



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-04-75-T
Date: 6 May 2013
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 6 May 2013

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON DEFENCE SUBMISSIONS
IN SUPPORT OF ADMISSION OF PRIOR INCONSISTENT STATEMENTS OF
A WITNESS FOR PURPOSE OF IMPEACHMENT**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for Goran Hadžić:

Mr. Zoran Živanović
Mr. Christopher Gosnell

1. **THIS TRIAL CHAMBER** of the 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 (“Tribunal”) is seized of the Defence “Submissions in Support of Admission of Prior Inconsistent Statements of a Witness for Purpose of Impeachment”, filed on 15 February 2013 (“Motion”). On 22 February 2013, the Prosecution filed its “Prosecution Response to Defence Submissions in Support of Admission of Prior Inconsistent Statements” (“Response”). On 1 March 2013, the Defence filed a “Reply to Prosecution Response to Defence Submissions in Support of Admission of Prior Inconsistent Statements of a Witness for the Purpose of Impeachment” (“Reply”).

A. Background

2. On 8 February 2013, during its cross-examination of Prosecution witness Samira Baranjek, the Defence sought the admission of two prior statements of the witness, Rule 65 *ter* numbers 03389 and 05961. The Defence submitted that the statements were inconsistent with the witness’s testimony and should be admitted in order to avoid putting every alleged discrepancy to a vulnerable witness during cross-examination.¹ The Defence further submitted that the admission of the documents would be useful for the Trial Chamber to assess their impeachment value.² The Prosecution opposed the admission of the statements on the basis that the statements were not reliable and so the relevant conditions for admission had not been met.³ After having heard the parties in court, the Trial Chamber did not decide finally upon the issue but directed Defence counsel to put any alleged inconsistencies in the prior statements to the witness during cross-examination.⁴ Following the cross-examination of the witness on the content of the two documents, the Trial Chamber affirmed that the Defence’s request to admit the statements was pending and directed the parties to provide written submissions to assist the Trial Chamber in making a final determination on the matter.⁵

B. Submissions

3. In the Motion, the Defence seeks the admission of the two prior statements for the limited purpose of impeachment.⁶ The Defence submits that, as impeachment requires a discrepancy to be established, either an unequivocal recognition of the discrepancy by the witness or admission of the

¹ Samira Baranjek, 8 February 2013, T. 3132.

² Samira Baranjek, 8 February 2013, T. 3133.

³ Samira Baranjek, 8 February 2013, T. 3133.

⁴ Samira Baranjek, 8 February 2013, T. 3138.

⁵ Samira Baranjek, 8 February 2013, T. 3175.

⁶ Motion, para 1.

prior statement is necessary.⁷ The Defence submits that admission of the statements would provide a definitive record of the discrepancies asserted, particularly in circumstances where the witness at times refused to acknowledge the discrepancy or affirm the content of the prior statement, and would allow the Trial Chamber to fully assess the alleged discrepancies in light of the statements as a whole.⁸ The Defence further submits that neither Rule 90(H)(ii) of the Rules of Procedure and Evidence (“Rules”) nor any other rule compels the cross-examining party to put all potentially relevant attributes of a prior inconsistent statement to a witness and that the practice of the Tribunal favours the admission of prior inconsistent statements for the purpose of impeachment.⁹

4. The Prosecution opposes admission of the prior statements into evidence,¹⁰ submitting that (a) the Defence’s request is a request for reconsideration and the Defence has failed to demonstrate that this is an exceptional case involving a clear error of reasoning or that the admission is necessary to prevent an injustice;¹¹ (b) there is no reason for the Trial Chamber to depart from its practice of not admitting alleged prior inconsistent statements into evidence;¹² and (c) should the prior statements be admitted, they may be admitted for the truth of their contents.¹³

5. In its Reply, the Defence submits that the Prosecution wrongly claims that prior inconsistent statements cannot, or should not, be admitted purely for impeachment and that the *Popović* decision cited by the Prosecution concerns “whether the *calling party* can use and tender a prior statement for the truth of its content”.¹⁴ The Defence further submits that the prior statements must be admitted if the Trial Chamber is to fully and fairly evaluate the witness’s credibility in light of issues raised on cross-examination.¹⁵ The Defence submits that the standard of review identified by the Prosecution is “unreasonable” and that the Prosecution misunderstands the asymmetry created by denying the cross-examining party the latitude to introduce prior inconsistent statements for impeachment.¹⁶ Finally, the Defence submits that the Prosecution has failed to dispute factors that weigh in favour of admission of the statements.¹⁷

⁷ Motion, paras 3-10.

⁸ Motion, paras 5-10.

⁹ Motion, paras 11-17.

¹⁰ Response, para 1.

¹¹ Response, paras 5-6.

¹² Response, paras 7-15

¹³ Response, paras 16-19.

¹⁴ Reply, paras 2-3

¹⁵ Reply, paras 4-7

¹⁶ Reply, para 10.

¹⁷ Reply, para 11

C. Discussion

6. The Trial Chamber recalls its statement on 8 February 2013 during the hearing that the Defence's request for admission of the two prior statements was "pending" a final decision.¹⁸ The Motion is therefore not a request for reconsideration. Accordingly, the Trial Chamber will proceed to determine the Motion without applying the legal standard for reconsideration of a decision.

7. The Appeals Chamber has held that prior inconsistent statements may not only be received into evidence for assessing the credibility of the witness, but also may be admitted as hearsay evidence for the truth of their contents when they fulfil the criteria under the Tribunal's Rules in relation to relevance, reliability, and probative value.¹⁹ Ultimately, it is a matter of discretion for the Trial Chamber whether to admit a prior statement.²⁰

8. The Trial Chamber is keen to prevent being burdened by the admission of superfluous material and finds, in the present circumstances, that the cross-examination of the witness is sufficient for the purposes of assessing her credibility, especially because the majority of the purported inconsistencies cited by the Defence pertain to alleged omissions from the prior statements, rather than discrepancies. The Trial Chamber will take the cross-examination of the witness into account when evaluating the weight to be given to her evidence.

¹⁸ Samira Baranjek, 8 February 2013. T. 3175

¹⁹ *Prosecutor v. Popović et al*, Case No IT-05-88-AR73 3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para. 31

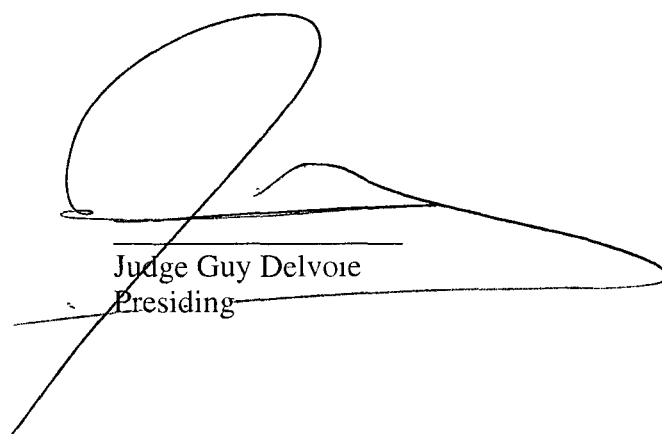
D. Disposition

9. For the foregoing reasons, the Trial Chamber, by majority and pursuant to Rules 54 and 89 of the Rules, hereby **GRANTS** the Defence leave to file the Reply and **DENIES** the Motion.

Judge Antoine Kesia-Mbe Mindua appends a dissenting opinion.

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

Done this sixth day of May 2013,
At The Hague,
The Netherlands.



Judge Guy Delvoire
Presiding

[Seal of the Tribunal]

²⁰ See *Prosecutor v. Limaj et al.*, Case No IT-03-66-T, Decision on Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras 25-26

DISSENTING OPINION OF JUDGE ANTOINE KESIA-MBE MINDUA

1. In this Decision, my colleagues, by majority, deny the Motion of the Defence for the admission of two prior statements of witness Samira Baranjek. I respectfully disagree with this conclusion and set forth my reasons below.

2. The two prior statements of the witness formed the basis of questions put to her during her cross-examination by the Defence, which tendered the statements as evidence for the limited purpose of impeaching the credibility of the witness.¹ My colleagues have exercised their discretion to deny the admission of these statements into evidence because, in their view, they are superfluous material and the cross-examination of the witness conducted by the Defence is sufficient for the purposes of assessing her credibility, especially because the majority of the purported inconsistencies cited by the Defence pertain to alleged omissions from the prior statements, rather than discrepancies.²

3. I agree with my colleagues that the statements are admissible and that the decision regarding whether to admit them is a discretionary one.³ However, I would have exercised the Chamber's discretion to admit them because, in my view, the statements are not superfluous material. Admission of the statements would have allowed the Trial Chamber to more fully assess the alleged discrepancies in light of the statements as a whole, and this would have given a more solid basis to the Defence for arguing in its final submissions that the witness lacked credibility. Moreover, the need to analyse the two statements would not have constituted a burden to the Trial Chamber during its final deliberations, especially because the Defence was tendering them for the limited purpose of impeachment.

4. Furthermore, although the Defence had the opportunity to cross-examine extensively the witness, it clearly chose solicitously not to do so, taking into account the particular vulnerability of Ms. Baranjek, an eye-witness and a victim who lost her husband during the events and who appeared to be very emotional since she cried very often during her testimony. Therefore, I am of

¹ Majority Decision, para 8

² Motion, para. 1

³ Majority Decision, para 7, citing *Prosecutor v Popović et al.*, Case No IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, para 31, see also *Prosecutor v Prlić et al.*, Case No IT-04-74-AR73 14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, paras 27-29, *Prosecutor v. R. Delić*, Case No IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, paras 22-23.

the view that cross-examination of Ms. Baranjek could not cover all aspects of the content of the said inconsistent statements.

5. For the foregoing reasons, I would have exercised the Trial Chamber's discretion to grant the Motion and thereby admit the statements into evidence for the limited purpose of assessing the credibility of the witness during the Trial Chamber's final deliberations in this case.

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

Done this sixth day of May 2013,
At The Hague.
The Netherlands.



Judge Antoine Kesia-Mbe Mindua

[Seal of the Tribunal]