or Request for Issue of Subpoenas to Individuals and Requests for Assistance to the Government of Bosnia and Herzegovina*, 22 June 1998, Case No. IT-96-21-T, T. Ch. I, at paras. 44-45. The Prosecution's briefs in this case were initially filed as confidential documents, and the Appellant's filings were classified as confidential documents by the Registry. As the Appeals Chamber has been informed that there is no reason for these documents to remain confidential, all of the briefs are hereby declared public documents.
[11] Rule 89(C).

for the proper administration of justice and the requirement of a fair trial" and the exceptions to the principle of oral testimony and cross-examination recognized "both in the national legal systems and precedents established by international jurisdictions, including those exceptions relating to the admission of statements of deceased witnesses." [13]

15. The Prosecution further relies on the Appeals Chamber decision in *Aleksovski* upholding the admission of transcripts from the *Blaškić* trial. In *Aleksovski*, the accused offered a transcript of the testimony of one witness, which was then admitted over the Prosecution's objection. This decision was upheld by the Appeals Chamber.[14] In addition, the Appeals Chamber in *Aleksovski* ordered the Trial Chamber to admit another transcript of another witness's testimony from *Blaškić* at the Prosecution's request and over the objection of the accused, for the purpose of rebutting the testimony contained in the first transcript.[15] The *Aleksovski* decision, the Prosecution contends, establishes the propriety of admitting prior statements without calling the witness for cross-examination in the current proceeding.

16. With regard to the jurisprudence of the European Court of Human Rights, the Prosecution submits that the Court has not held that Article 6(3)(d) is violated by the admission into evidence of uncross-examined statements. Rather, the court has held that it is violated only in cases in which the untested evidence has been the sole or the main basis for a conviction, and has upheld convictions based in part on such statements where there was other evidence of guilt.[16]

17. Finally, while noting that the Tribunal is not bound by national jurisprudence, the Prosecution contends that the Haskić statement would arguably be admissible under exceptions to the general rules in favour of oral testimony in a number of civil and common law countries, including the United Kingdom, Australia, United States, Japan, Italy, Germany, Spain, Portugal and the Netherlands.[17]

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[12] Rule 95.
[13] Prosecution Brief at p. 9, quoting Prosecutor v. Blaškić, *Decision on the Defence Motion to Admit into Evidence the Prior Statement of Deceased Witness Midhat Haskić*, 29 April 1998, Case No. IT-95-14-T, T. Ch. I.
[14] Prosecutor v. Aleksovski, *Decision on Prosecutor's Appeal on Admissibility of Evidence* [hereinafter *Aleksovski*], 16 February 1999, Case No. IT-95-14/1-AR73, A. Ch., at pp. 9-10.
[15] *Id.*, at pp.12-13.
[16] Prosecution Brief at p. 11 (citing *Ferrantelli and Santangelo v. Italy*, 7 August 1996, R.J.D., 1996-III, No. 12).
[17] Prosecution Brief at pp. 15-24.

III. Decision

18. The question before us is whether the unsworn, uncross-examined, out-of-court statement of a deceased witness should have been admitted into evidence as the only proof of the accused's presence in a particular place at a particular time.

19. The Tribunal's Rules express a preference for live, in-court testimony; Rule 90 states that "[s]ubject to Rules 71 and 71*bis*, witnesses shall, in principle, be heard directly by the Chambers." As the Appeals Chamber explained in *Kupreškić*, "[t]he Rules . . . provide for four exceptions to this general rule of direct evidence in the form of 1) deposition evidence (Rule 71); 2) the receipt of testimony via video-conference link (Sub-rule 90(A)) [now Rule 71*bis*]; 3) expert witness statement (Rule 94*bis*); and 4) the submission of affidavit evidence in corroboration of witness testimonies (Rule 94*ter*)."[18] The statement at issue here does not fall within any of these enumerated exceptions. If it is admissible at all, therefore, it must be under the Trial Chamber's residual power under Rule 89(C) to admit "any relevant evidence which it deems to have probative value."

20. Rule 89(C) grants the Trial Chambers broad discretion. The bounds of this discretion, however, are suggested by Rule 89(B), which provides that "[i]n cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." A Trial Chamber's exercise of discretion under Rule 89(C) ought, pursuant to Rule 89(B), to be in harmony with the Statute and the other Rules to the greatest extent possible.

21. The other rules providing for departures from the principle of hearing live, in-court testimony provide certain safeguards. For example, the provisions for depositions (Rule 71), testimony by video-conference link (Rule 71*bis*)[19] and expert reports (Rule 94*bis*) all envisage cross-examination. Likewise, Rule 94*ter*, which governs the use of affidavits or formal statements to corroborate live witness testimony, includes strict procedural protections. First, Rule 94*ter* statements are to be used to corroborate a fact in dispute contained in the live testimony of another witness. Second, Rule 94*ter* statements must be executed "in accordance with the law and procedure of the State in which such affidavits or statements are signed." Third, Rule 94*ter*

[18] Prosecutor v. Kupreškić, *Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition*, 15 July 1999, Case No. IT-95-16-AR73.3, A. Ch., at paras. 18-19.

provides that "if the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination."

22. In the same way, Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable. A starting point is the requirements of these other rules that expressly allow for departures from the principle of live evidence. Rule 89(C) may indeed permit some relaxation of these requirements, but it would be odd to find that a statement that met none of the requirements of those other rules was nonetheless admissible under Rule 89(C) without any other compensating evidence of reliability. This statement does not meet the requirements of these other rules and therefore other evidence of reliability must be found.

23. The admission of this statement is in marked tension with the guarantee in Article 21(4) that the accused has the right to examine the witnesses against him.[20] It is of course well-settled that this provision does not create a general prohibition on hearsay evidence, and as the Appeals Chamber explained in *Aleksovski*, "relevant out of court statements which a Trial Chamber considers probative are admissible under Rule 89(C)."[21] But as the *Aleksovski* Appeals Chamber went on to explain:

> Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence.[22]

24. This passage in *Aleksovski* supports the proposition that the reliability of a statement is relevant to its admissibility, and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that is not "probative" and is therefore inadmissible.

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[19] It has been held that when testimony is taken by video-conference link, the accused's right to confrontation must be respected. Prosecutor v. Delalić, et al, *Decision on the Motion To Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference*, 28 May 1997, Case No. IT-96-21-T, T. Ch. I.

[20] Although the statement of this same deceased witness was admitted in the *Blaškić* case, it was at the request of Blaškić, and so the accused's right to examine the witnesses against him was not implicated. Prosecutor v. Blaškić, *Decision on the Defence Motion to Admit into Evidence the Prior Statement of Deceased Witness Midhat Haskić*, 29 April 1998, Case No. IT-95-14-T, T. Ch. I.

[21] *Aleksovski*, at para 15. The general principle that hearsay is admissible before the Tribunal is not upset by this decision. The hearsay issue arises most often in the context of a live witness who, incidental to his or her testimony, says something about what he or she heard someone else say: "And when I was in the camp, I heard the guards say that someone had been killed." That sort of hearsay is a very different matter, in terms of the preference for live testimony and the accused's right to examine the witnesses against him, from admitting complete statements of primary witnesses in lieu of calling them to court.

[22] *Id.*

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25. In the Appeals Chamber's view, several factors distinguish the statement at issue here from the statements admitted in *Aleksovski.*

26. The two statements admitted in *Aleksovski* were transcripts of in-court testimony given in the *Blaškić* case. These statements were given under oath to the Tribunal. Moreover, they were subject to cross-examination when originally given. The first statement was offered against the Prosecution, which had itself cross-examined the witness in the *Blaškić* case and had made "no attempt . . . to demonstrate any particular line of cross-examination which would have been both relevant and significant to the *Aleksovski* trial but which would not also have been both relevant and significant to the *Blaškić* trial."[23] With regard to the second statement, offered against the defence to rebut the first statement, "the witness was extensively cross-examined in the *Blaškić* trial, and there is a common interest between the Defence in the two cases."[24]

27. By contrast, the statement in this case contains none of these indicia of reliability. It lacks all of the factors present in *Aleksovski.* It was not given under oath. It was never subject to cross-examination by anyone.[25] In terms of the truth of the matter asserted – the presence of the accused on a particular evening in a particular place – it appears not to have been corroborated by any other evidence.[26] In terms of whether it is "'first-hand' or more removed,"[27] it is not first-hand hearsay, but is more removed. Although statements can be taken through interpreters, the taking of this statement was more unusual. In this case, the investigator admitted that she did not speak Croatian, the language in which Mr. Haskić spoke, and relied on the interpreter's account of what he was saying. The statement of Mr. Haskić was then written in English by the investigator, whose native tongue is Dutch, and was then translated back into Croatian for the

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[23] *Id.* at para. 20.
[24] *Id.* at para. 27.
[25] The post-World War II trials operated under liberal rules of evidence and generally allowed the use of affidavits. Affidavits were, however, viewed skeptically and even stricken from evidence if the witness was not available for questioning: "[a] practice developed that if the witness was not available for cross-examination or interrogatories, either when the affidavit was presented or at a later stage, the affidavit was struck out." Richard May and Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Columbia Journal of Transnational Law 725, 751 (1999). In at least one case, the affidavit of a deceased witness was excluded, though in others such statements were allowed. *See id.* at 752. In any event, one of the common criticisms of the World War II trials is that affidavits were admitted too freely. *Id.* at 751.
[26] Corroboration is also a factor looked at in the European Court of Human Rights cases concerning whether reliance on out-of-court statements had the effect of denying the accused a fair trial. *See, e.g., Farrantelli and Santangelo, supra.* The parties in the case before us dispute whether the statement is corroborated by other evidence, and that question seems to turn on at what level of generality one should look at corroboration: need there be other evidence of the truth of the facts asserted in the statement, or simply other evidence of the accused's guilt in general? The Trial Chamber did not explicitly rule on this issue, though it did state that it dealt with "an important issue relating to the accused Dario Kordić, his presence in Donja Veceriska on the evening of the 15th of April, 1993, when he was in company with members of the military." Transcript p.14700. The Defence asserts that there is no other evidence of Kordić's presence in that town on that day. The fact that the Trial Chamber deemed the testimony important could be viewed as cutting both ways (both for and against admissibility), but our opinion is that it mainly increases the possible prejudice to the defence.
[27] *Aleksovski* at para. 15.

witness to sign it. These multiple translations in an informal setting create a much greater potential for inaccuracy than is the case when both the declarant and the witness speak the same language or when the original statement is given in court with professional, double-checked simultaneous translation. Nor do any of the additional factors mentioned by the Prosecution in its brief[28] weigh in favour of reliability. The statement was not made contemporaneously with the events in question, but some years afterwards.[29] Nor was it made under formal circumstances that might increase its reliability, such as in a hearing before an investigating judge. Consequently, it would be an abuse of discretion for the Trial Chamber to give this evidence any weight in its final judgement.

28. Taking all these factors into account, the Appeals Chamber finds that the statement is so lacking in reliability that it should have been excluded as without probative value under Rule 89(C).

IV. Disposition

29. For the foregoing reasons, the Appeals Chamber **ALLOWS** the appeal and **DIRECTS** the Trial Chamber to exclude the statement.

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

Patricia Wald
Presiding Judge

Dated this 21st day of July 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

[28] See, e.g., Prosecution Brief at para. 46 (citing U.S. law considering, *inter alia*, the lapse of time between the event and the statement and whether the statement was made under formal circumstances); *see also* Appellant's Brief at p.16 (discussing requirements under German and Dutch evidence law that statements must have been sworn before a judge to be admissible).

[29] Statements used in the Tribunal are often taken several years after the events in question. While this is not necessarily an indication of unreliability, neither is it a factor weighing in favour of reliability.