



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-AR73.1  
Date: 14 December 2007  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron  
Judge Wolfgang Schomburg

**Registrar:** Mr Hans Holthuis

**Decision of:** 14 December 2007

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVCANIN  
RADIOVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

*Public*

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**DECISION ON APPEALS AGAINST DECISION ADMITTING  
MATERIAL RELATED TO BOROVCANIN'S QUESTIONING**

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**The Office of the Prosecutor:**

Mr Peter McCloskey

**Counsel for the Appellants:**

Mr Zoran Živanović and Ms Mira Tapušковиć 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

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seized of four appeals, respectively filed by Ljubomir Borovčanin, Milan Gvero, Ljubiša Beara, and by the Office of the Prosecutor (“Prosecution”) against the “Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65*ter* Exhibit List” (“Impugned Decision”) issued on 25 October 2007 by Trial Chamber II (“Trial Chamber”).

## I. PROCEDURAL HISTORY

2. The Prosecution questioned Ljubomir Borovčanin (“Borovčanin”) on 20 February, 11 March, and 12 March 2002. The questioning was audio recorded and transcribed (collectively referred to as “Borovčanin Recordings and Transcript”).<sup>1</sup> On 6 September 2002, a judge of the Tribunal confirmed an indictment against Borovčanin. On 31 October 2005, the Trial Chamber granted a motion by the Prosecution and ordered the consolidation of the indictments previously issued against: Vujadin Popović (“Popović”);<sup>2</sup> Ljubiša Beara (“Beara”);<sup>3</sup> Drago Nikolić;<sup>4</sup> Ljubomir Borovčanin;<sup>5</sup> Zdravko Tolimir, Radivoje Miletić, and Milan Gvero (“Gvero”);<sup>6</sup> Vinko Pandurević;<sup>7</sup> Milorad Trbić.<sup>8</sup> The present proceedings, against seven accused (when referred to collectively, “Co-Accused”),<sup>9</sup> started on 14 July 2006.

3. On 6 July 2007, the Trial Chamber was seized of the confidential “Prosecution’s Motion for Leave to Amend 65*ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham” (“Rule 65 *ter* List Amendment Motion”). In this motion, the Prosecution requested the addition of the Borovčanin Recordings and Transcript and related materials to its list of exhibits prepared pursuant to Rule 65 *ter* (“Exhibit List”). The related material consists of a number of documents and audio-visual material brought by Borovčanin to the meeting with the Prosecution, some documents produced by Borovčanin himself during the questioning, as well as papers detailing the efforts by the

<sup>1</sup> Prosecution’s Motion for Leave to Amend 65 *ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham, 6 July 2007, para. 4 (quoted in Impugned Decision, para. 2). The parties and the Trial Chamber used the expression “Borovčanin Interview” or “Borovčanin’s Statements” to describe the transcript and audio recording of Borovčanin’s questioning.

<sup>2</sup> Case No. IT-02-57-I, Amended Indictment, 28 April 2002.

<sup>3</sup> Case No. IT-02-58-I, Indictment, 28 March 2002.

<sup>4</sup> Case No. IT-02-63-I, Indictment, 2 September 2002.

<sup>5</sup> Case No. IT-02-64-I, Indictment, 6 September 2002.

<sup>6</sup> Case No. IT-04-80-I, Indictment, 8 February 2005.

<sup>7</sup> Case No. IT-05-86-I, Indictment, 24 March 2005.

<sup>8</sup> Case No. IT-05-86-I, Indictment, 24 March 2005.

<sup>9</sup> Zdravko Tolimir’s case was severed on 26 June 2006 and 15 August 2006 (see *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Order on Operative Indictment and Severance of Case against Zdravko Tolimir, 15 August 2006). Milorad Trbić’s case was also severed and later transferred to Bosnia and Herzegovina pursuant to Rule 11*bis* of the Rules of Procedure and Evidence (“Rules” or, individually, “Rule”) (see *Prosecutor v. Milorad Trbić*, Case No. IT-05-88/1-PT, Decision on Referral of Case under Rule 11 *bis* with Confidential Annex, 27 April 2007).

Prosecution to question Borovčanin (collectively, "Borovčanin Documents").<sup>10</sup> In the period between 6 and 16 July 2007, the Co-Accused filed their responses to the Rule 65 *ter* Amendment Motion<sup>11</sup> and the Prosecution filed a consolidated Reply.<sup>12</sup> On 17 and 18 July 2007, the Trial Chamber heard Mr Alistair Graham's testimony about the procedures followed during the questioning of Borovčanin.<sup>13</sup> Between 17 and 20 July 2007, the parties filed additional written submissions on whether, if admitted, the Borovčanin Recordings and Transcript could be used with respect to the co-accused other than Borovčanin.<sup>14</sup> The parties further made submissions in court on 19 July 2007.<sup>15</sup>

4. On 25 October 2007, the Trial Chamber granted the Prosecution's request to amend the Exhibit List, adding the Borovčanin Recordings and Transcript as well as the Borovčanin Documents.<sup>16</sup> In particular, it admitted the Borovčanin Recordings and Transcript to be used "as evidence concerning" Borovčanin<sup>17</sup> and the other co-accused but, in the case of the latter, not to be used to prove their acts and conduct.<sup>18</sup> The Trial Chamber further admitted the Borovčanin

<sup>10</sup> Rule 65 *ter* List Amendment Motion, paras 1-6.

<sup>11</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T: 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); Defence Response on Behalf of Ljubiša Beara to the Prosecution's Motion for Leave to Amend 65*ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham, 12 July 2007; 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; Motion on Behalf of Drago 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; Motion on Behalf of Vinko Pandurević Joining the Defence Responses to Prosecution's Motion for Leave to Amend 65*ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham, 13 July 2007; Defence Response on Behalf of Ljubiša Beara to Prosecution Motion for Leave to Supplement Prosecution's 6 July 2007 65*ter* Motion, 13 July 2007; Borovčanin Defence Notification on Joining "Defence Response on Behalf of Ljubiša Beara to the Prosecution's Motion for Leave to Amend 65*ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham", 13 July 2007; 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; Corrigendum to Response of General Miletić to Prosecution Motion for Leave to Amend the Exhibits List by Adding 18 Exhibits Related to Alistair Graham, 16 July 2007 (French original), 25 July 2007 (English translation).

<sup>12</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, 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.

<sup>13</sup> T. 13834-13891, 13894-13946.

<sup>14</sup> 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; 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); Submission on Behalf of Milan Gvero on the Admissibility of an Accused's Interview in the Case of a Co-Accused, 20 July 2007; Prosecution's Further Submission Regarding Admissibility of the Interviews of Ljubomir Borovčanin as Evidence Against the Co-Accused, 20 July 2007; Book of Authorities for the Prosecution Submission Regarding Admissibility of the Interview of Ljubomir Borovčanin as Evidence Against the Co-Accused, 24 July 2007.

<sup>15</sup> T. 13956-13978.

<sup>16</sup> Impugned Decision, para. 83(a).

<sup>17</sup> Impugned Decision, para. 83(d).

<sup>18</sup> Impugned Decision, paras 77, 83(e). On the reasoning informing this holding of the Trial Chamber, see also paras 70-72, 77-80.

Documents without qualification. Lastly, the Trial Chamber granted the parties certification to appeal the Impugned Decision.<sup>19</sup>

5. On 1 November 2007, the Prosecution filed an appeal against the Impugned Decision.<sup>20</sup> Popović and Beara responded on 8 and 9 November.<sup>21</sup> On 13 November 2007, the Prosecution filed its Reply.<sup>22</sup>

6. On 1 November, Borovčanin,<sup>23</sup> Beara,<sup>24</sup> and Gvero,<sup>25</sup> also filed their appeals. The Prosecution reacted with two separate responses on 12 November<sup>26</sup> and on 16 November 2007 Borovčanin filed his reply to the Prosecution Response to Borovčanin.<sup>27</sup>

## II. STANDARD OF APPELLATE REVIEW

7. Trial Chambers exercise broad discretion as regards admission of evidence.<sup>28</sup> In this context, the Appeals Chamber notes that it is seized only of the issue of the admission of evidence: the substantial assessment of the evidence is for the Trial Chamber, subject to an appeal – if any – against the Trial Chamber’s judgement and will be properly undertaken when the trial record is complete. Considering that this type of decision must therefore be given a margin of deference, the Appeals Chamber will reverse such decisions only when an abuse of such discretion is established. The Appeals Chamber will overturn a Trial Chamber’s exercise of its discretion where it is found to

<sup>19</sup> Impugned Decision, paras 82, 83(g).

<sup>20</sup> Prosecution’s Appeal on Refusal to Admit Borovčanin’s Interview with Regard to Acts and Conduct of Co-accused, 1 November 2007 (“Prosecution Appeal”).

<sup>21</sup> Popović Response to Prosecution’s Appeal on Refusal to Admit Borovčanin’s Interview with Regard to Acts and Conduct of Co-accused, 8 November 2007 (“Popović Response”) and *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Response to the Prosecution’s Appeal on Refusal to Admit Borovčanin’s Interview with Regard to Acts and Conduct of Co-accused, 9 November 2007 (“Beara Response”).

<sup>22</sup> Prosecution Consolidated Reply to Popović’s and Beara’s Responses Regarding Admission of Borovčanin’s Interview, 13 November 2007 (“Prosecution Reply”).

<sup>23</sup> Borovčanin Defence Interlocutory Appeal of the Trial Chamber’s Decision on the Admissibility of the Borovčanin Interview and the Amendment to the Rule 65 *ter* Exhibit List, 1 November 2007 (“Borovčanin Appeal”).

<sup>24</sup> Interlocutory Appeal on Behalf of Ljubiša Beara to the Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65 *ter* Exhibit List and Joinder of the Appeal of Milan Gvero against the Decision (in part) on the Admissibility of the Borovčanin Interview, 1 November 2007 (“Beara Appeal”).

<sup>25</sup> Appeal of Milan Gvero against the Decision (in part) on the Admissibility of the Borovčanin Interview, 1 November 2007 (“Gvero Appeal”).

<sup>26</sup> Prosecution Response to Beara and Gvero Interlocutory Appeals Concerning Borovčanin Interviews, 12 November 2007 (“Prosecution Response to Beara and Gvero”); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Prosecution Response to Accused Borovčanin Interlocutory Appeal Concerning His Interview, 12 November 2007 (“Prosecution Response to Borovčanin”).

<sup>27</sup> Borovčanin Defence Reply to Prosecution Response to Accused Borovčanin’s Interlocutory Appeal Concerning His Interview, 16 November 2007.

<sup>28</sup> *Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Delalić et al.* Appeal Judgement”), para. 533. See also: *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007, para. 38; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 20; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.6, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 24.

be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>29</sup>

8. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.<sup>30</sup> For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.<sup>31</sup>

### III. SUBMISSIONS OF THE PARTIES

#### A. The Appeal by the Prosecution

##### 1. Reliability of the Borovčanin Recordings and Transcript

9. The Prosecution contends that the Trial Chamber committed an error by assuming *in abstracto* that a suspect has an incentive to shift the blame to persons who only subsequently become his co-accused in a joint trial, arguing that a more specific and concrete analysis is necessary.<sup>32</sup> According to the Prosecution, *prima facie* reliable evidence has to be admitted and the weight given to it must be determined at the end of the case.<sup>33</sup> Beara responds that the Trial Chamber adequately considered the problems fundamental to the issue, namely the incentive for Borovčanin to place the blame on the other co-accused.<sup>34</sup> He argues that the Prosecution bears the burden of proving beyond reasonable doubt that, in a particular case, the inherent lack of reliability of suspect interviews does not exist.<sup>35</sup>

<sup>29</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("Prlić Decision on Admission of Transcript"), para. 8; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006 ("Milutinović Decision on Review"), para. 6.

<sup>30</sup> *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4; *Milutinović Decision on Review*, para. 6.

<sup>31</sup> *Prlić Decision on Admission of Transcript*, para. 9.

<sup>32</sup> Prosecution Appeal, paras 9, 11.

<sup>33</sup> Prosecution Appeal, para. 11; Prosecution Reply, paras 5-8 and 17, referring to *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 17.

<sup>34</sup> Beara Response, para. 14.

<sup>35</sup> Beara Response, para. 13.

2. Interpretation of Rules 89, 92 bis, 92 ter, and 92 quater

10. The Prosecution argues that, pursuant to Rule 89(C) and (D), the Borovčanin Recordings and Transcript are admissible as against the Co-Accused without qualifications, that is, including those portions which go to prove their acts and conduct.<sup>36</sup> It submits that Rule 89(D) provides for the exclusion of evidence only in cases where “its probative value is substantially outweighed by the need to ensure a fair trial”.<sup>37</sup> The Prosecution alleges that the Trial Chamber’s reliance on the finding by the Appeals Chamber in *Galić* that questions concerning reliability have arisen in connection with witness statements before the Tribunal is mistaken<sup>38</sup> because, in the present case, the evidence in question stems from a *verbatim* record of the questioning of Borovčanin by Prosecution representatives in accordance with Rule 43.<sup>39</sup>

11. Beara avers that the Prosecution’s interpretation of Rules 89(C) and 92 *bis* is inconsistent with the *Galić* Decision, wherein the Appeals Chamber held that Rule 89(C) cannot be used so as to “avoid the stringency” of Rule 92 *bis*.<sup>40</sup> The concerns raised in the *Galić* Decision with regard to hearsay evidence apply *a fortiori* in the present case, according to Beara, because Borovčanin was questioned as a suspect and, therefore, had an even stronger reason not to tell the truth.<sup>41</sup> In any event, according to Beara, the Prosecution has disregarded the interpretation of Rule 92 *bis* by the Appeals Chamber in the *Galić* Decision, which is the relevant issue in the present case, rather than the question of how statements are compiled.<sup>42</sup>

12. The Prosecution replies that the conclusion in the *Galić* Decision, that Rule 92 *bis*(C) bars admission of evidence going to the acts and conduct of an accused has been superseded by the new Rule 92 *quater*(B), which explicitly contemplates the admission of such evidence.<sup>43</sup> The Prosecution further replies that the letter of Rules 92 *bis* and 92 *quater* also shows that they are inapplicable to the present case.<sup>44</sup> Rule 92 *quater* is not applicable as it concerns evidence which is unavailable for “factual reasons”, such as the death of a witness as opposed to “legal reasons”, such as the inability to compel the testimony of an accused.<sup>45</sup> Moreover, Rule 92 *bis* and Rule 92 *ter* are inapplicable because they use the term “witness” which does not encompass “a suspect interview

<sup>36</sup> Prosecution Appeal, paras 2-4.

<sup>37</sup> Prosecution Appeal, para. 10 (referring to Rule 89(D)).

<sup>38</sup> Prosecution Appeal, paras 20-21, referring to *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 (*Galić* Decision).

<sup>39</sup> Prosecution Appeal, para. 22; Prosecution Reply, para. 11.

<sup>40</sup> Beara Response, para. 10, referring to *Galić* Decision, para. 31.

<sup>41</sup> Beara Response, paras 11-12.

<sup>42</sup> Beara Response, para. 15.

<sup>43</sup> Prosecution Reply, para. 10.

<sup>44</sup> Prosecution Reply, paras 12-16.

<sup>45</sup> Prosecution Reply, para. 15.

originating from an accused”.<sup>46</sup> The Prosecution argues that the word “witness” shows that these Rules deal with instances where the evidence is in principle available *viva voce*, but can be admitted in writing, under certain conditions, so as to accelerate the proceedings. In the present case, however, if the Borovčanin Recordings and Transcript are not introduced in writing, they would be lost.<sup>47</sup>

### 3. The Requirement of Cross-examination

13. The Prosecution alleges that the exclusion of the Borovčanin Recordings and Transcript with respect to the acts and conduct of the other co-accused, is inconsistent with the prior holding of the Appeals Chamber in the *Martić* case, that evidence not tested by cross-examination does not necessarily need to be excluded.<sup>48</sup> The Prosecution argues that the present case is actually similar to the one dealt with in the *Martić* Decision, where a witness died before the defence was able to complete his cross-examination. Indeed, the Appeals Chamber in *Martić* relied on the European Court on Human Rights (“ECtHR”) case-law to support the proposition that evidence not tested through cross-examination should not be excluded as a matter of principle from the trial record.<sup>49</sup> The same jurisprudence has repeatedly upheld the admission of “uncrossed hearsay evidence” originating from one accused against co-accused.<sup>50</sup>

14. Beara and Popović distinguish the Borovčanin Recordings and Transcript from the evidence given by Milan Babić (“Babić”), which was allowed in *Martić* on two grounds. First, Babić was a witness in the *Martić* case, whereas Borovčanin’s statements are those of an accused and would be used against his co-accused in a joint trial.<sup>51</sup> Popović submits in this respect that the “inherent conflict of interest between co-accused” was not considered in the *Martić* Decision.<sup>52</sup> Second, Beara and Popović argue that the present situation is also distinguishable because Borovčanin has the right to remain silent under Article 21(4)(g) of the Tribunal’s Statute (“Statute”).<sup>53</sup> Popović adds that, if Borovčanin makes use of his right to remain silent, the other co-accused will be prevented from exercising their right to cross-examine him pursuant to Article 21(4)(e) of the Statute.<sup>54</sup> Beara

<sup>46</sup> Prosecution Reply, para. 13 (emphasis omitted).

<sup>47</sup> Prosecution Reply, paras 14, 15.

<sup>48</sup> Prosecution Appeal, para. 3, referring to *Prosecutor v. Milan 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 (“*Martić* Decision”), para. 20; Prosecution Reply para. 3.

<sup>49</sup> Prosecution Reply, para. 4, referring to the *Martić* Decision para. 19.

<sup>50</sup> Prosecution Reply, para. 4, referring to *Carta v. Italy*, Application No. 4548/02, Judgement, 20 April 2006, paras 46-55; *Ferrantelli & Santangelo v. Italy*, Application No. 19874/92, Judgement, 26 June 1996, paras 51-52; *Gossa v. Poland*, Application No. 47986/99, 9 January 2007, paras 57-65.

<sup>51</sup> Beara Response, para. 4; Popović Response, paras 7-8.

<sup>52</sup> Popović Response, para. 5.

<sup>53</sup> Beara Response, para. 19; Popović Response, para. 6.

<sup>54</sup> Popović Response, para. 6.

points out that Borovčanin has not been subjected to any cross-examination.<sup>55</sup> Thus, the present situation is further distinguishable from the one analyzed in *Martić*, where the witness in question (Milan Babić) was cross-examined for a certain amount of time.<sup>56</sup>

15. Moreover, the Prosecution claims that the Trial Chamber erred on three grounds when it held that ECtHR jurisprudence is irrelevant in the present case. First, the Appeals Chamber has explicitly considered ECtHR jurisprudence as a “useful source of guidance”.<sup>57</sup> Second, in this specific case, the right of the accused to cross-examine witnesses is spelled out identically under the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, as amended by Protocol No. 11 (“ECHR”)<sup>58</sup> and under the Statute.<sup>59</sup> Third, the Trial Chamber erroneously regarded the test on the propriety of admission as distinct from the question of the right to a fair trial, which is the test to be met under the ECHR. The Prosecution maintains that, in ascertaining the propriety of a decision under Rule 89(C), the Trial Chamber needs – on the basis of Rule 89(B) and (D) – to consider whether fair trial guarantees are met.<sup>60</sup>

#### 4. Joinder of Proceedings

16. The Prosecution further argues that the Trial Chamber erroneously applied Rule 82(A), when it held that accused in a joint trial must have the same “technical rights” that they would enjoy if they were tried individually.<sup>61</sup> The Prosecution claims that the system provides other safeguards, such as the requirement that untested evidence be corroborated if relied upon to ground a conviction. Otherwise, an accused would always be able to argue that “were he tried alone he would have the right to examine or cross-examine his co-accused whereas in a joinder case he does not.”<sup>62</sup> Popović responds that cross-examination is the only way to adequately assess whether or not Borovčanin told the truth when questioned by the Prosecution.<sup>63</sup>

<sup>55</sup> Beara Response, para. 19.

<sup>56</sup> Beara Response, paras 18-19; see also Popović Response, para. 4.

<sup>57</sup> Prosecution Appeal, para. 13, referring to *Martić* Decision, para. 19.

<sup>58</sup> 213 UNTS 221, CETS 005. See <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>59</sup> Prosecution Appeal, para. 14, referring to the ECHR and the Statute.

<sup>60</sup> Prosecution Appeal, para. 15.

<sup>61</sup> Prosecution Appeal, paras 23-24; Prosecution Reply, para. 19.

<sup>62</sup> Prosecution Appeal, para. 24, quoting Impugned Decision, Partial Dissenting Opinion of Judge Kimberly Prost, para.

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<sup>63</sup> Popović Response, para. 8.



## **B. The Appeals by the Co-Accused**

### **1. Borovčanin Appeal**

17. Borovčanin submits that the Trial Chamber erred in allowing the Prosecution to add the Borovčanin Recordings and Transcript, as well as the Borovčanin Documents, to its Exhibit List.<sup>64</sup> Borovčanin claims that the Trial Chamber failed to give adequate weight to arguments opposing this late addition and to the lack of a valid reason for the Prosecution's late request to amend. Moreover, he claims that the Trial Chamber abused its discretion by concluding that the Prosecution inadvertently omitted the Borovčanin Recordings and Transcript, as well as the Borovčanin Documents, from the original Exhibit List.<sup>65</sup>

18. The Prosecution responds that the Trial Chamber applied the Tribunal's jurisprudence and gave adequate weight to the relevant facts before allowing the Prosecution to amend its Exhibit List.<sup>66</sup> Noting Borovčanin's failure to identify any prejudice suffered,<sup>67</sup> the Prosecution recalls the factors listed in the Impugned Decision: (i) the Prosecution's evidence that the exhibits were of *prima facie* relevance to the Indictment; (ii) the lack of prejudice to the Accused; and (iii) the fact that the Prosecution's disclosure had provided enough time for the Co-Accused to prepare for Mr Graham's cross-examination.<sup>68</sup>

19. Borovčanin further challenges the admissibility, in relation to himself, of the Borovčanin Recordings and Transcript and of the Borovčanin Documents, claiming that the Trial Chamber's finding that Borovčanin was adequately represented during the questioning, considering the totality of the circumstances, was erroneous.<sup>69</sup> The circumstances that the Trial Chamber should have taken into account included (i) Counsel's relative silence during most of the questioning; (ii) Counsel's absence during the first three hours of the First Interview; (iii) Counsel's failure to inquire about the portion of the questioning that he missed; (iv) Counsel's failure to ask how Borovčanin was related to the investigation; (v) Counsel's failure to clarify Borovčanin's status as a potential suspect and his corresponding procedural rights; and (vi) the representative of the Prosecution's failure to ensure that Counsel understood the relevant Rules.<sup>70</sup>

20. Borovčanin insists that his waiver of the right to have counsel present during the whole of the questioning was invalid as he was informed that he was a "possible" rather than an "actual"

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<sup>64</sup> Borovčanin Appeal, para. 12.

<sup>65</sup> Borovčanin Appeal, paras 11-12.

<sup>66</sup> Prosecution Response to Borovčanin, paras 4-5.

<sup>67</sup> Prosecution Response to Borovčanin, para. 8.

<sup>68</sup> Prosecution Response to Borovčanin, paras 4-7.

<sup>69</sup> Borovčanin Appeal, paras 14, 22.

suspect. He refers to ECtHR and United States of America's jurisprudence to support the contention that his waiver was therefore not done voluntarily, knowingly or intelligently, thus concluding that nothing said thereafter should be admitted, pursuant to Rules 42 and 95.<sup>71</sup> Borovčanin submits that pursuant to the fair trial guarantees enshrined in Article 21 of the Statute, the summons, which did identify him as a suspect, was nullified when Mr Graham subsequently stated that he "may be a suspect". He therefore assigns error to the Trial Chamber's conclusion that Mr Graham confirmed Borovčanin's status as described in the summons.<sup>72</sup>

21. While conceding that Rule 42(a)(iii) does not require the Prosecution to explicitly warn that material gathered during a suspect's questioning could be used "against him", Borovčanin however argues that, since Mr Graham did tell Borovčanin that the questioning could be used "against him" but these words were not translated into Borovčanin's own language, Borovčanin was misled as to his status and therefore deprived of due process.<sup>73</sup>

22. In relation to Counsel's representation and to Borovčanin's waiver of the right to remain silent, the Prosecution avers that Borovčanin's description of Counsel's conduct is "incomplete",<sup>74</sup> as Borovčanin did not mention Counsel's meeting with Borovčanin or his suggestion that the session be terminated to discuss matters with his client.<sup>75</sup> Rejecting Borovčanin's interpretation of ECtHR and U.S. case law as inapplicable before the Tribunal, the Prosecution claims that the waiver of the right to remain silent was valid pursuant to Rule 42<sup>76</sup> and that the Trial Chamber's decision on this matter reflects its assessment of the circumstances enumerated in Borovčanin's appeal.<sup>77</sup> The Prosecution also faults Borovčanin for failing to identify the specific breach of his rights or to link any such breach to the admissibility issue.<sup>78</sup>

23. In his reply, Borovčanin suggests that the finding in the Impugned Decision that the admission of the Borovčanin Recordings and Transcript and of the Borovčanin Documents "in no way alters the Prosecution's case" is unsubstantiated.<sup>79</sup> Borovčanin submits that the Prosecution has not provided a reasonable excuse for its late amendment to the Exhibit List,<sup>80</sup> and that the Trial Chamber unduly allowed the Prosecution to make such unsubstantiated and untimely amendments

<sup>70</sup> Borovčanin Appeal, paras 14, 17-19.

<sup>71</sup> Borovčanin Appeal, paras 24-30.

<sup>72</sup> Borovčanin Appeal, paras 32-38.

<sup>73</sup> Borovčanin Appeal, paras 39-42.

<sup>74</sup> Prosecution Response to Borovčanin, para. 11.

<sup>75</sup> Prosecution Response to Borovčanin, paras 11-12.

<sup>76</sup> Prosecution Response to Borovčanin, para. 15.

<sup>77</sup> Prosecution Response to Borovčanin, para. 15.

<sup>78</sup> Prosecution Response to Borovčanin, para. 16.

<sup>79</sup> Borovčanin Reply, para. 8.

<sup>80</sup> Borovčanin Reply, para. 10.

without regard to these amendments' prejudicial effect on the Co-Accused.<sup>81</sup> Pointing to the cross-examination of Alistair Graham<sup>82</sup> and to the Trial Chamber's statement regarding his Counsel's conduct,<sup>83</sup> Borovčanin argues that Counsel's failure to "effectively and diligently" represent him is reflected in his failure to terminate the questioning instead of merely raising the issue after several hours of interviewing.<sup>84</sup> Borovčanin avers that Counsel's ineffectiveness was based not only on his experience, but on his relative unwillingness to educate himself on the applicable procedural rules.<sup>85</sup> Addressing the Prosecution's treatment of foreign case-law, Borovčanin submits that Rule 89(A) provides for the application of other sources of law when "lacunae in its rules of evidence" exist.<sup>86</sup>

## 2. Gvero Appeal

24. Gvero appeals the Impugned Decision in part. He argues generally that Trial Chamber did not properly distinguish between the status of a witness and that of an accused in deciding to admit the Borovčanin Recordings and Transcript.<sup>87</sup> Gvero submits that Borovčanin, has the choice of testifying during his defence case, and so cannot also be a Prosecution witness in his own trial against the Co-accused.<sup>88</sup> By "joining Borovčanin to the case", the Prosecution thus effectively lost the opportunity to use him as a witness in the case.<sup>89</sup>

25. Gvero argues that the Trial Chamber erred by referring to Rules 92 *bis* and 92 *ter*, which apply specifically to witnesses and not to accused persons: any analogy between the situation of Borovčanin and those of witnesses under these Rules is therefore fundamentally unfair.<sup>90</sup> Gvero agrees with the Trial Chamber's position that Rule 92 *quater* refers to circumstances that are inapplicable to the present case,<sup>91</sup> but argues that the Trial Chamber's interpretation of Rule 82(A) – dealing with the rights of an accused in joint and separate trials – should extend the prohibition of using the Borovčanin Recordings and Transcript as proof of the co-accused's acts and conduct to prevent their use as to *all* evidentiary issues.<sup>92</sup> Gvero further claims that since the Rules do not speak of the evidentiary value of a previous statement of an accused in relation to his co-accused, it would be improper to settle the issue through a Trial Chamber's judicial interpretation.<sup>93</sup>

<sup>81</sup> Borovčanin Reply, para. 11.

<sup>82</sup> Borovčanin Reply, para. 12.

<sup>83</sup> Borovčanin Reply, para. 14.

<sup>84</sup> Borovčanin Reply, para. 15.

<sup>85</sup> Borovčanin Reply, paras 16-17.

<sup>86</sup> Borovčanin Reply, paras 20-21.

<sup>87</sup> Gvero Appeal, para. 7.

<sup>88</sup> Gvero Appeal, para. 13.

<sup>89</sup> Gvero Appeal, para. 9.

<sup>90</sup> Gvero Appeal, paras 10-11.

<sup>91</sup> Gvero Appeal, para. 12.

<sup>92</sup> Gvero Appeal, para. 14.

<sup>93</sup> Gvero Appeal, para. 15.

26. In its response, the Prosecution addresses a number of Gvero's arguments. It rejects Gvero's propositions that the joinder of cases renders Borovčanin unavailable as a witness, since the Borovčanin Recordings and Transcript are documentary evidence rather than witness testimony.<sup>94</sup> In any event, according to the Prosecution, the joinder decision was issued by the Trial Chamber.<sup>95</sup> The Prosecution also objects to Gvero's interpretation of Rule 82(A) as requiring identical rights for accused tried separately and jointly, insisting that such rights must only be "equivalent". The Prosecution specifically notes that the right to cross-examine in joint proceedings is protected by requiring corroboration for evidence not tested by cross-examination.<sup>96</sup>

### 3. Beara Appeal

27. Beara joins Gvero's submissions on appeal in their entirety, further elaborating that the Trial Chamber erred by granting the Prosecution's request to add the Borovčanin Recordings and Transcript and the Borovčanin Documents to its Exhibit List.<sup>97</sup>

28. First, Beara points to the Prosecution's failure to address the need to ensure a fair trial under Rule 89(D)<sup>98</sup> by failing to show "good cause" in requesting permission to amend the Exhibit List,<sup>99</sup> and by disclosing the Borovčanin Recordings and Transcript and the Borovčanin Documents at a late stage of the proceedings, despite having had them in its possession for more than five years.<sup>100</sup> Beara then argues that his fair trial rights pursuant to Articles 20 and 21 of the Statute were prejudiced by numerous late amendments to the Exhibit List,<sup>101</sup> averring that the Trial Chamber erred in finding that the Defence only provided "general assertions of prejudice" since even the late submission of relatively short documents has affected its preparation in relation to other material.<sup>102</sup>

29. Second, Beara submits that the Trial Chamber's admission of the Borovčanin Recordings and Transcript against the other co-accused violates his right to examine the witnesses against him. He questions the reasoning supporting the application by analogy of Rule 92 *quater* to the situation under consideration.<sup>103</sup> Noting that the jurisprudence of the Tribunal is inconclusive on the admission of a statement by an accused against another co-accused, Beara further cites both Trial

<sup>94</sup> Prosecution Response to Beara and Gvero, paras 22-23.

<sup>95</sup> Prosecution Response to Beara and Gvero, para. 27.

<sup>96</sup> Prosecution Response to Beara and Gvero paras 28-29.

<sup>97</sup> Beara Appeal, para. 9.

<sup>98</sup> Beara Appeal, para. 13.

<sup>99</sup> Beara Appeal, para. 17.

<sup>100</sup> Beara Appeal, paras 14-15.

<sup>101</sup> Beara Appeal, para. 19.

<sup>102</sup> Beara Appeal, paras 20-23.

<sup>103</sup> Beara Appeal, para. 24.

Chamber decisions and external authorities to support his argument that such evidence should be excluded.<sup>104</sup>

30. As noted above, the Prosecution filed a joint response to the Gvero Appeal and to the Beara Appeal. In this Response, the Prosecution notes that the rights of all co-accused featured prominently in the Trial Chamber's decision.<sup>105</sup> The Prosecution submits that the Trial Chamber correctly allowed the amendment of the Exhibit List because the Prosecution had shown good cause: the exhibits were *prima facie* relevant to the Indictment and the disclosure did not prejudice the rights of the accused in the particular circumstances of the case.<sup>106</sup> As evidence of the absence of prejudice, the Prosecution notes that most of the new material was disclosed in 2005<sup>107</sup> and that the July 2007 disclosure of the remaining materials, which were "neither lengthy nor complicated", were either referenced in the interview transcripts disclosed in 2005 or only became relevant after the Prosecution became able to anticipate Defence challenges.<sup>108</sup>

31. The Prosecution submits that, contrary to Beara's arguments, Rules 89(C) and (D) do address the admission of the Borovčanin Recordings and Transcript against the other co-accused by treating them as hearsay evidence.<sup>109</sup> The Prosecution rejects Beara's reference to the Tribunal's jurisprudence as well as to external authorities as incorrect, inapplicable, or unhelpful.<sup>110</sup> The Prosecution assigns further error to Beara and Gvero's application of Rules 92 *bis*, 92 *ter*, and 92 *quater* to the admissibility issue,<sup>111</sup> arguing that, contrary to Beara's argument, the Trial Chamber did not rely on, but rather noted the limited applicability of the Rule 92 *quater*(A) cases.<sup>112</sup> The Prosecution submits that, while Rule 92 *quater*(A) involves mentally or physically unavailable witnesses, the reasons for unavailability do not matter: this provision is relevant, by analogy, to the admission of interview transcripts of a legally unavailable person.<sup>113</sup> The Prosecution therefore reiterates its position that the Trial Chamber erred in automatically excluding the Borovčanin Recordings and Transcript as proof of the acts and conduct of the co-accused other than Borovčanin.<sup>114</sup>

<sup>104</sup> Beara Appeal, paras 31-39.

<sup>105</sup> Prosecution Response to Beara and Gvero, paras 8-9.

<sup>106</sup> Prosecution Response to Beara and Gvero, paras 10-12.

<sup>107</sup> Prosecution Response to Beara and Gvero, para. 13.

<sup>108</sup> Prosecution Response to Beara and Gvero, para. 14.

<sup>109</sup> Prosecution Response to Beara and Gvero, paras 16-17.

<sup>110</sup> Prosecution Response to Beara and Gvero, paras 18-21.

<sup>111</sup> Prosecution Response to Beara and Gvero, para. 24.

<sup>112</sup> Prosecution Response to Beara and Gvero, para. 24.

<sup>113</sup> Prosecution Response to Beara and Gvero, para. 26.

<sup>114</sup> Prosecution Response to Beara and Gvero, para. 26.

## IV. DISCUSSION

### A. Borovčanin's Right to Effective Assistance of Counsel

32. A preliminary matter to the issue of admission of the Borovčanin Recordings and Transcript and the Borovčanin Documents is the question of whether, as Borovčanin submits, he was not adequately represented by Counsel during his questioning by the Prosecution.<sup>115</sup> Indeed, the questioning of a suspect pursuant to Rules 42 and 43 demands stringent safeguards in order to protect the questioned individual's right not to incriminate himself.<sup>116</sup>

33. In this respect, the Trial Chamber considered two relevant principles: (i) whether the procedural safeguards set forth in Rules 42 and 43 were satisfied; and (ii) whether the admissibility test laid down in Rules 89(C) and 89(D) (relevant evidence with probative value and not substantially outweighed by the need to ensure a fair trial) was met.<sup>117</sup> It further carefully analyzed the Tribunal's case law applying these principles<sup>118</sup> and took into account the investigator's examination and cross-examination in court in order to reach its conclusion on whether the rights of Borovčanin had been breached.<sup>119</sup>

34. The Appeals Chamber recalls that the Prosecution or another competent authority who is obliged to inform a suspect or an accused about his right to counsel must do so in an unambiguous way and in a language that the suspect or accused understands.<sup>120</sup> This procedure is essential to ensure the rights of each suspect. On the basis of the arguments of the parties, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion or otherwise erred in concluding that the Prosecution unambiguously advised Borovčanin about his right to counsel. Moreover, when Borovčanin appeared for his questioning, he was advised that he could wait for his attorney to arrive; notwithstanding this assurance, he agreed that the questioning could begin.<sup>121</sup>

35. Furthermore, the Appeals Chamber notes that Borovčanin has not brought specific evidence showing his former Counsel's misconduct, lack of necessary qualification and competence, or otherwise inappropriate behaviour.<sup>122</sup> In particular, Borovčanin does not contest the Prosecution's

<sup>115</sup> Borovčanin Appeal, paras 14-22.

<sup>116</sup> *Prlić* Decision on Admission of Transcript, para. 45.

<sup>117</sup> Impugned Decision, para. 28.

<sup>118</sup> Impugned Decision, paras 29-39.

<sup>119</sup> See, for example, Impugned Decision, paras 6, 33 and 37.

<sup>120</sup> *Delalić et al.* Appeal Judgement, paras 551-552.

<sup>121</sup> Impugned Decision, para. 33.

<sup>122</sup> *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 65 ("lurking doubt that injustice may have been caused to the accused by gross professional incompetence"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, 9 May 2007, para. 23. Cf., for example, *Prosecutor v. Sefer 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,

suggestion that he had originally misrepresented the conduct of Counsel, omitting to mention the fact that Counsel did have a meeting with him and did request termination of the questioning in order to discuss matters with Borovčanin.<sup>123</sup> From the moment when Counsel arrived, and considering that Borovčanin has not shown any misbehaviour by his former Counsel, it was not unreasonable for the Trial Chamber to conclude that Borovčanin's right to effective representation had been ensured.

36. In light of these circumstances, and taking into consideration all of the relevant arguments of the parties in this respect, the Appeals Chamber finds that in this case the Trial Chamber did not abuse its discretion in concluding that Borovčanin's procedural rights – both his right to be informed about the right to counsel and his right to effective representation – had been effectively safeguarded during the questioning by the Prosecution, both before and after Counsel's arrival at the location of the questioning.

### **B. Amendment to the Exhibit List**

37. Rule 65 *ter* (E)(iii) provides, *inter alia*, that the Prosecution shall file, within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference, “the list of exhibits the Prosecution intends to offer”, serving on the Defence copies of the listed exhibits. In the exercise of its inherent discretion in managing the trial proceedings and if satisfied that this is in the interests of justice, a Trial Chamber may, however, grant a Prosecution's request to amend the above-mentioned list. In doing so, a Trial Chamber must be satisfied that, taking into account the specific circumstances of a case, good cause is shown for amending the original list and that the newly offered material is relevant and of sufficient importance to justify the late addition. Moreover, a Trial Chamber must carefully balance any amendment to the lists in Rule 65 *ter* with an adequate protection of the rights of the accused.<sup>124</sup>

38. In the present case, the Trial Chamber carefully assessed the arguments of the parties on the amendment of the Exhibit List<sup>125</sup> and came to the conclusion that allowing the proposed amendments to the Exhibit List was in the interest of justice. This conclusion was based on the

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paras 61-62. See also *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, paras 67-84 (in particular para. 80 on requirement to show some “tangible example of gross professional misconduct by his Counsel such as resulted in a miscarriage of justice”) and *Ferdinand Nahimana et Consorts c. Procureur, affaire n° ICTR-99-52-A, Arrêt*, 28 November 2007 (“*Nahimana et al.* Appeal Judgement”), paras 130-131.

<sup>123</sup> Prosecution Response to Borovčanin, paras 11-16; Borovčanin Reply, paras 12-19.

<sup>124</sup> Cf. Rule 73 *bis* (E) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. See, in this respect, *Nahimana et al.* Appeal Judgement, paras 228-233.

<sup>125</sup> Impugned Decision, paras 10-17.

*prima facie* relevance of the newly proposed material and on the fact that enough time had been provided to the Co-Accused to familiarize themselves with the new material. Moreover, the Co-Accused had not demonstrated what prejudice would arise in the particular circumstances by allowing the amendment of the Exhibit List.<sup>126</sup> The Trial Chamber found that the Prosecution had only inadvertently omitted the Borovčanin Recordings and Transcript and the Borovčanin Documents from its original Exhibit List.<sup>127</sup> It further considered that, “in the context of a complex multi-accused trial in which a considerable amount of evidence is presented by the Prosecution, a certain level of flexibility must be maintained”.<sup>128</sup>

39. The Appeals Chamber finds that, in the circumstances of this case, the Trial Chamber has not abused its discretion in allowing a late amendment to the Exhibit List. Contrary to what Borovčanin<sup>129</sup> and Beara<sup>130</sup> argue, the Trial Chamber did not err in setting out the applicable law and in applying it to the circumstances of the case. In particular, it fell within the Trial Chamber’s discretion to conclude that the failure to add the material in question to the original Exhibit List was an inadvertent omission and that the rights of the accused could be safeguarded through means other than excluding potentially relevant material.

### C. Joinder of Proceedings

40. The parties are not in disagreement that the present trial proceedings originate from a request of joinder filed by the Prosecution, which the Trial Chamber granted on 31 October 2005, despite subsequent severance of the trial of two accused.<sup>131</sup>

41. Rule 82 provides that:

- (A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.
- (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Severance or joinder of cases is a matter falling within the discretion of Trial Chambers.<sup>132</sup>

<sup>126</sup> Impugned Decision, paras 19-20.

<sup>127</sup> Impugned Decision, para. 21.

<sup>128</sup> Impugned Decision, para. 18.

<sup>129</sup> Borovčanin Appeal, paras 11-12.

<sup>130</sup> Beara Appeal, paras 9-23.

<sup>131</sup> See *supra*, para. 2.

<sup>132</sup> *Prosecutor v. Ante Gotovina and Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006 (“*Gotovina* Decision of 25 October 2006”), para. 6; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s on Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006 (“*Miletić* Decision on Joinder”), para. 5;



42. The Trial Chamber recalled the import of this Rule and took it into account when reaching its conclusions, holding that, since the Prosecution elected to try Borovčanin jointly with the other accused in this trial, 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.<sup>133</sup>

43. Undoubtedly, the situation posed by the request for admission of the Borovčanin Recordings and Transcript into evidence does indeed modify the situation for Borovčanin's co-accused – had the trials been separate, each of them could conceivably request to have Borovčanin examined as a witness in their own trials, for he would not have benefited from the right to remain silent in those proceedings. The issue is whether such different treatment would result in prejudice.<sup>134</sup> The Appeals Chamber notes that one of the elements to be taken into account when joining different proceedings is indeed “the protection of the rights of the accused pursuant to Article 21 of the Statute”<sup>135</sup> and not whether the protection of the accused's rights would be identical in a separate and in a joint trial.

44. Even if the Co-Accused were tried separately, they would not necessarily have the opportunity to conduct an effective cross-examination of Borovčanin. If the Prosecution were to tender the Borovčanin Recordings and Transcript, the various Co-Accused could call Borovčanin as a witness and subject him to cross-examination; however, Borovčanin might refuse to answer questions pursuant to Rule 90(E), which stipulates that a witness may object to giving self-incriminating statements.<sup>136</sup> Nonetheless, the Trial Chamber, in principle, could still admit all of the documents in question as such into evidence. Thus, it cannot be said *a priori* that a joinder in such circumstances would entail prejudice to Borovčanin's co-accused.

45. Moreover, the Appeals Chamber does not accept that Rule 82(A) bars *in abstracto* any difference of treatment between accused in a joint trial and those in separate trials. The consequence of such reasoning would be that an accused could *always* successfully oppose joinder on the basis of the fact 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. The Appeals Chamber has already stated that, as long as a Trial Chamber considers potential prejudice to an accused stemming from joinder, his right to examine Prosecution witnesses is not unduly impaired by the fact that Counsel for another

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*Prosecutor v. Radoslav Brđanin and Momir Talic*, Case No. IT-99-36-AR72.2, Decision on Request to Appeal, 16 May 2000, p. 4. See, e.g., *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković Motion for Partial Severance, 27 September 2007, para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Jadranko Prlić's Motion for Severance, 17 August 2007, para. 22.

<sup>133</sup> Impugned Decision, paras 73 and 75.

<sup>134</sup> *Gotovina* Decision of 25 October 2006, para. 17.

<sup>135</sup> *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 8.

accused will examine those witnesses before, or even instead of, him in a joint trial.<sup>137</sup> Similarly, a Trial Chamber will have to be vigilant in ensuring the exercise of all the accused's rights related to a fair trial in such a situation – but this may not translate into barring any difference of treatment across the board.

46. The Appeals Chamber concludes that, though different safeguards apply in the two instances, there is no prejudice *per se* against Borovčanin's co-accused by allowing the Borovčanin Recordings and Transcript and the Borovčanin Documents into evidence in a joint trial. This does not, however, exclude the possibility that in certain circumstances, it might be appropriate for a Trial Chamber to take additional measures in order to ensure the right to a fair trial of an accused, including – but not limited to – severing proceedings, excluding certain evidence, and calling or recalling certain witnesses to be examined in court.

#### **D. Admissibility of Borovčanin Recordings and Transcript**

47. As mentioned above, the Trial Chamber admitted the Borovčanin Recording and Transcripts in relation to all Co-Accused in the instant proceedings.<sup>138</sup> However, it limited their admission as evidence concerning Borovčanin's co-accused, ordering that they not be used as evidence which goes to proof of the acts and conduct of co-accused other than Borovčanin.<sup>139</sup> The Appeals Chamber notes that several arguments raised by the parties in relation to the admissibility of the Borovčanin Recordings and Transcript in general<sup>140</sup> as well as in relation to the acts and conduct of Borovčanin's co-accused are interrelated.<sup>141</sup>

48. In the *Prlić* Decision on Admission of Transcript, the Appeals Chamber has recently reasoned that “[a] request to admit a transcript of a suspect's questioning into the trial record cannot be equated with a request to add the person in question to the Prosecution's witness list”.<sup>142</sup> Moreover, “as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination” as long as findings that a trier of fact has to reach beyond reasonable doubt (*i.e.*, on facts indispensable for a conviction or to find aggravating circumstances) require sufficient corroboration.<sup>143</sup> The Appeals Chamber has further remarked that this “does not mean that a trier of fact would always abuse its discretion in limiting, or even

<sup>136</sup> The basis of this rule is the fundamental right to remain silent enshrined in Art. 14(3)(g) of the International Covenant on Civil and Political Rights of 16 December 1966 (999 UNTS 171). For the ECHR, see *Funke v. France*, ECtHR, App. No. 10828/84, 25 February 1993, para. 44.

<sup>137</sup> *Miletić* Decision on Joinder, para. 29.

<sup>138</sup> Impugned Decision, para. 83(d) and (e).

<sup>139</sup> Impugned Decision, para. 83(e).

<sup>140</sup> See, *inter alia*, Gvero Appeal, paras 10-15, Beara Appeal, paras 24, 31-39.

<sup>141</sup> See, *inter alia*, Prosecution Appeal, paras 2-4, 9-15, 20-22.

<sup>142</sup> *Prlić* Decision on Admission of Transcript, para. 38.

denying, the admission of certain statements of a co-accused in light of Rules 89 and 95 and depending on the circumstances of the case".<sup>144</sup>

49. Trial Chambers faced with exceptional circumstances might indeed need to take steps additional to the requirement of corroboration described above in order to ensure the rights of all accused in a trial. In particular, the Appeals Chamber notes that there are indeed differences between the *Prlić et al.* case and the instant proceedings such as, for example, the fact that the investigator who questioned the suspect – Mr Alistair Graham – testified as a witness and that, therefore, the Trial Chamber had the opportunity to assess in greater detail the modalities of the questioning.

50. However, it would be wrong to exclude certain evidence solely because of the supposedly intrinsic lack of reliability of the content of a suspect's questioning in relation to persons who later became that suspect's co-accused. In this context, the Appeals Chamber notes that there is a fundamental distinction between admitting evidence and according weight to it.<sup>145</sup>

51. The Appeals Chamber further notes that, in order to properly ensure the rights of all Co-Accused in the present proceedings, a trier of fact is required to carry out a careful balancing of the probative value of the suspect's questioning to be admitted into evidence, taking into account all of the circumstances of the case.<sup>146</sup>

52. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber committed a discernible error. Taking into account that a proper assessment of the material in question should be done on the basis of the trial record,<sup>147</sup> and considering that the Impugned Decision is partly premised on an incorrect interpretation of the governing law and consequent lack of reasoning in relation to the content and modalities of the Borovčanin Recordings and Transcript, the Appeals Chamber finds it necessary to remand the issue to the Trial Chamber.

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<sup>143</sup> *Prlić* Decision on Admission of Transcript, paras 55-61.

<sup>144</sup> *Prlić* Decision on Admission of Transcript, para. 62, in particular fn. 104.

<sup>145</sup> See already, *mutatis mutandis*, *Prlić* Decision on Admission of Transcript, para. 62.

<sup>146</sup> *Prlić* Decision on Admission of Transcript, paras 61-62.

<sup>147</sup> *Prlić* Decision on Admission of Transcript, para. 62.

## V. DISPOSITION

In light of the foregoing, the Appeals Chamber

**DISMISSES** the Borovčanin Appeal;

**DISMISSES** the Beara Appeal;

**DISMISSES** the Gvero Appeal;


**ALLOWS** the Prosecution Appeal in part;

**REMANDS** the issue to the Trial Chamber for further action consistent with the present decision;

**DISMISSES** the remainder of the Prosecution Appeal.

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

Done this 14th day of December 2007,  
At The Hague,  
The Netherlands.

  
\_\_\_\_\_  
Judge Fausto Pocar  
President

[Seal of the Tribunal]