

IT-04-84-T
D25801-D25793
14 DECEMBER 2007

25801
AT



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-04-84-T
Date: 14 December 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: 14 December 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

REASONS FOR TRIAL CHAMBER'S DECISION TO EXCLUDE THE EVIDENCE
OF WITNESS 55 UNDER RULE 89(D) AND DENY HIS TESTIMONY PURSUANT
TO RULE 92 QUATER

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. Background

1. On 13 November 2007, the Chamber informed the parties that it had decided to exclude the testimony of Witness 55, with reasons to follow in writing.¹ The Chamber now gives those reasons.

II. Procedural history and parties' submissions

2. Having testified with regard to his protective measures on 5 September 2007, Witness 55 commenced his testimony in chief on 6 September 2007. During the course of his testimony, Witness 55 displayed clear signs of distress, prompting the Chamber to consult with the Victims and Witnesses Section of the Registry ("VWS"). VWS advised the Chamber that due to his state of health, Witness 55 should not be left alone in The Hague until the next scheduled court day, 10 September 2007. The Chamber accepted this advice and allowed Witness 55 to return home with his wife that evening. On 12 September 2007, Witness 55 returned to the Tribunal to continue his testimony. However, after taking the stand the Chamber observed that Witness 55 appeared not to be in good health and once again sought the advice of VWS. The Chamber was informed by VWS that it had taken Witness 55 to a doctor and again stressed their concern for Witness 55's well-being. Based on this advice and what the Chamber itself was able to observe, it took the decision that it would not be in the interests of justice to continue hearing Witness 55's testimony at that time.² On 23 October 2007, the Chamber asked the Parties to make submissions on whether Witness 55 should be recalled to complete his testimony.³

3. Having received submissions from the parties,⁴ on 1 November 2007 the Chamber announced that due to the state of health of Witness 55, he would not be called back to complete his testimony and invited the parties to make written submissions on the status of the interrupted testimony.⁵ Written reasons for not calling back Witness 55 were filed by the Chamber on 6 November 2007.⁶

¹ T. 10652, 10655.

² T. 8364-8370.

³ T. 9820-9822.

⁴ Submission on Behalf of Ramush Haradinaj in Respect of [Witness 55], 29 October 2007; Idriz Balaj's Submission Regarding Re-Calling [Witness 55], 30 October 2007 ("30 October 2007 Submission"); Prosecution's Submission - Witness 55 Should Complete His Testimony, 31 October 2007; Lahi Brahimaj's Submission in Opposition to Re-Calling [Witness 55], 1 November 2007.

⁵ T. 10118.

⁶ Reasons for the Trial Chamber's Decision Not to Recall [Witness 55] to Complete His Testimony, 6 November 2007 ("6 November Decision").

4. On 8 November 2007, the Prosecution filed its submission arguing that Witness 55's testimony should remain in evidence and be given appropriate weight.⁷ According to the Prosecution, no reason exists *per se* to exclude evidence which has not been tested in cross-examination and which goes to the acts and conduct of the Accused or which is pivotal to the Prosecution's case.⁸ The Prosecution argued that: (i) the testimony given by Witness 55 was relevant, probative and its non-exclusion would not violate the Accused's right to a fair trial; (ii) the testimony was reliable, consistent, internally and with the witness's previous statements and other evidence, given under oath, in the presence of the Accused and mostly in open session; and (iii) the Accused had partially tested Witness 55's testimony by cross-examining the witness on matters of credibility.⁹ In the alternative, the Prosecution submitted that Witness 55's testimony could be admitted under Rule 92 *quater*.¹⁰

5. On 7 November 2007, the Balaj Defence filed a submission arguing that since it would have no opportunity to cross-examine Witness 55, his testimony could not remain on the record without violating Balaj's right to confront and cross-examine the witnesses against him at trial, as provided by Article 21(4)(e) of the Statute, Article 14(e) of the International Covenant of Civil and Political Rights, and Article 6(3)(d) of the European Convention on Human Rights.¹¹ The Balaj Defence further added that in its 30 October 2007 Submission, it had provided significant cause to seriously doubt the credibility or reliability of the testimony of Witness 55, part of which was entirely uncorroborated by other evidence which, according to the Balaj Defence, would be a cause on its own to exclude the testimony.¹² The Balaj Defence concluded that Witness 55's evidence must be excluded.¹³

6. On 8 November 2007, the Haradinaj Defence filed a submission arguing that Witness 55's testimony should be excluded from the evidence.¹⁴ It argued that: (i) the subject of Witness 55's testimony directly concerned acts and conduct of Haradinaj, and in the absence of an opportunity to challenge its credibility and reliability, it would be fundamentally unfair

⁷ Prosecution's Submission on Witness 55's Evidence, 8 November 2007 ("Prosecution's Submission"), para. 1.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, paras 1, 7-8, 13-20, 22.

¹⁰ *Ibid.*, para. 1.

¹¹ Idriz Balaj's Motion to Strike the Testimony of [Witness 55], 7 November 2007 ("Balaj 7 November Motion"), paras 8, 11-13. On 8 November, Defence for Balaj filed a Corrigendum to its 7 November Motion, in which it attached an annex that it had omitted to file in the original motion (Corrigendum to Idriz Balaj's Motion to Strike the Testimony of [Witness 55], 8 November 2007).

¹² *Ibid.*, paras 9, 14.

¹³ *Ibid.*, para. 15.

¹⁴ Submission on Behalf of Ramush Haradinaj in Respect of the Admissibility of the Testimony in Chief of [Witness 55], 8 November 2007 ("Haradinaj Submission").

to the Accused to permit Witness 55's testimony to remain on the record;¹⁵ (ii) the defence was in possession of various materials that it would have deployed in cross-examination to challenge Witness 55's credibility;¹⁶ (iii) without an opportunity to test the witness's credibility and observe his reaction to issues which would have been explored in cross-examination, Witness 55's testimony must be regarded as having no probative value;¹⁷ (iv) as the statements of Witness 55 could never have been admitted pursuant to Rule 92 *bis* without cross-examination, similarly Witness 55's testimony could not be admitted with the Defence effectively being denied the right to confront the witness;¹⁸ (v) Witness 55's testimony about the acts and conduct of the Accused were entirely uncorroborated;¹⁹ (vi) there were significant inconsistencies between Witness 55's testimony and his prior statements;²⁰ and finally (vii) mental health issues had affected the reliability of Witness 55's evidence.²¹

7. On 8 November 2007, the Brahimaj Defence filed a submission in which it joined the Balaj 7 November Motion.²²

III. Discussion

8. The Chamber notes that while the right to cross-examine a witness is of fundamental importance to a fair trial, this right is not absolute but rather subject to the duty of the Chamber to ensure a fair and expeditious trial pursuant to Article 20(1) of the Statute.²³ The Appeals Chamber has held that while proceedings must be conducted with full respect for the rights enumerated in Article 21 of the Statute, restrictions on the right to cross-examination will not necessarily entail a violation of that provision or be inconsistent with a fair trial.²⁴

9. In support of its argument that as Witness 55's evidence is relevant and probative it should be admitted with the lack of an opportunity to cross-examine being a factor going to how much weight should be given to the evidence, the Prosecution referred the Chamber to

¹⁵ *Ibid.*, paras 4, 8, 15.

¹⁶ *Ibid.*, paras 5, 9-13.

¹⁷ *Ibid.*, para. 5.

¹⁸ *Ibid.*, para. 5.

¹⁹ *Ibid.*, para. 6.

²⁰ *Ibid.*, para. 14.

²¹ *Ibid.*, paras 17-19.

²² Lahi Brahinaj's Joinder in "Idriz Balaj's Motion to Strike the Testimony of [Witness 55]", 8 November 2007.

²³ *Prosecutor v. Milan Martić*, Decision on Appeal Against the Trial Chambers' Decision on the Evidence of Witness Milan Babić, 14 September 2006, paras 11-12 ("Martić Appeals Chamber Decision"); *Prosecutor v. Milan Martić*, Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, Together with Associated Exhibits, from Evidence, 9 June 2006, para. 56 ("Martić Decision"); see also *Prosecutor v. Jadranko Prlić et al.*, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, Appeals Chamber, 23 November 2007, paras 41 and 55.

²⁴ Martić Appeals Chamber Decision, para. 13.

Prosecutor v. Brđanin.²⁵ In this case, the un-sworn statement of General Talić was deemed admissible without being subject to cross examination, with a decision on what weight to be given to the testimony to be taken during final deliberations.²⁶ The Prosecution also made reference to *Prosecutor v. Milan Martić* in which the Chamber held that there was no reason *per se* to exclude the evidence of a witness who had died before the completion of his cross-examination, but that corroboration was required if used to establish a conviction.²⁷ This decision was affirmed by the Appeals Chamber in that case which upheld the two principles that the Trial Chamber had derived from the jurisprudence of the European Court of Human Rights, namely that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence, and (2) evidence which has not been cross-examined and goes to the acts and conduct of the accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction.²⁸ The Chamber further noted that in *Brđanin*, the Chamber in that case found that absent any corroborative evidence, it would be un-safe to rely on evidence of Rašim Čirkić, a witness who was unable to return to the Tribunal for cross-examination because of ill-health.²⁹

10. In considering whether to exclude the testimony of Witness 55, the Chamber agreed with the Prosecution that Witness 55's testimony is relevant to Haradinaj's alleged direct participation in crimes and the joint criminal enterprise charged in the indictment, the alleged conflict between the KLA and the FARK, the command structure within the KLA during the indictment period, and the alleged KLA use of the Lake Radonjić/Radoniq canal as a dump site for bodies.³⁰ The testimony therefore relates to central issues in the case, including the acts and conduct of one of the Accused, and is of a pivotal nature. The Chamber considered that under these circumstances, the lack of cross-examination would mean that the probative value of the testimony is substantially outweighed by the Accused's right to a fair trial, unless the Chamber is satisfied as to the reliability of the witness's testimony with there also being strong corroboration from other witnesses as to the central allegations.

11. The Prosecution argued that the Defence had an opportunity to partially test Witness 55's credibility in court with regard to one of his witness statements and failed asylum

²⁵ Prosecution's Submission, paras 11-14.

²⁶ *Prosecutor v. Radoslav Brđanin*, Oral Decision of 24 February 2004, T. 25083.

²⁷ Martić Decision, para. 67.

²⁸ Martić Appeals Chamber Decision, para. 20.

²⁹ *Prosecutor v. Radoslav Brđanin*, Trial Judgement, 1 September 2004, footnotes 944 and 2261.

³⁰ Prosecution's Submission, para. 13.

application in Switzerland in 1999.³¹ The Chamber does not accept this argument as the Defence only had the opportunity to cross-examine the witness on why he had told the Prosecution that he was a Kosovar Albanian and had gone to medical school. The Defence was not given the opportunity to cross-examine the witness on the substance of his testimony. As previously stated, the Defence indicated to the Chamber that it was in a position to conduct a substantial cross-examination of Witness 55 and was in possession of various materials that would have been deployed in cross-examination to challenge his credibility. To this effect, it provided only a brief outline of the areas where it intended to confront the witness with this evidence and what it believed it would be able to show.³²

12. In advancing its argument that Witness 55's testimony was reliable, the Prosecution submitted that the testimony was consistent with Witness 55's prior statements on key matters of substance.³³ Witness 55's testimony revolves to a great extent around the claim that he had had medical training and had been recruited as a medical assistant for the KLA. While the Chamber could not exclude that the witness had undergone some sort of medical training, during his testimony the witness first stated that he had spent one and a half years studying medicine at university in Tirana.³⁴ When cross-examined by the Defence on this matter, Witness 55 admitted that he had not been enrolled at university in Tirana, but had rather undertaken "pre-university education" at an institute in Kamzë, near Tirana.³⁵ In this regard, the Chamber noted firstly that the witness admitted in court that he had previously provided false information to both the Swiss authorities when applying for asylum and to the Prosecution with regard to his nationality.³⁶ The Chamber also took note of the Prosecution's argument that the witness had good reason for being untruthful in his asylum application, but still found this argument insufficient to explain why the witness had provided false information to the Prosecution over six years after his asylum request had been rejected.³⁷ While each of these factors taken individually would not suffice to warrant the exclusion of Witness 55's evidence, taken as a whole the Chamber found that they amounted to clear inconsistencies between the witness's evidence and his prior statements.

³¹ Prosecution's Submission, paras 1, 8, Confidential Annex A.

³² Haradinaj Submission, paras 5, 10-15.

³³ Prosecution's Submission, para. 7.

³⁴ T. 8060.

³⁵ T. 8099.

³⁶ T. 8064, 8089-8091, 8096-8098.

³⁷ Prosecution's Submission, Confidential Annex A.

⁴⁰ See 6 November Decision, para. 8.

13. The state of Witness 55's health was also a factor which the Chamber took into consideration in deciding to exclude his testimony. In this regard, the Chamber's decision not to recall Witness 55 to complete his testimony and be cross-examined by the Defence was based both on what the Chamber itself was able to observe in court with regard to Witness 55's mental state and on assessments received from VWS.⁴⁰ Additionally, as the witness himself admitted, for at least some period in the past he had suffered from visual and auditory hallucinations.⁴¹ The Chamber could therefore not ignore the possibility that these hallucinations may have affected the recollections of what he claims to have witnessed.

14. With regard to the Prosecution argument that the testimony of Witness 55 is corroborated by other evidence in this case,⁴² it was submitted that the Chamber had heard evidence from other witnesses of allegations relating to the transportation of weapons from Albania to Kosovo,⁴³ the use of the Lake Radonjić/Radoniq canal as a dump site for bodies and the dispute between the FARK and the KLA.⁴⁴ The main area of substance in Witness 55's testimony revolved around two alleged shooting incidents in which the witness claims Haradinaj was involved.⁴⁵ The Prosecution submits that these two events are corroborated by Witness 17, who also testified about two incidents as examples of disputes between the KLA and FARK. However, the Chamber viewed that the corroboration that the Prosecution was attempting to show was of a very general and non-specific nature, lacking the sufficient detail necessary to establish its veracity when compared against the similar testimonies of other witnesses.

15. In conclusion, as the Prosecution conceded, the testimony of Witness 55 goes directly to acts and conduct of the Accused. Added to this, many of the substantive parts of Witness 55's testimony are uncorroborated by other evidence and serious questions remain as to the reliability of his testimony. Under such circumstances, the Defence would suffer unfair prejudice from not having the opportunity to test the veracity of the testimony. Given the

⁴¹ T. 8108-8110.

⁴² Prosecution's Submission, para. 18.

⁴³ Ibid., paras 15-17.

⁴⁴ Ibid., paras 19-20.

⁴⁵ T. 8144, 8149.

⁵⁴ Prosecution's Submission, paras 1, 21.

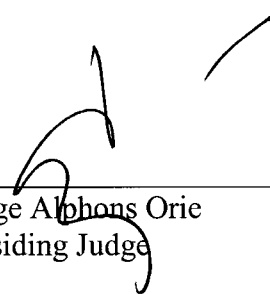
substance of Witness 55's testimony, the Chamber was satisfied that the probative value of his evidence would be greatly outweighed by the prejudicial effect that the admission of his untested testimony would have on the rights of the Defence.

16. The Chamber took a similar position with regard to the Prosecution's alternative submission that Witness 55's testimony should be admitted under Rule 92 *quater*.⁵⁴ Rule 92 *quater* (A)(ii) requires that the Chamber find from the circumstances in which the statement (or transcript) was made and recorded that it is reliable. The Chamber has previously set out the criteria for determining the reliability of the evidence of an unavailable witness under Rule 92 *quater*,⁵⁵ which are: (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. The Chamber found that the criteria under (a) had been met as Witness 55's testimony was given in court. However, the criteria under (b), (c) and (d) had clearly not been met in order to allow for Witness 55's testimony to be admitted under Rule 92 *quater*. Firstly, the testimony had not been subject to cross-examination. Secondly, as discussed in paragraph 14, the testimony relates in great part to events about which there is not sufficient corroborating evidence. Thirdly and finally, as discussed in paragraph 12, Witness 55's testimony is not free from manifest or obvious inconsistencies.

17. For the foregoing reasons, the Chamber decided to exclude the testimony of Witness 55 under Rule 89(D) and deny admission of the transcripts of 5, 6 and 12 September 2007 into evidence pursuant to Rule 92 *quater*.

⁵⁵ Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8.

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



Judge Alphons Orié
Presiding Judge

Dated this 14th day of December 2007
At The Hague
The Netherlands

[Seal of the Tribunal]