Commentary

1. Introduction

This commentary concerns six decisions on ICTY evidence and procedure.[1] Two decisions (a trial and an appeals decision) concern the same issue in the same case, i.e. the admissibility of suspect interviews against co-accused in multi-accused trials. The other four each concern different aspects of witness examination and, as such, are dealt with separately.

2. Admissibility of suspect interviews against co-accused in multi-accused trials

2.1 Procedural background

On 20 February, 11 and 12 March 2002, the Office of the Prosecutor (OTP) questioned Ljubomir Borovčanin as a suspect (within the meaning of Rules 42 and 43 of the ICTY Rules of Procedure and Evidence (RPE)). The interview was audio-recorded and transcribed (Borovčanin Recordings and Transcript). On 6 July 2007, the prosecution in the case of Popović *et al.*, in which Borovčanin was an accused, filed a confidential motion seeking the addition of, *inter alia*, the Borovčanin Recordings and Transcript to its Rule 65 *ter* list of exhibits.[2] On 17 and 18 July 2007, OTP investigator Alistair Graham testified about the procedures followed during Borovčanin's interview. On 25 October 2007, the Trial Chamber rendered its decision on the prosecution motion (Popović *et al.* Trial Decision)[3] and admitted the Borovčanin Recordings and Transcript into evidence in the case against all of the accused, on the proviso that they could not be used as proof of the acts and conduct of Borovčanin's co-accused (Vujadin Popović, Ljubiša Beara, Drago Nikolić, Radivoje Miletić, Milan Gvero and Vinko Pandurević). On 14 December 2007 the Appeals Chamber rendered its decision on the prosecution and defence appeals against the Popović *et al.* Trial Decision, remanding the issue back to the Trial Chamber on the basis of a discernible error.[4]

2.2 Applicable law and practice

Neither the ICTY Statute nor RPE make special provision for the admission of an out-of-court statement of a suspect (be it in the form of a written statement or a record of interview) in his or her (multi-accused) trial. Nevertheless, several ICTY Trial Chambers have admitted such statements pursuant to Rule 89 (C) of the ICTY RPE, which provides for wide discretion in admitting evidence. According to ICTY case-law, an accused's statement may be admitted in his own trial if it is relevant, has probative value and all the procedural guarantees and protections were respected at the time the statement was made.[5] The admission of a statement given in accordance with such guarantees and protections is dependent neither on the agreement of the

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1 ICTY, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj et al*., Case No. IT-04-84-T, T. Ch. I, 23 May 2007, in this volume, p. 229; ICTY, Decision on Notification of Cross-Examination Material, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 31 May 2007, in this volume, p. 239; ICTY, Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.5, A. Ch., 24 August 2007 in this volume, p. 245; ICTY, Decision on Motion by Witness 28 to Set Aside Subpoena or for Alternative Relief, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 5 September 2007, in this volume, p. 251; ICTY, Decision on Appeal Against Decision Admitting Material Related to Borovčanin's Questioning, *Prosecutor v. Popović et al.*, Case No. IT-05-88-Ar73.1, A. Ch., 14 December 2007, in this volume, p. 255; ICTY, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65*ter* Exhibit List, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 25 October 2007 in this volume, p. 269.

2 ICTY, Prosecution's Motion for Leave to Amend 65*ter* Exhibit List with 18 Exhibits Pertaining to Alistair Graham (Confidential), *Prosecutor v. Popović et al.*, Case No. IT-05-88, T. Ch. II, 6 July 2007.

3 Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65*ter* Exhibit List, *Prosecutor v. Popović et al.*, T. Ch. II, *supra* note 1.

4 Decision on Appeals against Decision Admitting Material Related to Borovčanin's Questioning, *Prosecutor v. Popović et al.*, A. Ch., *supra* note 1.

5 See *e.g.* ICTY, Decision on interlocutory appeal concerning admission of record of interview of the accused from the Bar Table, *Prosecutor v. Halilović*, Case No. IT-01-48-AR73.2, A. Ch., 19 August 2005, Klip/ Sluiter, ALC-XXVII-383, par. 14 and 15.

accused, nor on any testimony he might give in court.[6] Prior to the Prlić case, however, no ICTY chamber had ruled on the use of out-of-court statements of accused against co-accused in multi-accused trials.[7] It is this last issue with which this commentary is concerned. Before discussing the Prlić case, however, a brief overview of the relevant fair trial considerations is in order.

The fair trial considerations particular to the admissibility of suspect interviews in multi-accused trials have been summarised by Khan and Dixon as follows:

> In cases where the Prosecution seeks to introduce a statement it has taken from a suspect or accused as evidence, not only against the accused who gave the statement, but also against other accused, the rights of the accused who made the statement and the other accused against whom such evidence may be used, are at stake. Unless the accused whose statement was taken is called as witness [for the prosecution], the co-accused is deprived of an opportunity to cross-examine him on the contents of the statement. Moreover, given that the suspect or accused may have had reason to put the blame on others in an attempt to limit their own responsibility, the reliability of such a statement may be dubious. Such statements constitute hearsay of a potentially unreliable source.[8]

Although hearsay is not *per se* inadmissible at the *ad hoc* Tribunals, "hearsay statements prepared by the Prosecution for the purposes of litigation constitute hearsay of a very special kind, which involves the need for additional judicial scrutiny."[9] After all, such statements raise serious questions as to their reliability, due to the fact that they tend to be drafted "to ensure that they [contain] only the most favourable version of the facts stated".[10] According to the Trial Chamber in the ICTY case of Prlić,

> [t]hough Tribunal case law has identified a certain number of indicators to establish the reliability of hearsay evidence, it is clear from Rules 92*bis* and *ter* [of the ICTY RPE] that the reliability of a written statement on the acts and conduct of the Accused may only be established through cross-examination.[11]

Therefore, the written statement of a suspect who later becomes an accused, prepared for the purpose of criminal proceedings and going to the acts or conduct of the accused, cannot otherwise be admitted under Rule 89 (C) of the ICTY RPE, in order to sidestep the requirements of Rules 92 *bis* and 92 *ter*. By contrast, a suspect interview conducted in accordance with Rules 42 and 43 of the ICTY RPE is admissible pursuant to Rule 89 (C). In other words, according to the Trial Chamber in Prlić, a distinction may be made between suspect interviews on the one hand and Rule 92 *bis* and 92 *ter* statements on the other:

> 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 answers 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. The reliability of the circumstances surrounding a suspect interview is further enhanced by the provisions of Rule 42 (B) of the [ICTY RPE], according to which a suspect interview must take place in the presence of Counsel. The suspect also enjoys further protection from any possible pressure exerted upon him by the Prosecution.[12]

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6 *Ibid*, par. 15; ICTY, Decision on Request for Admission of the Statement of Jadranko Prlić (Public), *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 22 August 2007, par. 12.

7 Although in Blagojević and Jokić the Trial Chamber acknowledged the dangers of relying on such statements, it did not get around to ruling on the matter. ICTY, Decision on Prosecution's Motion for Clarification of Oral Decision Regarding Admissibility of Accused's Statement, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. Ch. I, 18 September 2003, Klip/ Sluiter, ALC-XIV-427, par. 24, 25, 26 and 27.

8 K. Khan, R. Dixon, Archbold International Criminal Courts Practice, Procedure and Evidence, Sweet & Maxwell, London 2009, par. 9–115.

9 *Ibid*, referring to ICTY, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, A. Ch., 7 June 2002, Klip/ Sluiter, ALC-VIII-281.

10 *Ibid.*, par. 27.

11 ICTY, Decision on Request for Admission of the Statement of Jadranko Prlić (Public), *Prosecutor v. Prlić et al.*, T. Ch. III, *supra* note 6, par. 25.

12 *Ibid.*, par. 27.

Accordingly, "the transcript of a suspect interview […] may be admitted and used without cross-examination even if it goes to the acts and conduct of the co-[a]ccused." Nevertheless, on the basis of jurisprudence from the European Court of Human Rights (which the ICTY Appeals Chamber adopted in an interlocutory appeal in the case of Martić), the Trial Chamber stressed that a conviction may not be based solely or substantially upon evidence not subjected to cross-examination, that any lack of cross-examination would be taken into account in determining the probative value of the suspect interview and that before giving such evidence any weight, it must be corroborated by other evidence.[13] In other words, the lack of opportunity to cross-examine the accused (*i.e.* the person to have been interviewed) and the incentive of the accused to shift blame on others (*i.e.* the co-accused) are, according to the Prlić Trial Chamber, matters of weight and not of admissibility. The Prlić Trial Chamber's decision was upheld on appeal.[14]

2.3 The Popović *et al.* Trial Decision

For the purposes of its decision, the Trial Chamber in Popović *et al.* assumed that the accused, Borovčanin, would exercise his right to silence and would therefore be unavailable for cross-examination by his co-accused.[15] According to the Trial Chamber, the factors enumerated by the Trial Chamber in Prlić, which 'enhance' the reliability of suspect interviews conducted in compliance with Rules 42 and 43 of the ICTY RPE, "do not lessen the fundamental problems with using the statements of an accused against co-accused", *i.e.* the incentive of the accused to shift blame on others and the fact that such statements are produced in anticipation of legal proceedings by the entity seeking to convict the accused. The Trial Chamber further noted that making the prosecution investigator who took the statement available for cross-examination is no substitute for cross-examining the maker of the statement, because (i) the prosecution investigator is affiliated with the entity seeking conviction of the accused, (ii) the prosecution investigator's evidence "can shed scant light on the nature and force of [an accused's] incentive to shift blame, and (iii) the prosecution investigator is "no substitute for exploring with [the maker of the statement] the circumstances under which he claims to have seen or heard relevant events and the accuracy and veracity of his account".[16] Accordingly, the Trial Chamber decided that the Borovčanin Recordings and Transcript were inadmissible as evidence of the acts and conduct of the co-accused.[17]

2.4 The Popović *et al.* Appeals Decision

Regarding the admissibility of out-of-court statements of an accused against his or her co-accused, the Appeals Chamber noted that "there is a fundamental distinction between admitting evidence and according weight to it".[18] Therefore, "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."[19] On these grounds, the Appeals Chamber found that the Trial Chamber had committed a discernible error and remanded the issue back to the Trial Chamber. On 18 June 2008, the Trial Chamber in an oral decision admitted the Borovčanin Recordings and Transcript for all purposes.[20]

2.5 Discussion

The Popović *et al.* appeals decision is in line with the approach in Prlić, according to which a suspect interview is, in principle, admissible as evidence (even if it goes to the acts and conduct of the suspect's co-accused) and, further, that any lack of opportunity to cross-examine the accused (i.e. the suspect interviewed)

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13 *Ibid.*, par. 28 and 33.

14 ICTY, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, *Prosecutor v. Prlić et al.,* Case No. IT-04-74-AR73.6, A. Ch., 23 November 2007.

15 Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65*ter* Exhibit List, *Prosecutor v. Popović et al.*, T. Ch. II, *supra* note 1, par. 54. This assumption turned out to be correct; Borovčanin did not testify.

16 *Ibid.*, par. 65, 66 and 67.

17 *Ibid.*, par. 77 and 80.

18 Decision on Appeals against Decision Admitting Material Related to Borovčanin's Questioning, *Prosecutor v. Popović et al.*, A. Ch., *supra* note 1, par. 50.

19 *Ibid*.

20 ICTY, Oral Decision, *Prosecution v. Popović et al.*, Case No. IT-05-88, T. Ch. II, 18 January 2003, transcript 19993.

or incentive of the accused to shift blame on others (i.e. the co-accused) are matters of weight and not of admissibility. This approach represents a shift away from the principle in Kordić and Čerkez (as endorsed in the Popović *et al.* Trial Decision, among others),[21] that "the reliability of a statement is relevant to its admissibility, and not just to its weight" because "evidence may be so lacking in terms of […] reliability that [it] is not "probative" and is therefore inadmissible".[22] According to the Appeals Chamber in Milošević, "[t]o some extent, the [the approach in Kordić and Čerkez] was dependent upon the preference in the [ICTY RPE] at the time for "live, in court" testimony".[23] As noted by the Trial Chamber in Popović *et al.*, "this preference has since been qualified by Rules 89(F) and 92 *bis*",[24] which provide for the admission of written evidence. Arguably, the shift referred to above may (in part) be explained by the increased acceptance of written evidence at the ICTY. According to the Trial Chamber in Prlić, it may (also) be explained by the "recognition that professional judges are better able to weigh evidence and consider it in its proper context than members of a jury" and by the fact that, "as opposed to a jury's verdict, professional judges have to write a reasoned decision, which is subject to appeal".[25] Either way, it is clear that where a suspect interview is admitted into evidence for all purposes, without having been tested, corroboration is essential, in order to ensure that a conviction is not based solely or substantially upon untested evidence.

3. Witness examination

3.1 Recording witness proofing sessions

3.1.1 Procedural background

On 22 March 2007, counsel for all three accused in the case of Haradinaj *et al.* filed a joint request for an order that the prosecution audio-record proofing sessions with its witnesses.[26] The request was made following a number of instances of discrepancy between the in-court testimony of a witness and the proofing notes provided by the prosecution to the defence shortly before the witness concerned was due to testify. According to counsel for the accused, such discrepancies were potentially important in assessing the credibility and reliability of the evidence of the witnesses concerned. Moreover, the audio-recording of proofing sessions would "provide the parties and the Trial Chamber with an accurate record of the discussions that have taken place with witnesses" and "permit evaluation and resolution of any differences that arise between a witness' evidence in court and the record of what the witness stated during a proofing session with the Prosecution".[27] The defence was not seeking the automatic disclosure of such recordings, but rather to be entitled to request such recordings when necessary.[28] The prosecution opposed the request, arguing that it would not serve the aims and objectives of proofing and could potentially cause delays in the trial. Instead, the prosecution offered to provide the defence with supplementary statements signed by the witness, which would set out any new, additional or different evidence gleaned from such witnesses during proofing.[29] On 23 May 2007, the Trial Chamber issued its decision,[30] some aspects of which are addressed below.

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[21] Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.,* T. Ch. II, *supra* note 1, par. 61.

[22] ICTY, Decision on Appeal Regarding Statement of a Deceased Witness, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, A. Ch., 21 July 2000, Klip/ Sluiter, ALC-V-157, par. 24.

[23] ICTY, Decision on Admissibility of Prosecution Investigator's Evidence, *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.2, A. Ch., 30 September 2002, Klip/ Sluiter, ALC-XI-359, par. 18, sub 2.

[24] Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, *Prosecutor v. Popović et al.,* T. Ch. II, *supra* note 1, par. 61.

[25] Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, *Prosecutor v. Prlić et al.,* A. Ch., *supra* note 14, par. 57.

[26] ICTY, Defence Submissions on the Procedure for the Proofing of Prosecution Witnesses, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 22 March 2007.

[27] *Ibid.*, par. 22.

[28] *Ibid.*, par. 3, sub ii.

[29] ICTY, Prosecution's Written Submissions Opposing Verbatim Recording of "Proofing" Sessions with Witnesses, *Prosecutor v. Haradinaj et al.,* Case No. IT-04-84-T, T. Ch. I, 22 March 2007, par. 2.

[30] ICTY, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, T. Ch. I, 23 May 2007.

3.1.2 Applicable law and practice

Witness proofing is a practice by which parties to trial proceedings meet with witnesses they intend to call shortly before they are due to testify in order to proof or prepare them. At the *ad hoc* Tribunals, the purpose of such meetings is not limited to procedural preparation of the witness for the examination in court, whereby the witness is acquainted with the process and applicable procedures in the courtroom. Proofing sessions may also be used to substantively prepare witnesses for examination, to review witnesses' evidence by providing them with their statement(s) (taken in the investigative stage of the proceedings) and by allowing them to refresh their memory in respect of their prospective testimony, provided that such preparation does not amount to rehearsing, practicing or coaching.[31] During such sessions, it is not unusual for new, additional or different facts or circumstances to come to light. Proofing notes provide a non-verbatim record of such sessions, usually in the form of an unsigned 'supplementary information sheet', sometimes in the form of a signed statement. In the event of discrepancy between in-court testimony and the record of the proofing session, signed statements allow the cross-examining party to challenge the credibility and reliability of the witness on that basis. Proofing notes are subject to disclosure to the opposing (cross-examining) party and, due to the fact that proofing often only occurs upon arrival of witnesses in The Hague (shortly before they are due to testify in court), are often disclosed a day or so before the witness concerned is sworn in. The 'practice' of substantively preparing witness during proofing sessions raises serious concerns for the cross-examining party in terms of preparation for cross-examination. Two situations may arise in this regard. In the first situation, the proofing notes, which will have been provided to the cross-examining party shortly before the examination-in-chief of the witness concerned is due to commence, contain something new, additional or different than in the previous witness statement(s). In the second, the proofing notes reflect the content of the previous statement(s), but the witness testifies to something new, additional or different during examination-in-chief. Either way, the cross-examining party may not have had sufficient time to prepare for cross-examination and, by extension, to effectively challenge the credibility of the witness concerned.

As counsel for the accused in the case under discussion were not challenging the practice of witness proofing *per se* and as much has been written on the (legitimacy of the) practice of witness proofing already,[32] this commentary will not include a general discussion of (the legitimacy of) such practice, but will be limited to the issue of recording proofing sessions.

3.1.3 The Haradinaj *et al.* Witness Proofing Decision

Before ruling on the merits, the Trial Chamber confirmed that it had the discretion, pursuant to Rule 54 and pursuant to its duty to ensure a fair and expeditious trial, to order the prosecution to audio-record proofing sessions.[33] Moreover, the Trial Chamber found that it would not be contrary to customary international law to make such an order.[34]

As to the merits, the Trial Chamber first observed that audio-recordings of proofing sessions allow the cross-examining party, in this case the defence, to challenge the credibility of the witness on the basis of any discrepancy between the in-court testimony of that witness and what the witness said during the proofing session. Not being able to challenge the witness' credibility on this basis may disadvantage the cross-examining party.[35] In the particular circumstances of the case, however, the Trial Chamber considered the disadvantage caused by the audio-recording not having been made (available) to have been 'very slight', but nevertheless resolved to "take into account the potential disadvantage when assessing the weight of [the evidence of the witness concerned]".[36] As to what measures should be taken in order to prevent the

31 S. Vasiliev, Commentary, Klip/ Sluiter, ALC-XXIII-313.
32 See e.g. C.E.F. Coracini, Commentary, Klip/ Sluiter ALC-XX-139, S. Vasiliev, Commentary, Klip/ Sluiter, ALC-XXIII-313 and S. Bock, Commentary, Klip/ Sluiter, ALC-XXV-130.
33 Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj et al.*, T. Ch. I, *supra* note 30, par. 11–14.
34 *Ibid.*, par. 17.
35 *Ibid.*, par. 18.
36 *Ibid*.

aforementioned disadvantage, the Trial Chamber considered that, while the exclusion of evidence pursuant to Rules 89 (D) and 95 of the ICTY Rules of Procedure and Evidence "is a possibility, it is not the most efficient solution, as it assumes litigation of the issue, and does not necessarily serve the interests of justice and the discovery of the truth".[37] Moreover, the incident(s) on which the request was based were "not sufficient to justify a general measure [the audio-recording of proofing sessions] which will have considerable implications for the Prosecution and which may be remedied just as well by a more diligent and cautious approach by Prosecution counsel when taking notes during witness proofing".[38] Instead, the Trial Chamber adopted the approach put forth by the prosecution, i.e. that the defence be provided with a supplementary statement signed by the witness, setting out any new, additional or different evidence gleaned from the witness during proofing. According to the Trial Chamber, "such a practice would ensure that proofing notes are attested to by the witness…and, in turn, this would lessen any concern that proofing notes are not a correct record of what the witness said during proofing".[39] In the event of such an approach proving to be insufficient, the Trial Chamber indicated its willingness to reconsider its decision not to order the audio-recording of proofing sessions.[40]

3.1.4 Discussion

The Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions,[41] is not the first ICTY decision to address the issue of (audio) recording proofing sessions. In the case of Limaj *et al.*, the Trial Chamber denied the request for an order "that a representative of the Defence be allowed to attend the prosecution's proofing sessions, or that the Defence be provided with a video or tape-recording of proofing sessions". The defence in that case was "seeking to avoid rehearsals of testimony that may undermine a witness's ability to give a full and accurate recollection of events". However, the Trial Chamber was not persuaded that the "clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses" were not being observed in that case, "as to warrant some intervention by the Chamber". The Trial Chamber also declined to order the prosecution to provide the defence with signed supplementary statements (as opposed to unsigned supplementary information sheets) of witnesses to have been proofed. According to the Trial Chamber, "[e]xcept perhaps where the subject of a notice of a new item of evidence, or a change of evidence is extensive, there is not any sufficient reason to require a signed statement". Although these findings were made in the particular circumstances of the case, generally speaking such an approach may be too restrictive, since evidence that is new, additional or different, but not significantly so, may also give rise to legitimate concerns as to its credibility. Moreover, such an approach, in order to be efficient, would require the party calling the witness to make an (initial) assessment as to whether the proposed evidence is new or significantly different, such as to warrant a signed statement. Given the (largely) adversarial character of the proceedings at the ICTY, it is questionable whether such an assessment should be left to a party to the proceedings, both in view of that party's inherent procedural bias and of the potential for unnecessary litigation. In this regard, the *Haradinaj et al.* Witness Proofing Decision, which prescribes the provision of signed supplementary statements to the defence (the cross-examining party), is to be applauded. It is questionable, however, whether this approach goes far enough. There is a clear difference between a signed statement and an audio-recording or transcript of an interview, as acknowledged by different ICTY Trial Chambers and the Appeals Chamber, albeit in a different context.[42] As such, the reasons for stopping short of ordering the audio-recording of all proofing sessions are best sought in more practical considerations, such as potentially far-reaching consequences for other Trial Chambers seized of the same matter.

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37 *Ibid.*, par. 21. Rule 89 (D) prescribes that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." Rule 95 prescribes that "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

38 *Ibid.*, par. 22.

39 *Ibid*.

40 *Ibid.*, par. 23.

41 Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, *Prosecutor v. Haradinaj et al.*, T. Ch. I, *supra* note 30.

42 See the case-law on admissibility of suspect interviews against co-accused in multi-accused trials, as set out above.

3.2 (Timely) disclosure of material to be used during cross-examination

3.2.1 Procedural background

On 23 March 2007, the prosecution in the case of Haradinaj *et al.* filed a motion requesting the Trial Chamber to order the defence to disclose to the prosecution, in advance of the cross-examination of prosecution witnesses, (a list of) the documents that the defence intended to use during such cross-examination. Specifically, the prosecution sought disclosure of such documents "at least by the commencement of the examination in chief".[43] The defence indicated its willingness to disclose the relevant information to the prosecution at the conclusion of the examination-in-chief of the witness, but only those documents which the defence had "definitively" resolved to use in cross-examination.[44] On 31 May 2007, the Trial Chamber rendered its decision.

3.2.2 Applicable law and practice

Although not provided for in the RPE, the practice of parties disclosing to the opposing party the (list of) documents they intend to use during cross-examination is well-established at the ICTY. Different ICTY Trial Chambers have set different deadlines in this regard: after the witness is sworn in (after the witness has made the solemn declaration pursuant to Rule 90 (A) of the RPE) but before examination-in-chief commences;[45] immediately after examination-in-chief ends;[46] at least twenty-four hours before a document is due to be used in cross-examination;[47] before cross-examination begins;[48] and piecemeal disclosure in the course of cross-examination.[49] Arguments in favour of the timely disclosure of cross-examination materials to the opposing party include procedural fairness and efficiency. Procedural fairness should be understood to ensure (within reason) not only that the opposing party be in a position to make informed objections on authenticity and to adequately re-examine the witness, but also that the cross-examining party be in a position to effectively challenge the credibility of the witness. Such a reading of procedural fairness flows from the largely adversarial mode of presentation of evidence prescribed at the ICTY. In this way, procedural fairness may also count as an argument against too early a deadline for disclosure of cross-examination materials.

In more recent ICTY decisions, the deadline for disclosing cross-examination material to the opposing party appears to have shifted to the moment following the solemn declaration (the first of the deadlines set out above). The first Trial Chamber to order such a deadline was the Milutinović Trial Chamber, which was closely followed in a number of other ICTY cases.[50] Regarding the use of undisclosed material during cross-examination, the Milutinović Trial Chamber held that, "[s]hould a party seek to use a document or material during cross-examination that has not been so listed and disclosed, that party may be permitted to do so on

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43 ICTY, Prosecution's Motion for a Cross-Examining Party to Provide Advance Copies of Documents Used to Cross-Examine Witnesses, *Prosecutor v. Haradinaj et al.,* Case No. IT-04-84-T, 23 March 2007, par. 4.

44 ICTY, Decision on Notification of Cross-Examination Material, *Prosecutor v. Haradinaj et al.,* Case No. IT-04-84-T, T. Ch. I, 31 May 2007.

45 ICTY, Decision on Joint Defence Motion For Modification of Order on Procedure and Evidence, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, T. Ch. III, 16 August 2006; ICTY, Order on Production of Defence Documents Used in Cross-Examination of Prosecution Witnesses, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. Ch. II, 24 August 2006; and ICTY, Decision on Time-Limits for Disclosure of Documents to be Used During a Witness' Testimony, *Prosecutor v. Milošević*, Case No. IT-98-29/1-T, T. Ch. III, 18 January 2007.

46 ICTY, Oral Decision, *Prosecutor v. Prlić et al.*, Case No. IT-04-74, T. Ch. III, 8 May 2006, t. 1475.

47 ICTY, Oral Decision, *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13/1-T, T. Ch. II, 6 December 2005, transcript 2953.

48 ICTY, Oral Decision, *Prosecutor v. Martić*, Case No. IT-95-11-T, T. Ch. I, 20 February 2006, transcript 1578–1579.

49 ICTY, Decision on the Accused Naletilić's Request for Enforcement of Trial Chamber's Previous Order Regarding Documents During Cross-Examination, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, T. Ch. I, 3 May 2002; and ICTY, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, *Prosecutor v. Halilović*, Case No. IT-01-48-T, T. Ch. I, 9 May 2005, par. 9.

50 Decision on Joint Defence Motion For Modification of Order on Procedure and Evidence, *Prosecutor v. Milutinović et al.*, T. Ch. III, *supra* note 45; Order on Production of Defence Documents Used in Cross-Examination of Prosecution Witnesses, *Prosecutor v. Popović et al.*, T. Ch. II, *supra* note 45; and Decision on Time-Limits for Disclosure of Documents to be Used During a Witness' Testimony, *Prosecutor v. Milošević*, T. Ch. III, *supra* note 45.

showing good cause for not listing and disclosing it". In such situations, "the opposing party or parties may then request a short adjournment in order to examine the material".[51]

3.2.3 The Haradinaj *et al.* Disclosure Decision

In relation to the defence concern that advance disclosure of cross-examination material and, by extension, a line of cross-examination, may provide the witness with "the opportunity to prepare a response in advance and to tailor his/her evidence accordingly", the Trial Chamber observed that "once a witness is sworn in, the Prosecution's communication with that witness is so heavily regulated that "advance notice" of an intended line of cross-examination – even if the line were evident to the Prosecution from reading the document – could not so easily be communicated to the witness".[52] Moreover, whilst advance disclosure may render the lines of cross-examination "less surprising overall to prosecution counsel", this "does not lessen the effectiveness or value of cross-examination".[53] According to the Trial Chamber, the shifting of the deadline for disclosure of cross-examination material to the moment following the swearing in of the witness is not due to pragmatism (alone), but (also) by "the legal principle that for the purposes of fair play the Defence must show part of its hand to the Prosecution".[54] In this regard, the Trial Chamber observed that although disclosure obligations may be asymmetrical at the ICTY, they are not entirely one-sided. In relation to the defence argument that it is only when a prosecution witness has completed his or her evidence-in-chief that a final decision can be made about documents to be put to the witness cross-examination, the Trial Chamber held that the consequence was "not a later deadline, but that the Defence notifies the Prosecution of the material which it is likely to use with each witness, and not only of the material which it has definitively resolved to use". Accordingly, the Trial Chamber ordered that the procedure to be followed was that set out in the case of Milutinović, noting that the "[u]se of unannounced material is not foreclosed".[55]

3.2.4 Discussion

The reasons for the cross-examining party to seek a later deadline for disclosure of cross-examination material are evident: to prevent witnesses from being given advance notice of a line of cross-examination so that he or she is able prepare a response in advance and to prevent the (directly) examining party from eliciting answers from the witness aimed at weakening or undermining the cross-examination. Whilst shifting the deadline for disclosure to the moment following the solemn declaration, in principle sidesteps this problem (due to the communication constraints placed on the examiner and witness from the moment the witness is sworn in), it may still put the (directly) examining party in a stronger position to undermine or weaken the line of cross-examination to be pursued and, as such, may lessen the cross-examination's effectiveness. As the Haradinaj *et al.* Trial Chamber noted, however, "experienced Prosecution counsel anticipate lines of cross-examination even without full knowledge of the documents to be used by the Defence".[56] In other words, the possibility that the opposing party might read into the disclosed cross-examination materials a potential line of cross-examination does not by definition render the deadline set by, *inter alia*, the Haradinaj *et al.* Trial Chamber procedurally unfair nor any subsequent cross-examination ineffective. Nevertheless, there are situations imaginable in which the aforementioned deadline for disclosure may seriously impede the cross-examining party's ability to challenge the witness' credibility. Such situations call for a more flexible approach to the disclosure of cross-examination materials, an approach that the Milutinović and Haradinaj *et al.* decisions appear to provide for. After all, according to those decisions, the use of unannounced, undisclosed material is permissible, provided that "good cause" is shown. The question, then, is what constitutes "good cause". That "good cause" is intended to cover exceptional circumstances only is evident from an 'efficiency' point of view. It should be recalled that where good cause is shown, the opposing party or parties may request a "short adjournment" in order to examine the material. An obvious example of "good cause" is where the non-disclosure of a document is attributable to

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51 Decision on Joint Defence Motion For Modification of Order on Procedure and Evidence, *Prosecutor v. Milutinović et al.*, T. Ch. III, *supra* note 45, par. 4.
52 Decision on Notification of Cross-Examination Material, *Prosecutor v. Haradinaj et al.,* T. Ch. I, *supra* note 44, par. 4.
53 *Ibid.*, par. 5.
54 *Ibid.*, par. 8.
55 *Ibid.*, par. 9.
56 *Ibid.*, par. 5.

practical or logistical constraints (which is not implausible, given the ongoing nature and piecemeal approach of defence investigations in international criminal proceedings). Whether it also applies to situations in which the cross-examining party has withheld material on the grounds that its effect would be significantly compromised by an earlier disclosure is, however, unclear. This will depend on a number of factors, including the subject matter of the witness' testimony, the type of witness testifying (for example, expert or not) and the frequency with which the party concerned invokes the "good cause" exception.

3.3 Participation of the accused in witness examination

3.3.1 Procedural background

On 28 April 2006, the Trial Chamber in Prlić *et al.* issued (revised) guidelines on the conduct of proceedings in that case. On the matter of witness examination, the Trial Chamber noted that the accused in that case were represented by counsel and (therefore) that witnesses were to be "primarily […] questioned by counsel for the Accused". However, in "exceptional circumstances" and with the permission of the Trial Chamber, the accused would also be allowed to put questions to the witness.[57] On 10 May 2007, the Trial Chamber indicated in a further written decision that while it was not, in principle, opposed to an accused putting questions to witnesses, "[t]he experience of previous months […] has shown that the complexity of this trial compels the Chamber to strictly control the modes of witness interrogation", since "in every multiple-accused trial, a Chamber must make sure that the intervention of an accused does not affect the rights of the other accused to an expeditious trial". The experience on which the Trial Chamber based this determination consisted, *inter alia*, of "irrelevant" questions and interventions by the accused Slobodan Praljak, which, according to the Trial Chamber, were "a useless waste of time".[58] Accordingly, the Trial Chamber determined that the guideline on witness examination referred to above would be applied more strictly. In particular, the Trial Chamber stated that witnesses would first be cross-examined by counsel for the accused, that the accused would only be able to put questions to witnesses with the Trial Chamber's prior approval and, finally, that the "exceptional circumstances" referred to in the original guidelines "shall be linked either to the examination of events in which the Accused personally took part or to the examination of issues about which he is specifically competent."[59] On 24 August 2007, the Appeals Chamber rendered its decision on the accused Praljak's appeal against the Trial Chamber's decision of 10 May 2007.[60]

3.3.2 Applicable law and practice

Article 21, paragraph 4, sub e of the ICTY Statute guarantees the accused's right "to examine, or have examined, the witnesses against him or her". Both the ICTY Statute and RPE are otherwise silent on the participation of the accused in the examination of witness, where the accused is represented by counsel. Nevertheless, such practice is not unheard of at the ICTY.[61] Also relevant in this regard is Rule 90 (F) of the ICTY RPE, pursuant to which "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time".

3.3.3 The Prlić *et al.* Appeals Decision

In relation to the defence contention that the restrictions imposed by the Trial Chamber in its decision of 10 May 2007 go beyond the proper exercise of discretion and "may substantially and unacceptably exclude"

57 ICTY, Revised version of the decision adopting guidelines on conduct of trial proceedings, *Prosecutor v. Prlić et al.*, Case No. IT-04-74, T. Ch. II, 28 April 2006, Klip/ Sluiter, ALC-XXIX-109, par. 9, sub c.
58 ICTY, Decision on the Mode of Interrogating Witnesses, *Prosecutor v. Prlić et al.,* Case No. IT-04-74-T, T. Ch. III, 10 May 2007, par. 10.
59 *Ibid*, par. 11 and 12.
60 Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, *Prosecutor v. Prlić et al.*, A. Ch., 24 August 2007, *supra* note 1.
61 See, for example, ICTY, Transcript, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. Ch. I, 3 June 2005.

him from participation in his own defence, the Appeals Chamber found that "there was good reason for the Trial Chamber to determine that a stricter application of [the guideline] was justified in order to protect the rights of [Praljak's] co-accused to a fair and expeditious trial, as well the rights of [Praljak]" and, as such, that the Trial Chamber had committed no discernible error.[62] In relation to the defence argument that the right to counsel and the right to self-representation are not mutually exclusive and that the assignment of counsel does not negate the right of the accused to also participate directly in the proceedings, the Appeals Chamber observed that the Trial Chamber never held that the accused did not have a right to participate in the proceedings alongside his counsel.[63] The Trial Chamber "merely placed reasonable restrictions on that right to prevent [Praljak's] needless waste of court time and to protect the rights of all accused to a fair and expeditious trial".[64]

3.3.4 Discussion

The Prlić *et al.* Appeals Decision confirms that an accused's participation in the examination of witnesses may be restricted pursuant to an accused's (and, in multi-accused trials, the co-accused's) right to a fair and expeditious trial.[65] It is, however, unclear on the issue of whether such participation can be limited solely on the grounds that, when an accused is represented by counsel, it is primarily counsel's task to examine witnesses. Since the Prlić *et al.* Appeals Decision, the shared Appeals Chamber of the *ad hoc* Tribunals has held that where an accused is represented by counsel, it for counsel, in principle, to conduct the examination of witnesses.[66] According to the Appeals Chamber in the ICTR case of Nahimana *et al.*, Article 20, paragraph 4, sub d of the ICTR Statute and Article 21, paragraph 4, sub d of the ICTY Statute provide for "a choice as between the right of an accused to conduct his own defence and his right to have legal assistance".[67] It further referred to the (ICTR) Directive on the Assignment of Defence Counsel, according to which assigned counsel "shall deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his Defence".[68] In finding that it is for counsel to examine witnesses, the Appeals Chamber does not appear to have been ruling out the possibility that, in exceptional circumstances, the accused may be permitted to participate in the examination of witnesses.

As to the "exceptional circumstances" under which an accused is permitted to participate in the examination of witnesses, the Appeals Chamber in Prlić *et al.* (in another decision) held that the additional restrictions imposed by the Trial Chamber in this regard constituted an abuse of discretion.[69] According to the Trial Chamber, the "issues about which he is specifically competent" referred to "the expertise held by an Accused at the time of the alleged facts and owing to which he was charged in the Amended Indictment of 11 June 2008".[70] The Trial Chamber "should have allowed more flexibility for its assessment of the notion of specific expertise and perform such assessment on a case-by-case basis when faced with a specific request".[71] Finally, according to the Appeals Chamber the Trial Chamber's approach "could potentially lead to a violation of the Appellant's rights under Article 21 of the [ICTY] Statute".[72] If that is correct, barring an accused represented by counsel from participating in the examination of witnesses altogether would surely constitute a violation of such rights.

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62 Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses, *Prosecutor v. Prlić et al.*, A. Ch., 24 August 2007, *supra* note 1, par. 9.
63 *Ibid.*, par. 11.
64 *Ibid*.
65 *Ibid.*, par. 9.
66 ICTR, Judgement, *Nahimana, Barayagwiza and Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, A. Ch., 28 November 2007, Klip/ Sluiter, ALC-XXXI-257, par. 267 and footnote 651.
67 *Ibid.*, footnote 651.
68 *Ibid*.
69 ICTY, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses dated 26 June 2008, *Prosecutor v. Prlić et al.,* Case No. IT-04-74-AR73.11, A. Ch., 11 September 2008, par. 21, to be published in volume XXXVII.
70 ICTY, Decision on Motion for Reconsideration Presented by the Praljak Defence, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, T. Ch. III, 26 June 2008, par. 5.
71 Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses dated 26 June 2008, *Prosecutor v. Prlić et al.,* A. Ch., *supra* note 69.
72 *Ibid*.

3.4 Testimonial privilege of witnesses

3.4.1 Procedural background

On 13 August 2007, Witness 28 was subpoenaed to appear as a witness before the Trial Chamber in the case of Haradinaj *et al.* On 15 August 2007, Witness 28 filed a motion to have the subpoena set aside or, in the alternative, to have her testimony received in closed session, claiming a "qualified testimonial privilege" on the basis of her work as a war correspondent and investigative journalist.[73] On 5 September 2007, the Trial Chamber rendered its decision.[74]

3.4.2 Applicable law and practice

There are different ways of protecting confidential information from being 'exposed' in international criminal proceedings, depending on, *inter alia*, the source, nature and (proposed) mode of the information concerned. In this regard, a distinction may be drawn between immunities on the one hand and privileges on the other.[75] In the context of testimonial immunity and testimonial privilege, Friman has noted that,

> [w]hile testimonial immunity means that a person cannot be compelled to appear before the court and to give evidence, testimonial privilege is typically more limited in scope – confidential information or communications – and does not automatically prevent the testimony as such. The concept of a privilege is an exception to a duty to speak, which in turn implies that the witness can be compelled.[76]

In the case-law of the ICTY, privileges can be both testimonial and documentary and have been afforded to a variety of individuals and entities, including ICRC workers,[77] war correspondents[78] and state officials acting in their official capacity.[79] Privileges at the ICTY are therefore not limited to the lawyer-client privilege provided for in Rule 97 of the ICTY RPE. It is the second of the aforementioned privileges, *i.e.* war correspondents, with which this commentary is concerned.

According to the Appeals Chamber in Brđanin and Talić, war correspondents are "individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict".[80] In view of the fact that "society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents,"[81] the Appeals Chamber set forth a two-pronged test for Trial Chambers issuing subpoenas to a war correspondents: "First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere."[82]

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73 Decision on motion by Witness 28 to Set Aside Subpoena or for Alternative Relief (Public), *Prosecutor v. Haradinaj et al.*, T. Ch. I, *supra* note 1, par. 1.

74 *Ibid*.

75 For a comprehensive overview of immunities and privileges in international proceedings, see K.A.A. Khan and G. Azarnia, Evidentiary Privileges, in K.A.A. Khan, C. Buisman and C. Gosnell (eds.), Principles of Evidence in International Criminal Justice, Oxford University Press, New York 2010, p. 551–598. See also H. Friman, Commentary, Klip/ Sluiter, ALC-XXI-311.

76 H. Friman, Commentary, Klip/ Sluiter, ALC-XXI-313.

77 ICTY, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness (*Ex Parte* Confidential), *Prosecutor v. Simić*, *Simić*, *Tadić*, *Todorović and Zarić*, Case No. IT-95-9-PT, T. Ch. III, 27 July 1999, Klip/ Sluiter, ALC-IV-231, par. 73.

78 ICTY, Decision on Interlocutory Appeal, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, A. Ch., 11 December 2002, Klip/ Sluiter, ALC-XI-325.

79 ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, A. Ch., 29 October 1997, Klip/ Sluiter, ALC-I-245.

80 Decision on Interlocutory Appeal, *Prosecutor v. Brđanin and Talić*, A. Ch., *supra* note 78, par. 29.

81 *Ibid.*, par. 36.

82 *Ibid.*, par. 50.

3.4.3 The Haradinaj *et al.* Subpoena Decision

In relation to witness 28's claim that she was covered by the testimonial privilege afforded to war correspondents, the Trial Chamber noted first that, during the Haradinaj *et al.* indictment period, "when Witness 28 was interviewing victims and witnesses about their experiences in Kosovo, she was neither a war correspondent nor a journalist".[83] Moreover, during that period, "she worked for an organization whose very purpose it was to gather information about, and assist the prosecution of, human rights violations".[84] Accordingly, witness 28 was not covered by the testimonial privilege which she invoked. As to her claim that she was otherwise covered by testimonial privilege on the basis of her human rights work, the Trial Chamber held that "Witness 28's attempted analogy between the work performed and privileges enjoyed by employees of the International Committee of the Red Cross, on the one hand, and members of the human rights organization which Witness 28 belonged to during the indictment period, on the other, fails for the reason that ICRC privileges are specific to the ICRC and cannot be extended to other groups by analogy."[85]

3.4.4 Discussion

As Khan and Dixon have noted, the definition of "war correspondent" provided by the Appeals Chamber in Brđanin and Talić is somewhat ambiguous.[86] The Haradinaj *et al.* subpoena decision confirms that, in determining whether a person may claim testimonial privilege as a war correspondent, the question is whether or not the person concerned was a war correspondent during the period in relation to which he or she is expected to give evidence.[87] In this way, the Haradinaj *et al.* subpoena decision restricts the privilege afforded to war correspondents, which goes some way to mitigate the criticism that the privilege established in Brđanin and Talić is overly broad and therefore potentially undermines the right of an accused to examine (or have examined) the witnesses against him or her (where documents authored by a "war correspondent" are admitted into evidence).[88]

Kelly Pitcher

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83 Decision on motion by Witness 28 to Set Aside Subpoena or for Alternative Relief (Public), *Prosecutor v. Haradinaj et al.*, T. Ch. I, *supra* note 1, par. 5.

84 *Ibid.*, par. 6.

85 *Ibid.*, par. 8.

86 K. Khan, R. Dixon, Archbold International Criminal Courts Practice, Procedure and Evidence, *supra* note 8, par. 9–197.

87 See also the following (earlier) decision: ICTY, Decision on Prosecution's Motion for Issuance of a Subpoena, *Prosecutor v. Popović et al.*, Case No. IT-05-88, T. Ch. II, 21 August 2007, par. 3.

88 See, for example, M. A. Fairlie, Prosecutor v. Brdjanin & Talić. Case No. IT-99-36-AR73.9, 98 American Journal of International Law 2004, p. 805–809.