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Mechanism for  
International  
Criminal Tribunals

Mécanisme pour les  
Tribunaux Péniaux  
Internationaux

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<b>CASE/AFFAIRE NO.</b>	MICT-14-84 Boskoski and Tarculovski	<b>DATE</b>	27/01/2015
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<b>President's Office/ <i>Président</i>:</b>			
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<b>Prosecutor MICT:</b> Mr. H. Jallow			
<b>Prosecutor Team MICT:</b>			
<b>Defence/ <i>Conseil de la Défense For Mr Boskoski</i> :</b> Mr. G. Mettraux, A. Apostolski, Ms. E. Residovic			
<b>Registrar/ <i>Greffier</i>:</b> Mr. J. Hocking			
<b>OLAD:</b>			
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<b>MICT Arusha Registry:</b>			
<b>Single Judge/ <i>Juge unique</i>:</b> Judge Liu			
<b>Witness Support and Protection Unit/ <i>Service d'appui et de protection des témoins</i>:</b>			
<b>PLEASE FIND ATTACHED/VEUILLEZ TROUVER CI-JOINT</b>			
<b>Decision on Application to lift the confidentiality of the 7 december 2007 Decision in the Boskoski and Tarculovski Case, submitted by Judge on 27 January 2015</b>			

Churchillplein 1,  
2517 JW The Hague.  
P.O. Box 13888,  
2501 EW The Hague.  
Netherlands

Churchillplein 1,  
2517 JW La Haye.  
B.P. 13888, 2501 EW  
La Haye, Pays-Bas

Tel.: 31-70-512 5689 /  
8751  
Fax: 31-70-512 8558

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<b>Date Created/ Daté du :</b>	27 January 2015	<b>Date transmitted/ Transmis le :</b>	27 January 2015
<b>No. of Pages/ Nombre de pages :</b>	30		
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Rev: April 2014/Rév. : Avril 2014

**UNITED  
NATIONS**



Mechanism for International Criminal Tribunals

Case No. MICT-14-84

Date: 27 January 2015

Original: English

**BEFORE A SINGLE JUDGE**

**Before: Judge Liu Daqun**

**Registrar: Mr. John Hocking**

**Decision of: 27 January 2015**

**PROSECUTOR**

**v.**

**LJUBE BOŠKOSKI  
JOHAN TARČULOVSKI**

***PUBLIC***

**DECISION ON APPLICATION TO LIFT THE  
CONFIDENTIALITY OF THE 7 DECEMBER 2007 DECISION  
IN THE *BOŠKOSKI AND TARČULOVSKI* CASE**

**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. Mathias Marcussen

**Counsel for Ljube Boškosi:**

Ms. Edina Residović  
Mr. Guénaél Mettraux

**Counsel for Johan Tarčulovski:**

Mr. Antonio Apostolski

I, **LIU DAQUN**, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case;<sup>1</sup>

**BEING SEISED OF** the “Application to Lift the Confidentiality of the 7 December 2007 Decision in the *Boškoski* Case” filed confidentially by Ljube Boškoski on 2 December 2014 (“Application”);

**NOTING** the “Decision on Prosecution’s Motion for Admission into Evidence of Documents MFI P251, P379 and P435” filed confidentially by Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) on 10 December 2007 in the case of *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T (“Decision”);

**NOTING** that, in the Application, Boškoski requests that: (i) the confidentiality of the Decision be lifted or, in the alternative, that any reference in the Decision to Exhibit P251, which was filed under seal, be redacted as necessary in order to permit the remainder of the Decision to be made public; and (ii) the confidential status of the Application be also lifted;<sup>2</sup>

**NOTING** Boškoski’s submission that it is in the interests of justice to lift the confidential status of the Decision as: (i) the proceedings in his case have come to an end; (ii) the Decision does not disclose any information regarding protected witnesses; (iii) the references in the Decision to confidential Exhibit P251 do not warrant its continued confidentiality; (iv) the need to guarantee public and transparent proceedings militate in favour of lifting the confidentiality; and (v) the Decision is of jurisprudential importance;<sup>3</sup>

**NOTING** the “Prosecution’s Response to Application of Ljube Boškoski’s Counsel to Lift the Confidentiality of the 7 December 2007 Decision in *Boškoski* Case”, filed confidentially by the Prosecution on 15 December 2014 (“Response”), in which the Prosecution does not oppose the Application on the basis that: (i) the references to protected witnesses in the Decision do not compromise their protective measures; and (ii) the references to Exhibit P251 do not reveal the reasons for the exhibit’s confidentiality or any other information that would jeopardize its confidential content;<sup>4</sup>

**NOTING** that the Decision refers to Witnesses M052 and M053 who were granted protective measures by the Trial Chamber on 30 March 2007;<sup>5</sup>

<sup>1</sup> Order Assigning a Single Judge to Consider an Application, 8 December 2014 (confidential), p. 1.

<sup>2</sup> Application, paras. 13-14. *See also* Application, para. 10.

<sup>3</sup> Application, paras. 10-12.

<sup>4</sup> Response, paras. 1-2.

<sup>5</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion for Protective Measures, 30 March 2007 (partly confidential), para. 17.

**RECALLING** that the Single Judge considered it appropriate to invite submissions from the Registry's Witnesses Support and Protection Unit ("WISP") as to which passages of the Decision, if any, require redaction in order to ensure effective protection for Witnesses M052 and M053 or for any other protected witnesses in this case;<sup>6</sup>

**NOTING** the "Corrigendum to Prosecution's Response to Application of Ljube Boškosi's Counsel to Lift the Confidentiality of the 7 December 2007 Decision in the *Boškosi and Tarčulovski Case*", filed confidentially by the Prosecution on 23 January 2015 ("Corrigendum"), in which the Prosecution seeks leave to: (i) correct its position to reflect that it opposes making the Decision public without redactions; and (ii) supplement its Response by proposing redactions to the Decision to ensure the witnesses' effective protection;<sup>7</sup>

**NOTING** the "Registrar's Submission in Compliance with Order for Submissions on Application to Lift the Confidentiality of the 7 December 2007 Decision in the *Boškosi and Tarčulovski Case*", filed confidentially by the Registrar of the Mechanism on 26 January 2015, which attaches a report prepared by WISP ("WISP Report") indicating the redactions it considers necessary to ensure effective protection for Witnesses M052 and M053, in addition to those suggested by the Prosecution;<sup>8</sup>

**RECALLING** the general importance of maintaining the public character of the proceedings in accordance with Rule 78 of the ICTY Rules of Procedure and Evidence and Rule 92 of the Rules of Procedure and Evidence of the Mechanism ("Rules");

**CONSIDERING** that, pursuant to Rule 86(F) of the Rules, once protective measures have been ordered in proceedings before the ICTY, they shall continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism unless and until they are rescinded, varied or augmented;

**CONSIDERING** that Rule 95(B) of the Rules allows for the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non disclosure no longer exist and after due consideration has been given to any matters relating to witness protection;

**NOTING** that the proceedings in the *Boškosi and Tarčulovski* case have been completed;<sup>9</sup>

<sup>6</sup> Order for Submissions on Application to Lift the Confidentiality of the 7 December 2007 Decision in the *Boškosi and Tarčulovski Case*, 19 January 2015, p. 2.

<sup>7</sup> Corrigendum, paras. 1, 3. *See also* Corrigendum, Confidential Annex A.

<sup>8</sup> WISP Report, paras. 2-4. *See also* WISP Report, Confidential Annex.

<sup>9</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008; *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010.

**CONSIDERING** that redaction of any identifying information in the Decision relating to Witnesses M052 and M053 is necessary to ensure the effectiveness of protective measures granted to them by the Trial Chamber;

**FINDING** that it is in the interest of maintaining the public character of the proceedings to issue a public redacted version of the Decision;

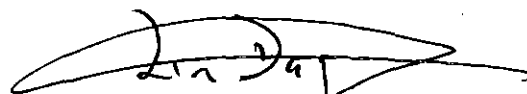
**FOR THE FOREGOING REASONS**, and **PURSUANT TO** Article 12(1) of the Statute of the Mechanism and Rule 95(B) of the Rules;

**HEREBY GRANT** the Application, in part, and **ISSUE** a public redacted version of the Decision (see Annex I);

**INSTRUCT** the Registry to lift the confidential status of the Application.

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

Done this 27th day of January 2015,  
At The Hague,  
The Netherlands



Judge Liu Daqun  
Single Judge

[Seal of the Mechanism]

# ANNEX I

UNITED  
NATIONS

IT-04-82-T  
① 16691 - ① 16667  
10 December 2007

16691  
16667



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-04-82-T  
Date: 7 December 2007  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr Hans Holthuis

**Decision:** 7 December 2007

**PROSECUTOR**

v.

**LJUBE BOŠKOSKI  
JOHAN TARČULOVSKI**

*CONFIDENTIAL*

**DECISION ON PROSECUTION'S MOTION FOR ADMISSION  
INTO EVIDENCE OF DOCUMENTS MFI P251, P379 AND P435**

**The Office of the Prosecutor:**

Mr Dan Saxon

**Counsel for the Accused:**

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškosi  
Mr Antonio Apostolski and Ms Jasmina Zivković for Johan Tarčulovski



16690

## 1. Background

1. This decision of Trial Chamber II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is in respect of a motion, raised orally by the Prosecution in court session on 18 September 2007, for the admission into evidence of documents marked for identification (MFI) as P251, P379 and P435 ("Motion").<sup>1</sup> The Prosecution submitted that these documents are relevant and of probative value.<sup>2</sup> Counsel for Ljube Boškosi ("Boškosi Defence") and Counsel for Johan Tarčulovski ("Tarčulovski Defence") opposed the Motion,<sup>3</sup> arguing, *inter alia*, that the admission of statements given by the Accused Johan Tarčulovski would be unfair to him as his rights were violated when the statements were taken<sup>4</sup> and unfair to the co-Accused Ljube Boškosi as he would not be able to confront that evidence.<sup>5</sup> Both Defences further argued that the statements by Johan Tarčulovski and others were unreliable both because of the circumstances under which they were taken and because some of the statements were contradictory.<sup>6</sup> The Chamber requested the parties to file written submissions in support of their positions.<sup>7</sup> On 25 September 2007 the Prosecution filed its written submissions ("Prosecution's Written Submissions") and also sought permission to file a submission exceeding the word limit.<sup>8</sup> On 3 October 2007 the Boškosi Defence and the Tarčulovski Defence filed their submissions, "Boškosi's Written Response"<sup>9</sup> and "Tarčulovski's Written Response,"<sup>10</sup> respectively. In their responses, both Defences sought leave to file submissions exceeding the word limit.<sup>11</sup>

[REDACTED]

<sup>2</sup> Court Hearing of 18 September 2007, T 5147.

[REDACTED]

<sup>4</sup> Court Hearing of 18 September 2007, T 5136-5137; 5144; 5145.

<sup>5</sup> Court Hearing of 18 September 2007, T 5136.

<sup>6</sup> Court Hearing of 18 September 2007, T 5138; 5140-5141; 5143-5144; 5145.

<sup>7</sup> Court Hearing of 18 September 2007, T 5146-5147; 5152.

<sup>8</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, "Prosecution's Submissions Regarding the Admission into Evidence of the Exhibits Marked for Identification as P00379, P00435 and P00251 with Public Annexes A, B, D and E and Confidential Annex C", filed on 25 September 2007.

<sup>9</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, "Boškosi Defence Response to Prosecution Motion for Admission of Documents Pertaining to Second Ljuboten Commission", filed confidentially on 3 October 2007. Confidential Annex A was attached to the Response containing a corroboration chart.

<sup>10</sup> *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, "Johan Tarčulovski Submissions Regarding the Admission into Evidence of the Exhibits Marked for Identification as P00379, P00435 and P00251 with Public Annex A", filed on 3 October 2007.

<sup>11</sup> Boškosi's Written Response, para 2; Tarčulovski's Written Response, para 2.

16689

## 2. Documents proposed for admission into evidence

2. All documents proposed for admission relate to the work of a commission established by the then Minister of Interior of the Republic of Macedonia, Mr Hari Kostov, on 7 March 2003 ("the Commission")<sup>12</sup> to conduct an inquiry into the events at Ljuboten which have given rise to the Indictment in this trial.

3. One group of documents, all part of MFI P379, contains information provided by the Accused Johan Tarčulovski in writing or orally to the Commission regarding the Ljuboten events. These documents comprise: an Official Note, which was written by Johan Tarčulovski in connection with a meeting by the Commission that he attended on 5 May 2003,<sup>13</sup> in which he explained his role and the role of a group of police reservists during the events. He also provided an oral statement to the Commission at this meeting on 5 May 2003 which is summarised in a report dated 6 May 2003 produced by the Commission ("Report of 6 May 2003").<sup>14</sup> Johan Tarčulovski was summoned for a second interview with the Commission on 12 November 2003 on the same subject matter. The content of his interview is summarised in a document entitled "Minutes" dated 12 November 2003 ("Minutes of 12 November 2003")<sup>15</sup> and in a document entitled "Information" of 25 November 2003 ("Information of 25 November 2003"),<sup>16</sup> both documents produced by the Commission. In the Report dated 6 May 2003, the Minutes of 12 November 2003 and the Information of 25 November 2003, Johan Tarčulovski made assertions of the involvement of the other Accused, Ljube Boškoski, in the relevant events.<sup>17</sup> No such assertion is made in the Official Note.

4. Another group of documents, all part of MFI P379, are official notes and records of interviews before the Commission provided by other persons regarding their activities before and during the Ljuboten events.<sup>18</sup>

<sup>12</sup> See MFI P379, The Decision on Establishment of a Commission dated 7 March 2003 signed by Minister of Interior Hari Kostov ("Decision").

<sup>13</sup> MFI P379, Official Note dated 3 March 2003 by Inspector Johan Tarčulovski. However, as to the date of this document, Tatjana Groševa testified that the date 3 March 2003 is obviously wrong because this was even before the Commission was set up on 7 March 2003, T 4778. Tatjana Groševa said she was not present at this meeting, but according to the procedure such written statements were taken on the same day as the person was interviewed by the Commission or on one of the following days, T 4717-4718. Tatjana Groševa found this statement, together with the information from the first meeting, in the dossier in the record of the work of the Commission, T 4717. Zoran Jovanovski confirmed that this Official Note was signed by Johan Tarčulovski, T 5019.

<sup>14</sup> MFI P379, Report on the Meeting of the Commission Investigating the Events in Ljuboten Village dated 6 May 2003.

<sup>15</sup> MFI P379, Minutes of a Meeting of the Commission for Inquiry into the Events and Incidents in Ljuboten Village dated 12 November 2003.

<sup>16</sup> MFI P379, Information on the Activities that were Undertaken by the Investigation Commission about the Events and Happenings in the Village Ljuboten dated 25 November 2003.

<sup>17</sup> MFI P379, Report of 6 May 2003, Minutes of 12 November 2003 and Information of 25 November 2003

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5. A third group of documents reflect the activities of the Commission. This include MFI P435, which is entitled "Information" dated 28 May 2003 and addressed to the Minister of the Interior<sup>19</sup> describing the activities of the Commission to that date and two letters from the Liaison Officer for the ICTY in the Ministry of Interior to the ICTY Office in Skopje. MFI P251<sup>20</sup> and part of MFI P379 ("Letter of 9 August 2004 to ICTY with attachments")<sup>21</sup> respectively, give an update of the activities undertaken by the Commission.
6. Finally, there are a number of other documents connected to the setting up and work of the Commission.<sup>22</sup>
7. The Chamber will deal with these four groups of documents separately.

### 3. Law

8. The Chamber would emphasize that the present issue is whether the documents described earlier should be admitted into evidence. This is not the stage of the trial at which the Chamber should seek to assess the weight that should ultimately be given to this evidence (if admitted). As will be discussed, a number of factors may need to be considered to determine admissibility. What is said in this regard is in no sense, however, an indication of the weight, if any, which the Chamber may ultimately attach to evidence it admits.

MFI P435, Information on the Activities that were Undertaken so far by the Commission for Investigating the Circumstances and Factual Situation Regarding the Events and Incidents in Ljuboten Village.

<sup>20</sup> MFI P251, Report on Activities to date Concerning the Investigation into Events in the Village of Ljuboten dated 16 June 2003 submitted by Liaison Officer for the International Criminal Tribunal for the Former Yugoslavia in the MVR Besim Ramićević to the Office of the International Criminal Tribunal for the Former Yugoslavia in Skopje.

<sup>21</sup> MFI P379, Letter to the Office of the International Criminal Tribunal for the Former Yugoslavia in Skopje, dated 9 August 2004, Subject: Submission of Information and Documentation in Relation to the Request from the Office of the Prosecutor, submitted by Liaison Officer with the International Criminal Court for Former Yugoslavia in the MVR, Besim Ramićević, ("Letter of 9 August 2004 to ICTY with attachments"). The attachments referred to in the letter that are in fact attached to the letter are the following: The Decision, Information of 25 November 2003, Minutes of 12 November 2003 and Official note by Johan Tarčulovski (ERN N000-8939-N000-8955). While a Report of 6 May 2003 is attached to this letter in Ecourt (ERN N000-8957-N000-8959), the Chamber will not consider this as an attachment to the letter as this does not follow from the letter itself. However, the Report of 6 May 2003 is also submitted as a separate document, and will be dealt with by the Chamber as such.

<sup>22</sup> MFI P379, Decision on Establishing a Committee by Minister of Interior Hari Kostov dated 7 March 2003; Letter to Tatjana Groševa dated 11 March 2003 re: Decision on Establishing Committee; Receipt of Summons received by Johan Tarčulovski to Report to the Minister of Interior; General Authorisation for lawyer Simeon Dvojakov from Johan Tarčulovski dated 1 October 2003; Request for Assistance from the Office of the Prosecutor of the ICTY to the Government of the Republic of Macedonia dated 17 June 2004; Excerpt of Article 29 of the Statute and Rule 39 and a fax from an ICTY Investigator to Chief of Investigations dated 30 August 2004.

Kobay

9. General provisions regulating the rules of evidence in trials before the Tribunal are found in Rule 89 of the Rules of Procedure and Evidence ("Rules"). By Rule 89(B), in cases not otherwise provided for in Section 3 (i.e. Rules 89-98), the Chamber shall apply rules of evidence which will best favour a fair determination of the matter and are consonant with the spirit of the Statute and the general principles of law. It is in Rules 89(C), 89(D) and 95, however, where the more direct provisions are found to assist with the present issues.

10. Rule 89(C) provides for the admission of any evidence which is relevant and has probative value, however, by Rule 89(D) the Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Further, by Rule 95, no 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.

11. It is the principles reflected in these rules which essentially guide the determination of the admissibility of earlier, out-of-court, oral or written statements made in the circumstances raised here, by a person who is later accused of offences being tried in this Tribunal,<sup>23</sup> and of the other statements and documents which are the subject of this Motion.

12. With particular reference to earlier oral or written statements made by an accused in the present trial, however, if an oral or written statement is made when the accused is questioned as a suspect by the ICTY Prosecutor,<sup>24</sup> Rules 42 and 43 govern the procedure to be followed by the ICTY Prosecutor. These Rules provide for the rights of a suspect when questioned by the ICTY Prosecutor. Similarly, where a person who has been indicted in this Tribunal, and is thereby an accused, is questioned by the ICTY Prosecutor, Rule 63 governs the procedure to be followed and provides for the rights of an accused when questioned by the ICTY Prosecutor.

13. With respect to the statements made to the Commission by the Accused Johan Tarčulovski, the Boškoski Defence seeks to rely on Rule 42, submitting that its guarantees should not be limited to questioning by the ICTY Prosecutor, but should also be applied to oral or written statements made to national authorities, including in this case, the Commission established by the Macedonian Minister of Interior. The context of Part Four, Section 1 of the Rules (which commences with Rule 39) and the very precise wording of Rules 42 and 43, however, is expressly directed to the questioning of a suspect by the ICTY Prosecutor during an investigation, and does not provide any obvious or satisfactory foundation for the submission of the Boškoski Defence.

<sup>23</sup> *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/I-T, Decision Concerning the Use of Statements Given by the Accused, 9 October 2006 ("Mrkšić Decision"), paras 24-26; *Prosecutor v. Milan Milutinović et al.*, Decision on

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14. While the *Čelebići Decision*<sup>25</sup> can be read as an application of Rule 42 to questioning by a national authority, that decision dealt with a complex factual situation in which the questioning occurred in the context of proceedings at the behest of the ICTY Prosecutor to secure the transfer of an accused to this Tribunal. There are also words in the decision of the Trial Chamber in *Halilović* which may be understood as indicating that Rule 43 applies to all statements of an accused regardless of what authority questioned the accused or for what purpose.<sup>26</sup> However, in that case, the issue before the Trial Chamber was the admissibility of a statement of the Accused, made to the ICTY Prosecutor, but as a witness, not as a suspect. On appeal from that Trial Chamber decision, no Judge of the Appeal Chamber interpreted and applied Rule 43 in the broad terms suggested above.<sup>27</sup>

15. More recent jurisprudence of this Tribunal has held that Rules 42 and 43 do not apply in situations where questioning of a suspect by national authorities is not for the purpose of an investigation by the ICTY Prosecutor.<sup>28</sup> In such a context, in the Chamber's view, it is essentially Rules 89(C) and 89(D), and in relevant situations Rule 95, which regulate the admission of statements made when a suspect is questioned by national authorities. Indeed, it would be both impractical, and no doubt beyond power, for the Rules of this Tribunal to seek to anticipate and to regulate the myriad of circumstances in which a person, who is later tried by this Tribunal, may come to be questioned by national authorities. Where, however, a statement made in the course of such questioning is sought to be tendered in evidence in a trial in this Tribunal, issues such as the reliability of the statement and whether its admission would lead to an unfair trial, clearly arise. Hence, the relevance and significance of Rules 89(C), 89(D) and 95.

16. Relevant out of court statements, whether made by a person who is later indicted before this Tribunal, or not, may be admitted under Rule 89(C) provided that a Chamber considers them to be

Evidence Tendered Through Sandra Mitchell and Frederick Abrahams, 1 September 2006 ("*Milutinović Decision*"), paras 13, 15 and 16.

<sup>24</sup> Pursuant to Rule 37(B) this could be the ICTY Prosecutor or persons authorised by the Prosecutor.

<sup>25</sup> *Prosecutor v. Zenil Delalić et al*, Case No. IT-96-21-T, Decision on Zdravko Mucić for the Exclusion of Evidence, 2 September 1997 ("*Čelebići Decision*"), para 43.

<sup>26</sup> *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005 ("*Halilović Decision*"), para 21, the Trial Chamber stated that: "The Trial Chamber finds in order to protect the right of the Accused to a fair trial, in accordance with Article 21 of the Statute, it should be taken into account whether the safeguards of Rules 42, 43 and 63 of the Rules have been fully respected when deciding on the admission of any former statement of an accused irrespective of the status the accused at the time of taking the statement."

<sup>27</sup> Rather, on appeal. *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović Appeal Judgement*"), an issue was whether the Trial Chamber had applied Rule 89(D) or Rule 43 in reaching its decision, and also whether Rule 43 applied to statements made by an Accused to the Prosecutor as a witness (see Opinion of Judge Meron, para 5), or only as a suspect (see Opinion of Judge Schomburg, para 5, and Declaration of Judge Shahabudeen, para 6).

<sup>28</sup> *Mrkšić Decision*, para 17.

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probative.<sup>29</sup> However, as held by the Appeals Chamber, since such evidence is admitted to prove the truth of its content, the Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the statement and the circumstances under which the evidence arose.<sup>30</sup> As the position was very recently stated by the Appeals Chamber in the *Prlić et al* Decision<sup>31</sup>:

Of even more relevance for the issue at hand, since the Tribunal's first cases, the jurisprudence has been constant in holding that, under the Tribunal's system, a statement of a person made otherwise than in the proceedings in which it is tendered, whether orally by a witness or in writing is not inadmissible, in particular when the source of hearsay is known and subject to potential evaluation by a Chamber. In particular, the Appeals Chamber found that Trial Chambers have a wide discretion in admitting hearsay evidence, although establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence in order to prove the truth of its contents.<sup>32</sup>

17. As to whether it would be fair to an Accused to admit a prior statement of the Accused, an important consideration is whether the statement was made freely and voluntarily.<sup>33</sup> As the Appeals Chamber has said:

An accused has the right to refuse to give statements incriminating himself prior to trial, and he had the right to refuse to testify at trial. But where the accused has freely and voluntarily made statements prior to trial, he cannot later on choose to invoke his right against self-incrimination retroactively to shield those statements from being introduced, provided he was informed about his right to remain silent before giving the statement; there is, however, a presumption that he knows about this right if he is assisted by counsel.<sup>34</sup>

18. In cases where the statements have been taken by national authorities, the Tribunal has also considered whether the statements were taken in accordance with national laws,<sup>35</sup> although this is not conclusive as the admissibility must ultimately be considered within the context of the Rules of the Tribunal.

19. Where the questioned person is one of two or more accused in a joint trial, the issue arises as to whether his or her statement is to be declared inadmissible because the co-accused may not have an opportunity to challenge the content of that statement through cross-examination of the co-accused who made the statement. The Appeals Chamber recently held that none of the rules

<sup>29</sup> *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999 ("*Aleksovski* Decision"), para 15.

<sup>30</sup> *Aleksovski* Decision, para 15.

<sup>31</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* Appeals Decision").

<sup>32</sup> *Prlić* Appeals Decision, para 52.

<sup>33</sup> *Halilović* Decision, para 18; *Prosecutor v. Vujadin Popović et al*, Case No. IT-05-88-T, Decision on the Admissibility of the Borovčanin Interview and the Amendment of the Rule 65ter Exhibit List, 25 October 2007 ("*Popović* Decision"), para 29. See also *Mrkšić* Decision, para 28.

<sup>34</sup> *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, 19 August 2005. ("*Halilović* Appeal Decision"), para 15.

<sup>35</sup> *Mrkšić* Decision, para 27; *Čelebici* Decision, para 40.

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explicitly<sup>36</sup> provide for this situation.<sup>37</sup> Referring to the right of all accused to a fair and public hearing as enshrined in Article 21(2) of the Statute, the Appeals Chamber stated that: “[W]hile such a hearing generally entails the examination of evidence against the accused, this principle is not absolute”<sup>38</sup>, and held, following reference to the jurisprudence of the European Court of Human Rights, that “as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.”<sup>39</sup> This was held in the context of a statement made by a co-accused, although the Appeals Chamber did not expressly comment on the situation where the statement of a co-accused attributed acts and conduct to another accused that were disputed in the trial by the other accused. The Appeals Chamber recognised, however, that a trier of fact “would not always abuse its discretion in limiting, or even 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>40</sup>

#### 4. Submissions and discussion

##### (a) Documents containing statements provided by Johan Tarčulovski to the Commission

###### (i) Submissions

20. The Prosecution submits that the documents containing information provided by Johan Tarčulovski to the Commission in May and November 2003; *i.e.* reports from interviews of Johan Tarčulovski and an Official Note made by Johan Tarčulovski, are relevant.<sup>41</sup> It is further submitted that this information is reliable and of probative value as, *inter alia*, the information was gathered and recorded diligently by the Commission for their employer, the Government, and the information was based on notes taken contemporaneously when Johan Tarčulovski made his statements. Further, it is submitted that Johan Tarčulovski was not compelled to answer questions, that no pressure was exerted on him and that he provided his statements freely and voluntarily.<sup>42</sup>

<sup>36</sup> *Prlić* Appeals Decision, para 40. Therefore, the starting point would be Rule 89(B) which provides: “In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.”

<sup>37</sup> The case before the Appeals Chamber was the issue of admission of a transcript of the questioning of a suspect before the ICTY Prosecutor, *see Prlić* Appeals Decision, para 2.

<sup>38</sup> *Prlić* Appeals Decision, para 41, 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 of the Admissibility of Evidence, 4 March 1998, para 22. *See also Prlić* Appeals Decision, para 52, 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, para 12.

<sup>39</sup> *Prlić* Appeals Decision, para 55.

<sup>40</sup> *Prlić* Appeals Decision, para 62.

<sup>41</sup> Court Hearing of 18 September 2007, T 5147; Prosecution’s Written Submissions, paras 5-14.

<sup>42</sup> Prosecution’s Written Submissions, para 15. *See also* Court Hearing of 18 September 2007, T 5147-5148.

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Additionally, it is submitted that the information contained in these documents is corroborated by evidence already admitted during this trial.<sup>43</sup>

21. The Prosecution further submits that their admission into evidence would not be in contradiction to the Rules.<sup>44</sup> It is submitted that Rules 42 and 43 did not apply as the interviews were not part of a criminal process, but only of an internal administrative procedure, and in any event, the ICTY Prosecutor was not involved in these interviews. Moreover, Johan Tarčulovski was not treated as a suspect to a crime when questioned by the Commission and the purpose of the Commission was only to produce information for the then Minister of Interior Hari Kostov.<sup>45</sup>

22. It is further submitted that the admission would not result in unfairness to either Accused,<sup>46</sup> as, *inter alia*, no compulsion or coercion was used to force Johan Tarčulovski to answer questions<sup>47</sup> and he understood his right to remain silent as he refused to answer some questions.<sup>48</sup>

23. With respect to the admissibility of the statements of Johan Tarčulovski against his co-Accused Ljube Boškosi, it is submitted that Ljube Boškosi will suffer no prejudice if the statements are admitted, as his right to cross-examine Johan Tarčulovski is not an absolute one and this could be cured, *inter alia*, by the opportunity he had to cross-examine the two members of the Commission who had appeared as witnesses before the Chamber.<sup>49</sup>

24. The Tarčulovski Defence submits that, as the information was given by Johan Tarčulovski to the Commission after the present case was deferred to the Tribunal, he became a possible suspect. Therefore, the statements should have been taken in compliance with Rule 42.<sup>50</sup>

25. Both Defences submit that these documents are inadmissible as a number of Johan Tarčulovski's rights were violated when he was interviewed by the Commission.<sup>51</sup> In this respect the Defences contend that Rules 42 and 43 applied. Hence, it is submitted that Johan Tarčulovski was not informed of his right to remain silent and not to incriminate himself pursuant to Rule 42, that there is no proof that he waived this right knowingly and voluntarily,<sup>52</sup> that the interviews were

<sup>43</sup> Prosecution's Written Submissions, paras 16 and 32; Annex D containing a "corroboration chart." [REDACTED]

<sup>44</sup> Prosecution's Written Submissions, para 5.

<sup>45</sup> Prosecution's Written Submissions, para 19.

<sup>46</sup> Prosecution's Written Submissions, para 20.

<sup>47</sup> Prosecution's Written Submissions, paras 15 and 21.

<sup>48</sup> Prosecution's Written Submissions, para 21.

<sup>49</sup> Prosecution's Written Submissions, para 22.

<sup>50</sup> Tarčulovski's Written Response, para 7; Court Hearing of 18 September 2007, T 5145.

<sup>51</sup> Boškosi's Written Response, paras 15, 16, 21, 24-25 and 29-31; Tarčulovski's Written Response, para 3. Regarding MFI P251 the Tarčulovski Defence also submits that this document should be regarded as statements and, therefore, inadmissible, Tarčulovski's Written Response, para 32.

<sup>52</sup> Boškosi's Written Response, paras 10-14 and 22-23; Court Hearing of 18 September 2007, T 5137; Tarčulovski's Written Response, paras 9 and 12-13.



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not audio- and video recorded or recorded verbatim pursuant to Rule 43,<sup>53</sup> that Johan Tarčulovski was not warned of his right to counsel pursuant to Rule 42, that he did not have counsel present when questioned on two occasions, that he did not voluntarily waive this right in an informed manner<sup>54</sup> and that Johan Tarčulovski was not informed that the information he gave could be used against him in the criminal proceedings before this Tribunal.<sup>55</sup>

26. Referring to the summoning of Johan Tarčulovski by the Commission and the tasks of the Commission, the Tarčulovski Defence submits that the Ministry of Interior was conducting an investigation and, therefore, was under an obligation to apply the Code on Criminal Procedure of the Republic of Macedonia.<sup>56</sup> It is submitted that the interviews were obtained in breach of the Code on Criminal Procedure of the Republic of Macedonia<sup>57</sup> and would be inadmissible according to Macedonian Law.<sup>58</sup>

27. The Boškoski Defence submits that these documents are not admissible because Johan Tarčulovski as a co-accused has the right to remain silent and may not be compelled to testify in his own trial, therefore, their admission would violate the right of the Accused Ljube Boškoski to confront this evidence.<sup>59</sup> This submission was made before the *Prlić* Appeals Decision was given.

28. Both Defences submit that these documents are not sufficiently reliable, referring, *inter alia*, to the procedure by which they were obtained<sup>60</sup> and that they reveal important differences and contradictions.<sup>61</sup>

(ii) Discussion

a. Did Rules 42, 43 and 63 apply?

29. The documents are clearly relevant to the present case. The first issue is whether Rules 42 and 43 applied when Johan Tarčulovski was questioned by the Commission.

<sup>53</sup> Boškoski's Written Response, para 16; Tarčulovski's Written Response, para 6; Court Hearing of 18 September 2007, T 5140.

<sup>54</sup> Boškoski's Written Response, paras 18 and 20; Tarčulovski's Written Response, paras 9 and 11.

<sup>55</sup> Court Hearing of 18 September 2007, T 5138; Tarčulovski's Written Response, paras 7 and 14.

<sup>56</sup> Tarčulovski's Written Response, para 10.

<sup>57</sup> Tarčulovski's Written Response, para 13.

<sup>58</sup> Tarčulovski's Written Response, paras 16-22; Court Hearing of 18 September 2007, T 5140; 5145.

<sup>59</sup> Boškoski's Written Response, paras 4-9; Court Hearing of 18 September 2007, T 5136-5137.

<sup>60</sup> Boškoski's Written Response, para 27; Tarčulovski's Written Response, para 27.

<sup>61</sup> Boškoski's Written Response, para 28; Tarčulovski's Written Response, paras 25-26.

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30. The Commission was established by a written decision of the Minister of Interior. Its terms disclose it was established for "investigating"<sup>62</sup> into the circumstances and factual situation in relation to the events in Ljuboten and to:

II. ...make an inquiry and analyses of all materials and documents in relation to the occurrences in the area of Skopje village of Ljuboten, about the events in the period of August 2001; to prove the composition and the capacity of the unit that had undertaken activities on the mentioned period, including also determination of all members of the unit individually; to prove the reasons and circumstances about the human victims and material damage, in order to establish the truth in connection to the mentioned events; to inquire the legal authorisations of the unit; and finally to determine the consequences of the implemented action.

...during its work to make all the necessary contacts in order to establish the truth..

...to prove the responsibility about the implemented action.

....

III. The Commission to prepare a report and latest till 02 May 2003 to submit a report about its work it to the Minister of Interior.<sup>63</sup>

31. The Decision indicates that the Commission was to make an inquiry, *inter alia*, for the purpose of informing the Minister of Interior of the information it gathered concerning the events in Ljuboten,<sup>64</sup> and the participants, at least in so far as the participants were members of "the unit" (of the Ministry of Interior) which had undertaken the activities at Ljuboten, the authorisation of that unit and the consequences of the action. The Commission comprised employees in the Ministry of Interior,<sup>65</sup> none of whom were members of the staff of the ICTY Prosecutor. The interviewees were summoned or invited orally to attend by the Commission itself.<sup>66</sup> While, later in 2003, the Minister of Interior apparently informed the ICTY Prosecutor of the Commission,<sup>67</sup> no apparent basis appears in the present evidence for concluding that the Commission was established to further the work of the ICTY Prosecutor or to inquire or question on behalf of the ICTY Prosecutor.

32. Thus, the circumstances indicate that the Commission was set up for internal purposes of the Government of Macedonia, in particular of the Ministry of Interior. They do not indicate that the Commission acted under the direction of the ICTY Prosecutor or for the purpose of the ICTY Prosecutor. The fact that the present case was deferred to the Tribunal on 4 October 2002<sup>68</sup> does not establish that the Commission acted upon the Prosecutor's direction or even that there was any connection between the ICTY Prosecutor and the Commission. While both the Commission and

<sup>62</sup> MFI P379, Decision, ERN: N000-8942-N000-8943.

<sup>63</sup> MFI P379, Decision, ERN: N000-8942-N000-8943.

<sup>64</sup> [REDACTED] Tatjana Groševa, T 4777-4779.

<sup>65</sup> MFI P379, Decision.

<sup>66</sup> Zoran Jovanovski, T 5009-5010.

<sup>67</sup> MFI P379, Letter of 9 August 2004 to ICTY with attachments; MFI P251.

<sup>68</sup> *In Re: The Republic of Macedonia*, Case No. IT-02-55-MISC.6, Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, 4 October 2002.

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the Prosecutor appear to have inquired into the Ljuboten events, there is nothing which suggests, let alone establishes, that these investigations were joint or related. They were conducted separately and independently of each other. It is the evidence that the Prosecutor did not submit any information to the Commission,<sup>69</sup> and the President of the Commission was not informed of the activities of the ICTY other than being aware that there was a motion of deferral of the present case.<sup>70</sup> All interviewees before the Commission, including Johan Tarčulovski, were questioned and made their statements as witnesses.

33. Given these circumstances there is no basis on which Rules 42, 43 or 63 are applicable to the proceedings of the Commission which led to the Official Note of Johan Tarčulovski and his interviews. The submissions of the Defences, in so far as they rely on one or more of these Rules, cannot be sustained.

b. Were the statements before the Commission taken in accordance with the Macedonian law?

34. As to whether the questioning and statements were taken according to Macedonian law, two preliminary issues arise. The first is whether the Commission was performing statutorily regulated functions under Macedonian law. Secondly, if so, whether the statements were taken according to the applicable legal provisions.

35. The Commission was set up pursuant to Article 55 of the Law on the Organisation and Work of Government Bodies.<sup>71</sup> However, neither that Article, nor the Decision, stipulated under which law the Commission was to work and what procedure it was to adhere to. This was confirmed by the President of the Commission.<sup>72</sup>

36. The precise legal basis under Macedonian law for the existence of the Commission, and the scope of its role or authority is less than clear. The submissions of the Defences have tended to obscure, rather than resolve, this situation. Despite contrary submissions, it is not shown that the Commission was performing any function or exercising any authority pursuant to the Code of Criminal Procedure of the Republic of Macedonia<sup>73</sup> ("Criminal Procedure Code"). In essence, pursuant to the Criminal Procedure Code the Macedonian Public Prosecutor is given the

<sup>69</sup> Tatjana Groševa, T 4774.

<sup>70</sup> Zoran Jovanovski, T 5070-5071. See also Tatjana Groševa, T 4774.

<sup>71</sup> MFI P379, Decision. Article 55(1) provides: "The Minister submits rules, orders, guidelines, plans, programs, decisions and other types of acts for the exclusion of laws and other regulations, when he is authorized to do so by law."

<sup>72</sup> Zoran Jovanovski said that there were no rules as to how the Commission was to conduct its work, T 5009-5010. See also Tatjana Groševa, T 4809.

<sup>73</sup> Exhibit P88, Code on Criminal Procedure of the Republic of Macedonia.

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responsibility of directing those involved or assisting in the collection of information and the securing of potential evidence relating to a possible crime,<sup>74</sup> with a formal investigation being conducted by an investigative judge<sup>75</sup> on the request of the Prosecutor.<sup>76</sup> The Commission in this case was not set up to perform any of the specific roles contemplated by the Criminal Procedure Code, nor was it invested with any powers under that Code. Some provisions of the Criminal Procedure Code provide for functions to be carried out by the Ministry of Interior during both the pre-criminal procedure<sup>77</sup> and during an investigation.<sup>78</sup> These provisions may have encouraged the view that as the Commission was established by the Minister of Interior, and comprised officers of the Ministry of Interior, it was therefore performing functions under the Criminal Procedure Code. But this approach is misconceived. The Criminal Procedure Code deals comprehensively with the various stages of preliminary and the formal investigation of suspected criminal conduct. It would be quite contrary to its scheme and intention for an *ad hoc* body such as the Commission to be given part of this responsibility. More particularly, when the Law on Internal Affairs<sup>79</sup> is read with the Criminal Procedure Code, it is apparent that only authorised officers in the operative section of the Criminal Police Department within the Ministry of Interior can undertake work on the detection of crimes and take statements from citizens pursuant to the pre-trial procedure of the Criminal Procedure Code.<sup>80</sup> None of the members of the Commission who constituted the Commission were authorised officers for these purposes. Neither the Commission nor any of its members were authorised to conduct the tasks conferred on the Ministry of Interior for the purposes of a pre-

<sup>74</sup> Exhibit P88, Code on Criminal Procedure, Article 42, para 2 (1). See also Exhibit P89, Law on Public Prosecutor's Office, Article 20 (2): "Public Prosecutor direct the work and measures of authorized Ministry of Interior's officials aimed at finding a perpetrator of a crime, preventing a perpetrator or an accomplice to hide or to run away, revealing and securing traces of crimes and objects that can be used as evidence and is entitled to require that the Ministry of Interior and other competent organs and legal entities collect all information and take other measures for uncovering crimes and other punishable acts and perpetrators."

<sup>75</sup> Exhibit P88, Code on Criminal Procedure, Article 154.

<sup>76</sup> Exhibit P88, Code on Criminal Procedure, Articles 16, 42, para 2 (2) and 151.

<sup>77</sup> Exhibit P88, Code on Criminal Procedure, Chapter XV.

<sup>78</sup> Exhibit P88, Code on Criminal Procedure, Chapter XVI. The tasks of Ministry of Interior under this chapter could only be conducted with the allowance of a judge, see Article 155.

<sup>79</sup> Exhibit P86, Law on Internal Affairs, Article 12 provides: "The activities on preventing criminal offences, finding out and apprehension of perpetrators of the criminal offences, crime-technical activities, control over the stay and movement of the foreigners, inspection and supervision in protection from fires and explosives, as well as other activities from Article 1 of this Law, are being conducted by the Criminal Police of the Ministry." See also Exhibit 1D107, Book of Rules on the Organization and Operation of the Ministry of Interior Affairs, Article 5 of which provides: "The Criminal Police works on preventing the perpetration of crimes, discovery and capture of perpetrators of crimes, as well as other matters from Article 1 from the Law on Internal Affairs."

<sup>80</sup> Tatjana Groševa, T 4745-4747;4756;4762. See also Vilma Roskovska, T 1529-1530; Zoran Jovanovski, T 5008; Risto Galevski, T 3642-3643; Exhibit P89, Law on Public Prosecutor's Office, Article 20 (2) by which "the Public Prosecutor direct the work and measures of *authorized* (emphasis added) Ministry of Interior's officials..". See also Exhibit P86, Law on Internal Affairs, Article 24 provides who are regarded as authorized officers under that law: (1) police and operative employees, (2) employees who accomplish activities that are in direct connection to police and operative activities and (3) the Minister, his deputy, and supervisors of certain organizational units.

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criminal procedure or an investigation under the Criminal Procedure Code.<sup>81</sup> The Commission did not ever purport to be acting in any such role.

37. It is also clear that the Commission was not established with a view to exercise any disciplinary measures or powers against any employee of the Ministry of Interior who was engaged in the relevant events at Ljuboten. A Standing Commission<sup>82</sup> is established pursuant to the Collective Agreement of the Ministry of Interior for disciplinary purposes.<sup>83</sup> Its composition is different from the Commission established by the Minister to consider the events in Ljuboten.<sup>84</sup> There is also a specific Department of Internal Control, established pursuant to Article 7.2 of the Book of Rules on the Organization and Operation of the Ministry of Interior Affairs, which has responsibility for dealing with cases involving possible abuses of an official position, and the like, by officers of the Ministry of Interior.<sup>85</sup> The Commission was not, therefore, established to investigate any such possible misconduct by any employee of the Ministry of Interior at Ljuboten.

38. Johan Tarčulovski was twice questioned by the Commission, on 5 May 2003 and on 12 November 2003. He attended voluntarily in May and he was summoned to attend in November.<sup>86</sup> The President of the Commission said he had to be summoned in November because he was no longer employed in the Ministry and attended as a civilian.<sup>87</sup> Curiously, it appears from a receipt which Johan Tarčulovski signed for the summons, that he was actually served with the summons at the time of his attendance, i.e. 1400 hours on 12 November 2003.<sup>88</sup> The receipt purports to warn of consequences for non-compliance under Article 142, paragraph 3 of the Criminal Procedure Code,<sup>89</sup> but these are provided in the case of a court summons<sup>90</sup> which this clearly was not. Further, for the reasons already given, it is not apparent that the Criminal Procedure Code had any application to the Commission's activities. Nevertheless, even if it be assumed for present purposes, that Johan

<sup>81</sup> Tatjana Groševa, T 4745-4746; 4756.

<sup>82</sup> Tatjana Groševa, T 4754-4755; Risto Galevski, T 3675.

<sup>83</sup> Exhibit P382, Collective Agreement, Article 144. See also Tatjana Groševa, T 4762; Risto Galevski, T 3674-3675.

<sup>84</sup> Exhibit P382, Collective Agreement, Article 144. The Commission is composed of president, two members and deputies.

<sup>85</sup> Exhibit ID107, Article 7.2 provides: "DEPARTMENT FOR INTERNAL CONTROL works directly on the clearing up and documenting of overstepping of legal authorization, abuse of official position and other illicit activities by employees of the Ministry, proposes measures to prevent and manage such occurrences within legal framework and other regulations of the Ministry, and conducts other affairs entrusted to them and authorized by the minister."

<sup>86</sup> Zoran Jovanovski, T 5010; Tatjana Groševa, T 4766.

<sup>87</sup> [REDACTED] See also MFI P379, Minutes of 12 November 2003.

<sup>88</sup> The receipt reads: "Today on 12 November 2003 at 1400 hours, I received summons number 10-239, dated 12 November 2003 from the Ministry of Interior requesting that I report on 12 November 2003 at 1400 hours. I was advised of my right to engage a lawyer. I was warned of the consequences pursuant to Article 142, paragraph 3 of the Law on Criminal Procedure." *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Court hearing, 10 September 2007, T 4728.

<sup>89</sup> See *supra*, footnote 88.

<sup>90</sup> Exhibit P88, Code on Criminal Procedure, Article 142(3), which provides: "A person may forcefully be apprehended only with a court decision and only when he apparently avoids to respond to the correctly delivered court summons in which he is informed of the possibility of a forceful apprehension and when he does not justify why he would not attend."

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Tarčulovski was duly and lawfully summoned pursuant to the Criminal Procedure Code, the effect of the evidence is that he was questioned as a witness. He was never regarded as a suspect by the Commission<sup>91</sup> and of course, he had not been and was not charged with any offence, in respect of the events at Ljuboten, by any Macedonian authorities. If the Criminal Procedure Code applied (which is not the case in the view of the Chamber,) while by Article 223(1) he could be questioned and was obliged to answer orally,<sup>92</sup> he could not be compelled to make a statement,<sup>93</sup> or obliged to answer a question if to do so would be likely to expose him to criminal prosecution,<sup>94</sup> a right which a witness is to be warned of and the warning is to be included in the Minutes of the hearing.<sup>95</sup>

39. In November 2003 Johan Tarčulovski attended the Commission with his legal adviser,<sup>96</sup> who advised him throughout the interview.<sup>97</sup> He was not, however, explicitly advised that he could remain silent and need not answer questions likely to incriminate him,<sup>98</sup> which would have been required had the Criminal Procedure Code applied to the questioning by the Commission. The Minutes of the 12 November 2003 meeting reveal, however, that Johan Tarčulovski was well aware that he need not answer questions put to him by members of the Commission and did not feel compelled to answer as, on a number of occasions, he declined to answer questions put to him by the Commission.<sup>99</sup> Whenever he did this, his objection was respected without question and no attempt was made to persuade or compel him to answer.<sup>100</sup> This appears to be the procedure followed by the Commission; those interviewed were not compelled to answer questions.<sup>101</sup> By virtue of the presence of his legal adviser, who can be presumed to have advised him,<sup>102</sup> and the fact that several times he remained silent and did not answer certain questions, the Chamber is satisfied that the Commission on 12 November 2003 proceeded on the basis that Johan Tarčulovski was not compelled to answer questions and need not answer questions which could incriminate him, and that this was well known by him at the time even though no formal advice or warning was given by the Commission. The evidence as to the proceedings of the Commission indicates that, apart from

<sup>91</sup> Exhibit P88, Code on Criminal Procedure, Article 139 provides: "A suspect is a person against whom a pre-criminal procedure is conducted." The record from the Commission meeting on 28 May 2003, MFI P435, p 3, only states that "part of the commission members agreed that they should call Tarčulovski for another conversation" "on the grounds of the activities that were undertaken so far."

<sup>92</sup> Exhibit P88, Code on Criminal Procedure, Article 223(1) provides: "Witnesses are heard separately and without the presence of other witnesses. They are obliged to answer orally."

<sup>93</sup> Exhibit P88, Code on Criminal Procedure, Article 3(1) provides: "Anyone who is summoned... must be immediately informed, in the language which he understands, of the reasons for his summoning, ... and of any charge against him, as well as about his rights and that he cannot be compelled to make a statement."

<sup>94</sup> Exhibit P88, Code on Criminal Procedure, Article 221.

<sup>95</sup> Exhibit P88, Code on Criminal Procedure, Article 223(2).

<sup>96</sup> MFI P379, Minutes of 12 November 2003. See also Tatjana Groševa, T 4726.

<sup>97</sup> MFI P379, Minutes of 12 November 2003. See also Tatjana Groševa, T 4726.

<sup>98</sup> Tatjana Groševa, T 4808.

<sup>99</sup> MFI P379, Minutes of 12 November 2003.

<sup>100</sup> Zoran Jovanovski, T 4838-4839; 5087. See also Tatjana Groševa, T 4712-4713.

<sup>101</sup> Zoran Jovanovski, T 4838-4839; 5087.

<sup>102</sup> See *supra*, footnote 34 (reference to Halilović Appeal Decision, para 15).

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the specific questions which Johan Tarčulovski declined to answer, he freely and voluntarily gave his account relating to the events at Ljuboten when he attended the meeting of the Commission on 12 November 2003. While, under the prescribed procedures which must be followed for formal criminal investigations in Macedonia, a statement not made in accordance with those procedures may be inadmissible in Macedonian courts, even if given voluntarily,<sup>103</sup> that is not a factor which is material for present purposes, nor is it material that Johan Tarčulovski was not formally warned that his answers to the Commission might later be used against him in a trial before this Tribunal. In this last respect, for the reasons indicated earlier, Rules 42 and 43 had no application to the questioning by the Commission, so there was no requirement for such a warning, and it is apparent from the circumstances that have been described that Johan Tarčulovski acted freely and voluntarily when he answered the questions. Given these circumstances, the Chamber is not persuaded that it would lead to an unfair trial to admit into evidence the answers which Johan Tarčulovski voluntarily and freely gave when he attended the session of the Commission on 12 November 2003.

40. Even though Johan Tarčulovski was not represented by counsel at the meeting of the Commission on 5 May 2003 and when he provided an Official Note in connection with that meeting,<sup>104</sup> the Chamber finds that the Official Note and what he said were provided freely and voluntarily. He was not questioned as a suspect. The President of the Commission has confirmed that interviewees were not compelled to answer questions. Johan Tarčulovski himself wrote and signed the Official Note.<sup>105</sup> As the Chamber has already noted, it is not demonstrated that the Commission performed functions under the Criminal Procedure Code, or exercised any statutory disciplinary measures.<sup>106</sup>

41. Turning now to the issue of reliability, the Chamber observes that the Official Note by Johan Tarčulovski was written by Johan Tarčulovski himself,<sup>107</sup> it was signed by him,<sup>108</sup> and is apparently a record of his own observations of the material events in Ljuboten. As it was written for the purpose of use by the Ministerial Commission, there is no reason to consider that its content was not conscientiously recorded by the Accused. The document may be accepted as an apparently reliable record of the Accused's understanding of these events.

<sup>103</sup> Vilma Ruskovska, T 1535-1536.

<sup>104</sup> Tajana Groševa testified that if a person had been informed of certain rights, this would appear in the summary made by the Commission, T 4808.

<sup>105</sup> MFI P379, Official Note dated 3 March 2003 by Inspector Johan Tarčulovski; Zoran Jovanovski, T 4838-4839; 5087.

<sup>106</sup> See *supra*, paras 36-37.

<sup>107</sup> Zoran Jovanovski, T 5019.

<sup>108</sup> MFI P379, Official Note by Johan Tarčulovski. There is a signature on the statement underneath the name Johan Tarčulovski.

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42. Regarding the Report of 6 May 2003, the Chamber has not heard evidence from the person who produced this report and is, therefore, unable to be satisfied whether this Report reflects accurately what was said by Johan Tarčulovski. To the contrary, the President of the Commission gave evidence that the persons taking notes for the Commission for their meetings would only write down as much as was possible given the ongoing flow of the proceedings.<sup>109</sup> Further, the President of the Commission testified that only 80 per cent at a maximum of what was said by the interviewees would be put in such a report.<sup>110</sup> While these reports were reviewed for accuracy<sup>111</sup> before being submitted to the Minister,<sup>112</sup> such a report, in general, would only be a summary of what the interviewees had said and it could contain different wording from what was written by an interviewee in an Official Note.<sup>113</sup> Tatjana Groševa further explained that a full and consistent record was not necessary because the purpose of these summaries was only to inform the Minister of Interior on the activities of the Commission.<sup>114</sup> On this basis, in the Chamber's view, the method by which the interview with Johan Tarčulovski was recorded in the Report of 6 May 2003 is not shown to provide sufficient indicia of reliability.

43. The Minutes of 12 November 2003 were prepared by the witness Tatjana Groševa. While the interviews were not noted verbatim,<sup>115</sup> Groševa was present, made notes contemporaneously with what was happening in the meeting<sup>116</sup> and prepared these Minutes immediately after the Commission meeting. Relevantly, she did so in the presence of Johan Tarčulovski and his attorney.<sup>117</sup> Further, Johan Tarčulovski was given the opportunity to review the minutes,<sup>118</sup> and what is apparently his signature appears under the name Johan Tarčulovski on these Minutes.<sup>119</sup> The evidence as to the circumstances under which these Minutes were produced satisfies the Chamber that they may be accepted as sufficiently accurate and reliable to be admitted in evidence.

44. The Information of 25 November 2003 and the record of the evidence attributed to Johan Tarčulovski therein is a complete reproduction of the Minutes dated 12 November 2003 and may, therefore, be accepted as reliable for the same reasons.

45. On this basis, the Official Note, the Minutes of 12 November 2003, and the Information of 25 November 2003 will be admitted in evidence.

<sup>109</sup> Zoran Jovanovski, T 4839.

<sup>110</sup> Zoran Jovanovski, T 4840.

<sup>111</sup> Zoran Jovanovski, T 4840; 4842; 4844.

<sup>112</sup> Zoran Jovanovski, T 4839.

<sup>113</sup> Tatjana Groševa, T 4735-4736; 4776-4777.

<sup>114</sup> Tatjana Groševa, T 4777; 4779.

<sup>115</sup> Tatjana Groševa, T 4735-4736; 4777.

<sup>116</sup> Tatjana Groševa, T 4723; 4725.

<sup>117</sup> Tatjana Groševa, T 4725-4726.



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46. However, in so far as Johan Tarčulovski has specifically attributed actions and words to Ljube Boškosi in the Report of 6 May 2003, the Minutes of 12 November 2003 and the Information of 25 November 2003, the Chamber is not persuaded that these documents should be admitted in evidence as proof against Ljube Boškosi of the truth of the assertions therein by Johan Tarčulovski of the acts and conduct of Ljube Boškosi, at least at this stage of the trial. Ljube Boškosi was not present when the assertions were made to the Commission by Johan Tarčulovski, he has not had an opportunity to question or test these assertions by cross-examination of Johan Tarčulovski, and he may not have the opportunity of doing so in the course of this trial, unless Johan Tarčulovski elects to give evidence himself. Significantly, in the view of the Chamber, Johan Tarčulovski has altered his position on at least one material aspect of the conduct of Ljube Boškosi which he asserts to have occurred. In his original account, in May 2003, he says that he went to Ljuboten on the express order of Ljube Boškosi whereas, in November 2003, he had come to change this account, denying that anyone order him to go to Ljuboten at the material time. There is no other direct evidence at present on this issue. The Chamber is, therefore, not prepared to accept the reliability of Johan Tarčulovski's assertions of the direct role of Ljube Boškosi in the material events. The evidence in this trial has not yet concluded. The circumstances may change in such a way as to enable the Chamber to accept as reliable what has been asserted about Ljube Boškosi to the Commission by Johan Tarčulovski. In the present circumstances, however, the Chamber is not able to accept this evidence as sufficiently reliable to justify its admission against Ljube Boškosi. To admit it as proof of the truth of its content against Ljube Boškosi would be unfair in these circumstances.

47. The Chamber notes that there is no assertion of any role of Ljube Boškosi in the Official Note. This document may, therefore, be admitted as evidence also against Ljube Boškosi.

48. The Chamber is aware of the *Prlić* Appeals Decision, by which it is accepted that the right to cross-examination is not an absolute one and that in some circumstances a statement made by a co-accused may be admitted against an accused, even though it may not be possible for the accused to cross-examine the co-accused about the statement. The circumstances of each statement must be weighed carefully by the Chamber, in particular to assess the apparent reliability of the statement and whether the admission would result in an unfair trial. In the Chamber's view, the particular circumstances in this case, that Johan Tarčulovski changed his account on this most material aspect, call into question the reliability of what Johan Tarčulovski has said about the role of Ljube Boškosi.

<sup>118</sup> Tatjana Groševa, T 4729.

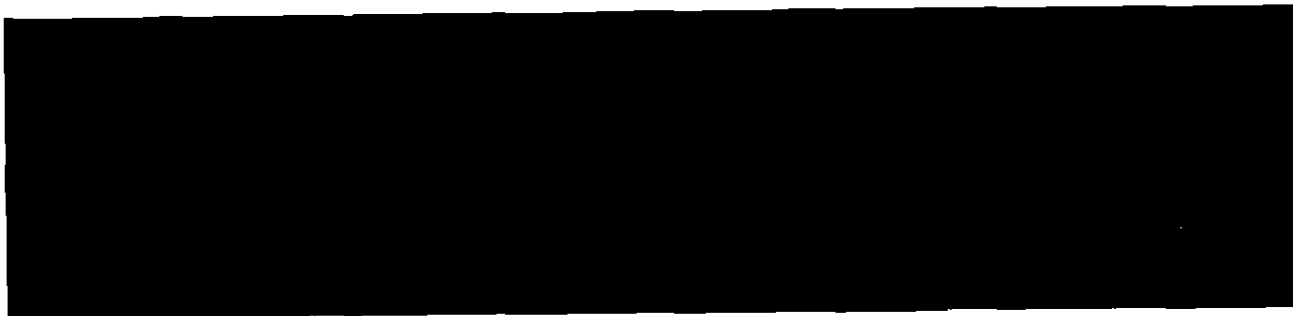
<sup>119</sup> MFI P379, Minutes of 12 November 2003.

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49. Further, on this basis, while the Minutes of 12 November 2003 and the Information of 25 November 2003 have probative value, the Chamber takes the view that, in so far as they contain assertions by Johan Tarčulovski about Ljube Boškosi, their probative value is outweighed by the need to ensure a fair trial for the co-Accused Ljube Boškosi. The opportunity to cross-examine Tatjana Groševa and Zoran Jovanovski, who were present during one or both interviews of Johan Tarčulovski, could not remedy the fact that Ljube Boškosi would not be able to cross-examine Johan Tarčulovski as they were not in a position to verify or dispute the content of the information given by Johan Tarčulovski.

(b) Records of interviews and statements made by other persons to the Commission

(i) Submissions



51. The Boškosi Defence submits, *inter alia*, that the Prosecution has failed to show that any of those persons is unavailable in the meaning provided for under Rule 92*quater*. The opportunity to cross-examine witnesses who recorded or summarized the interviews is insufficient to test the reliability of the persons making those statements.<sup>123</sup> It further submits that these documents are not sufficiently reliable due to the circumstances under which this evidence was obtained,<sup>124</sup> as the statements, *inter alia*, were not taken under oath and there was no warning and no sanction of any risk of perjury.<sup>125</sup> Moreover, the information is contradictory,<sup>126</sup> remained un-investigated<sup>127</sup> and is either uncorroborated or not corroborated as suggested by the Prosecution.<sup>128</sup>

52. Both Defences also submit that these statements have not been obtained in compliance with Rules 42 and 43 as the persons who made the Official Note have, it is said, later been regarded as

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<sup>123</sup> Boškosi's Written Response, para 36.

<sup>124</sup> Boškosi's Written Response, paras 42-43 and 50.

<sup>125</sup> Court Hearing of 18 September 2007, T 5141.

<sup>126</sup> Boškosi's Written Response, para 41; Court Hearing of 18 September 2007, T 5141; 5143.

<sup>127</sup> Boškosi's Written Response, para 44; Court Hearing of 18 September 2007, T 5141.

<sup>128</sup> Boškosi's Written Response, para 46; Confidential Annex A.

suspects as understood under the Rules.<sup>129</sup> [REDACTED]

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(ii) Discussion

53. Whether one or more of these interviewees before the Commission have later been treated as suspects by the Prosecutor of this Tribunal is not established. In any event, what is more pertinent for the issue of admission is the status these persons had at the time their interviews were taken. Each was then questioned as a witness. For reasons already given, Rules 42 and 43 had no application to the proceedings of the Commission. While it is the case that what was said to the Commission was not under oath, and no warning regarding perjury was appropriate, such matters can assist in the assessment of the reliability of statements made by persons but are not preconditions for accepting the reliability of such statements. The Chamber may be persuaded of the apparently reliability of statements to the Commission despite such matters. In particular the level of formality attaching to the existence of the Commission, its composition, and the manner in which it conducted its proceedings support an expectation that persons making statements to the Commission would do so conscientiously and persuade the Chamber that the statements given to the Commission, generally speaking, may be regarded as reliable in the absence of some particular reason suggesting unreliability. The Prosecution is not relying on Rule 92*quater* for the admission of these exhibits. The Chamber is also conscious that, at least in some respects, some of what is dealt with in the proposed exhibits may be contradictory, as between witnesses, may not have been the subject of specific investigation and may not be confirmed by all respects by other evidence. These matters will be taken into account as the Chamber considers whether each particular document should be admitted in evidence.

54. The interviewees were officers within the police in the Ministry of Interior<sup>131</sup> or employees in the security agency Kometa.<sup>132</sup> [REDACTED]

<sup>129</sup> Boškoski's Written Response, para 37; Tarčulovski's Written Response, para 29; [REDACTED]

<sup>130</sup> [REDACTED]

<sup>131</sup> [REDACTED]

[REDACTED] Chief of the PSOLO (Police Station for the Security of Persons and Facilities) Gjorgij Mitrov, and his Deputy Chief, Former Assistant Minister for Security, Zivko Gacovski, MFI P379, Report of 6 May 2003.

<sup>132</sup> Zoran Jovanovski aka Bučuk and Trajče Kuzmanovski, MFI P379, Information of 25 November 2003 and Goce Ralevski, Report of 6 May 2003.

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[REDACTED] the other interviewees answered questions concerning their activities on or about 12 August 2001 in relation to the Ljuboten events.

55. The records of the interviews by the Commission of Gjorgij Mitrov and Zivko Gacovski on 5 May 2003 referred to in the Report of 6 May 2003,<sup>134</sup> and the records of the interviews by the Commission of Zoran Jovanovski aka Bučuk on 12 November 2003, Ljupčo Bliznakovski and Pero Stojanovski on 20 November 2003 and Trajče Kuzmanovski in the period 20-25 November 2003 referred to in the Information of 25 November 2003,<sup>135</sup> appear to be relevant to the case. The statement of Goce Ralevski<sup>136</sup> in the Report of 6 May 2003 is not relevant and will, therefore, not be admitted. The remaining records are hearsay. While Tatjana Groševa testified that she took notes contemporaneously when the interviews were taken by the Commission in November 2003,<sup>137</sup> as a general practice, only a summary of her notes of the interviews would ultimately be put into the "Information".<sup>138</sup> With regard to the meeting on 5 May 2003, as discussed earlier, the Chamber has found that the method of recording what was said by the interviewees does not offer an assurance of reliability and completeness.<sup>139</sup> None of the records of the statements made by these witnesses are able to be confirmed with Official Notes written by the witnesses themselves.<sup>140</sup> In each case what is recorded leaves the Chamber with the impression that each of these persons was careful before the Commission to avoid the disclosure of activities for which they could be criticized. For these reasons, the Chamber is not able to be satisfied that these records are shown to be sufficiently reliable to justify their admission.

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<sup>134</sup> MFI P379, Report of 6 May 2003.

<sup>135</sup> MFI P379, Information of 25 November 2003.

<sup>136</sup> MFI P379, Report of 6 May 2003.

<sup>137</sup> Tatjana Groševa, T 4729-4730.

<sup>138</sup> Tatjana Groševa, T 4776-4777.

<sup>139</sup> See *supra*, para 42.

<sup>140</sup> MFI P379, Report of 6 May 2003, it is said that Gjorgij Mitrov provided an Official Note, but such a document is not submitted to the Chamber.

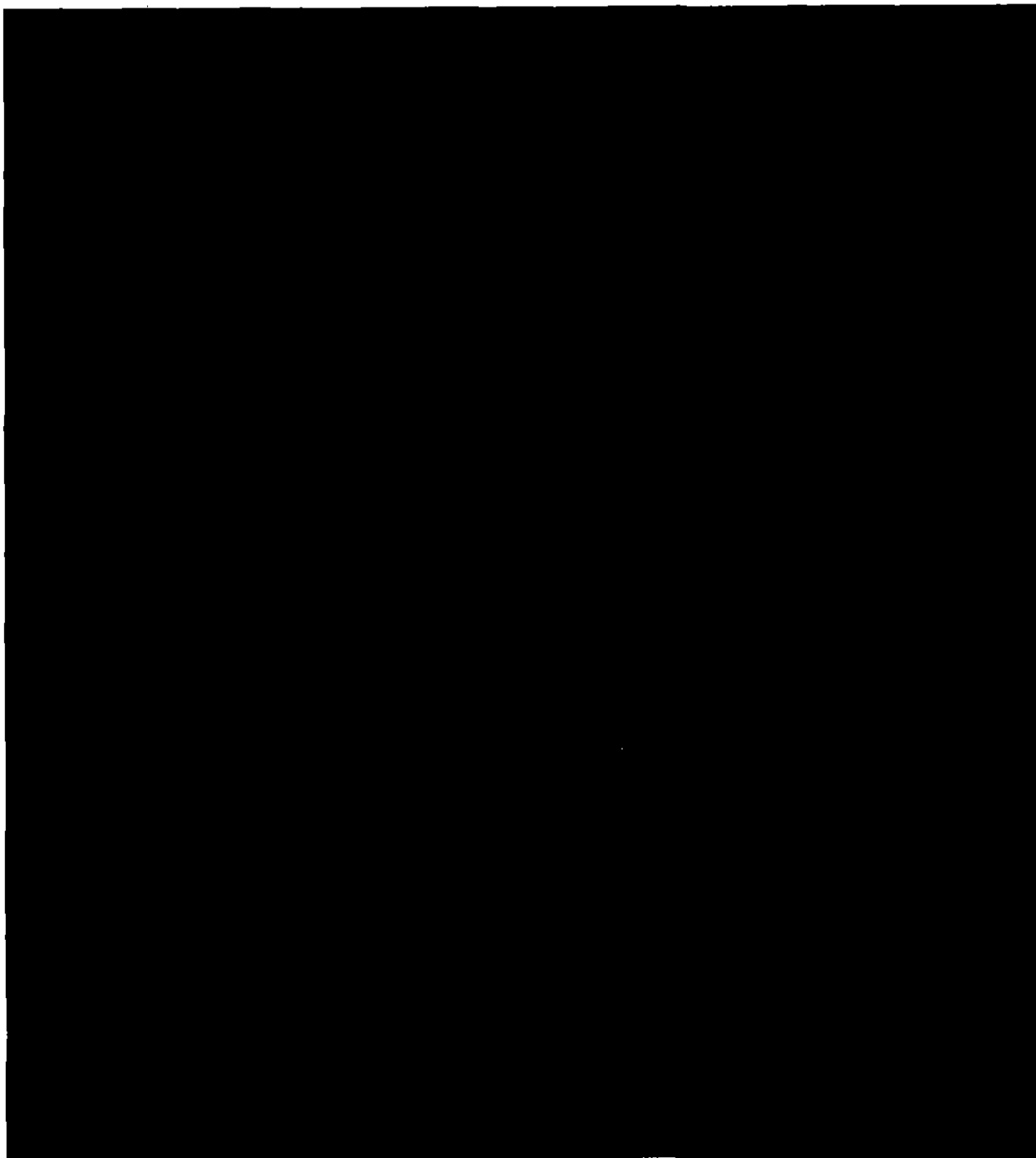
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(c) Correspondance reflecting the activities by the Commission: MFI P251, MFI P379 (Letter of 9 August 2004 to ICTY with attachments)<sup>158</sup> and MFI P435

(i) Submissions

61. With regard to document MFI P251,<sup>159</sup> the Prosecution submits that unlike correspondence which would normally be inadmissible, the document MFI P251 is sufficiently reliable as one witness before the Chamber has confirmed its content and the information is similar to that contained in the Commission records in MFI P379.<sup>160</sup>

62. Both Defences submit, *inter alia*, that MFI P251 is inadmissible as it contains a statement given by Johan Tarčulovski which was taken in violation of his rights.<sup>161</sup>

(ii) Discussion

63. MFI P251 and part of MFI P379<sup>162</sup> are letters from Besim Ramićević, a liaison officer to the ICTY in the Ministry of Interior, to the ICTY Office in Skopje. MFI P435 is a report from the second meeting of the Commission on 28 May 2003 submitted to the Minister of Interior. The documents give an overview and record of the activities of the Commission relevant to this case. They appear to be official documents. These documents can therefore be admitted. However, they are admitted only as a record of the activities conducted by the Commission, and not as proof of the

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<sup>158</sup> MFI P379, ERN: N000-8939-N000-8955. *See supra*, footnote 21.

<sup>159</sup> MFI P251, Report on Activities to date Concerning the Investigation into Events in the Village of Ljuboten dated 16 June 2003 submitted by Liaison Officer for the International Criminal Tribunal for the Former Yugoslavia in the MCR Besim Ramićević to the Office of the International Criminal Tribunal for the Former Yugoslavia in Skopje.

<sup>160</sup> Prosecution's Written Submissions, para 32.

<sup>161</sup> Boškovski's Written Response, paras 15, 16, 21, 24-25 and 29-31; Tarčulovski's Written Response, paras 3 and 32.

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truth of matters and events reported in those documents. MFI P251 was marked for identification under seal,<sup>163</sup> and will therefore be admitted into evidence under seal.

(d) Other documents

64. The following documents in MFI P379: Decision on Establishing a Committee by Minister of Interior Hari Kostov dated 7 March 2003, Letter to Tatjana Groševa dated 11 March 2003 re: Decision on Establishing Committee, Receipt of summons received by Johan Tarčulovski to report to the Minister of Interior, General Authorisation for Lawyer Simeon Dvojakov from Johan Tarčulovski dated 1 October 2003 and Request for Assistance from the Office of the Prosecutor of the ICTY to the Government of the Republic of Macedonia dated 17 June 2004 are relevant to the present case. The reliability is sufficiently demonstrated, in particular as they appear to be official documents of the Commission. They will, therefore, be admitted.

65. There is no need to admit an excerpt of Article 29 of the Statute and Rule 39 into evidence. Further, a fax from an ICTY Investigator to the Chief of Investigations dated 30 August 2004 seems of little relevance to the case. These documents will, therefore, not be admitted.

For the foregoing reasons, pursuant to Rules 54 and 89 of the Rules, the Chamber

**A. GRANTS**

- (i) the Prosecution's motion for leave to file a submission exceeding the word limit;
- (ii) the Boškoski Defence's motion for leave to file a response exceeding the word limit;
- (iii) the Tarčulovski Defence's motion for leave to file a response exceeding the word limit;

**B. GRANTS** the Motion **IN PART** and, **DECIDES** as follows:

- (i) The proposed documents or part of documents identified as MFI P379: Official Note by Johan Tarčulovski, Minutes of 12 November 2003, Official Note by [REDACTED] the part of the Information of 25 November 2003 relating to the statement by Vladimir Čagorović and the statement by Johan Tarčulovski, Decision on Establishing a Committee by Minister of Interior Hari Kostov dated 7 March 2003, Letter to Tatjana Groševa dated 11 March 2003 re: Decision on Establishing Committee, Receipt of summons received by Johan Tarčulovski to report to the Minister of Interior, General Authorisation for Lawyer

<sup>162</sup> MFI P379, ERN: N000-8939-N000-8955. *See supra*, footnote 21.

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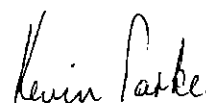
Simeon Dvojakov from Johan Tarčulovski dated 1 October 2003, Request for Assistance from the Office of the Prosecutor of the ICTY to the Government of the Republic of Macedonia dated 17 June 2004, Letter of 9 August 2004 to ICTY with attachments as well as MFI P251 and MFI P435 will be admitted into evidence; however the Minutes of 12 November 2003 and part of the Information of 25 November 2003 relating to the statement by Johan Tarčulovski will not be admitted as evidence against Ljube Boškoski. MFI P251 is admitted under seal.

(ii) The proposed documents or parts of the proposed documents identified as MFI P379: Report of 6 May 2003, Information of 25 November 2003, except for those parts relating to the statements by Johan Tarčulovski and [REDACTED] which have been dealt with under (i), [REDACTED]

[REDACTED] Excerpt of Article 29 of the Statute and Rule 39 and a fax from an ICTY Investigator to Chief of Investigations dated 30 August 2004, will not be admitted into evidence.

**REQUESTS** the Registry to assign exhibit numbers to the received documents and to inform the Chamber and the parties in writing accordingly.

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



Judge Kevin Parker

Dated this seventh day of December 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>163</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Court Hearing of 12 June 2007, T 1905.