

IT-04-84-T
D22238-D22233
07 SEPTEMBER 2007

22238 AT



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

Case No. IT-04-84-T

Date: 7 September 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Decision of: 7 September 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE
PURSUANT TO RULE 92 *QUATER* AND 13TH MOTION FOR TRIAL-RELATED
PROTECTIVE MEASURES

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

I. Submissions of the Parties

1. On 21 June 2007, the Prosecution filed a motion for the admission of deceased Witness 7's statement of 28 April 2004 pursuant to Rule 92 *quater*. The Prosecution argues that Witness 7's statement meets the criteria of admissibility under Rule 92 *quater* as the witness is unavailable, his statement was reliably taken, it corroborates the evidence of other witnesses and it is both relevant and probative.¹ Further, the Prosecution requests that the witness's identity not be revealed and that his unredacted statement be filed under seal as his evidence risks identifying other protected witnesses in the case.²
2. On 28 June 2007, the Accused Lahi Brahimaj and Idriz Balaj filed separate motions opposing the admission into evidence of Witness 7's statement on the ground that it does not meet the criteria of Rule 92 *quater*. Brahimaj argues that Witness 7's statement is unreliable for the following reasons: much of it is uncorroborated by other witnesses,³ it was not taken under oath,⁴ the acknowledgment is signed only with an "x",⁵ and the statement is inconsistent with the Prosecution's case.⁶ Brahimaj also points out that, as conceded by the Prosecution, the statement goes to proof of acts and conduct of the Accused and argues that this, coupled with the reasons set out above, should weigh in favour of the Chamber excluding the evidence.⁷ Brahimaj states that should the motion be granted, there would be no objection to the protective measures requested by the Prosecution being granted.⁸
3. Balaj submits that Witness 7's statement is not admissible under Rule 92 *quater* as the circumstances under which it was taken do not allow for the conclusion that it is sufficiently reliable to be admitted without cross-examination by the Accused.⁹ In reaching this conclusion, Balaj argues that Witness 7 is illiterate and so unable to read his statement as a means of checking its accuracy and only signed the acknowledgement with an "x".¹⁰ Further, the statement was not given under oath,¹¹ was not the product of an impartial investigation,¹²

¹ Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures (Witness SST7/7), 21 June 2007 ("Motion"), paras 12-15.

² Motion, paras 16-18.

³ Response of 3rd Defendant, Lahi Brahimaj, to Prosecution's Motion of 21 June 2007 Seeking Admission of Witness SST7/7's Evidence Pursuant to Rule 92 *Quater*, 28 June 2007 ("Brahimaj Response"), paras 17-18.

⁴ *Ibid.*, para. 14.

⁵ *Ibid.*

⁶ *Ibid.*, para. 19.

⁷ *Ibid.*, para. 20.

⁸ *Ibid.*, para. 3.

⁹ Idriz Balaj's Opposition to the Prosecution 'Motion for Admission of Evidence Pursuant to Rule 92 *quater*' Regarding Witness SST7/7, 28 June 2007 ("Balaj Response"), paras 7-8.

¹⁰ *Ibid.*, para. 21.

¹¹ *Ibid.*, para. 9.

was not subject to cross examination,¹³ and much of the testimony is not corroborated by that of Witness 6.¹⁴ Balaj also joins Brahimaj in arguing that as the statement of Witness 7 goes directly to proof of acts and conduct of an accused, this should be a factor that weighs against its admission into evidence.¹⁵

4. On 29 June 2007, the Accused Ramush Haradinaj joined the Responses of his two co-Accused.¹⁶

II. Applicable Law

5. Rule 92 *quater*, which governs the admissibility of evidence of unavailable persons, provides:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

- (i) is satisfied of the person's unavailability as set out above; and
- (ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

6. Additionally, the Chamber must also ensure that the general requirements of admissibility of evidence under Rule 89 (C) are satisfied, namely that the evidence is relevant and has probative value.¹⁷

III. Discussion

7. As the Chamber is satisfied that Witness 7 is deceased and so unavailable for cross-examination within the meaning of Rule 92 *quater* of the Rules,¹⁸ it will focus on the indicia

¹² *Ibid.*, para. 16-19.

¹³ *Ibid.*, para. 10.

¹⁴ *Ibid.*, para. 11.

¹⁵ *Ibid.*, para. 7.

¹⁶ Response of Behalf of Ramush Haradinaj to the Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *Quater* Regarding Witness SST7/7, 29 June 2007.

¹⁷ *Prosecutor v. Milutinović et al.*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 4 (1st *Milutinović* Decision); *Prosecutor v. Milutinović et al.*, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007, para. 6.

¹⁸ The Prosecution has provided the death certificate of Witness 7 in Confidential Annex B of the Motion.

of reliability of the witness's statement and on whether, if any part of the statement goes to the proof of acts and conduct of the Accused, this warrants exclusion of the evidence under Rule 92 *quater*.

8. When examining the reliability of the evidence of an unavailable witness under Rule 92 *quater*, the Chamber will consider: (a) the circumstances in which the statement was made and recorded, in particular whether (i) the statement was given under oath; (ii) the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; and (iii) the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c) whether the statement, in particular an un-sworn statement that has never been subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statement.¹⁹

9. Firstly, with regard to the method in which the statement was taken, the Chamber is aware that the evidence presented by Witness 7 was not given under oath. However, the witness signed each page of his statement as well as the accompanying acknowledgement that the statement had been read to him in his language and was true to the best of his knowledge and recollection.²⁰ Further, a Registry-approved interpreter confirmed that he had read the statement back to Witness 7 in the language of the witness and that the witness understood the translation of his statement and acknowledged that the contents were true to the best of his knowledge.²¹ For the purposes of 92 *quater*, therefore, the Chamber finds this to be sufficient proof of the witness's acceptance that the written statement was a fair reflection of the account he gave to the Prosecution. Additionally, given the certifications of the Registry-approved interpreter, the signing of the acknowledgement with an "x" is in this case sufficient as a sign of endorsement of the document by the witness.

10. Secondly, while the Prosecution and the Defence both take the position that the witness's testimony goes to the proof of the acts and conduct of the Accused,²² the Defence argues that this is a factor that should weigh in favour of excluding the evidence.²³ In this regard, having carefully reviewed the contents of Witness 7's statement, the Chamber agrees

¹⁹ 1st *Milutinović* Decision, para. 7.

²⁰ See Motion, para. 9.

²¹ *Ibid.*, Annex C, page 6 and Annex D, page 6.

²² *Ibid.*, paras 12-15; Brahimaj Response, para. 20; Balaj Response, para. 7.

²³ Brahimaj Response, para. 20; Balaj Response, para. 7.

that Witness 7's statement does go towards proving acts and conduct of the Accused, but does not agree that this fact is of sufficient weight in this case to deny admission under Rule 92 *quater*, as the statement is corroborated by that of other witnesses who were subject to cross-examination. Witness 7's statement is an account of the detention of Witness 6 and the subsequent visits that Witness 7 paid to Witness 6 in the alleged Jablanica/Jabllanicë detention centre. While the Chamber has acknowledged that this episode is an important part of the Prosecution's case,²⁴ it was Witness 6 who was allegedly incarcerated and subjected to the crimes listed in the indictment. In this regard, Witness 6 provided evidence both to the alleged presence of Lahi Brahimaj at the detention centre and to the fact that Lahi Brahimaj was also known as "Maxhupi".²⁵ Witness 6 also corroborates Witness 7's account that he visited Witness 6 in the detention centre.²⁶ Another witness, Cüfe Krasniqi, testified that Lahi Brahimaj was the KLA commander in Jablanica/Jabllanicë.²⁷ The Chamber therefore takes the position that Witness 7's statement is a corroborative account of Witness 6's alleged detention, and finds the statement of Witness 7 coherent and internally consistent. With regard to inconsistencies between Witness 7's statement and the testimony of other witnesses, the Chamber finds that there are no such inconsistencies that would bar the admission of Witness 7's statement.

11. With regard to the requirements set out under Rule 89 (C), Witness 7's refers to events relating to two counts in the indictment and so is clearly relevant. Further, insofar as reliability is a component part of the probative value of a piece of evidence, there is no need to re-examine the issue of probative value in so far as an examination has already been made in the context of Rule 92 *quater* (A) (ii).²⁸

12. In summary, the Chamber finds the contribution of the evidence contained in Witness 7's statement to be relatively peripheral to the case as a whole and mainly corroborative of the evidence of other witnesses whose testimonies were subject to cross-examination. The unavailability of the witness for cross-examination does not bar the Chamber from admitting the statement of Witness 7, though the Chamber will be mindful of this when deciding on the weight to be given to this witness's evidence.

²⁴ T. 7278.

²⁵ T. 5164-5403.

²⁶ T. 5252.

²⁷ T. 5731-5733, 5740, 5749, 5855; P351 (92 *ter* statement of Cüfe Krasniqi), para. 63; P352. (Sketch made by witness Cüfe Krasniqi, of three KLA Brigades and how these were located in relation to the KLA Staff Headquarters in Glodane/Glllogjan).

13. Lastly, the Chamber agrees that only Witness 7's redacted statement should be made public so as to avoid identification of other witnesses with protective measures.

IV. Disposition

14. For the foregoing reasons and pursuant to Rules 69, 75, 89 and 92 *quater*, the Chamber hereby:

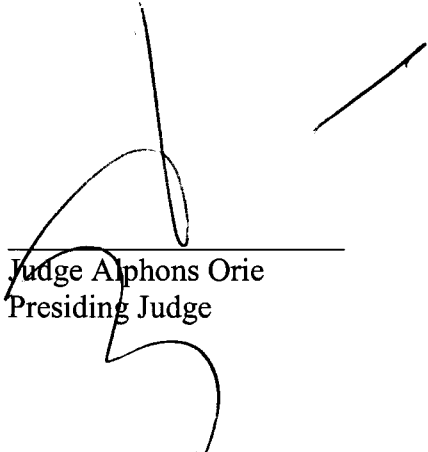
GRANTS the Motion;

ORDERS that the public use of a pseudonym for Witness 7 be maintained, that the unredacted statement of Witness 7 be admitted into evidence under seal, and that the redacted version of the statement be filed publicly;

REQUESTS that the Registrar assign an exhibit number to both statements.

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

Dated this 7th day of September 2007
At The Hague
The Netherlands



Judge Alphons Orié
Presiding Judge

[Seal of the Tribunal]

²⁸ *Prosecutor v. Prlić et al.*, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 27 October 2006, para. 11.