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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-05-88-T

Date: 25 October 2007

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **25 October 2007**

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

DECISION ON THE ADMISSIBILITY OF THE BOROVČANIN INTERVIEW AND THE AMENDMENT OF THE RULE 65 *TER* EXHIBIT LIST

Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused
Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS TRIAL 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 ("Tribunal"), is seised of the "Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", filed confidentially on 6 July 2007 ("Rule 65 *ter* List Amendment Motion"); the "Motion for Leave to Supplement Prosecution's 6 July 2007 65 *ter* Motion", filed on 12 July 2007 ("Supplemental Rule 65 *ter* Motion"); the "Corrigendum to Prosecution's 6 July 2007 and 12 July 2007 Motions Seeking Leave to Amend 65 *ter* Exhibit List", filed on 13 July 2007 ("Prosecution Corrigendum")—collectively, "Amendment Motions." In the course of considering the motions and Defence objections, this Trial Chamber has become seised of the issue of whether statements taken by the Prosecution from one of the accused, Ljubomir Borovčanin ("Borovčanin"), should be admitted as evidence against the other accused in this case ("co-Accused").

I. INTRODUCTION

1. On 28 April 2006, the Prosecution indicated intent to call its investigator Alistair Graham ("Graham") to testify about statements taken by the Prosecution from Borovčanin, one of seven accused in this case.[1]

2. Borovčanin was interviewed by the Prosecution on 20 February 2002 and 11 to 12 March 2002. The interview resulted in audio recordings and transcripts ("Borovčanin Recordings" and "Borovčanin Transcripts", collectively referred to as "Borovčanin Interview" or "Borovčanin's statements").[2] Multiple documents were also referenced during the interviews ("Borovčanin Documents").[3]

3. On 6 July 2007, the Prosecution sought to amend its Rule 65 *ter* Exhibit List to add the materials related to its 2002 interview with Borovčanin.[4] Defence teams filed responses to the Prosecution's motion to amend its 65 *ter* list,[5] and the Prosecution filed a reply,[6] between 6 and 16 July 2007.

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1 *See* Prosecution's Filing of Pre-Trial Brief Pursuant to Rule 65 *ter* and List of Exhibits Pursuant to Rule 65 *ter* (E)(v), 28 April 2006, Annex B, p. 2 (listing Graham as witness in 65*ter* pre-trial brief).

2 Rule 65 *ter* List Amendment Motion, para. 4.

3 *Ibid.*, para. 5.

4 *Ibid.*, para. 1.

5 Response of General Miletić to Prosecution Motion for Leave to Amend the List of Exhibits by Adding 18 Exhibits Related to Alistair Graham, 12 July 2007 (French original), 26 July 2007 (English translation), ("Miletić Response"); Defence Response on Behalf of Ljubisa Beara to the Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham, 12 July 2007 ("Beara Response"); Borovčanin Defence Response and Motion in Opposition to "Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", 12 July 2007 ("Borovčanin Response"); Motion on Behalf of Drago

4. On 28 June 2007, defence counsel for Borovčanin and Gvero orally asked whether Borovčanin's statements to the Prosecution would be treated as admissible evidence against the co-Accused.[7] The prosecutor stated that "that the policy of the Office of the Prosecutor is now that a statement can be used against fellow accused and it's up to the Court to decide what weight they give it."[8]

5. The Trial Chamber heard extensive oral argument on 11 and 12 July 2007 about whether Borovčanin's statements should be admitted against the co-Accused.[9] Beara also filed a written submission on the issue on 12 July 2007.[10]

6. Without prejudice to these submissions or pending Amendment Motions, the Trial Chamber heard Graham's testimony, limiting examination-in-chief and cross-examination to the

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Nikolić Joining the Borovčanin and Miletić Defence Responses to "Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", 12 July 2007 ("Nikolić Response"); Motion on Behalf of Vinko Pandurević Joining the Defence Responses to Prosecution's Motion for Leave to Amend the 65 *ter Exhibit* List with 18 Exhibits Pertaining to Alistair Graham, 13 July 2007 ("Pandurević Response"); Defence Response on Behalf of Ljubisa Beara to Prosecution Motion for Leave to Supplement Prosecution's 6 July 2007 65 *ter* Motion, 13 July 2007 ("Second Beara Response"); Borovčanin Defence Notification on Joining "Defence Response on Behalf of Ljubisa Beara to the Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", 13 July 2007 ("Second Borovčanin Response"); Borovčanin Defence Response to Prosecution 12 July 2007 65 *ter* Motion, Notification on Joining Beara Defence Response to Prosecution 12 July 2007 65 *ter* Motion, and Motion for Leave to Supplement "Borovčanin Defence Response and Motion in Opposition to "Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham"", 16 July 2007 ("Third Borovčanin Response"); Corrigendum to Response of General Miletić to Prosecution Motion for Leave to Amend the Exhibits List by Adding 18 Exhibits Related to Alistair Graham, 25 July 2007 (English translation), 16 July 2007 (French original) ("Miletić Corrigendum").

6 Prosecution's Request for Leave to Reply and Prosecution's Consolidated Reply to Defence Responses to "Prosecution's Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", 16 July 2007 ("Prosecution Reply").

7 *See, e.g.*, T. 13516-13517, 28 June 2007 (statement of Aleksandar Lazarević, counsel for Borovčanin) ("The other issue is, well, it is of course relevant for Mr. Borovčanin's Defence but it's also relevant for all other defences and that's the impact that the admissibility of -- the admission of Mr. Borovčanin's interview into evidence will have towards other Defences."); T. 13522-13523 (28 June 2007) (statement of David Josse, counsel for Milan Gvero) ("[I]n due course, those of us representing the co-accused will need to know in terms, whether this interview, if admitted into evidence, in part or in whole, has any evidential effect as against our clients. . . . I know as well that it was a live issue in the *Blagojević-Jokić* case and indeed I hope Mr. McCloskey will forgive me for saying this but in that case he conceded that Jokić's interview had no evidential effect as against Blagojević.")

8 T. 13524 (28 June 2007) (statement of Peter McCloskey, Office of the Prosecutor).

9 On 11–12 July 2007, the Trial Chamber heard oral submissions on the following three questions: (1) If the statement is admissible against Borovčanin, what probative value, if any, does it have with respect to the other Accused? T. 13709–13751 (11 July 2007); (2) If the Chamber determines the statement has probative value with respect to the other accused, what is the permissible scope of cross-examination of witness Alistair Graham by the other accused as to admissibility? T. 13756 (11 July 2007)–13764 (12 July 2007); (3) If instead the Chamber determines the statement has no probative value with respect to the other accused, what if any redactions should be made to the statement? T. 13767–13800 (12 July 2007). The Trial Chamber then invited the parties to supplement their oral submissions on the broader issue of the use of the Borovčanin Interview vis-à-vis the co-accused with further written submissions and/or authorities by 20 July 2007. T. 13802–13804 (12 July 2007).

10 Defence Submission Regarding the Admissibility of the Interview of Accused Ljubomir Borovčanin as Evidence Against the Co-Accused Ljubisa Beara, 12 July 2007 ("Beara Submissions").

circumstances surrounding the Prosecution's taking of statements from Borovčanin.[11] Graham testified on 17 and 18 July 2007 about the procedures followed during the Borovčanin interview.[12]

7. Following Graham's testimony, the Prosecution sought to further examine him to lay the foundation for the introduction of documents and materials used, generated, and/or viewed during the interviews with Borovčanin.[13] These documents are the subject of the Amendment Motions. The Defence argued that the attempt at further examination was premature pending the decision on whether, and for what purposes, Borovčanin's statements would be admitted as evidence.[14] The Trial Chamber concurred.[15]

8. Between 17 and 20 July 2007, the parties filed further written submissions on the issue of the admissibility of the Borovčanin interview with respect to the other Accused.[16] The parties presented additional oral submissions on the admissibility of the Borovčanin interview on 19 July 2007.[17]

9. Collectively, the various written and oral submissions of the parties present three issues to be decided by the Trial Chamber: (1) the addition of documents to the Prosecution's Rule 65 *ter* Exhibit List; (2) whether Borovčanin's statements should be admitted as evidence against him; and (3) whether Borovčanin's statements should be admitted as evidence against the co-Accused in this case.

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11 T. 13827–13832 (17 July 2007).

12 T. 13834–13891, 13894–13946 (17–18 July 2007).

13 T. 13946–13947 (18 July 2007).

14 T. 13947–13948 (18 July 2007).

15 T. 13948–13949 (18 July 2007).

16 Addendum to the Defence Submission Regarding the Admissibility of the Interview of Accused Ljubomir Borovčanin as Evidence Against the Co-Accused Ljubisa Beara, 17 July 2007 ("Further Beara Submissions"); Arguments of the Defence for General Miletić Regarding the Admissibility of the Interview with Ljubomir Borovčanin Against General Miletić, 19 July 2007 (French original), 27 July 2007 (English translation), ("Miletić Submissions"); Submission on Behalf of Milan Gvero on the Admissibility of an Accused's Interview in the Case of a Co-Accused, 20 July 2007 ("Gvero Submissions"); Prosecution's Further Submission Regarding Admissibility of the Interviews of Ljubomir Borovčanin as Evidence Against the Co-Accused, 20 July 2007 ("Prosecution's Further Submission") including Appendix 1: Book of Authorities for the Prosecution Submission Regarding Admissibility of the Interview of Ljubomir Borovčanin as Evidence Against the Co-Accused, filed separately on 24 July 2007.

17 T. 13956–13978 (19 July 2007).

II. ADDITION OF DOCUMENTS TO THE PROSECUTION'S RULE 65 *TER* EXHIBIT LIST AND THE ADMISSIBILITY OF THE BOROVČANIN DOCUMENTS

A. Submissions of the Parties

1. Prosecution Motions

10. Pursuant to Rule 73,[18] the Prosecution seeks to add the Borovčanin Interview to its existing Rule 65 *ter* Exhibit List together with the Borovčanin Documents.[19]

11. Relying on the Trial Chamber's previous decisions on similar motions,[20] the Prosecution submits that the Borovčanin Documents are "procedurally and substantively probative and relevant to the testimony of Graham and the issues raised by the Indictment".[21] The Borovčanin Documents were either "created, obtained, and/or utilised" during the Borovčanin Interview[22] or "pertain directly to the anticipated legal challenges to the admissibility and reliability of the interviews".[23] Accordingly, the Prosecution argues the introduction of the Borovčanin Documents "will enable the Trial Chamber to better understand the testimony of Graham and the interviews made by Borovčanin".[24] Furthermore, the Defence will suffer no undue prejudice by the Borovčanin Interview,[25] as they have been (1) on notice of the Prosecution's intention to introduce the Borovčanin Interview since the beginning of the case; (2) in possession of the draft Borovčanin Transcripts since September 2005; and (3) provided with copies of the Borovčanin Documents.[26]

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18 Prosecution Corrigendum, paras. 2–3 (where the Prosecution indicates that its previous reference to Rule 72 *bis*(F) was in error and that it meant to refer only to Rule 73).

19 The Borovčanin Documents are the following: (1) five documents brought to the 20 February 2002 interview by Borovčanin regarding his employment from 1982 through 1998 (Rule 65 *ter* List Amendment Motion, para. 5(i)); (2) four documents created during the 20 February 2002 interview by Borovčanin, including a sheet of paper indicating his name, date of birth, and occupation; an organisational chart of the Republika Srpska Ministry of the Interior in 1995; an organisational chart of the Republika Srpska Supreme Command and Armed Forces in 1995; and a list of the units comprising the First Company Zvornik PJP in 1995 and the number of individuals assigned to each unit (Rule 65 *ter* List Amendment Motion, para. 5(ii)); (3) a DVD shown to Borovčanin during the 12 March 2002 interview consisting of footage from the Srebrenica area in July 1995 (Rule 65 *ter* List Amendment Motion, para. 5(iii)); and (4) documents chronicling the Prosecution's efforts to interview Borovčanin, including three summonses; and one receipt of summons with attached cover letter (Rule 65 *ter* List Amendment Motion, paras. 6, 10); as well as an additional summons and two letters to the Republika Srpska Ministry of Justice requesting assistance in delivering summonses (Supplemental Rule 65 *ter* Motion, para. 2, see also T. 13533–13534, 9 July 2007).

20 Rule 65 *ter* List Amendment Motion, para. 8.

21 *Ibid.*, para. 2.

22 *Ibid.*

23 *Ibid*; *See also ibid.*, para. 7; Supplemental Rule 65 *ter* Motion, para. 1.

24 Rule 65 *ter* List Amendment Motion, para. 7; *See also* Supplemental Rule 65 *ter* Motion, para. 1.

25 Rule 65 *ter* List Amendment Motion, para. 11.

26 *Ibid.*, paras. 3–6, 9, 10.

2. Defence Responses

12. Miletić objects to the addition of the Borovčanin Interview on the grounds that (1) the Prosecution has failed to show a valid reason for the addition at such a late stage in the proceedings;[27] and (2) the Borovčanin Interview is devoid of probative value based on its inherent lack of credibility given the circumstances under which it was made. [28] Miletić takes no position with respect to the Borovčanin Documents.[29]

13. Beara opposes the Amendment Motions in their entirety, arguing that (1) the Prosecution has previously failed to show "just cause" for its failure to disclose the Borovčanin Interview and Borovčanin Documents;[30] and (2) the Accused have been unjustly prejudiced by the Prosecution's "constant" practice of amending its Rule 65 *ter* Exhibit List.[31]

14. Borovčanin states that (1) the Rule 65 *ter* List Amendment Motion is untimely;[32] (2) the Prosecution's mere intention to seek the additions of the Borovčanin Interview and the Borovčanin Documents does not amount to good cause for not having done so to date;[33] and (3) granting the Rule 65 *ter* List Amendment Motion would unfairly prejudice Borovčanin's rights.[34] Additionally, Borovčanin joins the Beara Response.[35] With respect to the Supplemental Rule 65 *ter* Motion, Borovčanin (1) argues that no good cause has been shown with respect to the summons,[36] but does not object to the other two documents–the letters of the Republika Srpska Ministry of Justice dated 12 February and 7 March 2002 respectively–being added to the list;[37] (2) joins the Second Beara Response;[38] (3) notes that two of the Borovčanin Documents are already on the 65 *ter* Exhibit List ("Two Documents");[39] and (4) seeks leave to supplement its Borovčanin Response and Second

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27 Miletić Response, paras. 5–9.

28 *Ibid.*, paras. 5, 10–11. Miletić also argues that the admission of the Borovčanin Interview without cross-examination would unduly prejudice the rights of the co-accused (Miletić Response, paras. 5,12–13)

29 *Ibid.*, para. 2.

30 Beara Response, paras. 7–11.

31 *Ibid.*, para. 16.

32 Borovčanin Response, para. 13.

33 *Ibid.*, para. 16.

34 *Ibid.*, para. 22.

35 Second Borovčanin Response, para. 2.

36 Third Borovčanin Response, para. 9.

37 *Ibid.*, para. 10.

38 *Ibid.*, para. 11.

39 *Ibid.*, paras. 12–13. The Trial Chamber notes that the Two Documents, (1) RS MUP Ministerial Order 64/95, dated 10 July 1995 and (2) the article entitled "The Whitewashing of the Town Has Begun" from the newspaper "Intervju", dated 21 July 1995 are already on the 65 *ter* Exhibit List under numbers P00057 and P00469 respectively.

Borovčanin Response by submitting that the Prosecution's arguments and the relief sought in the 65 *ter* Motion should be deemed moot with regard to these two Borovčanin Documents.[40]

15. Nikolić (1) joins the Borovčanin Response and Miletić Response;[41] and (2) contends that the Prosecution has not shown good cause for failing to include them previously on the Rule 65 *ter* Exhibit List.[42] Nikolić further objects to the Supplemental Rule 65 *ter* Motion for the same reasons.[43]

16. Pandurević joins the "various Defence responses filed to date",[44] while Popović and Gvero do not make any submission in response to either of the Amendment Motions.

3. Prosecution Reply

17. Asking for leave to reply and addressing the arguments raised by the various responses, the Prosecution argues that (1) it has made clear its intention to use the Borovčanin Interview and some of the Borovčanin Documents since 2005 and that the timing of the disclosure of the Borovčanin Documents causes no prejudice to the Defence;[45] (2) as a general matter, Prosecution requests to amend its Rule 65 *ter* Exhibit List are made in good faith;[46] (3) the Borovčanin Interview and the Borovčanin Documents would in no way alter the case against the Accused;[47] and (4) the question of the admissibility of the Borovčanin Interview and Borovčanin Documents is not germane to the Amendment Motions and should be dealt with separately.[48]

B. Discussion on the Addition of Documents to the 65 *ter* List

18. Pursuant to Rule 65 *ter*(E)(iii), the Prosecution is required to file "the list of exhibits [it] intends to offer" and to "serve on the defence copies of the exhibits so listed". However, the Prosecution is not strictly bound by this initial filing. When exercising its discretion in this regard, "the Trial Chamber should balance the Prosecution's duty to present the available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay".[49] In striking that balance "in the context of a complex multi-accused

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40 *Ibid.*, para. 14.
41 Nikolić Response, para. 2.
42 *Ibid.*, paras. 5, 10, 14.
43 *Ibid.*, para. 17.
44 Pandurević Response, para. 1.
45 Prosecution Reply, paras. 4–5.
46 *Ibid.*, para. 6.
47 *Ibid.*, para. 7.
48 *Ibid.*, para. 9.
49 Decision on Prosecution's Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, 6 December 2006 ("6 December Decision"), p. 6 (internal citations omitted).

trial in which a considerable amount of evidence is presented by the Prosecution, a certain level of flexibility must be maintained."[50] However, the primary concern should be "whether the rights of the Accused will be adequately protected if exhibits [...] will be added to the Prosecution Exhibit List".[51] Additional factors to consider include "whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment, and whether good cause for amending the [...] exhibit list was shown, taking into consideration the complexity of the case, on-going investigations, and translation of documents and other materials".[52]

19. The Trial Chamber is satisfied that it is in the interest of justice to allow the proposed amendments to the Prosecution's Rule 65 *ter* Exhibit List. The information contained in the Borovčanin Interview is clearly *prima facie* relevant to issues raised in the indictment vis-à-vis Borovčanin, as well as potentially probative with regard to the co-Accused. The Borovčanin Documents are also relevant in so far as they relate directly to the circumstances surrounding the taking of the Borovčanin Interview and may therefore assist the Trial Chamber in its evaluation of Graham's testimony relative to the admissibility of the Borovčanin Interview.

20. The Prosecution's intention to introduce the Borovčanin Interview has been clear at the least since April 2006 and the defence have long been in possession of the Borovčanin Transcripts. The Accused have made general assertions of prejudice arising from the addition of the Borovčanin Interview and the Borovčanin Documents to the 65 *ter* Exhibit List.[53] However they have not demonstrated to the satisfaction of the Trial Chamber how that prejudice arises in the particular circumstances. Although several of the Borovčanin Documents were not disclosed to the Defence by the Prosecution until early July 2007, these Borovčanin Documents—all related to the Borovčanin Interview—are neither lengthy nor complicated. Moreover, the Defence was provided with copies of the Borovčanin Documents two weeks prior to Graham's testimony, giving counsel for the Accused sufficient time to prepare for Graham's preliminary cross-examination.[54] Accordingly, the Trial Chamber finds that the Accused will suffer no prejudice as a result of the proposed modifications to the 65 *ter* Exhibit List.

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50 Decision on Nikolić's Motion for Disclosure Pursuant to Rules 65 *ter* and 66, 30 January 2007, p. 4.

51 6 December Decision, p. 6 (internal citations omitted); *See also* Decision on Prosecution's Third Motion for Leave to Amend Rule 65 *ter* Exhibit List, 10 January 2007 ("10 January Decision"), p. 2.

52 6 December Decision, p. 7 (internal citations omitted); *See also* Decision Permitting the Addition of One Exhibit to the Prosecution's Rule 65 *ter* List and Denying an Oral Request for Certification Pursuant to Rule 73(B), 16 January 2007, p. 4; 10 January Decision, p. 2.

53 *See supra* paras. 8–12.

54 *See supra* para. 7.

21. The Trial Chamber acknowledges the Prosecution's desire to resolve any issues regarding the Borovčanin Interview and the Borovčanin Documents by stipulation with the Defence.[55] It further serves to evidence the intent to introduce the Borovčanin Interview as evidence in the case. Considering this and the other surrounding circumstances, the Trial Chamber concludes that the non-inclusion of the Borovčanin Interview and the Borovčanin Documents in the 65 *ter* Exhibit List was however an inadvertent omission by the Prosecution. As noted, the Accused have suffered no prejudice from this omission and inclusion of the Borovčanin Interview and the Borovčanin Documents at this stage of the proceedings in no way alters the Prosecution's case. Taking all these factors into account, the Trial Chamber holds that the Prosecution has shown good cause as to why the 65 *ter* Exhibit List should be amended and will accordingly allow the additions requested to the 65 *ter* Exhibit List.

III. ADMISSIBILITY OF THE BOROVČANIN INTERVIEW VIS-À-VIS BOROVČANIN

A. Submissions of the Parties

1. Defence Submissions

22. According to Borovčanin, in order for the Borovčanin Interview to be admitted into evidence it must have been given voluntarily.[56] He submits that the burden of proof rests with the Prosecution,[57] and the analysis is two-pronged.[58] First, it must be shown that no "compulsion, coercive force, or serious threat was applied" in order to extract the Borovčanin Interview.[59] Second, the Trial Chamber must evaluate "whether, when giving his interview, Mr. Borovčanin was aware of his position" and "his rights which emanate from his position".[60] While Borovčanin concedes that he was not compelled, coerced, or threatened in any way, he argues that the second prong of the test was not met and therefore the statement should not be admitted into evidence.[61]

23. Specifically, Borovčanin considers the following putative errors to be significant: (1) although his summons indicated that he was regarded as suspect, it did not list his rights as

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55 *See* Rule 65 *ter* List Amendment Motion, para. 3.
56 T. 13956 (19 July 2007).
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 T. 13956–13957 (19 July 2007).

such;[62] (2) because Graham informed Borovčanin at the interview that he "may be a suspect", Borovčanin believed he was only a potential or possible suspect and such concepts do not exist in the Rules or in the "relevant legislation of other jurisdictions";[63] (3) although Graham cautioned Borovčanin in English that his statement could be used "against him", that portion was not translated into Bosnian-Croat-Serbian ("BCS") as would have been required under his domestic legal system;[64] (4) "at no time was it clearly stated to him that he did not have to speak to the Office of the Prosecutor at all" or that "he was free to stop and leave the interview";[65] (5) Borovčanin was never informed of the particular crimes of which he was suspected;[66] (6) because Borovčanin is not a lawyer, "his ability to understand such cautions or lack of them" was somehow hampered by "the fact that his legal counsel was not present at the time";[67] (7) although Borovčanin's counsel was present for much of the time, Borovčanin "was deprived [...] of effective legal representation" because counsel did not "effectively protect his rights";[68] and (8) although Borovčanin was given an opportunity to clarify his statement, he could not have made any meaningful clarifications or corrections because he was not provided with copies of the Borovčanin Recordings.[69]

24. Beara submits that (1) the provisions of Rule 42 are mandatory;[70] (2) the Prosecution has the burden of showing that the suspect "knowingly, intelligently and voluntarily waived his rights" and "thereafter [...] voluntarily gave his statement";[71] and (3) Graham's use of the aide-memoire was "nothing less than subterfuge [...], a ruse, a trick, a device, to obtain an advantage over [Borovčanin] to get him to give the statement".[72] For the reasons canvassed by Borovčanin, Beara submits that the Prosecution has failed to demonstrate that there was a "knowing, intelligent, and voluntary waiver".[73]

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62 T. 13957–13958 (19 July 2007).

63 T. 13958–13959 (19 July 2007); *See also* T. 13963–13965 (19 July 2007) where Borovčanin argues that certain provisions of the Bosnia and Herzegovina criminal procedure code related to the questioning of suspects should apply to the instant proceedings.

64 T. 13959–13960 (19 July 2007).

65 T. 13961 (19 July 2007).

66 *Ibid.*

67 T. 13962–13963 (19 July 2007); *See also* T. 13965 (19 July 2007).

68 T. 13966–13967 (19 July 2007).

69 T. 13968 (19 July 2007).

70 T. 13969 (19 July 2007).

71 T. 13970 (19 July 2007).

72 T. 13971 (19 July 2007); *See also* T. 13972 (19 July 2007).

73 T. 13971 (19 July 2007); *See also* T. 13972 (19 July 2007).

2. Prosecution Submissions

25. The Borovčanin Interview is admissible because it is "probative" and "reliable",[74] and the "crux [...] of the issue" is whether Rule 42 was followed.[75] The Prosecution submits that "all the procedural safeguards required under the Statute were fully complied with" and the Borovčanin Interview "was given voluntarily and knowingly and intelligently by Mr. Borovčanin".[76]

26. Regarding the right to counsel, the Prosecution submits that Borovčanin was advised "in a very simple fashion" that he was under no obligation to begin without his lawyer, and he indicated that he wanted to proceed.[77] Borovčanin, a highly educated man with an extensive background in law enforcement, made an intelligent, unambiguous, and express waiver of his right.[78] Once his lawyer arrived, the fact that the lawyer did not ask questions or interrupt the interview does not constitute ineffective assistance of counsel.[79]

27. With respect to the caution given, the Prosecution notes that an investigator is not obliged to go further than clearly informing the suspect in a language he understands of his rights under Rule 42.[80] By attempting to inform Borovčanin that the Borovčanin Interview could be used "against him", Graham "went beyond the rule".[81] Further, Rule 42 does not require that a suspect be advised of his status as such,[82] and the jurisprudence of the Tribunal rejects arguments regarding cultural differences.[83]

B. Discussion

28. Tribunal jurisprudence has addressed the issue of the admissibility of a suspect's interview in proceedings brought subsequently against him or her. The legal test to be met is two-pronged: (1) whether the procedural safeguards set forth in Rules 42 and 43 are satisfied, and (2) whether the admissibility test laid down in Rules 89(C) and 89(D) is met.[84]

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74 T. 13972 (19 July 2007).
75 *Ibid.*
76 *Ibid.*
77 T. 13974–13975 (19 July 2007).
78 T. 13975–13977 (19 July 2007).
79 T. 13975 (19 July 2007).
80 T. 13974 (19 July 2007).
81 *Ibid.*
82 T. 13976 (19 July 2007).
83 T. 13973 (19 July 2007).
84 *Prosecutor v. Kvočka, Radić, Žigić, and Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 128; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 ("*Halilović* Appeal Decision"), para. 14; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Clarification of

1. Procedural safeguards set forth in Rules 42 and 43

29. The interview of a suspect who subsequently becomes an accused may be admitted into evidence if the Trial Chamber is satisfied "that the interview was obtained voluntarily and that it was conducted in compliance with the requirements set out in the Rules".[85] In such a case, the "principal question at issue is what *safeguards* should have been applied by the Prosecution in order for a former statement of a now accused person to be admissible into evidence".[86]

30. The specific *safeguards* are set forth in the Statute which bestows certain fundamental guarantees on behalf of suspects, namely the "right to have legal assistance [...] as well as to necessary translation into and from a language [the suspect] speaks and understands".[87] Rule 42 contains these guarantees and sets forth a third—the right to remain silent, and to be cautioned that any statement made would be recorded and could be used in evidence:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language that the suspect understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
>
> (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or been assigned counsel.[88]

31. The right to be assisted by counsel of the suspect's choice during questioning, as provided by Rule 42, "is neither ambiguous nor difficult to understand. As long as the suspect is clearly informed of it in a language he or she understands, the Prosecution fulfils its obligations. Contrary

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Oral Decision Regarding Admissibility of Accused's Statement, 18 September 2003 ("*Blagojević* September 2003 Decision"), paras. 6–8, 13.

85 *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 ("*Halilović* Trial Decision"), para. 18. Certification to appeal this decision was denied by the Trial Chamber. *See Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Prosecution Request for Certification for Interlocutory Appeal of "Decision on Motion for Exclusion of Statement of Accused", 25 July 2005.

86 *Halilović* Trial Decision, para. 19 (emphasis added); *See also ibid.*, para. 21. ("The Trial Chamber finds that in order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43, and 63 of the Rules have been fully respected when deciding on the admission of *any* former statement of an accused irrespective of the status of the accused at the time of taking the statement.").

87 Article 18(3). *Prosecutor v. Delalić, Mucić a/k/a "Pavo", Delic, and Landzo a/k/a "Zenga"*, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997 ("*Mucić* Decision"), para. 47 ("[T]he litmus test of the right of the suspect is clearly laid down in Article 18 of the Statute as elaborated in Rule 42.").

88 *See also Halilović* Trial Decision, para. 21 (quoting *Mucić* Decision, para. 43), ("Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention of Human Rights. These are the internationally

to [Defence] submissions, an investigator is not obliged to go further."[89] The duty of an investigator is "only to interpret to the suspect the rules in a language he or she understands".[90] With regard to the right to be assisted by counsel, a Trial Chamber is obliged to assess a lawyer's "actual competence to adequately represent the interests"[91] of the suspect, but only where substantive evidence is adduced to the contrary.[92]

32. The Appeals Chamber has held that Rule 42 "should be construed objectively" and explicitly rejected the notion of a "subjective standard of informed consent".[93] Any different or additional procedures provided under the suspect's national legal system are simply inapplicable to proceedings before the Tribunal, and the suspect's familiarity with such rules is irrelevant.[94]

33. Borovčanin was clearly advised on multiple occasions of his right to counsel.[95] With regard to the initial portion of the 20 February 2002 interview, the Trial Chamber is satisfied that Borovčanin provided a knowing and voluntary waiver of this right after being advised in conformity with the requirements of Rule 42(B).[96] As for the remaining portions of the 20 February 2002 interview and the entirety of the 11–12 March 2002 interviews, Borovčanin was repeatedly advised of his right to

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accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial.").

89 *Prosecutor v. Delalić, Mucić a/k/a "Pavo", Delić, and Landžo a/k/a "Zenga"*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Delalić Appeal Judgement"), para. 551, *affirming Mucić* Decision.

90 *Delalić* Appeal Judgement, para. 552, (*quoting Mucić* Decision, para. 58).

91 *Halilović* Appeal Decision, para. 61.

92 *Ibid.*, para. 62.

93 *Delalić* Appeal Judgement, para. 553; *See also Mucić* Decision, para. 59 (Rule 42 "should be objectively construed"), para. 60 ("Rule 42 is an adaptation *mutatis mutandis* of Article 6(3) of the European Convention on Human Rights and Article 14(3) of the International Covenant on Civil and Political Rights ('ICCPR'). These are supranational conventions based on the most elementary and fundamental provisions for the protection of individual human rights. The former Yugoslavia was a party to the ICCPR. It will, therefore, be anomalous to rely on cultural differences for their interpretation.").

94 *Mucić* Decision, para. 59 ("If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment."); *See also Delalić* Appeal Judgement, para. 552 ("[P]rovided that the suspect's rights are explained in a language that the suspect understands, it shouldn't matter in what country the suspect is at the time, particularly in the case of an international tribunal which may interview suspects in many different countries and which has a legal system that's different to that in any particular national jurisdiction.") (internal citation omitted).

95 Ex. P02852 (Interview of 20 February 2002), pp. 2, 23, 44, 63; Ex. P02853 (Interview of 11 March 2002), pp. 2, 50, 73, 91; Ex. P02853 (Interview of 12 March 2002), p. 115.

96 When Borovčanin appeared for his interview on the morning of 20 February 2002 without his attorney, he was advised by Graham as well as Mr. McCloskey that there was no need for the interview to commence until his attorney arrived; notwithstanding this assurance, Borovčanin agreed to begin. T. 13837, 13852 (17 July 2007). Ex. P02852 (Interview of 20 February 2002), pp. 2–3, 23. Borovčanin was further advised—and he acknowledged—that he could suspend the interview at any time, Ex. P02852 (Interview of 20 February 2002), pp. 3, 23. After the first break in the interview, Graham further advised Borovčanin that he had the right to stop and wait for his lawyer to arrive. T. 13852–13853 (17 July 2007). Borovčanin indicated that he was "happy to continue without legal presentation at [that] time". T. 13853 (17 July 2007). Sometime before the lunch break, Graham was informed that Borovčanin's lawyer had arrived, and he "stopped the tape immediately". T. 13853 (17 July 2007). Ex. P02852 (Interview of 20 February 2002), p. 42.

counsel, and his attorney was present throughout.[97] The Trial Chamber finds Borovčanin's argument that his counsel failed to adequately represent his interests during the interviews[98] to be unsubstantiated by objective evidence. That counsel stood mute during the majority of the interviews[99] does not, in the circumstances of the Borovčanin Interview, suggest that the representation was in any way deficient.[100]

34. The Trial Chamber notes that at the beginning of each session Borovčanin was advised of his right to an interpreter,[101] and one was present throughout the interviews, which were audio-recorded and conducted in English with simultaneous translation.[102] Borovčanin was advised that he "may be a suspect who is responsible for committing acts which may be chargeable under the Tribunal statute".[103] Borovčanin's submission that this particular language was equivocal and therefore led him to believe he was only a potential or possible subject[104] is both immaterial and objectively unsound. Borovčanin was previously informed—by way of summonses accompanied by undertakings of safe passage—that the Prosecution wished to speak to him as a suspect.[105] Any reasonable person would have understood Graham's comments as simply confirming this fact.

35. On multiple occasions throughout the Borovčanin Interview, he was informed of the right to remain silent and was further cautioned that any statement he made could be used in evidence before the Tribunal.[106] This is sufficient to satisfy Rule 42, and Graham was under no obligation to go further in his caution to Borovčanin, although he did—by including the language "against you".[107] The fact that these words were not translated into BCS is immaterial to the application of the objective test set out in Rule 42. Further, the fact that such additional language may be required

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97 Upon resuming the interview, Graham again advised Borovčanin of his rights, including his right to counsel, in the presence of his counsel. T. 13854 (17 July 2007). Borovčanin's counsel remained until the interview was completed. T. 13857 (17 July 2007). During the interviews of 11–12 March 2002, Borovčanin was again advised of his right to counsel, who was present throughout. T. 13858–13860, 13862 (17 July 2007).

98 *See supra* note 69, para. 20.

99 T. 13966–13977 (19 May 2007).

100 In fact, Borovčanin met with his lawyer Goran Bubić for two hours after the latter's arrival on 20 February 2002—presumably to receive advice about the interview—and after meeting privately with Peter McCloskey later in the day, Bubić suggested terminating the session in order to discuss matters further with Borovčanin. Ex. P02852 (Interview of 20 February 2002), pp. 43, 89–90.

101 Ex. P02852 (Interview of 20 February 2002), pp. 1–2; Ex. P02853 (Interview of 11 March 2002), pp. 1–2; Ex. P02853 (Interview of 12 March 2002), p. 115.

102 T. 13838, 13843 (17 July 2007).

103 T. 13845 (17 July 2007). Ex. P02852 (Interview of 20 February 2002), pp. 2, 43–44; Ex. P02853 (Interview of 11 March 2002), pp. 2, 50; Ex. P02853 (Interview of 12 March 2002), p. 115.

104 *See supra* note 64, para. 20.

105 T. 13834–13836, 13857 (17 July 2007).

106 T. 13844–13845, 13854, 13858–13860, 13862 (17 July 2007). Ex. P02852 (Interview of 20 February 2002), pp. 2, 23, 44, 63; Ex. P02853 (Interview of 11 March 2002), pp. 2, 50, 73, 91; Ex. P02853 (Interview of 12 March 2002), p. 115.

107 T. 13858, 13879 (17 July 2007).

under the criminal procedure of Republika Srpska is not of relevance.[108] Accordingly, Borovčanin's submission that he did not understand that his statement could be used *against him* is untenable.[109] Moreover, Graham was not required by the Rules to inform Borovčanin that he was at liberty to leave the interview or not required to speak "at all",[110] nor was he obliged to advise Borovčanin of the particular crimes for which he was a suspect at the time.[111]

36. Additionally, Rule 43 sets out the necessary procedures to be followed for the recording of the questioning of suspects:[112]

> Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:
>
> (i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;
>
> (ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
>
> (iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
>
> (iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;
>
> (v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and
>
> (vi) the tape shall be transcribed if the suspect becomes an accused.

37. No one has argued that the requirements laid down in Rule 43(i), (ii), (v), and (vi) were not met. With regard to the requirement set forth in Rule 43(iii), Borovčanin was given an opportunity to add to and/or clarify his statement at the conclusion of each session but he declined to do so.[113] Borovčanin, however, now argues that, given the length of the interviews, because he was not provided with copies of the audio-tapes of his interviews, he was effectively prevented from making

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[108] T. 13963 (19 July 2007).

[109] *See supra* note 65, para. 20.

[110] *See supra* note 66, para. 20. In fact, Borovčanin was advised—and he acknowledged—that he was not required to say anything or to answer any questions unless he wanted to do so. Ex. P02852 (Interview of 20 February 2002), pp. 2, 23, 44, 63; Ex. P02853 (Interview of 11 March 2002), pp. 2, 50, 73, 91; Ex. P02853 (Interview of 12 March 2002), p. 115.

[111] *See supra* note 67, para. 20.

[112] *See Halilović* Trial Decision, para. 24 ("The Trial Chamber finds that Rule 43 is a fundamental provision to protect the rights of a suspect and an accused. Moreover, it is a safeguard for a full and accurate reflection of the questions and answers during the interview and thus enables the parties and the Trial Chamber to verify the exact wording of what was said during the interview.").

[113] T. 13856, 13861–13863 (17 July 2007). Ex. P02852 (Interview of 20 February 2002), p. 90; Ex. P02853 (Interview of 11 March 2002), p. 113.

additions or clarifications.[114] The Trial Chamber does not accept this argument. Although Rule 43(iv) requires the Prosecution to provide copies of the "recorded tape" to the suspect, the Trial Chamber is not convinced that the delay in providing the recordings to Borovčanin had any impact on his decision not to make further comment when offered the opportunity by Graham.[115] As to the failure to provide the Borovčanin Recordings immediately after the interviews, the Trial Chamber does not consider that this affected the content or reliability of the Borovčanin Interview or created such prejudice so as to implicate fair trial standards. Therefore this delay does not warrant exclusion of the Borovčanin Interview. Finally, at the end of each session, Borovčanin confirmed that he had answered the questions of his own free will, that he was not threatened, promised, or induced in any way, and that he had no complaints about the way he had been treated before and during the Borovčanin Interview.[116]

38. For the foregoing reasons, the Trial Chamber holds that the procedural safeguards contained in Rules 42 and 43 were afforded to Borovčanin during the Borovčanin Interview.

2. The Admissibility test under Rules 89 (C) and (D)

39. The Trial Chamber notes that no one argues that the Borovčanin Interview is not relevant or probative and given that this is the statement of an accused relating to the events in the Indictment, such an argument would be difficult to sustain. The Trial Chamber is fully satisfied that the Borovčanin Interview is both relevant and probative. Accordingly, considering that the Borovčanin Interview meets the procedural safeguards set forth in Rules 42 and 43, is both relevant and has probative value to the Prosecution's case against Borovčanin, the Trial Chamber will admit it against Borovčanin.

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[114] *See supra* note 70, para. 20.

[115] Copies of the Borovčanin Recordings were not immediately available following the 20 February 2002 interview due to, according to the Prosecution, certain limitations of the recording equipment. T. 13857 (17 July 2007). It is not clear from the record exactly when the Prosecution subsequently provided the Borovčanin Recordings to Borovčanin. T. 13858 (17 July 2007), T.13902 (18 July 2007). However, Borovčanin was informed that he would be provided with copies of the Borovčanin Recordings and Borovčanin Transcripts as soon as possible. Ex. P02852 (Interview of 20 February 2002), p. 4; Ex. P02853 (Interview of 11 March 2002), p. 3; Ex. P02853 (Interview of 12 March 2002), pp. 116, 162.

[116] Ex.P02852 (Interview of 20 February 2002), p. 91; Ex. P02853 (Interview of 11 March 2002), pp. 113–114; Ex. P02853 (Interview of 12 March 2002), p. 163.

IV. ADMISSIBILITY OF BOROVČANIN'S STATEMENTS AGAINST HIS CO-ACCUSED

A. Submissions of the Parties

1. Prosecution Submissions

40. The Prosecution assumes for purposes of argument that "Borovčanin will not testify and that his co-accused will not have the right to cross-examine him on the contents of his interview".[117] So assuming, the Prosecution argues for the admission of Borovčanin's statements to the Prosecution against his co-Accused for any purpose, including proof of the acts and conduct of the co-Accused.[118]

41. The Prosecution argues in the alternative that Borovčanin's statements should be admitted against the co-Accused only with respect to matters other than "acts and conduct" as that phrase has been "interpreted and applied under Rule 92 *bis*".[119]

42. The Prosecution first contends that admission of Borovčanin's statements against the co-Accused for any purpose would not violate the co-Accused's right to a fair trial.[120] The Prosecution points to the Trial Chamber's broad discretion to admit evidence, including hearsay, under Rules 89(C) and (D), and submits that the "primary considerations" should be "probative value and fairness".[121] While the right to cross-examine witnesses is an important aspect of a fair trial, "'it is settled law before the International Tribunal that the right of an accused to cross-examine a witness is not absolute'".[122] In certain circumstances, Chambers have admitted statements or prior testimony of witnesses who were not available for cross-examination or where cross-examination was curtailed.[123] The Prosecution argues that the strong motive of an Accused to exculpate himself

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[117] Prosecution's Further Submission, para. 7; *See also* T. 13718 (11 July 2007) (statement of Peter McCloskey, Office of the Prosecutor) ("I am assuming this—Mr. Borovčanin would not testify, because I have no way of knowing at this point whether he would or would not. And aside from asking Defence counsel, but Defence counsel, that's a decision they have to make and it can change. So I have assumed for this argument that he is not testifying, though he may, and of course if he does testify he will be open for cross-examination by everyone and the door is all open and no one would have any objection, I take it.").

[118] Prosecution's Further Submission, paras. 3–4.

[119] *Ibid.*, para. 5.

[120] *Ibid.*, paras. 8–18.

[121] *Ibid.*, para. 9; T. 13714 (11 July 2007).

[122] *Ibid.*, para. 10; *See also ibid.*, paras. 12–15 (quoting *Prosecutor v. Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12 ("*Martić* Appeals Chamber Decision").

[123] *Ibid.*, paras. 11, 16–18. *Compare Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 27 ("*Aleksovski* Appeals Chamber Decision")(permitting transcript of evidence from witness "extensively cross-examined" in prior proceeding by defence with "common interest" with the accused); *Martić* Appeals Chamber Decision, paras. 14–15, 20, 26

by shifting blame to others does not render such statement inadmissible,[124] but rather goes to the weight to be attached to it "in relation to each co-accused in light of the totality of the evidence at the end of the trial."[125] Cases before this Tribunal are decided by professional judges,[126] and an accused may not be convicted solely on the basis of uncorroborated hearsay evidence.[127] The Prosecution represents that it "has called, or will be calling, evidence corroborating those portions of his [Borovčanin's] interview which relate to the acts and conduct of the co-accused".[128]

43. Second, the Prosecution contends that Rule 92 *quater* should be applied by analogy to this case where Borovčanin is essentially an "unavailable witness" if he chooses not to testify.[129] Rule 92 *quater* concerns "[t]he evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally". The Prosecution points out that under Rule 92 *quater*, "if the evidence in the statement goes to proof of 'acts and conduct' of an accused, this 'may be a factor against the admission of such evidence, or that part of it.' However, such evidence is not automatically disqualified for that reason."[130]

44. The Prosecution's third point is that the "common-law rule against admission [...] should not be applied wholesale in this Tribunal",[131] as the "procedural system at the ICTY is distinct from most common-law ones".[132] Cases at the Tribunal are heard before professional judges who, unlike members of a common law jury, are better able to "consider factors such as a co-accused's possible motives to try and exculpate himself or to implicate others".[133] Further, the general approach of the Trial Chamber should be to consider individual pieces of evidence "in light of the totality of the evidence in this case, and in particular with reference to witness and documentary evidence that

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(affirming Trial Chamber's admission of evidence from a witness who committed suicide before the accused's cross-examination was complete based on the finding that the accused had an adequate opportunity to cross-examine the witness for about 10.5 hours); *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, paras. 52–53 (admitting *Washington Post* news article as hearsay evidence without requiring former war correspondent to appear to testify about the veracity and accuracy of the contents). *But see Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, paras. 5, 18, 21–27 ("*Kordić and Čerkez* Appeals Chamber Decision") (ruling it was an abuse of discretion to admit the unsworn, uncross-examined, out of-court statement of a witness taken by a Prosecution investigator).

124 *See* Prosecution's Further Submission, para. 3.

125 *Ibid.*, para. 4; *See also* T. 13716 (11 July 2007) where the Prosecution submitted that an untested statement of one accused which implicates his co-accused is a piece of evidence a Chamber will look at with "a great critical eye and would be able to give [...] the appropriate weight, if any, it needed."

126 Prosecution's Further Submission,para. 10.

127 *Ibid.*, para. 10.

128 *Ibid.*, paras. 3 n.1, 29.

129 *Ibid.*, para. 21.

130 *Ibid.*

131 *Ibid.*, para. 23.

132 *Ibid.*, para. 26.

plainly supports and corroborates it".[134] In the final analysis, the Trial Chamber will assign little or no weight to evidence it determines is not credible or has not been sufficiently corroborated.[135]

45. Fourth, the Prosecution argues that its position is supported by the jurisprudence of the European Court of Human Rights,[136] which has ruled that the use at trial of a co-accused's statement does not amount to a violation of Articles 6(1) and 6(3)(d) of the European Convention on Human Rights provided the rights of the defence have been "respected".[137] The European Court of Human Rights has held that where a conviction is not based "solely or to a decisive extent" on a co-accused's interview, the inability of an accused to cross-examine the co-accused does not so undermine the right to a fair trial as to violate the Convention.[138] The Prosecution contends that the position of the European Court of Human Rights "accords with the Tribunal's jurisprudence providing that convictions cannot be based on uncorroborated hearsay."[139]

46. If the Trial Chamber chooses not to admit Borovčanin's statements against the co-Accused, the Prosecution submits that—pursuant to Rule 92 *bis* and the normal rule on hearsay—redactions are inappropriate with respect to background material and facts associated with underlying crimes.[140]

2. Defence Submissions

47. The various Defence submissions raise three major objections. The first is that admission of Borovčanin's statements to the Prosecution against the co-Accused would violate their rights under Article 21(4)(e) of the Statute, which guarantees an accused the right "to examine, or have examined, the witnesses against him".[141] Beara cites the Rules,[142] the established practice of certain

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133 *Ibid.*

134 *Ibid.*, para. 28.

135 *Ibid.*, para. 29.

136 *Ibid.*, paras. 30–42; *See also* T. 13715–13716 (11 July 2007).

137 Prosecution's Further Submission, para. 32.

138 *Ibid.*, paras. 33–40.

139 *Ibid.*, para. 42.

140 T. 13767 (12 July 2007); Nor are redactions necessarily appropriate with respect to material related to the acts or conduct of the co-accused, as the mention of such acts or conduct by the maker of the statement could be probative of matters relevant to the maker, for example his participation in a JCE or his state of mind. *See* T. 13767–13768 (12 July 2007); redactions are essentially a safeguard for juries. *See* T. 13768–13769 (12 July 2007); in a common law bench trial, the judge would review the material and if he felt it was not admissible, he would simply set it aside." *See* T.13770 (12 July 2007); the distinction between 92 *bis* redactions and the instant case is that, in the former scenario all references to all accused are redacted, whereas in the latter, the evidence remains with respect to the maker of the statement. *See* T. 13772–13773 (12 July 2007).

141 Beara Submissions, paras. 5–6; *See also* T. 13728–13731 (11 July 2007); Miletić Submissions, paras. 5, 20–24 (Miletić also refers to Article 82(A). *See infra* para. 52); *See also* T. 13723, 13726–13727 (11 July 2007); Gvero Submissions, para. 6; *See also* T. 13735–13736, 13738 (11 July 2007); *See* T. 13743–13744 (11 July 2007) for Popović; *See* T. 13745–13747 (11 July 2007) for Pandurević, Borovčanin and Nikolić).

142 Beara Submissions, para. 17.

national jurisdictions,[143] the jurisprudence of the Tribunal[144] and the ECHR[145] in support of the Defence position. He suggests a fair balance would be struck between the right of the co-Accused to confront their accuser and Borovčanin's right not to testify by admitting the evidence against Borovčanin pursuant to Rule 89(C) but excluding it against the others with respect to their acts, conduct, and mental state pursuant to Rules 89(D) and 95.[146] Additionally, Pandurević submits that the Tribunal's jurisprudence is in accordance with the common law and ECHR positions on the issue,[147] while Borovčanin argues that because all of the Accused are charged with participation in a joint criminal enterprise, it would be unfair to allow the Borovčanin interview to negatively impact the others.[148]

48. Beara argues that statements of an accused against co-accused are a particularly problematic category of hearsay due to the strong motive of an accused to shift blame away onto others.[149] The probative value of such evidence is so intrinsically dubious as to render it insufficient to establish any fact in issue as proven beyond a reasonable doubt.[150] To admit such a problematic species of hearsay into evidence untested by cross-examination would be manifestly unfair.[151] Hearsay evidence, though generally admissible at the Tribunal, must be subject to some measure of regulation, and it would be imprudent to depart from the widely-accepted municipal rules and procedures that govern the exceptional type of hearsay at issue in the instant case.[152]

49. Finally, Miletić argues that any limitation on the general right of cross-examination should be "regulated by specific rules"[153] and therefore the question of the admissibility of an accused's statement should be assessed "within the framework of the Rules concerning the admission of written statements",[154] namely Rules 89(F), 92 *bis*, 92 *ter*,[155] and 92 *quater*.[156] In Miletić's view, "[t]he fact that the Rules contain specific rules governing the admission of written statements into

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143 *Ibid.*, paras. 11–14, 28–30; *See also* Further Beara Submissions, para. 2.

144 Beara Submissions, paras. 7–8.

145 *Ibid.*, paras. 9–10.

146 *Ibid.*, paras. 19–21, 24. However, Beara concedes that it is legally possible that the value of the statement in relation to the co-Accused could remain in limbo until the moment it is known whether there will be the possibility of cross-examination. T. 13731–13732 (11 July 2007); Miletić and Gvero expressly endorse the Beara Submissions (Miletić Submissions, para. 2; Gvero Submissions, para. 5).

147 T. 13745 (11 July 2007).

148 T. 13743–13744 (11 July 2007).

149 T. 13730 (11 July 2007); *See also* Beara Submissions, paras. 16, 25–26.

150 Miletić Submissions, para. 19; *See also* T. 13721–13722 (11 July 2007); *See* T. 13728–13729 (11 July 2007) for Beara ; *See* T. 13744 (11 July 2007) for Nikolić.

151 *See supra note* 153, para. 51.

152 T. 13745–13746 (11 July 2007).

153 Miletić Submissions, para. 6.

154 *Ibid.*, para. 7.

155 *Ibid.*, paras. 9–11.

156 *Ibid.*, para. 13.

evidence but do not provide the possibility of admitting the statement of one accused against his co-accused resolutely speaks against" admission.[157] Miletić argues that Rule 82(A), guaranteeing accused in a joint trial the same rights as if each were tried separately, is implicated because the Borovčanin interview would not be admitted if Miletić were tried separately without Borovčanin being called to testify.[158]

50. Defence teams take varying positions on whether redaction is warranted if the Trial Chamber decides not to admit Borovčanin's statements against his co-Accused. Beara submits that if the material has no probative value, then redactions are generally appropriate regardless of whether the Judges can "put it out of [their] minds or not."[159] Further, as a practical matter, any redactions he would seek would have no effect on the Prosecution's case against Borovčanin.[160] Pandurević suggests that redactions are preferable in order to give the appearance to the co-Accused and the public that justice is being done.[161] Popović and Borovčanin also favour redactions.[162] Miletić is not opposed to redactions.[163] Nikolić argues that although redactions would prevent any confusion as to the exact use made of Borovčanin's statements, where the Trial Chamber is very clear in this regard, redaction is not required.[164] Finally, Gvero accepts that on occasion professional judges will view material which they might be required to disregard as a matter of law and therefore considers redaction unnecessary.[165]

B. Discussion

1. Introduction

51. As more joint trials are proceeding and the Prosecution has begun advocating for use of statements by an accused against co-accused, Trial Chambers are being confronted with the question of whether to admit statements taken by the Prosecution from an accused against co-accused.[166] Except for a recent Trial Chamber decision in *Prosecutor v. Prlić*,[167] there has been no

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157 *Ibid.*, para. 14.

158 *Ibid.*, paras. 20.

159 T. 13775 (12 July 2007); T. 13777–13778 (12 July 2007).

160 T. 13779 (12 July 2007).

161 T. 13790 (12 July 2007).

162 T. 13774 (12 July 2007); T. 13787 (12 July 2007).

163 T. 13787-13786 (12 July 2007).

164 T. 13783–13784 (12 July 2007).

165 T. 13788–13789 (12 July 2007).

166 *See, e.g., Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić*, Case No. IT-05-87-T, T. 12596–12599 (3 May 2007) (considering but not deciding question); Prosecution's Further Submission, p. 2 n. 2 (noting question will not be decided until end of the *Milutinović* trial). *Compare Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accuseds' Statements, 30 June 2003, paras. 13, 15-20 (stating that the Accused Jokić's statements will not be used against co-Accused Blagojević and arguing that admission of Jokić's statements will not "improperly taint[]" his

written decision by any Chamber of this Tribunal on the important issue.[168] Now this Trial Chamber, which is presiding over the largest joint trial in the Tribunal's history, is faced with the question.

52. The Prosecution references European Court of Human Rights (ECHR) cases holding that the admission of statements by an accused against his co-accused without opportunity for cross-examination does not amount to a violation of the fair trial provisions of the European Convention on Human Rights if the evidence is not the sole or decisive basis for conviction.[169] But the ECHR has repeatedly emphasized that as a supranational court of review, it does *not* examine the propriety of admission.[170] Rather the ECHR simply reviews whether the admission of statements amounted to a defect that invalidated the fairness of the trial altogether.[171]

53. As a Trial Chamber, the duty to decide whether to exercise our discretion under Rules 89(C) and (D) to admit or exclude the statements of an accused against co-accused falls squarely on us.[172] Exercising discretion informed by the principles of fair trial undergirding the Tribunal's Rules, including the concern demonstrated by Rules 92 *bis* and *ter* for safeguards concerning evidence used as proof of the acts and conduct of an accused and the guarantee at Rule 82(A) that if accused are jointly tried, each accused shall have the same rights as if separately tried, the Trial Chamber by

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co-Accused's defence because professional judges will properly limit the use of the statement); T. 13524 (28 June 2007) (statement of Peter McCloskey, Office of the Prosecutor) (acknowledging that during the *Blagojević and Jokić* trial he indicated that statements by an Accused should not be used against a co-Accused, but stating, "I can tell everyone that the policy of the Office of the Prosecutor is now that a statement can be used against fellow accused and it's up to the Court to decide what weight they give it.").

167 *Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić and Pušić*, Case No. IT-04-74-T, Decision on Request for Admission of the Statement of Jadranko Prlić, 22 August 2007 ("*Prlić* Trial Chamber Decision"), For the reasons stated below, the Trial Chamber reaches a different outcome than that in *Prlić*.

168 *See ibid.*, para. 13 (stating that "no Chamber of the Tribunal has expressed itself" on the use of an accused's statement against co-accused in a joint trial).

169 Prosecution's Further Submission, paras. 30-32, 34, 36-40.

170 *See, e.g., Carta v. Italy*, Application No. 4548/02, Définitif, European Court of Human Rights, 13 September 2006, para. 47 ["*Carta v. Italy*, ECHR Decision"] ("La Cour rappelle qu'elle n'est pas compétente pour se prononcer sur le point de savoir si des dépositions de témoins ont été à bon droit admises comme preuves ou encore sur la culpabilité du requérant.") (available only in French); *Lucà v. Italy*, Application No. 33354/96, Judgement, European Court of Human Rights, 27 February 2001, para. 38 ("The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.").

171 *See, e.g., Carta v. Italy*, ECHR Decision, para. 47 ("La mission confiée à la Cour par la Convention consiste uniquement à rechercer si la procédure considérée dans son ensemble, y compris le mode de présentation des moyens de preuve, a revêtu un caractère equitable et si les droits de la défense ont été respectés revêtu un caractère équitable et si les droits de la défense ont été respectés.") (available only in French); *Gossa v. Poland*, Application No. 47986/99, Judgement, European Court of Human Rights, 9 January 2007, paras. 52, 64 (observing that "[t]he Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence" and ruling, after reviewing the proceedings as a whole, that the Court could not find "that the applicant's trial as a whole was unfair").

172 *See Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case Nos. ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 11 ("The decision to admit or exclude evidence pursuant to Rule 89(C) is one within the discretion of the Trial Chamber and, therefore, appellate intervention is warranted only in limited circumstances."). Rule 89(C) of the Rules of the International Criminal Tribunal for Rwanda referenced by the Appeals Chamber is worded identically to Rule 89(C) of this Tribunal's Rules.

majority declines to use Borovčanin's statements to the Prosecution as proof of the acts and conduct of the co-Accused.[173]

2. Analysis

54. The Trial Chamber must assume at this juncture for purposes of analysis that Borovčanin will exercise his absolute right not to be called to testify during his trial. The co-Accused will therefore have no meaningful opportunity to cross-examine Borovčanin about the accuracy and veracity of his statements taken by the Prosecution in anticipation of legal proceedings.

55. If Borovčanin ultimately chooses to testify, the Trial Chamber will re-evaluate the issue of the admissibility of his statements against the co-Accused.[174]

a) The Right of Cross-Examination

56. We begin with fundamental principles. The Appeals Chamber has explained that "the right to cross-examine witnesses is a fundamental right recognized under international human rights law and restated in Article 21(4) of the Statute of this Tribunal".[175] Article 21(4) of the Tribunal's Statute guarantees to an accused, "in fully equality" the right "to examine, or have examined, the witnesses against him".

57. Invoking the right of cross-examination, the co-Accused argue that the admission of Borovčanin's statements against them would be a violation because they would be unable to cross-examine Borovčanin.[176] This argument does not end the analysis, however, because the Appeals Chamber has explained that the right to cross-examination "is not absolute" and this Tribunal does not generally bar hearsay evidence.[177]

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[173] Judge Prost dissents in part. Her dissent in part is appended.

[174] *See Prosecutor v. Orić*, Case No. IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, 21 October 2004, p. 5 ("The fact that the Trial Chamber may, at some point in the course of the proceedings, issue a ruling upon the admissibility of a particular document or other piece of evidence, will not prevent that ruling being reversed at a later stage as further evidence emerges that is relevant to the admissibility of the evidence in question.").

[175] *Prosecutor v. Prlić, Stojić, Praljak, Petković, Ćorić and Pušić* Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to File an Amicus Brief, 4 July 2006, p. 2 ("*Prlić* Appeals Chamber Decision on Management of Cross-Examination").

[176] Beara Submissions, paras. 5–6; *See also* T. 13728–13731 (11 July 2007); Miletić Submissions, paras. 5, 20–24; Gvero Submissions, para. 6; T. 13743–13744 (11 July 2007) (Popović defence arguments); T. 13745–13747 (11 July 2007) (Pandurević, Borovčanin and Nikolić defence arguments).

[177] *See, e.g.*, *Martić* Appeals Chamber Decision, paras. 12, 25 (noting the right of cross-examination is not absolute and permitting admission of testimony by a witness who committed suicide after the defence had conducted about 10.5 hours of cross-examination, but had not completed cross-examination); *Kordić and Čerkez* Appeals Chamber Decision, paras. 18, 23 (noting that admission of an "unsworn, uncross-examined, out-of-court statement of a deceased witness" is "in marked tension with the guarantee in Article 21(4) that the accused has the right to

58. Counsel for Beara has argued that at issue here "is a special kind of hearsay" that is particularly problematic because the statements come from someone with powerful self-interest in shifting blame away from himself and onto others.[178] In a written submission, Beara invokes the United States' rule on the exclusion of uncross-examined statements of a defendant concerning a co-defendant.[179] The United States Supreme Court has held "that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination."[180]

59. The Trial Chamber's decision does not turn on the presumption or *per se* bar of a particular domestic jurisdiction. Arguments trying to turn reliability concerns into a *per se* bar do not end the analysis because the Trial Chamber does not adopt such a position. Rather, in analyzing how to exercise discretion to admit or exclude evidence, the Trial Chamber finds guidance in the balances struck by the international and hybrid set of Rules forged at the Tribunal[181] and the principles of fair trial that undergird the Rules and jurisprudence.

b) Rules 89(C) and (D)

60. Rule 89(C) provides that the Trial Chamber "may admit any relevant evidence which it deems to have probative value" while Rule 89(D) provides: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

61. The Prosecution's transcript and recording of Borovčanin's statement is hearsay that implicates fairness as well as reliability concerns if used against the co-accused. Both concerns are relevant to the analysis. In *Kordić and Čerkez*, the Appeals Chamber ruled that "the reliability of a statement is relevant to its admissibility, and not just to its weight" and ruled that the evidence "may be so lacking in terms of the indicia of reliability" that admission would be an abuse of discretion.[182] While the Appeals Chamber has since noted that "[t]o some extent, the *Kordić & Čerkez* Decision

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examine the witnesses against him" but that it is "well-settled that this provision does not create a general prohibition on hearsay evidence").

178 T. 13730 (11 July 2007) (statement of Christopher Meek, counsel for Beara).

179 Beara's Submissions, paras. 11–12, n. 7, 28-29 (citing *Bruton v. United States*, 391 U.S. 123 (1968)). Beara also underscores U.S. jurisprudence on the Sixth Amendment right to confront witnesses which mandates that that the reliability of "testimonial statements" be tested "in the crucible of cross-examination". Beara's Submissions, paras. 12–13 (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)). As explained *supra*, at paragraph 57, however, this Tribunal generally admits hearsay statements, in marked contrast to the common law position.

180 *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

181 *See* O-Gon Kwon, *the Challenge of An International Criminal Trial as Seen from the Bench*, 5 J. INT'L CRIM. JUSTICE 360, 361-64, 367, 376 (2007) (analyzing how provisions of the Rules represent "the internationalization of criminal procedure" and "combine different features of the common-law and civil-law systems in a unique hybrid fashion unknown to any domestic jurisdiction in the world" and describing the duty of the Tribunal's judges, drawn from a diverse array of domestic jurisdictions "to continue to think 'internationally'").

182 *Kordić and Čerkez* Appeals Chamber Decision, paras. 24, 27.

was dependent upon the preference in the Rules at the time for 'live, in court' testimony" and this preference has since been qualified by Rules 89(F) and 92 *bis*, the Appeals Chamber has restated and left unperturbed the principle in *Kordić and Čerkez* that reliability of hearsay is relevant to its admissibility, and not just to its weight.[183] Rule 89(D) explicitly prescribes "the need to ensure a fair trial" as a consideration.

c) The Special Concerns Posed

62. The hearsay at issue is problematic and "special" for two reasons. First, it involves statements by an accused—a suspect at the time the Prosecution questioned him—with powerful incentive to shift blame away to others. Second, the statements were taken by the Prosecution in anticipation of legal proceedings. The only materials or person the co-Accused have to examine or cross-examine were produced by, or affiliated with, the party seeking their conviction in this case.

63. Considering the admissibility of statements made by prospective witnesses to investigators of the Office of the Prosecutor ("OTP"), the Appeals Chamber in *Galić* underscored that statements prepared for purposes of legal proceedings constitute "hearsay material of a very special type, with very serious issues raised as to its reliability."[184] The *Galić* Appeals Chamber described "the recognised potential [...] of such documents being carefully devised by lawyers or others to ensure that they contained only the most favourable version of the facts stated."[185]

64. The need to ensure reliability was particularly salient, the *Galić* Appeals Chamber wrote, "in relation to written statements given by prospective witnesses to OTP investigators, as questions concerning the reliability of such statements have unfortunately arisen, from knowledge gained in many trials before the Tribunal as to the manner in which those written statements are compiled."[186]

65. The *Prlić* Chamber has endeavoured to distinguish suspect statements taken by the Prosecution pursuant to Rules 42 and 43, emphasizing that transcripts are more complete following such interviews and the suspect interviewed may have counsel present.[187] These factors do not lessen the

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[183] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18(2), (3), 19 ("*Milošević* Appeals Decision on Admissibility of Prosecution Investigator's Evidence"). *See also Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 27 ("*Galić* Appeals Chamber Decision") ("To some extent, the *Kordić & Čerkez* Decision by the Appeals Chamber was dependent upon the preference in the Rules a the time for 'live, in court' testimony, but its insistence upon the reliability of hearsay evidence was maintained in relation to hearsay written statements, despite the qualification of that preference [.....] when Rule 92*bis* was introduced as a result of that decision.").

[184] *Galić* Appeals Chamber Decision, paras. 1, 28.

[185] *Ibid.*, para. 29.

[186] *Ibid.*, para. 30.

[187] *Prlić* Trial Chamber Decision, paras. 26-27.

fundamental problems with using the statements of an accused against co-accused—the high incentive to shift the blame away to others by a suspect undergoing prosecution questioning, and the fundamental fact that the only person or materials the co-Accused have to cross-examine or examine are affiliated with, or produced in anticipation of legal proceedings by, the entity seeking their conviction in this case.

66. Cross-examining the Prosecution investigator does little to mitigate reliability concerns because the Prosecution investigator's testimony can shed scant light on the nature and force of Borovčanin's incentive to shift blame, which will be left largely unexplored and untested by cross-examination.

67. Cross-examining the prosecution investigator is also no substitute for exploring with Borovčanin the circumstances under which he claims to have seen or heard relevant events and the accuracy and veracity of his account.[188] Where the Appeals Chamber has permitted evidence despite abrogation of cross-examination, the Appeals Chamber has carefully considered other protections, such as subjection to extensive cross-examination by a defence team with a common interest in a prior proceeding,[189] or the ability of the defence to cross-examine a witness for ten and a half hours before he committed suicide.[190] Here there are no such indicia.

d) Rule 89(B)

68. The parties do not dispute, and the Trial Chamber readily recognizes, that no provision of the Rules is directly on point as to whether, and under what conditions, the statements of an accused relevant to co-accused are admissible. Rule 89(B) provides that "[i]n cases not otherwise provided for" by the Rules of Evidence, "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." In carrying out this task, the Trial Chamber finds guidance by analogy to the Rules, which have evolved over the years to balance the interests in having information available, expediency, and the need for fairness and reliability.

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[188] *Compare Milošević* Appeals Decision on Admissibility of Prosecution Investigator's Evidence, para. 22 ("Contrary to the submission of the prosecution, the opportunity to cross-examine the person who summarized those statements does not overcome the absence of the opportunity to cross-examine the persons who made them.").

[189] *E.g., Aleksovski* Appeals Chamber Decision, para. 27.

[190] *Martić* Appeals Chamber Decision, paras. 25-26.

e) Applying the Safeguard in Rules 92 *bis* and *ter* by Analogy

69. As the *Galić* Appeals Chamber detailed, Rule 92 *bis* was fashioned to address the special circumstances of written statements taken for purposes of legal proceedings.[191] The introduction of the initial version of Rule 92 *bis* in December 2001 was accompanied by the qualification of the Tribunal's preference for "live, in court" testimony by Rule 89(F), which permits evidence in written form "where the interests of justice allow".[192] In 2003, the Appeals Chamber clarified that written evidence that did not meet the strictures of Rule 92 *bis* may be admitted under Rule 89(F) where the witness is available for cross-examination and attests to the accuracy of the written statement.[193] This holding was codified in Rule 92 *ter*, introduced in 2006 together with an amended version of Rule 92 *bis* and the insertion of Rule 92 *quater*.[194] This trio of Rules—92 *bis*, 92 *ter*, and 92 *quater*—reflect a balancing of the special concerns posed by witness statements taken for purposes of legal proceedings that can inform our analysis.

70. Rule 92 *bis* "strikes a balance between the procedural rights of the Accused and the interest of expediency".[195] The Rule gives a Trial Chamber discretion to "dispense with the attendance of a witness in person" and to admit "the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." Evidence may thus potentially be admitted under Rule 92 *bis* absent cross-examination—but is limited to proof of a matter other than the acts and conduct of an accused.

71. The acts and conduct limitation is an important safeguard for fairness and reliability and has been applied by the Appeals Chamber analogously in the context of judicial notice. Reasoning by analogy to Rule 92 *bis*, the Appeals Chamber ruled that "judicial notice should not be taken of

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191 *Galić* Appeals Chamber Decision, paras. 28-29.

192 *Milošević* Appeals Decision on Admissibility of Prosecution Investigator's Evidence, para. 18(3).

193 *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, paras. 1, 21.

194 *See Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T, Decision on Use of Time, 9 October 2006, pp. 3–4 n. 9 (noting that Rule 92 *ter* "codifies the existing jurisprudence on admission of evidence under Rule 89(F)").

195 *Prosecutor v. Karemera, Ngirumpatse & Nzirorera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 51 ("*Karemera* Appeals Chamber Decision on Judicial Notice"). The *Karemera* Appeals Chamber wrote regarding Rule 92 *bis* of the Rules of the International Criminal Tribunal for Rwanda, which, is in substance if not in full text, largely identical to this Tribunal's Rule 92 *bis* and concerns the admission of "the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment." *Compare, e.g.*, Rule 92 *bis* (this Tribunal's Rule) (concerning "the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment").

adjudicated facts relating to the acts, conduct, and mental state of the accused."[196] The Appeals Chamber found instructive the balance between expediency and procedural protections struck by Rule 92 *bis* and reasoned there is cause "to be particularly sceptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental states of an individual not on trial in those cases" because "the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another."[197] The Appeals Chamber's analogical reasoning and fashioning of a fair limitation in light of the principles balanced in Rule 92 *bis* is instructive.

72. Also instructive is Rule 92 *ter*, which provides that written witness statements or transcripts going to proof of acts and conduct may be admitted under three conditions—including, importantly, that the witness is present in court and available for cross-examination. Read in conjunction with Rule 92 *bis*, Rule 92 *ter* underscores the special sensitivity for procedural protections and ensuring a meaningful right of cross-examination where evidence goes to the acts and conduct of an accused.

73. The Prosecution argues that the Trial Chamber should reason by analogy to Rule 92 *quater* rather than Rules 92 *bis* and *ter*.[198] The argument elides the point of Rule 92 *quater* and raises concerns of conflict with Rule 82(A)'s guarantee that persons jointly tried shall have the same rights as if tried separately.

74. By its terms, Rule 92 *quater* governs evidence by a person "who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally"[199]—in short, a person who cannot appear for reasons beyond control. As a further safeguard, Rule 92 *quater* requires a finding "from the circumstances in which the statement was made and recorded that it is reliable."[200] Only such compelling circumstances trigger Rule 92 *quater*'s permission to potentially admit the written statement of the person unable to appear because of uncontrollable circumstances—and even then, the fact that evidence goes to proof of acts and conduct is a factor against the admission of the evidence or that part of the evidence.[201]

75. A potential witness made unavailable by the Prosecution's seeking of joinder plainly cannot be likened to witnesses made unavailable by the uncontrollable circumstances defined in Rule 92

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[196] *Karemera* Appeals Chamber Decision on Judicial Notice, para. 50.
[197] *Ibid.*, para. 51.
[198] Prosecution's Further Submissions, para. 21.
[199] Rule 92 *quater*(A).
[200] Rule 92 *quater*(A)(ii).
[201] Rule 92 *quater*(B).

quater. The position would be perverse and perverse incentive indeed. The position also poses potential conflict with Rule 82(A)'s guarantee that each accused in a joint trial "shall be accorded the same rights as if such accused were being tried separately." The Prosecution elected to try Borovčanin jointly with the other accused in this trial. As a result, Borovčanin's absolute right not to testify in his own trial operates as a bar preventing the six other co-Accused from calling him for cross-examination.

76. The interaction between, and principles behind, Rules 92 *bis* and 92 *ter* are the most fair and analogous guide to the circumstances at issue here.[202] There is no need to slip beneath the balance of protections borne of concern for ensuring a fair trial struck in Rules 92 *bis* and 92 *ter*. To do so would be anomalous indeed given the particularly special nature of the hearsay at issue, involving not only statements taken by a party in anticipation of legal proceedings but the statements of an accused with strong self-interest in shifting blame away onto others.[203]

3. Conclusion

77. Exercising discretion informed by analogy, the Trial Chamber decides that, absent cross-examination, Borovčanin's statements to the Prosecution cannot be used as proof of the acts and conduct of his co-accused.

78. The phrase "acts and conduct of the accused" is "a plain expression and should be given its ordinary meaning: deeds and behaviour of the accused."[204] The meaning of the terms "should not be extended by fanciful interpretation."[205] The Trial Chamber directs the parties' attention to the *Galić* Appeals Chamber's detailed list of what constitutes statements going to acts and conducts of an accused excluded under Rule 92 *bis*.[206] The *Galić* Appeals Chamber listed statements that the Prosecution relies on to establish:

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202 Even if Rule 92 *quater* were applied analogously, moreover, it does not counsel for admitting Borovčanin's statements as proof of the acts and conducts of his co-Accused. As noted, Rule 92 *quater* requires a finding from the circumstances in which the statement was made and recorded that it is reliable—and even then, the fact that evidence goes to proof of the acts and conduct of an accused may be a factor against admission of the evidence, or that part of it.

203 The dissent aptly notes this powerful self-interest but posits that suspects videotaped and interrogated by the Prosecution might be more careful with the truth. This creative speculation does not undercut the strong and obvious self-interest of a suspect warned and questioned by the Prosecution in trying to shift blame away onto others.

204 *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92*bis*(D) – Foča Transcripts, 30 June 2003, para. 11; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92*Bis*, 21 March 2002, para. 22 ["*Milošević* Trial Chamber 2002 Decision on Written Statements"]

205 *Milošević* Trial Chamber 2002 Decision on Written Statements, para. 22.

206 *Galić* Appeals Chamber Decision, para. 10.

(a) that the accused committed (that is, that he personally physically perpetrated) any of the crimes charged himself, or

(b) that he planned, instigated or ordered the crimes charged, or

(c) that he otherwise aided and abetted those who actually did commit the crimes in their planning, preparation or execution of those crimes, or

(d) that he was a superior to those who actually did commit the crimes, or

(e) that the knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or

(f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[207]

Where the prosecution alleges participation in a joint criminal enterprise, statements going to acts or conduct of an accused also include those used to establish:

(g) that he had participated in that joint criminal enterprise, or

(h) that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[208]

79. Additionally, the *Galić* Appeals Chamber ruled that the limitation concerning evidence of "conduct" includes a statement that goes to proof of any act or conduct, or relevant omission to act, used to establish the state of mind of an accused.[209]

80 Borovčanin's statements may be used as evidence in the case pertaining to the co-Accused for purposes other than proving the acts and conduct of the co-Accused.[210] Redactions are unnecessary because professional judges are entrusted with, and well-able to, properly use evidence for the prescribed purposes.

V. THE ADMISSIBILITY OF DOCUMENTS RELATED TO THE BOROVČANIN INTERVIEW

81. The Trial Chamber recalls the parties' submissions on the admissibility of the Borovčanin Documents related to the Borovčanin Interview.[211] The Borovčanin Documents consist of (1)

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207 *Ibid.*

208 *Ibid.*,

209 *Ibid.*, para. 11.

210 Because Borovčanin's statements are admitted with the limitation that they may not go to proof of the acts and conduct of the accused, the statements will not have sole or decisive weight in proving the case against the co-accused in keeping with ECHR jurisprudence *See Kaste & Mathisen v. Norway*, Application Nos. 18885/04 & 21166/04, Judgement, 9 November 2006, paras. 9-13, 54, 56 (finding denial of a fair trial where statements of an accused not subject to cross-examination may have had decisive influence on the outcome of the cases of the co-accused). *Compare Galić* Appeals Chamber Decision, para. 12, n. 34 (analysing consistency between Tribunal's practice under Rule 92 *bis* and ECHR jurisprudence).

211 *See supra* paras. 6–12.

documents regarding Borovčanin's employment from 1982 through 1998; (2) documents that Borovčanin generated during the 20 February 2002 interview, including a sheet of paper stating his personal details, organisational charts of the Republika Srpska Ministry of the Interior and Supreme Command, and a list of the units and number of people per unit in the First Company Zvornik PJP in 1995; (3) a DVD of footage from the Srebrenica area in July 1995 that Borovčanin viewed during his interview on 12 March 2002; (4) documents related to the Prosecution's efforts to interview Borovčanin, including multiple summonses, one receipt of summons with attached cover letter, and two letters to the Republika Srpska Ministry of Justice requesting assistance in delivering summonses.[212] As such, the Borovčanin Documents do not go to proof of the acts and conduct of the co-Accused. In view of the foregoing decisions on the admissibility of the Borovčanin Interview, the Borovčanin Documents are admitted.

VI. CERTIFICATION TO FILE INTERLOCUTORY APPEAL

82. The Trial Chamber envisages that a party may wish to file a request for certification pursuant to Rule 73. Rule 73(B) provides that "[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." Satisfied that both these requirements are met and because of the importance of the issues involved in this decision, the Trial Chamber will grant certification.

VII. DISPOSITION

83. For these reasons, pursuant to Rules 54, 73(A), 73(C), 89(B), 89(C) and 89(D) of the Rules, the Trial Chamber hereby decides as follows:

a) **GRANTS** the Amendment Motions and **ORDERS** that the Prosecution's 65 *ter* Exhibit List be amended to include the Borovčanin Interview and Borovčanin Documents;

b) **GRANTS** Borovčanin leave to supplement the Borovčanin Response and the Second Borovčanin Response and **DECLARES** the 65 *ter* Motion with regard the Two Documents which are already on the 65 *ter* Exhibit List as moot;

[212] Rule 65 *ter* List Amendment Motion, paras. 5-6, 10; Supplemental Rule 65 *ter* Motion, para. 2.

c) **GRANTS** the Prosecution leave to file its Prosecution Reply and to exceed the word limit of 3,000 words in the Prosecution Submissions;

d) **ADMITS** the Borovčanin Interview as evidence concerning Borovčanin;

e) **ADMITS** the Borovčanin Interview as evidence concerning the co-Accused except that, as decided on by majority, Judge Prost dissenting, it will not be used as evidence which goes to proof of the acts and conduct of the co-Accused;

f) **ADMITS** the Borovčanin Documents; and

g) **GRANTS** certification to file an interlocutory appeal of this decision within seven days of the filing of this decision.

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

Carmel Agius
Presiding

Dated this twenty-fifth day of October 2007
At The Hague,
The Netherlands

[Seal of the Tribunal]

PARTIAL DISSENTING OPINION OF JUDGE KIMBERLY PROST

1. I depart from the position of the majority on the issue of whether the Borovčanin Interview is admissible against the co-Accused in so far as it goes to the proof of their acts and conduct as charged in the Indictment.

A. The Right of Cross-Examination

2. As is noted in the majority decision, the submissions from the Defence cited several authorities from national jurisdictions in support of exclusion of the Borovčanin Interview with reference to the Accused.[1] Almost without exception, these precedents come from common law jurisdictions where the answer to this question is an easy one; an out-of-court statement given by an accused is, with reference to the other accused, inadmissible hearsay.[2] However, when the question is raised before a Tribunal where there is no general exclusionary rule with reference to hearsay, it is a much more complex matter.

3. The co-Accused argue that the central obstacle to admissibility is that the introduction of this evidence would offend the right prescribed by Article 21(4)(e) of the Statute "to examine, or have examined, the witnesses against him."[3] Because Borovčanin cannot be compelled by the co-Accused to appear to be examined or cross-examined, the Borovčanin Interview should be excluded as evidence with reference to them.[4]

4. However, as acknowledged by the majority, the jurisprudence and rules of this Tribunal establish clearly that this right in the Statute, which has been interpreted as a right to cross-examine a witness, is not absolute.[5] The majority has discussed this at some length with reference to the authorities of this Tribunal regarding the admissibility of witness evidence which has not been fully tested by cross-examination.[6] While this is of some relevance, my starting point is a much simpler one, flowing from the early decisions of this Tribunal which held that generally hearsay evidence is admissible.[7] As a result, if Borovčanin had made comments relating to the acts and conduct of his co-Accused, before, during or after the events, other than in the circumstances of an interview with

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1 *See supra* paras. 47–48, 58.

2 In the case of jurisprudence of the United States it is restricted even more to its national context by virtue of a constitutionally enshrined right to "confrontation" neither found in other jurisdictions nor in the Statute of this Tribunal.

3 *See supra* para. 47.

4 *See supra* paras. 47–50.

5 *See supra* para. 56–57.

6 *See supra* paras. 60–76.

7 *Prosecutor v.Duško Tadić a/k/a/ "Dule"*, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, paras. 5,7,15.

the OTP, those comments would be admissible for all purposes. If for example he had told a fellow officer that Mr. X had ordered executions or he told a journalist that Mr. Y was in charge of it all, those statements could be considered by the Trial Chamber in relation to Borovčanin and with respect to X and Y. Because hearsay evidence is generally admissible in this Tribunal,[8] Trial Chambers often consider such out-of-court statements of persons without the maker of the statement being produced for cross-examination. It therefore cannot be the case that the mere absence of an opportunity to cross-examine the maker of a statement is *per se* sufficient to make the statement inadmissible before this Tribunal. Instead, the crux of the issue is whether the very particular circumstances of this hearsay statement - made by a co-accused, as a suspect, in an interview with the OTP – render the statement inadmissible in these proceedings with reference to the acts and conduct of the other accused.

5. Like the majority, I agree that statements made in this context do not constitute ordinary hearsay. These are a) made by a person who is involved in the same events, ultimately as a co-accused and b) given to OTP authorities in the course of an investigation. Because of these special characteristics, the resulting interviews are quite distinct from other hearsay which is admissible and they deserve separate consideration. I move, therefore, to examine if there are features to this particular evidence which make it inadmissible in part before this Tribunal, given its special context. In so doing, I agree with the majority that the only directly applicable rules are 89(C) and (D) which provide for the admissibility of evidence which has probative value, when it is not outweighed by the need to ensure a fair trial.

B. Statements in anticipation of legal proceedings

6. To begin, I do not concur with the majority position that these interviews can be categorised as "statements taken in anticipation of legal proceedings" subject to the dangers outlined by the *Galić* Appeals Chamber in dealing with witness statements with reference to Rule 92 *bis*.

7. At issue in *Galić* were statements that were taken from witnesses in anticipation of legal proceedings **against other persons**. The Appeals Chamber was concerned that in this situation the party putting forward the evidence, in conjunction with the witness, could "construct" the statement in the most favourable light for the particular legal proceedings and it would be admitted in that form, without subsequent testing through cross-examination. In contrast, a suspect is questioned in anticipation of legal proceedings against himself or herself. The adversarial dynamic that will exist between the Prosecution and a suspect clearly will not support a collaborative effort to craft a favourable statement for use at trial.

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[8] *See supra* note 177, para. 57; *See also, supra.* note 183, para. 61.

8. The purposes of the two statements are also very different. The statement of a witness has as its main, if not sole, purpose the compiling of evidence from a witness to be adduced in a legal proceeding against others, generally with a very specific proceeding in mind. It is this single-minded focus which enhances the danger that evidence will be carefully crafted to fit its intended purpose.

9. Suspect statements do not have as their sole or main purpose the gathering of evidence against others. In fact, it would be highly unusual for the Prosecutor to use the very restrictive process delineated in Rules 42 and 43 for that purpose. If that is the intent, the Prosecution would be far better off interviewing the person as a witness, without any of the procedural constraints or the psychological impact attached to a suspect statement.

10. Admittedly, the Prosecution may use the opportunity, especially in a case such as this with many suspects, to explore evidence against others. Even more likely, the interview may result in the suspect giving information relevant to other individuals. But that is not when the dangers of "constructed" statements arise. Such dangers surface when the party interviewing the person is focused on crafting a statement in a favourable way with the purpose of introducing it in specific legal proceedings, against individuals other than the maker of the statement.

11. Taking these differences into account, at best what can be said is that the suspect may use the opportunity to put forward the most favourable account of his acts and conduct and shift blame to others. But that, in my view, is no more than a different way of characterising the fundamental issue—which the majority seems to treat as a separate inquiry- what effect does the motivation of the suspect have on admissibility?

12. Finally, we must focus on the concern of the Appeals Chamber which is aptly summarised in the quotation cited by the majority—"in relation to written statements given by prospective witnesses to OTP investigators, as questions concerning the reliability of such statements have unfortunately arisen, from knowledge gained in many trials before the Tribunal as to the manner in which those written statements are compiled."[9] Albeit the OTP may have in place protocols and procedures for the conduct of witness interviews, nothing in the Tribunal Rules provides that they must do so or sets any conditions as to the conduct of such questioning. Because of this difference, there is scope for the slanted "compilation" of statements as the Appeals Chamber rightly identifies.

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[9] *Galić* Appeals Chamber Decision, para. 30; *See also, supra* para. 64.

13. In contrast, the interview of a suspect is circumscribed by the rigorous requirements of Rules 42 and 43. These provisions ensure a process, where the accused is fully informed as to his or her rights and has the opportunity to have counsel present. A verbatim record exists of the proceedings which makes the circumstances surrounding the taking of the statement transparent and subsequently open to close scrutiny. This is well illustrated in this case where the Accused each had an opportunity to review the transcript and question the investigator who took the statement. In so far as these conditions are followed, the possibility of "compiling" evidence against others simply does not exist in the context of a suspect interview.

14. The majority says that these procedures bring little comfort to the co-Accused because they do not go to the motivation of the suspect. I agree–motivation remains the live and central issue. But what these procedures do safeguard against are the dangers associated with witness statements "taken in anticipation of legal proceedings" as described by the *Galić* Appeals Chamber.

15. For all these reasons I do not consider that the jurisprudence surrounding the taking of statements in anticipation of legal proceedings has any relevance to a suspect interview, either directly or by analogy.

C. Reliability of the Borovčanin Interview

16. I move then to what I consider to be the crucial question. While I agree that the context of the Borovčanin Interview mandates that it be considered on a distinct basis in terms of admissibility under Rules 89(C) and (D), I do not agree with the manner in which the majority treats the interviews or with their conclusion as how context affects its reliability.

17. The majority draws no distinction between the written statement of a witness and the questioning of a suspect and thus relies heavily, if not exclusively, upon the jurisprudence and rules relating to the introduction of witness statements and testimony. As discussed above, the statement of a suspect is very distinct from a witness statement most notably in terms of the protections enshrined in the Rules for the process by which suspect interviews are conducted.

18. In this regard, I agree with the finding of the *Prlić* Trial Chamber that:

> the transcript of the suspect interview that was carried out pursuant to Rules 42 and 43 of the Rules, offers further indications of reliability with regard to the written statements taken pursuant to Rule 92 *bis*(B) of the Rules. The latter reflect only the words of the witness; they do not include the questions asked of the witness; nor do they recount the circumstances under which the interview was held. On the other hand, the transcript of a suspect interview reflects not only the questions asked of the witness but also the answered [*sic*] given. It even includes pauses in the interview. As such, the Chamber has not only indications of external reliability but also indications of intrinsic reliability of the "statement". It can place the answers given by a suspect in their proper context; it knows the questions asked; it sees what subject-matter has been omitted; it is aware of

> any possible pressure exerted on the suspect.[...] a suspect interview must take place in the presence of Counsel, unless the suspect voluntarily renounced his right to assistance from Counsel.[10].

19. My second point of departure from the majority is the view of the effect of the context of the Borovčanin Interview on its content. Clearly the situation is a unique and special one. Questions are constructed and posed by an investigating authority. The individual is informed that he or she is a suspect. A formal caution is administered outlining the right to silence and to counsel and the whole of the interview is taped.

20. There is no doubt that in these grave circumstances, a suspect faced with a real possibility of arrest and prosecution may indeed be motivated to mislead or lie to the investigators and to cast blame for the events on to others. On this I agree with the majority. However, in this situation, a suspect might be equally motivated to be careful and precise as to his words when he knows the interview is being given to investigative authorities with access to other witnesses and information, especially when he is under caution and every word is being recorded.[11] In addition, a suspect of course is presumed innocent and as such he or she may use the interview as an opportunity to describe his or her version of the events as truthfully and precisely as possible. Therefore, I do not presume, as does the majority, that the sole effect of the circumstances is a negative one that leads invariably to unreliable statements in terms of the acts and conduct of other persons who might possibly one day become a co-accused. On balance, the circumstances of an interview can affect its reliability positively or negatively. But there is certainly nothing in my view about this special hearsay which would make it so intrinsically unreliable that it should be *per se* excluded in all cases.

21. Further, I cannot subscribe to the view that because the statement is taken by the authorities advancing the prosecution, there is a presumed bias in the questioning or presentation which makes this evidence suspect. As is the case with any hearsay statement, the Trial Chamber must look carefully at the context of the statement and its content and determine what if any weight to give to it. In fact, I see no reason why such evidence is less reliable than off-hand comments made to a friend several months after an incident; comments admissible in this Tribunal. To the contrary, I believe that the grave circumstances in which this evidence was taken make it more reliable than other forms of evidence which are routinely admissible before us. In any event, I certainly see no basis to exclude any particular portion of the statement as unreliable *per se.*

22. I come then to my most significant point of departure from the majority in terms of the reliability of this evidence. The majority decision rests on the presumption that in giving this

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[10] *Prlić* Trial Chamber Decision, para. 27.

[11] *Ibid.*

statement to investigative authorities, the accused has a powerful motive to construct the facts in his favour and to shift blame from to others. As I have said, I agree. However, that is unquestionably a concern that must be carefully weighed by the Trial Chamber in examining the entirety of a suspect interview. The motivation to construct evidence in his or her favour would extend to all parts of the statement. What he says about general events, chronology, command structure, the acts of others and, most importantly, how he describes his own acts, conduct and intent; all of these comments must be viewed with the knowledge that the suspect may have a powerful motive to lie. In admitting the evidence against Borovčanin in totality and against the other accused, save with reference to their acts and conduct, the majority draws a distinction that, for me, is unsupportable. I fail to understand why the Trial Chamber considers itself capable of weighing part of the evidence in light of the circumstances of the interview but not the totality.[12] In my view, it is not possible to conclude that the circumstances under which the Borovčanin Interview occurred – the very circumstances which give it reliability for some of its content – suddenly have no value when it comes to comments that the Accused may have made about others. It is important to note in this regard that the phrase "acts and conducts as charged in the indictment" is a very broad one. It is not like the situation the majority cites from the United States jurisprudence where "one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating others."[13]

23. It is far more complex. This is particularly so in a case of this nature with many accused and the alleged existence of two joint criminal enterprises. In my opinion, the mere possibility that a suspect may be motivated to place the blame on someone else should not have the effect of excluding from the Trial Chamber's consideration such a broad category of evidence as every statement made that goes to the acts and conduct of other individuals who later became his co-accused. Such an exclusionary rule is vastly disproportionate in terms of striking an appropriate balance between available information, probative value and possible prejudice to the accused in terms of the fairness of the trial.

D. The analogy to Rules 92 *bis*, *ter* and *quater*

24. To inform its reasoning, the majority looks to other rules which address statements of a similar nature – namely Rules 92 *bis*, 92 *ter* and 92 *quater*. I agree that while these rules are not of direct application in the instant case, it is important to consider them in analysing the issue before us.

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[12] *See supra* paras. 77–80.

[13] *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *see supra* para. 58.

25. However, I attach a significant caveat particularly when dealing with Rules 92 *bis* and 92 *ter*. As highlighted by the Appeals Chamber in *Galić*, the intention in the introduction of Rules 92 *bis* and subsequently Rule 92 *ter* was the facilitation of the trial process by allowing for the introduction of written statements or transcripts in lieu of oral evidence. The rules were introduced simultaneously with amendments that qualified the previous preference for live, in-court testimony. As a result, as discussed by the majority, both rules are designed to strike a balance between efficiency and fairness in the trial process.

26. However, considerations of the efficacy of the trial do not arise in the context of the statement of an accused. There is no suggestion that the Prosecution is adducing the interviews as written evidence in lieu of oral testimony. There is no question of advancing the efficiency of the trial. If the recording equipment had failed and no written evidence existed, the same issue would be before us for consideration – whether the out-of-court comments of Borovčanin to OTP authorities on the acts and conduct of the co-Accused are admissible. The only distinction would be that the comments would be adduced not by the tendering of a statement but by the recounting of the investigator through oral testimony. While certainly there would be more questions as to accuracy, the crux of the issue would not change. For that reason, while I agree these rules are relevant to the analysis, there are limits as to what analogies can be drawn.

27. It is correct, as pointed out by the majority, that Rule 92 *bis* does not permit the introduction of written evidence which involves the acts and conduct of the accused.[14] The majority argues that this reflects a balancing of the interests of efficiency and fairness, a balance which should be replicated in the case before us. Thus, references to acts and conduct in Borovčanin's statements should be similarly inadmissible.[15] As stated above, I do not agree that the same factors are to be balanced in considering an interview of a suspect. Further, what this overlooks is that Rule 92 *bis* does not address instances where the author of the written evidence in question is not available for cross-examination. In the situations governed by that Rule, the evidence relating to acts and conduct can be presented to the Trial Chamber simply by calling the witness either for full *vive voce* testimony or for cross-examination in accordance with Rule 92 *ter*. It is understandable that evidence of acts and conduct are excluded under Rule 92 *bis* where there is no compelling reason to allow such evidence to be adduced in the absence of cross-examination. In every instance actually covered under Rule 92 *bis*, there is no possibility that evidence may be denied to the Trial Chamber due to the unavailability of the witness. It is no surprise therefore that the balance between fairness and efficiency is so struck under that rule as the evidence can be made available to the Chamber, albeit

[14] *See supra* note 195, para. 70.
[15] *See supra* para. 77.

in a more protracted manner. In my view, an analogy cannot be drawn between Rule 92 *bis* and the Borovčanin Interview.

28. The same must be said of the Appeals Chamber jurisprudence relating to adjudicated facts. It is not a question as to whether or not a fact can be demonstrated to the Trial Chamber, it is a question of how it must be established. Even though a fact may be outside the realm of adjudicated facts it is always open to the party to call evidence on it.

29. Even more so, Rule 92 *ter* is not helpful in the analysis of the issue before us. It is a procedural provision designed to facilitate the introduction of direct examination in written form. It is predicated entirely on the requirement that the witness appear for cross-examination and thus is not analogous at all to a situation where that is not possible.

30. In my view, what is most helpful is Rule 92 *quater*. Under this Rule, statements or transcripts of persons who have subsequently died or are by reason of bodily or mental condition unable to testify orally, can be admitted. And in this instance, even if the evidence goes to proof of acts and conduct, the Trial Chamber has the discretion to admit the statement or transcript. The underlying difference between Rule 92 *bis* and Rule 92 *quater* in terms of the treatment of evidence of acts and conduct of the accused is that the evidence in the case of Rule 92 *quater* will not be available at all to the Trial Chamber if it cannot be adduced under this Rule. In contrast, the narrow category of evidence excluded under Rule 92 *bis* can always be introduced if necessary by calling the relevant witness – either for full *viva voce* testimony or for cross-examination pursuant to Rule 92 *ter*.

E. Prejudice resulting from the Joinder

31. By contrast, the situation facing the Trial Chamber is very similar to that under Rule 92 *quater*. The difference in the two situations is the reason for the unavailability of the maker of the statement. For legal reasons, as opposed to physical or mental ones, the person who made the statement is not available for cross-examination. I fail to see how the reasons for unavailability can affect the evidence – in terms of its reliability or otherwise - so as to exclude one category of statement completely but allow for possible admissibility in the other instance. In my view, given the similarity of circumstance and underlying rationale, Rule 92 *quater* supports, at the least, discretion to admit the Borovčanin statements with reference to the acts and conduct of the co-Accused.

32. The majority is of the view that it would be perverse to apply Rule 92 *quater* by analogy to situations where the unavailability of the witness was brought about by the Prosecution's

application for joinder.[16] The majority fears it would constitute a perverse incentive, though I am unclear as to what the incentive would be towards. As I read the majority opinion, because the Prosecution's joinder application has acted as a bar to the right of the co-Accused to cross-examine Borovčanin on his statements, fairness dictates that the evidence with reference to the acts and conduct of the co-Accused must be excluded.

33. I find that argument to be somewhat artificial. Such a position ignores a fundamental fact that it was not the application of the Prosecution which triggered the limitations on cross- examination but rather the decision of the Trial Chamber to grant joinder. It is at that juncture – when the decision on joinder was at issue - that an argument as to possible prejudice to cross- examination rights should have been advanced. However, after the fact, in a Tribunal where the question of the admissibility of the statement of one co-accused against another has not been decided, it does not seem appropriate to me that the Prosecution's application for joinder constitutes any basis upon which to exclude evidence.

34. More significantly, in a Tribunal of this nature, not strictly adversarial, the issue of admissibility of evidence in my view should not be couched in terms of choices by the parties. Rather the question is: did the joinder application and decision so alter the circumstances surrounding this evidence such that its admission by the Trial Chamber would affect the fairness of the trial? In considering this question I refer also to the related argument advanced by Miletić. He has argued that the Rules and jurisprudence mandate that an accused should not be prejudiced in his or her position as a result of joinder. Here, because of joinder, Miletić is denied the right to cross-examine Borovčanin, which would have been an option if they had been tried separately. In his view, the admission of Borovčanin's statements against him would thus prejudice his position as a result of joinder.

35. In response to both points, I agree fully that the situation with reference to this evidence would have been different if the Accused had been tried separately. But where I differ from the majority is as to whether Miletić or any of the co-Accused is prejudiced as a result of this difference.[17] In the case of separate trials the Prosecution would have been required to call Borovčanin to adduce this evidence and the co-Accused would have had the opportunity to cross-examine him. That is true. At the same time, in that case the evidence of Borovčanin would be admissible without question or qualification and would carry any weight the Trial Chamber chose to accord to it. It could in fact form the sole basis for conviction. In the instance case, if the evidence is admitted, untested by cross-examination, it can never be accorded full weight nor can it possibly serve as the sole or

[16] *See supra* para. 75.

decisive evidence upon which to found a conviction. This for me strikes the appropriate balance between consideration of relevant evidence and possible prejudice to the co-accused. Complete exclusion is an unnecessary step which would deprive the Trial Chamber access to potentially relevant evidence whatever weight to be ascribed to it.

36. As to the related argument that Rule 82(A) has been breached in that there is no right to cross-examine Borovčanin as would have been the case in a separate trial, I note that the Rule must be read in light of the Statute and the relevant jurisprudence. As discussed previously and by the majority, there is no absolute right to cross-examination under the Tribunal regime. Thus, Rule 82(A) cannot be interpreted so as to mandate the exact same opportunity for cross-examination in joinder cases as exists in a separate trial. Taken to its logical conclusion, that would lead to an impossible situation in terms of joinder. An accused could always successfully oppose the motion on the basis of the principle that were he tried alone he would have the right to examine or cross-examine his co-accused whereas in the joint case he does not. While that may be a relevant consideration on the facts of a particular case, it cannot be argued in the abstract as is advanced here. The provisions of Rule 82(A) do not assist in terms of the admissibility of this evidence.

37. For these reasons, to the extent that existing Rules provide guidance on the question of the admissibility of this evidence, I am of the view that 92 *quater* is of most significance and it clearly supports, at the least, a discretion to admit the evidence.

F. Admissibility

38. But there is an important distinction between the question at hand and the circumstances governed by Rule 92 *quater*. This is not an instance where the evidence in question will be admitted or not. The Trial Chamber has decided to admit the full text of Borovčanin's statements with reference to Borovčanin. I clearly recognise that the factors leading to the admission with reference to Borovčanin are different. They are his own statements, arguably against his interests. However, I cannot accept that evidence, which we consider sufficiently reliable to meet the threshold of admissibility with respect to one accused, is at the same time so unreliable with reference to others as to require its exclusion from consideration as evidence. If, for example, Borovčanin places himself and Mr. X, a co-accused, at the command of the Zvornik Brigade on a certain date, I fail to see why that statement should be considered as reliable with reference to one accused but totally unreliable and inadmissible with reference to the other. Where that leaves us in practical terms is within the uncomfortable realm that often exists in the common law where evidence is admissible and reliable for some purposes but not for others. While such an analysis can be conducted by

[17] *See supra* paras. 49, 53.

professional judges and even by juries, I see no necessity for it in the instant case. In my view, the civil law concept of free evaluation of this evidence should prevail. In essence, it should all be a question of weight.

39. In conclusion, in my view the proper analysis here is not whether the evidence in question has *per se* sufficient indicia of reliability to allow for its admissibility. I do not reach that point. Under the prevailing jurisprudence of this Tribunal, I can find no principled basis upon which to treat this evidence differently than any other evidence governed directly by Rule 89(C) and (D). Similarly, I do not consider that its nature is such that in every instance its probative value is substantially outweighed by possible prejudice that affects fair trial rights under Rule 89(D).

G. Conclusion

40. For these reasons, I would have held Borovčanin's statements to be admissible in their entirety with reference to all of the Accused. I find it necessary however to go further and make it clear that there is, of course, a fundamental distinction between admitting evidence and according weight to it. While I would be prepared to admit the evidence for consideration, a totally separate question would be the weight that I would attribute to it. I am in complete agreement with the authorities cited from the ECHR whereby a conviction cannot be founded solely or to a decisive extent on evidence such as this, which is untested.[18] Further, in my view such evidence can never be given the full weight accorded to other types of evidence which have been the subject of cross-examination.

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

Kimberly Prost
Judge

Dated this twenty-fifth day of October 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

[18] *Martić* Appeals Decision, paras. 20, 22; *Prlić* Trial Chamber Decision, para. 28.