



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: 28 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: 28 November 2007

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON PROSECUTION'S MOTION TO ADMIT FIVE STATEMENTS OF
WITNESS 1 INTO EVIDENCE PURSUANT TO RULE 92 *QUATER* WITH
CONFIDENTIAL ANNEX

Office of the Prosecutor

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1. On 25 October 2007, the Prosecution filed a motion to admit five statements of deceased Witness 1 under Rule 92 *quater* of the Rules of Procedure and Evidence (“Rules”).¹ On 12 November 2007, the Defence for Haradinaj and the Defence for Balaj requested that the Chamber deny the motion.² On 13 November 2007, the Defence for Brahimaj joined in their responses.³

2. The Prosecution’s position is that Witness 1’s statements meet the requirements for admissibility under Rule 92 *quater*.⁴ The Prosecution submits that Witness 1 is unavailable because he is deceased, and that his statements are relevant, probative, reliable, free of manifest inconsistencies, and corroborated by other witnesses who have testified before the Chamber in this case.⁵ The Prosecution further submits that the Defence has had the opportunity to cross-examine those witnesses.⁶ The Prosecution acknowledges that Witness 1’s statements go to proof of the acts and conduct of the Accused, but argues that Rule 92 *quater* allows for the admission of such statements.⁷

3. The Defence for Haradinaj holds the position that Witness 1’s statements do not meet the requirements for admission under Rule 92 *quater*.⁸ It submits that the statements contain allegations regarding the acts and conduct of the Accused that are central to the Prosecution’s case.⁹ The Defence for Haradinaj further submits that Witness 1’s statements lack the necessary indicia of reliability, are inherently implausible or inconsistent with evidence heard by the Chamber, and are for the most part not corroborated by such evidence.¹⁰

4. The Defence for Balaj also holds the position that Witness 1’s statements are not admissible under Rule 92 *quater*.¹¹ It submits that they are unreliable and in many aspects uncorroborated or contradicted by evidence received by the Chamber in this case.¹² Furthermore, the Defence for Balaj argues that the statements go to proof of the acts and

¹ Prosecution’s Motion to Admit the Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater*, 25 October 2007 (“Motion”), paras 1, 21.

² Idriz Balaj’s Opposition to Prosecution Motion to Admit the Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater* with Confidential Annex A and Public Annex B, 12 November 2007 (“Balaj’s Response”), paras 2, 40; Response on Behalf of Ramush Haradinaj to Prosecution’s Motion to Admit the Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater*, 12 November 2007 (“Haradinaj’s Response”), paras 2, 39.

³ Lahi Brahimaj’s Joinder in the 1st and 2nd Defendants’ Responses to Prosecution Motion to Admit the Statements of Witness 1 into Evidence Pursuant to Rule 92 *quater*, 13 November 2007, para. 7.

⁴ Motion, paras 4, 21.

⁵ *Ibid.*, paras 1, 3-5, 9-13, 18, Confidential Annex A.

⁶ *Ibid.*, para. 18.

⁷ *Ibid.*, paras 15-17.

⁸ Haradinaj’s Response, para. 7.

⁹ *Ibid.*, paras 2-3, 7.

¹⁰ *Ibid.*, paras 2-3, 7-8.

¹¹ Balaj’s Response, para. 2.

conduct of the Accused, and often concern issues that are central to the Prosecution's case.¹³ The Defence for Balaj finally submits that, since Rule 92 *quater* was adopted on 13 September 2006 when the present case was already pending before the Tribunal, Rule 6 (D) bars the application of Rule 92 *quater* as prejudicial to the Defence.¹⁴ According to the Defence for Balaj, the old Rule 92 *bis* (C) must be applied, which did not allow for the admission of written statements describing the acts and conduct of an accused.¹⁵

5. Rule 92 *quater* provides that:

(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. In addition to the conditions set out in this Rule, the Chamber must ensure that the general requirements of admissibility under Rule 89 (C) are satisfied, namely that the proposed evidence is relevant and probative.¹⁶ Since a statement cannot be probative if it is not reliable, the Chamber will deal with the probative value of Witness 1's statements when discussing their reliability.¹⁷

7. The Prosecution has attached to its Motion a death certificate of Witness 1.¹⁸ This satisfies the Chamber that Witness 1 is unavailable.

8. The Chamber will proceed to examine whether the circumstances in which the statements were made and recorded satisfy the Chamber of their reliability. The Chamber will

¹² Ibid., paras 2-3, 8-9, 11-16, 18, 26, 30, 32.

¹³ Ibid., paras 2, 28, 30.

¹⁴ Ibid., paras 33-39.

¹⁵ Ibid., paras 34, 39.

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

¹⁷ See *Prosecution v. Haradinaj et al.*, 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, ("7 September Decision"), para. 11.

particularly consider whether: (i) the statements were given under oath; (ii) they were signed by the witness with an accompanying acknowledgement that they are true to the best of his recollection; and (iii) they were taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal.¹⁹

9. Witness 1's statements are summaries of interviews that Prosecution investigators have conducted with the witness. The statements were not given under oath. However, the witness signed or initialled each page of his statements, as well as the accompanying acknowledgements that the statements were read back to him in his own language and were true to the best of his knowledge. Further, an interpreter approved by the Registry confirmed that the statements were read back to Witness 1 in his own language and that Witness 1 confirmed that they were true to the best of his knowledge. The Chamber finds this to be sufficient proof of Witness 1's acceptance that the written statements were true and accurate. The Chamber will assess the reliability of the content of Witness 1's statements below, in paragraphs 12 to 20.

10. With regard to the requirements in Rule 89 (C), the Chamber agrees with the parties that Witness 1's statements are highly relevant to the case. The statements contain allegations about the Accused Idriz Balaj's direct involvement in Counts 7, 8, 17, 18, 19, 20, 35, 36 and 37 of the Indictment, as detailed below. The statements also claim that the Accused Ramush Haradinaj, as the local KLA commander, gave orders to kidnap, torture and kill people, and that no KLA member would dare take any such action without Ramush Haradinaj's knowledge or permission.²⁰ The statements therefore contain allegations that go to proof of the acts and conduct of the Accused and are central to the Prosecution's case.

11. It is in the Chamber's discretion to admit written statements that go to proof of the acts and conduct of an accused and are central to the Prosecution's case, but it will only do so if fully satisfied that they are reliable. In assessing this, the Chamber will evaluate whether the statements are corroborated by other evidence that the Chamber has received and whether the statements are internally consistent.²¹

¹⁸ Motion, Confidential Annex B.

¹⁹ See 7 September Decision, para. 8.

²⁰ Witness 1, statement of 23 and 24 August 2002, pages 5-6; Witness 1, statement of 15 and 16 October 2002, pages 2-5, 7.

²¹ See Second *Milutinović* Decision, para. 9. The Prosecution also cited *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. However, in that decision the *Prlić et al.* Chamber held that the transcripts tendered by the Prosecution made "no mention of the acts and conduct of any of the six Accused" (para. 18) and did "not go to proof of facts

12. In relation to Counts 7 and 8 of the Indictment, Witness 1 stated that in August 1998 he saw some soldiers, including Idriz Balaj, forcibly take Vukosava Marković and Darinka Kovać from their house in Gornji Ratiš/Ratishë ë Eperm.²² He further stated that the women were put in a car which drove away in the direction of Rznić/Irznik or Lake Radonjić/Radoniq.²³ Witness 1 stated that he saw Idriz Balaj set the house on fire after two other soldiers had poured gasoline at the entrance of the house upon Idriz Balaj's order.²⁴ Witness 1 also stated that about an hour and a half after the car drove away, he heard shots coming from the direction of the concrete canal leading to Lake Radonjić/Radoniq.²⁵

13. There is little evidence to support the allegations made by Witness 1. The evidence of Marijana Anđelković and Miloica Vlahović does not indicate who allegedly abducted and killed Vukosava Marković and Darinka Kovać.²⁶ The evidence of Dušan Dunjić's and Vera Kovačević contains information about the identification of the bodies believed to be those of Vukosava Marković and Darinka Kovać, but nothing about who allegedly abducted and killed them.²⁷ Branimir Aleksandrić testified that the remains labelled R-10 and R-17, allegedly belonging to these women, were found buried outside the canal leading to Lake Radonjić/Radoniq.²⁸

14. Furthermore, according to the statement of Witness 1 dated 23 and 24 August 2002, he never saw the bodies of Vukosava Marković and Darinka Kovać, yet, according to his statement dated 15 and 16 October 2002, he saw the women's bodies in or on the edge of the basin of the canal leading to Lake Radonjić/Radoniq.²⁹ The Chamber considers this to be a significant inconsistency in the witness's statements.

15. In relation to Counts 17 and 18 of the Indictment, Witness 1 stated that around the beginning of August 1998 he witnessed Tush and Ilira Frrokaj being stopped in their car at a checkpoint by some soldiers, including Idriz Balaj.³⁰ According to Witness 1, Idriz Balaj

so fundamental to this case that it would be unfair to the Defence to authorise its being tendered into evidence in written form" (para. 19).

²² Witness 1, statement of 23 and 24 August 2002, page 6; Witness 1, statement of 28 May 2006, paras 6-20; Witness 1, statement of 29 October 2006, paras 8, 12-13, 16-20.

²³ Witness 1, statement of 23 and 24 August 2002, page 6; Witness 1, statement of 28 May 2006, para 23.

²⁴ Witness 1, statement of 23 and 24 August 2002, page 6; Witness 1, statement of 28 May 2006, paras 17, 21-22.

²⁵ Witness 1, statement of 23 and 24 August 2002, page 6; Witness 1, statement of 28 May 2006, para. 24.

²⁶ Marijana Anđelković T. 525-526; P6 (Spotlight Report No. 26), page 28; Miloica Vlahović T. 1572-1573.

²⁷ P618 (Dušan Dunjić, witness statement, 8 June 2007), paras 295-309, 394-410.

²⁸ P1112 (Branimir Aleksandrić, witness statement, 26 June 2007), paras 129-130, 144, 146, 149.

²⁹ Witness 1, statement of 23 and 24 August 2002, page 6; Witness 1, statement of 15 and 16 October 2002, page 5-6.

³⁰ Witness 1, statement of 15 and 16 October 2002, page 5; Witness 1, statement of 28 May 2006, paras 58-64.

subsequently forced Ilira Frrokaj to enter his vehicle, while the other soldiers entered the car driven by Tush Frrokaj.³¹ Both vehicles set off in the direction of Lake Radonjić/Radoniq.³² Witness 1 also stated that in mid-August 1998 he saw the bodies of Tush and Ilira Frrokaj in the basin leading to Lake Radonjić/Radoniq.³³

16. Witness 1's statements with regard to Counts 17 and 18 are only partly corroborated by other witnesses who have testified in this case. Witness 21 testified that while he was looking for the couple in late August 1998, he learned from some KLA soldiers that two people who bore physical resemblance to Tush and Ilira Frrokaj were stopped and questioned by a man called "Toger" at a checkpoint outside Glođane/Gllogjan.³⁴ In his search for the couple, Witness 21 came across "Toger" twice but never spoke to him.³⁵ Witness 21 later recognized Idriz Balaj from a photo-spread as the man he called "Toger".³⁶ Witness 21's testimony was based on hearsay and did not allege that the couple was abducted and killed by Idriz Balaj. Dušan Dunjić testified that the body of Ilira Frrokaj was found in the canal leading to Lake Radonjić/Radoniq and that it had a bullet wound and multiple bone fractures.³⁷ According to Mr Dunjić, the identification of the remains by traditional means was confirmed by DNA analysis.³⁸ Mr Dunjić did not give any evidence regarding who abducted and killed Ilira Frrokaj. He also could not indicate what caused her death.³⁹ According to the Indictment, the body of Tush Frrokaj has not been recovered,⁴⁰ which raises doubt as to whether Witness 1 could have seen his body at the canal site.

17. The Chamber notes that Witness 1 stated that he saw Tush Frrokaj drive in his Mercedes, whereas the other evidence before the Chamber indicates that Tush Frrokaj drove an Opel Kadett.⁴¹ Moreover, witness 1's statements about the time of the alleged abduction of Tush and Ilira Frrokaj and the time that he claimed to have seen their bodies in or near the canal leading to Lake Radonjić/Radoniq are hard to reconcile with evidence received by the Chamber. Witness 1 stated that the couple was abducted in the beginning of August 1998 and that he saw their bodies in or near the canal leading to Lake Radonjić/Radoniq in mid-August

³¹ Witness 1, statement of 15 and 16 October 2002, page 5.

³² Witness 1, statement of 15 and 16 October 2002, page 5.

³³ Witness 1, statement of 15 and 16 October 2002, page 5; Witness 1, statement of 28 May 2006, paras 65-67.

³⁴ Witness 21, T. 2754-2756, 2761-2762.

³⁵ P42 (Witness 21, witness statement, 12 April 2007), para. 32; Witness 21, T. 2719-2720, 2853.

³⁶ P375 (Pekka Haverinen, witness statement, 26 June 2007), paras 50-52; P63 (ICTY photo board identification on which Witness 21 marked the picture of Mr Balaj).

³⁷ P 618 (Dušan Dunjić, witness statement, 8 June 2007), paras 411, 418.

³⁸ P 618 (Dušan Dunjić, witness statement, 8 June 2007), paras 424-425, 431.

³⁹ P 618 (Dušan Dunjić, witness statement, 8 June 2007), para. 417.

⁴⁰ Fourth Amended Indictment, para. 74.

1998, whereas the couple appears to have disappeared in late August of that year.⁴² Moreover, Witness 1 stated that he left his village a couple of days before 31 August 1998, in which case he must have left around the time that Tush and Ilira Frrokaj were allegedly abducted.⁴³ Witness 21 did not see the bodies of the victims when he visited the site in early September 1998.⁴⁴

18. In relation to Counts 19, 20, 35, 36 and 37 of the Indictment, Witness 1 stated that in August 1998 he and Witness 61 were taken from their house to the local KLA headquarters, where he was put in a well.⁴⁵ He further stated that “Toger” mistreated him for a considerable time.⁴⁶ Witness 1 also stated that he heard and saw how “Toger” severely mistreated Zenun Gashi, Misin Berisha and Sali Berisha.⁴⁷ Finally, Witness 1 claimed to have been forced to dig trenches for the KLA and declared that he had been used as a “human shield” by “Toger”.⁴⁸

19. This account is partly corroborated by Witness 61, who testified that she and Witness 1 were taken from their home to the local KLA headquarters, where they were separated from each other.⁴⁹ She also testified that Witness 1 later told her that he had been put in a well, and that she noticed that his clothes were wet up to his waist.⁵⁰ On the other hand, she did not corroborate the allegations of mistreatment of Witness 1, Zenun Gashi, Misin Berisha and Sali Berisha. Moreover, Witness 61 testified that she was in a room with a man who was allegedly “Toger” on from the moment she and Witness 1 arrived at the headquarters and were separated from each other up until the moment they were reunited and left the headquarters together.⁵¹ Since “Toger” could not have been in two different places at once, the Chamber finds Witness 1’s claims on this matter to be hard to reconcile with Witness 61’s evidence. Witness 52 testified about Zenun Gashi’s disappearance but provided no evidence about what happened to him. Although forensic evidence before the Chamber suggests that the bodies of

⁴¹ Witness 1, statement of 15 and 16 October 2002, page 5; Witness 21, T. 2755.

⁴² Witness 1, statement of 15 and 16 October 2002, page 5; Witness 1, statement of 28 May 2006, para. 60; Witness 21, T. 2736-2739; D67 (Report by Kosovo Diplomatic Monitoring Mission on the Disappearance of Ilira and Tush Frrokaj).

⁴³ Witness 1, statement of 23 and 24 August 2002, page 2; Witness 1, statement of 28 May 2006, para. 35.

⁴⁴ P42 (Witness 21, witness statement, 12 April 2007), paras 54-57; Witness 21, T. 2622-2627, 2745-2746.

⁴⁵ Witness 1, statement of 23 and 24 August 2002, page 3; Witness 1, statement of 11 August 2006, para. 7.

⁴⁶ Witness 1, statement of 23 and 24 August 2002, page 4.

⁴⁷ Witness 1, statement of 23 and 24 August 2002, page 4-5.

⁴⁸ Witness 1, statement of 15 and 16 October 2002, pages 2-4, 6, 8; Witness 1, statement of 28 May 2006, paras 49-50.

⁴⁹ Witness 61, T. 3977-3985, 3987-3991, 4014-4017, 4032-4033.

⁵⁰ Witness 61, T. 3991, 4005-4007.

⁵¹ Witness 61, T. 3991-3992, 3996, 4006.

Zenun Gashi, Misin Berisha and Sali Berisha were found near Lake Radonjić/Radoniq and identified by DNA analysis it does not shed any light on how they went missing and who is responsible for their deaths.⁵² Finally, the Chamber has received no evidence that could corroborate Witness 1's allegations that he was forced to work for the KLA and that he was used as a human shield. Witness 56 testified that Witness 1 sometimes worked for the KLA by digging trenches, but provided no evidence that Witness 1 was forced to do so.⁵³

20. In sum, only Witness 1's account of how he and Witness 61 were allegedly taken from their house to a local KLA headquarters and how he was put in a well is corroborated by evidence that is before the Chamber. On some of the uncorroborated matters, Witness 1's statements are moreover internally inconsistent and hard to reconcile with other evidence that is before the Chamber. Since Witness 1's statements go to proof of the acts and conduct of the Accused and contain allegations that are central to the Prosecution's case, and since there has been no opportunity for the Accused to cross-examine the witness, the Chamber will not admit these parts of the statements.

21. Since the Chamber only admits corroborated parts of the statements of Witness 1 that relate to the acts and conduct of the Accused, the rights of the Accused are not prejudiced under Rule 6 (D).

22. The Prosecution requests that the Chamber lift the protective measures for Witness 1.⁵⁴ The Prosecution submits that Witness 1's identity is already in the public domain because of the publicity surrounding his death, and that his statements can be redacted so as to protect the identity of other witnesses.⁵⁵ The Defence did not respond to the Prosecution's request to lift Witness 1's protective measures.

23. After thoroughly examining Witness 1's statements in the context of the evidence before it, the Chamber is not convinced that redacting the statements is sufficient to hide the identity of other protected witnesses. The Chamber considers that due to the unique nature of certain allegations contained in the statements, making them public, even in a redacted form, could lead to disclosure of the identity of other protected witnesses who have testified about the same charges. Therefore, the Chamber decides that Witness 1 shall retain his pseudonym and that his statements shall remain under seal.

⁵² Joint Motion on Agreed Facts, 26 November 2007, Annex A; P 618 (Dušan Dunjić, witness statement, 8 June 2007), paras 211-226, 227-238, 251-258.

⁵³ Witness 56, T. 7113-7114.

⁵⁴ Motion, paras 2, 22.

⁵⁵ *Ibid.*, para. 19.

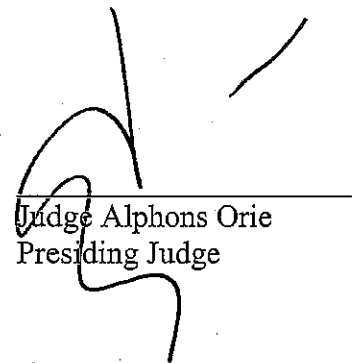
24. For the foregoing reasons and pursuant to Rules 54, 75, and 92 *quater* of the Rules, the Chamber:

ORDERS that Witness 1 continue to be referred to as Witness 1 in all public documents;

ADMITS into evidence under seal the written statements of Witness 1, as redacted by the Chamber and attached to this Decision. In this respect the Chamber notes that in the statement dated 15 and 16 October 2002, the word 'he' on page 4 (ERN U0031015), taken in context, relates to a man called "Toger";

REQUESTS the Registrar to upload the attached statements into eCourt, assign them exhibit numbers and inform the Chamber and the parties of the numbers assigned.

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



Judge Alphons Orié
Presiding Judge

Dated this 28th day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]