

IT-04-84-T
D22549-D22546
14 SEPTEMBER 2007

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**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: 14 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: 14 September 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PURPORTED MOTION FOR CERTIFICATION TO APPEAL
TRIAL CHAMBER DECISION CONCERNING SUBPOENAED WITNESS**

Office of the Prosecutor

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

Counsel for Witness 28

Ms Virginia Lindsay

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

1. On 5 September 2007, the Trial Chamber dismissed Witness 28's motion for the suppression of a subpoena to testify issued to her on 12 July 2007.¹ Witness 28 claimed that she enjoyed a privilege against compelled testimony in consequence of the nature of her past and present employment. She argued, in the alternative, for a grant of protective measures amounting to closed-session testimony and related relief. She now seeks leave to appeal the Trial Chamber's decision.²

2. The Trial Chamber explained in its 5 September decision that Witness 28 had a valid action before it, because the subpoena gave her the option of showing cause to the Trial Chamber why she would not comply with the subpoena.³ There was the possibility of a civil action implicit in the subpoena. Witness 28 availed herself of that action, and access to a court was granted to her accordingly.

3. That action has now been exhausted. Witness 28 has assumed, without any argument, that she may now also avail herself of the certification procedure in Rule 73 of the Tribunal's Rules of Procedure and Evidence. Yet, that procedure, as indicated in the opening paragraph of the rule, is limited in its application to "either party" to the proceedings.⁴

4. It is not surprising that the Tribunal's Rules have been crafted with an overwhelming focus on the interests of the parties to criminal proceedings before this Tribunal. Non-parties may not appropriate these provisions. Avenues of appeal for non-parties are rare and very specific (see Rules 54 bis and 108 bis, concerning states). No appeal route has been specified for the situation of Witness 28. The imposition of restrictions on access to the Appeals Chamber is justified so as to avoid that the appellate body becomes overloaded.⁵ The judges sitting under Article 15 of the Tribunal's Statute (adoption of rules of procedure and evidence) have a wide discretion in formulating such restrictions.

5. Not only is Witness 28 not a party to the present case, she is not a party to any criminal proceedings before the Tribunal. The subpoena issued to her is not a criminal sanction (although her refusal to comply with it may cause her to be held in contempt of court). The hearing she was granted on the subpoena, and the Trial Chamber's decision on her earlier

¹ Decision on Motion by Witness 28 to Set Aside Subpoena or for Alternative Relief, 5 September 2007.

² Motion [by Witness 28] for Leave to Appeal Decision, 10 September 2007. The Prosecution filed a response on 13 September 2007 opposing the purported motion.

³ Paras 2-3 of the Trial Chamber's decision.

⁴ Rule 73(A). See also Art. 82 of the Statute of the International Criminal Court, which contains the same limitation.

⁵ See *Bruella Gómez de la Torre v. Spain*, ECHR, 19 December 1997, para. 36.

motion, occurred in the context of a “determination of her civil rights and obligations”.⁶ It makes a difference to her purported right of appeal that this litigation occurred in the civil and not the criminal sphere, albeit by a bench of judges hearing a case under the criminal law.⁷ Considering that a specific avenue to appeal the kind of decision here in question has not been provided for in the Rules, Witness 28 does not have a right of access to the Appeals Chamber under international law.⁸

6. The litigation in the *Brđanin* case may give the impression that Rule 73 is available to a person in Witness 28’s situation. Yet, in that case, the question of standing of non-parties was not raised or discussed at all.⁹ Moreover, the judges in that case may have allowed the appeal on the basis that they were dealing with a question of general public interest expected to impact upon cases before this Tribunal generally. Such is not the case in the present instance – and thus *Brđanin* may be distinguished. The Trial Chamber therefore is not persuaded that that single precedent establishes a right of access of non-parties in the situation of Witness 28 to the appeal mechanism of Rule 73.

7. Even assuming that Rule 73 were available to Witness 28, her application would fail for essentially the same reasons outlined above. The second paragraph of Rule 73 limits appeals to issues that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”. If, as Witness 28 claims in her purported certification motion, she

⁶ The words from Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷ See *Dombo Beheer B.V. v. The Netherlands*, ECHR, 27 October 1993, para. 32 (“The requirements inherent in the concept of ‘fair hearing’ are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 [of the European Convention] applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law ... the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases”); and cf. Art. 2(1) of Protocol No. 7 to the European Convention; Art. 14(5) of the International Covenant on Civil and Political Rights; and the commentary in S. Trechsel, *Human Rights in Criminal Proceedings* (2005), p. 364.

⁸ Cf. *Golder v. U.K.*, ECHR, 21 February 1975, para. 36 (“it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. This is not an extensive interpretation forcing new obligations on the Contracting States”); *Ashingdane v. U.K.*, ECHR, 28 May 1985, paras 55, 57 (“This ‘right to a court’, of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of Article 6 para. 1 ... Certainly, the right of access to the courts is not absolute but may be subject to limitations”); and *Bruella*, op. cit., para. 37 (“The Court reiterates that Article 6 of the Convention does not compel the Contracting States to set up courts of appeal or of cassation ... However, where such courts do exist, the guarantees of Article 6 must be complied with, for instance in that it guarantees to litigants an effective right of access to the courts for the determination of their ‘civil rights and obligations’”).

⁹ See *Prosecutor v. Brđanin and Talić*: Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 7 June 2002; Decision to Grant Certification to Appeal, 19 June 2002; and Decision on Interlocutory Appeal, 11 December 2002.

is entitled to have the subpoena set aside on the basis of a privilege not presently known to the Trial Chamber (but discoverable – she says – by the Appeals Chamber), the violation of this assumed privilege would affect the witness as a private citizen, with no significant impact on the fair and expeditious conduct of these proceedings or the outcome of the trial.

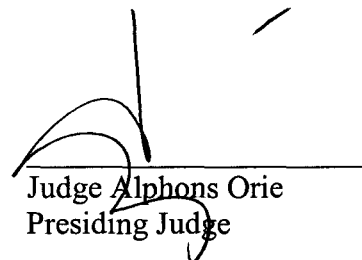
8. In sum, Witness 28 either cannot avail herself of Rule 73, or, if she could, she would fail to meet the basic test under the rule.

9. Witness 28's purported motion is therefore **DISMISSED**.

10. In deciding protective measures for a witness, the Trial Chamber normally awaits an application from the calling party, unless, of course, the witness has been called by the Trial Chamber itself. Such an application is not a precondition for a grant of protective measures. The Trial Chamber regularly explores a witness's fears and security circumstances with the witness himself or herself, in order to ensure that the requested protective measures are appropriate to address the witness's security concerns.

11. If Witness 28 has a request to make on matters of protective measures pursuant to Rule 75(A), she will be heard when she appears to testify. If she requires legal assistance in making the relevant oral submissions, her counsel may, at the witness's expense, be in attendance for that portion of the hearing.

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



Judge Alphons Orie
Presiding Judge

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

[Seal of the Tribunal]