

IT-04-84-T
D24172-D24169
02 November 2007

24172 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: 2 November 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: 2 November 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION DENYING SUBPOENA AD TESTIFICANDUM FOR WITNESS 15 AND
INSTEAD CONDITIONALLY ADMITTING THE WITNESS'S STATEMENTS
PURSUANT TO RULE 92 *BIS*

Office of the Prosecutor

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

Counsel for Ramush Haradinaj

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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

1. Witness 15 gave three statements to the Prosecution.¹ On 7 September 2007, the Trial Chamber (“Chamber”) denied the admission of Witness 15’s statements under Rule 92 *bis* of the Rules of Procedure and Evidence (“Rules”) and decided that the witness should be called for cross-examination.² A decision on the admission of the witness’s evidence would be taken on the day that the witness would appear in court.³ On 13 September 2007, the Prosecution applied for a *subpoena ad testificandum* for Witness 15.⁴ It had been unable to secure the witness’s voluntarily cooperation.⁵ On 18 September 2007, the Chamber denied the requested subpoena, noting that much of the anticipated evidence of Witness 15 is referred to in the evidence of Witness Dušan Dunjić, and that important evidence on Counts 7 and 8 was also expected from Witness 28 and Witness 1.⁶ The Chamber concluded that it could not make a determination that Witness 15’s evidence would be sufficiently material to the Prosecution’s case to justify the issuance of a subpoena, before receiving the remaining anticipated evidence relating to Counts 7 and 8. The Chamber indicated it would revert to the matter upon receiving the remaining anticipated evidence on Counts 7 and 8.⁷

2. On 25 October 2007, the Prosecution filed a motion again asking the Chamber to issue a subpoena for Witness 15.⁸ The Prosecution submitted that: (i) Witness 15 remains unwilling to testify; (ii) Witness Dušan Dunjić has finished his testimony; (iii) a motion requesting the Chamber to admit the evidence of Witness 1 under Rule 92 *quater* would be filed soon; and (iv) Witness 28 is expected to testify in the week commencing on 5 November 2007.⁹ The Prosecution argued that since it is expected to finish its case on 8 November 2007, waiting for a decision on the requested subpoena until all evidence concerning Counts 7 and 8 is heard would leave the Prosecution with no time to have a subpoena executed.¹⁰ On 25 October

¹ These statements were filed on 19 February 2007 in Confidential Annexes A, B and C to the Prosecution Notice of Motion to Admit Written Statements Pursuant to Rule 92 *Bis*, 19 February 2007. The statements were accompanied by three other documents U0086119 (plus English and Albanian translations); U0086113 (plus English and Albanian translations) and U013-8218. For numbering purposes, the Chamber considers these documents to form part of the third witness statement.

² Decision on Third Batch of 92bis and 92ter Witnesses, 7 September 2007 (“7 September Decision”), para. 7. and Confidential Annex to this decision, table 2.

³ 7 September Decision, para. 7.

⁴ Prosecution’s 17th Application for a Subpoena Ad Testificandum (Witness 15), 13 September 2007.

⁵ *Ibid.*, para. 6 and Confidential Annexes A and B.

⁶ T. 8629-8630.

⁷ T. 8630.

⁸ Prosecution Motion Seeking Issuance of Subpoena for Witness 15, 25 October 2007 (“Motion”).

⁹ Motion, paras 3-4; Confidential Annex A to the Motion.

¹⁰ Motion, para. 4.

2007, the Prosecution filed a motion to admit the statements of Witness 1 into evidence under Rule 92 *quater*.¹¹

3. The Chamber agrees with the Prosecution that waiting for a decision on the requested subpoena until all evidence related to Counts 7 and 8 has been heard is not a realistic option, due to the imminent close of the Prosecution's case and the expectation that the motion relating to Witness 1's evidence will not be decided much before the close.

4. The Chamber has thoroughly examined the existing and proposed evidence relating to Counts 7 and 8 and finds that Witness 15's expected evidence is of very limited importance. Dušan Dunjić already provided evidence about the way in which the victims Vukosava Marković and Darinka Kovać were identified. Witness 15's expected evidence mainly corroborates Dušan Dunjić's testimony. Witness Barney Kelly has provided evidence about the steps the Prosecution took to try to locate the graves of these victims. The evidence that Witness 15 is expected to provide on this topic does not add anything to Kelly's testimony. The Chamber therefore finds that the expected evidence of Witness 15 is not important enough to justify the issuance of a subpoena.

5. The original Rule 92 *bis* motion to admit the written statements of Witness 15 was filed on 19 February 2007 and amended on 7 May 2007.¹² The Defence responded to the original motion on 1 and 5 March 2007 and to the amended motion on 21 and 22 May 2007.¹³ The Chamber has thoroughly re-examined the arguments the parties set forth in relation to Witness 15 and has decided to reconsider its decision of 7 September 2007. Witness 15's evidence goes to proof of a matter other than the acts and conduct of the Accused and it is of cumulative nature, as explained above. The Chamber has not identified any factor which speaks against admitting Witness 15's evidence in the form of a written statement. Therefore Witness 15's statements is admitted into evidence pursuant to Rule 92 *bis*, on the condition

¹¹ Prosecution's Motion to Admit the Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater*, 25 October 2007.

¹² Prosecution Notice of Motion to Admit Written Statements Pursuant to Rule 92 *Bis*, 19 February 2007; Prosecution Motion to Admit Eight Written Statements Pursuant to Rule 92 *Bis*, With Confidential Annexes A, B and C, 7 May 2007.

¹³ Confidential Response of Ramush Haradinaj to Prosecution's Application Pursuant to Rule 92*Bis*, dated 28 February 2007, filed 1 March 2007; Idriz Balaj's Response to Prosecution's Partly Confidential Notice of Motion to Admit Written Statements Pursuant to Rule 92*Bis* and 92*Quater*, 1 March 2007; Lahi Brahimaj's Response to Prosecution's Partly Confidential Notice to Admit Written Statements Pursuant to Rule 92*Bis* and 92*Quater*, 5 March 2007; Confidential Response on Behalf of Lahi Brahimaj to Prosecution's Motion to Admit Eight Witness Statements Pursuant to Rule 92*Bis*, 21 May 2007; Confidential Response on Behalf of Ramush Haradinaj to Prosecution Motion to Admit Eight Written Statements Pursuant to Rule 92*bis*, 22 May 2007; Idriz Balaj's [Confidential] Response to Prosecution's Motion of 7 May 2007 to Admit Eight Written Witness Statements Pursuant to Rule 92*Bis*, dated 21 May 2007, filed 22 May 2007.

that the attestation required by Rule 92 *bis* (B) is attached to the three statements. The deadline for the Prosecution to provide the necessary attestation is Thursday 15 November 2007 at 5 p.m. If no attestations are received by that deadline, Witness 15's statements will not be in evidence.

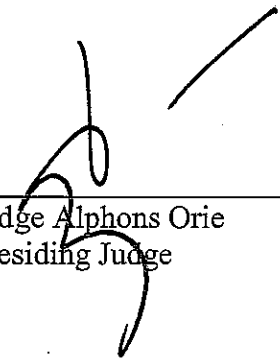
For the foregoing reasons, the Chamber:

DENIES the requested subpoena for Witness 15;

CONDITIONALLY ADMITS, without cross-examination, the three statements of Witness 15: admission will not be final until the attestation required by Rule 92 *bis* (B) is filed, and the deadline for that is Thursday 15 November 2007 at 5 p.m.;

REQUESTS the Registrar to assign a separate exhibit number to each of the statements and to inform the parties and the Chamber accordingly.

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



Judge Alphons Orie
Presiding Judge

Dated this 2nd day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]