

IT-04-84bis-PT
D1328-D1322
11 April 2011

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UNITED
NATIONS



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-04-84bis-PT
IT-04-84-R77.4-A
Date: 11 April 2011
Original: English

IN TRIAL CHAMBER II

Before: Judge Bakone Justice Moloto, Presiding
Judge Burton Hall
Judge Guy Delvoie

Registrar: Mr. John Hocking

Decision: 11 April 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON BALAJ DEFENCE AND BRAHIMAJ DEFENCE
REQUEST FOR ACCESS TO CONFIDENTIAL MATERIALS IN
THE *HARAQIJA AND MORINA* CASE**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Defence:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen M. Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaaj

Counsel for Astrit Haraqija:

Mr. Karim A. A. Khan

Counsel for Bajrush Morina:

Mr. Jens Dieckmann

THIS CHAMBER of the International Criminal 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 seised of “Idriz Balaj’s Motion for Access to Confidential Materials in the Haraqija & Morina Case” filed on 14 January 2011 (“Motion”) and “Lahi Brahimaj’s Joinder to Idriz Balaj’s Motion for Access to Confidential Materials in the Haraqija & Morina Case” filed on 31 January 2011 (“Joinder”). On 28 January 2011 the Prosecution filed “Prosecution Response to Balaj’s Motion for Access to Confidential Materials in the *Haraqija and Morina* Case”. The Chamber hereby renders its decision.

I. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj of certain counts of the indictment and ordered that Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj be retried on these counts.¹ On 28 October 2010 the Prosecution filed a revised version of the Fourth Amended Indictment, “to correspond to the Appeals Chamber’s order for partial retrial”.² On 9 November 2010 the Prosecution filed “tracked” and “clean” versions of the Fourth Amended Indictment.³
2. On 14 January 2011 the Trial Chamber issued its “Decision on Shortened Form of the Fourth Amended Indictment”, in which it ordered revisions of the Fourth Amended Indictment and further ordered the Prosecution to file a revised indictment by 21 January 2011.⁴
3. On 3 and 24 February 2011, respectively, the Trial Chamber granted a motion on behalf of Ramush Haradinaj and a motion on behalf of Idriz Balaj, which was joined by Lahi Brahimaj, for certification of appeal in respect of aspects of the Trial Chamber’s decision of 14 January 2011.⁵

¹ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 21 July 2010, para. 377.

² *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, “Submission of Revised Fourth Amended Indictment”, 28 October 2010.

³ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, “Submission of New Version of the Revised Fourth Amended Indictment”, 9 November 2010, Appendices A and B.

⁴ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, “Decision on Shortened Form of the Fourth Amended Indictment”, 14 January 2011, para. 42.

⁵ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, “Decision on Application on Behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B)”, 3 February 2011, para. 20.

II. SUBMISSIONS

4. In the Motion, Counsel for Idriz Balaj (“Balaj Defence”) seeks access to confidential material in the case of the *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, pursuant to Rule 75(G) of the Rules of Procedure and Evidence (“Rules”), including:

- a. All confidential closed and private session testimony transcripts;
- b. All confidential closed and private session hearing transcripts;
- c. All confidential exhibits; and
- d. All confidential *inter partes* filings and submissions, including confidential decisions and orders by the Trial Chamber.⁶

5. The Balaj Defence submits that the material subject of the motion, i.e. “all confidential materials” is sufficiently specific within the meaning of the Tribunal’s jurisprudence.⁷

6. It is further submitted that the material requested is sufficiently relevant as it is likely to assist the Balaj Defence. The Balaj Defence submits that there is sufficient overlap between Balaj’s Defence case and the case to which access is sought. It is submitted that the accused in the *Haraqija and Morina* case were alleged to have interfered with the administration of justice by interfering with a protected witness in the *Haradinaj et al.* case. It is submitted further that the protected witness in question is also presently on the Prosecution’s witness list for the retrial.⁸ The Balaj Defence further submits that access to the confidential material sought in its Motion is important for the effective investigation and preparation of the case against Idriz Balaj. It is submitted that the information is not only relevant to the allegations of witness interference, but that it is also relevant for the investigation and preparation of a potential witness in the trial against Idriz Balaj.⁹ The Balaj Defence contends that it is therefore likely, at a minimum, that access to the material sought will assist its case.¹⁰

⁶ Motion, para. 1.

⁷ Motion, para. 4.

⁸ Motion, para. 6.

⁹ Motion, para. 8.

¹⁰ Motion, para. 9.

7. Furthermore, the Balaj Defence states that in accordance with Rule 75, it will adhere to all protective measures in place in the *Haraqija and Morina* case.¹¹

8. The Prosecution does not oppose the Motion, provided that the Chamber orders that certain conditions apply to the Balaj Defence's request, as being necessary to protect the safety and security of sensitive witnesses and information, and to guard against improper disclosure to third parties.¹² Additionally, the Prosecution requests that save for any disclosure granted by the Chamber's Decision, the confidential material provided shall remain subject to any previously imposed protective measures.¹³

9. On 31 January 2011 Lahi Brahimaj filed "Lahi Brahimaj's Joinder to Idriz Balaj's Motion for Access to Confidential Materials in the Haraqija & Morina Case", in which he requests the same access to confidential materials in the *Haraqija and Morina* case as the Balaj Defence. Counsel for Lahi Brahimaj ("Brahimaj Defence") submits that, for the same reasons as outlined by the Balaj Defence, access to the materials would significantly aid Lahi Brahimaj in the effective investigation and preparation of the case against him.¹⁴

III. APPLICABLE LAW

10. Article 20(4) of the Statute of the Tribunal ("Statute") and Rule 78 of the Rules provide for the principle that proceedings before the Tribunal should be conducted in public. Pursuant to Rule 75(A) of the Rules a Chamber or a Judge may order appropriate measures for the privacy and protection of victims and witnesses, provided that these measures are consistent with the rights of the accused. Pursuant to Rule 79 of the Rules, in exceptional circumstances, including for reasons of safety, security or non-disclosure of the identity of a victim or witness, access to proceedings may be restricted.

11. Rule 75(F)(i) of the Rules provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal ("the first proceeding"), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("the second proceedings") unless and until they are rescinded, varied or augmented.

¹¹ Motion, para. 11.

¹² Response, para. 1.

¹³ Response, para. 4.

¹⁴ Joinder, para.3.

12. It is also a well-established practice of the Tribunal that a party to proceedings before the Tribunal is always entitled to seek information from any source, including from another case before the Tribunal, to assist in the preparation of its case.¹⁵ In determining whether a party must be granted access to confidential material in another case, a Chamber must balance the interests of the party and the need to guarantee the protection of witnesses. A party may obtain confidential *inter partes* material from another case, if the information sought has been identified or described by its general nature, and if a legitimate forensic purpose for access to such information has been shown.¹⁶ With respect to the requirement of a legitimate forensic purpose, the party seeking access to confidential *inter partes* material must demonstrate that the material sought is relevant and essential. The requirement of relevance may be met by demonstrating “the existence of a nexus between the applicant’s case and the original case from which the information is sought” in the sense of a “geographical, temporal or otherwise information overlap” between the two proceedings.¹⁷ The essential nature of the information, in turn, means that the party seeking access to confidential information must show that “the material sought is likely to assist the applicant’s case materially, or at least, there is a good chance that it would.”¹⁸

13. The Chamber notes that Rule 75(G)(ii) of the Rules provides that a party to the second proceedings, seeking to rescind, vary, or augment protective measures ordered in the first proceedings, must apply to the Chamber seised of the second proceedings if no Chamber remains seised of the first proceedings. Pursuant to Rule 75(I) of the Rules, before determining an application under Rule 75(G)(ii), a Chamber must endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, as well as consult with any Judge who ordered the protective measures in the first proceedings if that Judge remains a Judge of the Tribunal.

¹⁵ See for instance *Prosecutor v. Perišić*, Case No. IT-04-81-T, “Decision on Motion by Radovan Karadžić for Access to Confidential Material in the Perišić Case”, 26 May 2009, para. 11, (“*Perišić Decision*”); *Prosecutor v. Martić*, Case No. IT-95-11-A, “Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić Case pursuant to Rule 75(G)(i)”, 22 February 2008, para. 9 (“*Martić Decision*”); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Decision on Appellant’s Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in *Prosecutor v. Blaškić*” 16 May 2002, para. 14 (“*Blaškić Decision*”).

¹⁶ *Blaškić Decision* para. 14; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, “Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez Case*”, 23 January 2003, p. 3 (“*Kordić Decision*”).

¹⁷ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, “Decision on Vlastimir Đorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*”, Case No. IT-03-66”, 6 February 2008, para. 7; *Blaškić Decision*, para. 15.

¹⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, “Decision on Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the *Aleksovski Case*”, 8 March 2002, p 3; *Kordić Decision*, p 4.

IV. DISCUSSION

14. The Chamber notes that no Chamber is currently seized of the *Haraqija and Morina* case, and that therefore, according to Rule 75(G)(ii) of the Rules, the Chamber is competent to deal with the Motion and the Joinder.

15. The Balaj Defence and the Brahimaj Defence seek access to confidential *inter partes* material in the *Haraqija and Morina* case. To grant the Motion, the Chamber must first be satisfied that the material sought has been identified or described by its general nature.¹⁹ The Chamber recalls in this respect that references to “all confidential materials” have been deemed sufficiently specific to meet this standard.²⁰ The Balaj Defence seeks access to all under-seal transcripts, all under-seal exhibits and all confidential filings in the *Haraqija and Morina* case. The Chamber is satisfied, therefore, that the first requirement has been met.

16. In order to fulfil the second requirement, the requesting party must demonstrate a legitimate forensic purpose justifying granting access to the confidential material sought. In assessing whether a legitimate forensic purpose exists, the Chamber has consulted with Judge Orić, the Presiding Judge of the *Haraqija and Morina* Chamber, pursuant to Rule 75(I) of the Rules. It is Judge Orić’s view that the confidential record of the *Haraqija and Morina* case does not contain any information – other than already available to the Balaj and Brahimaj Defence – that would materially assist the Balaj and Brahimaj Defence, and that material having potential impact on assessing the credibility of the Prosecution witness in the *Haradinaj et al.* case should be disclosed by the Prosecution to the Defence pursuant to Rules 68 and 75(F)(ii) of the Rules. In light of the above view, and having considered the nature of the material sought, the Chamber is not satisfied that a legitimate forensic purpose for access to the requested material exists in the present circumstances.

V. DISPOSITION

17. For these reasons, pursuant to Rule 75(G)(ii), the Chamber hereby **DENIES** the Motion and the Joinder.

¹⁹ *Perišić* Decision, para. 11; *Martić* Decision, para. 9; *Blaškić* Decision, para. 14.

²⁰ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, “Decision on Defence Motion for Access to Transcripts, Exhibits and Documents in the Đorđević Case”, 10 June 2009, para. 15.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this eleventh day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]