

IT-04-84bis-T  
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02 December 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-T  
Date: 2 December 2011  
Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Order:** 2 December 2011

**PROSECUTOR**

v.

**RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ**

***PUBLIC***

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**ORDER TO REDACT CERTAIN PORTIONS OF DECISION ON  
HARADINAJ MOTION FOR DISCLOSURE OF  
EXCULPATORY MATERIALS IN RESPECT OF WITNESS 81**

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**The Office of the Prosecutor:**

Mr. Paul Rogers

**Counsel for the Accused:**

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 Brahimaj

**THIS TRIAL CHAMBER** (“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;

**NOTING** its “Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Respect of Witness 81,” issued confidentially on 18 November 2011 (“Decision”), by which the Chamber ordered the Parties to file submissions indicating which passages of the Decision should be redacted, if any, for the sake of confidentiality before the Decision is made public;

**NOTING** the “Prosecution Submission in Compliance with Trial Chamber Order of 18 November 2011,” filed confidentially on 25 November 2011, by which the Prosecution requests that certain passages of paragraphs 13, 14, and 19 of the Decision be redacted;

**NOTING** the “Defence Submission on Behalf of Ramush Haradinaj on Redactions to Trial Chamber’s Decision of 18 November 2011,” filed confidentially on 25 November 2011, by which Haradinaj requests that no redactions be made to the Decision;

**NOTING** “Idriz Balaj’s Submission and Joinder in Ramush Haradinaj’s Submission on Redactions to Trial Chamber’s Decision of 18 November 2011,” filed confidentially on 25 November 2011, and “Lahi Brahimaj’s Submission and Joinder in ‘Defence Submission on Behalf of Ramush Haradinaj on Redactions to Trial Chamber’s Decision of 18 November 2011,’” filed confidentially on 25 November 2011, by which Balaj and Brahimaj adopt in full the position taken by Haradinaj;

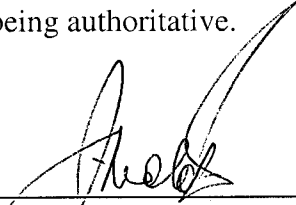
**CONSIDERING** the necessity of preserving the confidential status of Witness 81’s identity and current place of residence;

**FOR THE FOREGOING REASONS** and **PURSUANT** to Rules 54, 69, and 75 of the Rules of Procedure and Evidence

**GRANTS** the Prosecution's request for redactions **IN PART**, as set out in Public Annex A;

**ORDERS** the Registry to re-file the public version of the Decision which is annexed hereto as Public Annex A.

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



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Judge Bakone Justice Moloto,  
Presiding

Dated this second day of December 2011  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

**THE PROSECUTOR**

**v.**

**RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ**

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**PUBLIC ANNEX A**

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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-T  
Date: 18 November 2011  
Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Decision:** 18 November 2011

**PROSECUTOR**

v.

**RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ**

***PUBLIC REDACTED VERSION***

**DECISION ON HARADINAJ MOTION FOR DISCLOSURE OF  
EXCULPATORY MATERIALS IN RESPECT OF WITNESS 81**

**The Office of the Prosecutor:**

Mr. Paul Rogers

**Counsel for the Accused:**

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

**THIS TRIAL CHAMBER** (“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 the “Defence Motion on Behalf of Ramush Haradinaj for Urgent Disclosure of Exculpatory Materials in Respect of Witness 81, with Confidential Annexes A and B” (“Motion”), filed confidentially on 4 October 2011.

## I. BACKGROUND AND SUBMISSIONS

1. The present Motion requests the Chamber to direct the Prosecution to disclose a number of categories of specified documents, which Haradinaj states may affect the credibility of Witness 81 and/or which are material to the preparation of the Defence.<sup>1</sup> Balaj and Brahimaj have adopted the Motion in full.<sup>2</sup> The Prosecution filed a response to the Motion on 19 October 2011,<sup>3</sup> to which the Defence replied on 26 October 2011.<sup>4</sup>

2. Haradinaj submits that he has received two redacted statements of Witness 81 on 3 and 15 December 2010, respectively, from the Prosecution. The first statement was signed on 26 November 2010 and was based on interviews conducted on 23 to 26 November 2010 (“First Statement”);<sup>5</sup> and the second was apparently signed on 8 December 2010 following interviews conducted on 7 and 8 December 2010 (“Second Statement”).<sup>6</sup>

3. It is submitted that the Second Statement makes a number of references to corrections made by Witness 81 during the interviews that led to the First Statement,<sup>7</sup> but that these changes are not mentioned in the First Statement.<sup>8</sup> Haradinaj contends that the changes concern “absolutely essential aspects of his evidence”, such as the identity of the alleged perpetrators of the acts alleged in Count 1; the identity of the alleged victims; whether the victims left Jabllanicë/Jablanica alive or

<sup>1</sup> Motion, paras 1, 5. The Defence requests an extension of the word limit for its Motion. *See* Motion, fn. 1.

<sup>2</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Idriz Balaj’s Joinder to Motion, filed confidentially on 11 October 2011; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Lahi Brahimaj’s Joinder to Motion, filed confidentially on 12 October 2011.

<sup>3</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Prosecution Response to Haradinaj’s Motion of 4 October 2011, With Confidential Annexes A to B (“Response”), filed confidentially on 19 October 2011.

<sup>4</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Request for Leave to Reply and Reply to Prosecution Response to Defence Motion on Behalf of Ramush Haradinaj for Urgent Disclosure of Exculpatory Material in Respect of Witness 81 (“Reply”), filed confidentially on 26 October 2011. The Defence also seeks an extension of the word limit for this filing. *See* Reply, fn. 1.

<sup>5</sup> Confidential Annex A to Motion.

<sup>6</sup> Confidential Annex B to Motion. The statement reads that it was signed on 8 November 2010 but this must be an error given that the statement indicates that the interviews occurred on 7-8 December 2010 and that Witness 81 states therein, at para. 20: “I did mention during my previous interview on 25/11/2010 that [...]”. The Chamber considers it plausible that the statement was actually signed on 8 December 2010 following the end of the interview, not 8 November 2010.

<sup>7</sup> Motion, para. 7.

<sup>8</sup> Motion, para. 8.

not; and whether Witness 81 had ever seen another alleged victim mentioned in the Indictment in Jabllanicë/Jablanica.<sup>9</sup>

4. Haradinaj previously asked the Prosecution, on 18 January 2011, to disclose all statements made by Witness 81, all materials indicating how the Office of the Prosecutor (“OTP”) initially learned of the witness, all of the OTP’s contacts with the witness, and information about his participation in any witness protection program.<sup>10</sup>

5. According to Haradinaj, the Prosecution refused to disclose this material, stating that it had complied with its Rule 68 obligations, that the changes to the First Statement were made electronically, and that no record existed of the changes made by the witness prior to signing the First Statement.<sup>11</sup>

6. On 28 January 2011, Haradinaj filed a motion requesting the Chamber to order the Prosecution to disclose the material at issue, submitting, in particular, that fundamental changes were made to the witness’s account during the interviews on 23 to 26 November 2010; and that these changes may affect the credibility of the witness.<sup>12</sup>

7. In Haradinaj’s submission, the Prosecution responded that all of its disclosure duties had been discharged by disclosing the Second Statement. It added that draft statements for the witness had been compiled during both interviews and stored electronically on a laptop computer, but that it could no longer retrieve the data from that laptop. The Prosecution indicated that laptops used on missions are shared by various organs of the Tribunal and that the OTP had returned this laptop to the Tribunal’s Information Technology Support Section (“ITSS”), which wiped its data so it could be available to a subsequent user.<sup>13</sup>

8. On 1 April 2011, the Chamber held that the Prosecution was not under any disclosure obligation in relation to Witness 81 till 30 days before the commencement of the trial or 45 days

<sup>9</sup> Motion, para. 8.

<sup>10</sup> Motion, para. 9.

<sup>11</sup> Motion, para. 10.

<sup>12</sup> Motion, para 13. *See also Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, Motion on Behalf of Ramush Haradinaj for Disclosure of Materials Relating to Witness 81, filed confidentially on 28 January 2011, paras 2, 5, 6. *See also Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, Reply on Behalf of Ramush Haradinaj to Prosecution Response to Motion for Disclosure of Materials Relating to Witness 81 With Confidential Annexes A & B, filed confidentially on 18 February 2011. In particular, Haradinaj sought disclosure of the following material: : (i) a list of changes made to the statement before it was signed by Witness 81; (ii) all records from meetings and interviews with the witness; (iii) all materials and documents provided by the witness to the Prosecution; (iv) an explanation of how the Prosecution initially became aware of the witness and the documents associated with this; and (v) information about any protective measures or programmes pertaining to the witness.

<sup>13</sup> Motion, para. 14. *See also Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, Prosecution Response to Motion on Behalf of Ramush Haradinaj for Disclosure of Materials Relating to Witness 81 (“Prosecution Response to Previous Disclosure Motion”), filed confidentially on 11 February 2011, paras 3-7.

before the testimony of the witness. It denied the motion “without prejudice to any further Defence motions for disclosure of material pertaining to Witness 81 after the beginning of this period”.<sup>14</sup>

9. Haradinaj submits that he subsequently received from the OTP the unredacted versions of the First and Second Statements, as well as a further statement from Witness 81, dated 4 July 2011, and two witness statements from a Serbian police inspector in Belgrade who interviewed the witness on a number of occasions.<sup>15</sup> However, Haradinaj again requested disclosure of the additional material mentioned above, although the Prosecution refused his request.<sup>16</sup>

10. The present Motion sets out three main categories of additional material that Haradinaj seeks to have disclosed by the Prosecution under Rule 68 and/or Rule 66(B).<sup>17</sup>

11. Firstly, Haradinaj requests all records of Prosecution interviews of Witness 81. He notably claims that he is entitled to a record of the changes made before Witness 81 signed the First Statement.<sup>18</sup> He posits that the Prosecution has accepted that the Second Statement contains exculpatory material and that consequently the Defence is entitled to all records which formed the basis of the statement.<sup>19</sup> Haradinaj further contends that the Prosecution will have to make the investigator who interviewed Witness 81 available for cross-examination on the issue of how the statement was prepared, and that the requested materials are also required for such the examination.<sup>20</sup> In response to the Prosecution’s claim that the documents compiled on a laptop no longer exist, it asserts that the Prosecution should be ordered to make the laptop in question available for inspection.<sup>21</sup>

12. Secondly, Haradinaj requests all records of interviews of Witness 81 by Serbian officials. Haradinaj submits that a senior police inspector, a senior prosecutor, and other Serbian officials attended all of the interviews conducted by the Prosecution with Witness 81, and had separate meetings and interviews with Witness 81 over a period of over 25 days. Haradinaj asserts that the Prosecution “must have made inquiries about these interviews and meetings” between Witness 81 and Serbian officials, that these materials must be available to the Prosecution, and that it should therefore disclose them to the Defence.<sup>22</sup> In addition, Haradinaj advances that the Prosecution

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<sup>14</sup> Motion, para. 17. See also *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Haradinaj’s Motion for Disclosure of Materials Relating to Witness 81, 1 April 2011, para. 18.

<sup>15</sup> Motion, para. 18.

<sup>16</sup> Motion, para. 19.

<sup>17</sup> Motion, paras 5, 20.

<sup>18</sup> Motion paras 5(a), 16, 26.

<sup>19</sup> Motion, paras 21, 22.

<sup>20</sup> Motion, para. 28.

<sup>21</sup> Motion, paras 25, 27, 38.

<sup>22</sup> Motion, paras 29-32.



should make the two senior Serbian officials available for cross-examination regarding their interactions with Witness 81.<sup>23</sup>

13. Thirdly, Haradinaj seeks all records of contacts between Serbian officials, the OTP and Witness 81, [REDACTED]. Haradinaj emphasises that in light of the fact that the witness only came in contact with the OTP in October 2010, it needs these materials in order to explore the motivations of Witness 81 for coming to testify at a late stage of the proceedings.<sup>24</sup>

14. According to Haradinaj, disclosure of all these materials is necessary because they concern a key OTP witness whose testimony poses serious credibility problems, as indicated by the inconsistencies between the First and Second Statements, a finding by [REDACTED] that the witness was not credible in a trial [REDACTED], and a previous conviction against the witness for offences suggesting dishonesty.<sup>25</sup> Haradinaj equally advances that, in view of the fact that Witness 81 is scheduled to be called by the Prosecution in the next sitting period of the trial, immediate access to the materials is imperative in order to prepare for the witness's testimony.<sup>26</sup>

15. In response, the Prosecution reports that it disclosed to the Defence, on 19 October 2011, the notes of an OTP attorney present during the interviews conducted with Witness 81 on 23-26 November 2010, which led to the First Statement, and that all other materials available to the Prosecution in relation to its interviews with Witness 81 have been disclosed.<sup>27</sup> The Prosecution specifies that an OTP investigator was also present at the First Interview with Witness 81 in November 2010, and that this investigator took notes during the interview. It nonetheless indicates that “[t]hese notes are no longer available” because “[t]he investigator disposed of these notes on 7 December 2010 once the inconsistencies from the First Interview were inputted into the electronic document which became the Second Statement”, which “was taken for the purpose of addressing the inconsistencies in Witness 81’s account during the First Interview”.<sup>28</sup>

16. The Prosecution argues that it cannot fulfil Haradinaj’s request for a record of the changes made before Witness 81 signed the First Statement,<sup>29</sup> and puts forward the following explanation:

[The] draft version of the [First Statement] which would show the record of changes is not available to the Prosecution. These changes were made during a process called a “read-back”. [...] As part of the First Interview, a working draft of the statement—which the witness had yet to adopt—had been prepared on the

<sup>23</sup> Motion, paras 32-33.

<sup>24</sup> Motion, paras 3, 34-36.

<sup>25</sup> Motion, paras 2-3, 22, 36.

<sup>26</sup> Motion, para. 3.

<sup>27</sup> Response, paras 2, 5.

<sup>28</sup> Response, para. 6.

<sup>29</sup> Response, para. 8. See also Motion paras 5(a), 16, 26.

basis of the Attorney's Notes and Investigator's Notes [...] the witness was taken through the electronic version of this un-adopted draft statement to ensure that it accurately reflected the witness's own words and account of the events. [...]

The changes made during the read-back process of the First Interview were inputted electronically into the draft statement. [...] Once Witness 81 adopted the working document as his statement, it was saved, printed and the witness signed it.<sup>30</sup>

17. The Prosecution claims, however, that its provision of the attorney's notes conveys a record of all changes made during the interviews leading to the First Statement, and thereby satisfies Haradinaj's request.<sup>31</sup> It otherwise avers that no notes were taken during subsequent interviews with Witness 81, namely on 7 and 8 December 2010, 27 and 30 June 2011, and 1 and 4 July 2011. The statements resulting from these interviews were reportedly inputted directly on computers.<sup>32</sup>

18. Moreover, the Prosecution submits that its earlier representation that the First Statement was compiled on a laptop that was subsequently returned to the Tribunal's ITSS and cleared of its data is in fact inaccurate. The Prosecution clarifies that the working draft of the First Statement was compiled on an office computer at the Belgrade Field Office, and was transferred to an office laptop via a USB stick. It submits that the draft statement was then deleted from the office computer, that it was read back to the witness using the laptop and that the final version of the draft statement was saved on the USB stick. The Prosecution considers, however, that the disclosure of the aforementioned attorney's notes provides Haradinaj with sufficient material upon which to cross-examine Witness 81.<sup>33</sup>

19. The Prosecution affirms that it has provided to Haradinaj all records in its possession of interviews of Witness 81 by Serbian officials. It posits that it is neither in possession of additional records of such interviews by Serbian officials nor has seen such records.<sup>34</sup> It adds that no other correspondence or records of contacts between Serbian officials, the OTP and Witness 81 fall within the scope of disclosure.<sup>35</sup> [REDACTED].<sup>36</sup>

20. The Prosecution submits that the information sought by Haradinaj regarding the circumstances in which the Prosecution learned of Witness 81's existence, the witness protection

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<sup>30</sup> Response, paras 8, 10.

<sup>31</sup> Response, para. 2.

<sup>32</sup> Response, para. 7.

<sup>33</sup> Response, para. 11.

<sup>34</sup> Response, paras 3, 12.

<sup>35</sup> Response, para. 14.

<sup>36</sup> [REDACTED].

program in which the witness is engaged, and information concerning the witness's background have all already been disclosed to the Defence.<sup>37</sup>

21. Further, the Prosecution emphasises that it does not intend to call the OTP investigator or the Serbian officials who interviewed Witness 81, and that Haradinaj cannot seek to compel the Prosecution to make them appear for cross-examination.<sup>38</sup>

22. In its Reply, Haradinaj notably protests that the Prosecution's disclosure of the attorney's notes on 19 October 2011 was not timely, as it should have occurred no later than 19 July 2011.<sup>39</sup> Haradinaj further remonstrates against the destruction of the investigator's notes and requests that the Chamber order the investigator to provide a full explanation of his conduct in disposing of his notes.<sup>40</sup> It also asks that the Chamber allow it to inspect computers and the memory stick in the OTP's possession for prior statements by Witness 81.<sup>41</sup>

23. Haradinaj reemphasises that the Prosecution should procure and disclose all materials related to Witness 81 that are in the possession of the Serbian authorities.<sup>42</sup> In Haradinaj's view, the Prosecution "has the authority and the necessary contacts with the Serb authorities to request that this material is provided expeditiously".<sup>43</sup> He asserts that it "cannot realistically be left to obtain this information from the Serbian authorities as suggested by the Prosecution", especially given that these authorities allegedly "have not responded to any of the requests for information made by the Balaj Defence since July 2011".<sup>44</sup> It is submitted further that a Trial Chamber may also order a State to provide information and accordingly it is requested that the Chamber order the Serbian authorities to provide this material to the Court and the Parties.<sup>45</sup>

24. Further, Haradinaj does not accept the Prosecution's position that it has no further Rule 68 material in its possession. Haradinaj contends that, in light of the Prosecution's prior violations of Rule 68, "the Prosecution should be ordered to file a detailed disclosure report which lists every document in the Prosecution's possession concerning its dealings with Witness 81 and the Serbian authorities, and provides a summary of the contents of each document and the reasons why the Prosecution claims that it should not be disclosed".<sup>46</sup> Lastly, Haradinaj reiterates his request that the

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<sup>37</sup> Response, paras 4, 16.

<sup>38</sup> Response, para. 17.

<sup>39</sup> Reply, paras 3, 11-13.

<sup>40</sup> Reply, paras 4, 14-17, 36.

<sup>41</sup> Reply, paras 10, 22-23.

<sup>42</sup> Reply, paras 24-26.

<sup>43</sup> Reply, para. 26.

<sup>44</sup> Reply, para. 26.

<sup>45</sup> Reply, para. 28.

<sup>46</sup> Reply, para. 7. *See also* *ibid* at 29-32.

OTP investigator and the Serbian officials who interviewed Witness 81 be made available for cross-examination and submits that the Chamber may issue such an order pursuant to Rule 98.<sup>47</sup>

## II. APPLICABLE LAW

25. Rule 66(A)(ii) of the Rules of Procedure and Evidence (“Rules”) stipulates that, “[s]ubject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands [...] copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial [...]”. In addition, Rule 66(B) states that the Prosecutor shall, “on request, permit the defence to inspect any books, documents [...] in the Prosecutor’s custody or control, which are material to the preparation of the defence”.

26. In relation to Rule 66(A)(ii), the Appeals Chamber has held that “the usual meaning of a witness statement in trial proceedings is an account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”.<sup>48</sup> It has further held that “[r]ecords of questions put to witnesses by the Prosecution and of the answers given constitute witness statements pursuant to Rule 66(A)(ii)”. Once a question is put to a witness and is thus part of a witness statement, it is distinguished from “internal documents prepared by a party” under Rule 70(A) and is not imbued with the protection of that Rule.<sup>49</sup>

27. “The Prosecution is obliged to make [a] witness statement available to the Defence in the form in which it has been recorded”.<sup>50</sup> Preliminary versions of a witness statement transcribed by another person must be disclosed, as Rule 66(A) is not limited to final official statements that have been signed and adopted by a witness.<sup>51</sup> There is no valid distinction between official statements signed by a witness and other statements.<sup>52</sup>

<sup>47</sup> Reply, pars 26-36.

<sup>48</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 (“*Blaškić Appeals Decision*”), para. 15. See also *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 14.

<sup>49</sup> *The Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras 33, 34 (“*Niyitegeka Appeals Judgement*”). Rule 70(A) provides that, notwithstanding the provisions of Rules 66 and 67, “reports, memoranda, or other internal documents prepared by a party [...] are not subject to disclosure or notification under those Rules”. See also *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Decision on Joint Defence Motion for Disclosure of All Original Witness Statements, Interview Notes and Investigators’ Notes pursuant to Rules 66 and 68, 4 May 2005, p. 6.

<sup>50</sup> *Niyitegeka Appeals Judgement*, para. 13.

<sup>51</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, paras 37-38 (“*Blaškić Decision of 27 January 1997*”).

<sup>52</sup> *Ibid.*

28. Moreover, Rule 68(i) provides that “the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.

29. The Chamber has set out recently the law regarding Rule 68.<sup>53</sup> The Chamber notably recalls that “[t]he standard for assessing whether material is considered to be exculpatory within the meaning of Rule 68(A) of the Rules is whether there is *any possibility*, in light of the submissions of the Parties, that the given information could be relevant to the defence of the accused”.<sup>54</sup>

30. Finally, Rule 85 indicates the basic practice for the presentation of evidence at the Tribunal. In particular, it specifies that the Prosecution shall first present its case, followed by the Defence, should it so desire, followed by evidence in rebuttal and in rejoinder, followed by evidence ordered by the Chamber pursuant to Rule 98, which notably provides that “[a] Trial Chamber may order either party to produce additional evidence”.

### III. DISCUSSION

#### A. The Disposal of the Investigator’s Notes

31. The Chamber notes with concern that the OTP investigator’s notes of the initial interview with Witness 81 were “disposed of” on 7 December 2010.<sup>55</sup> The First Statement was partly based on these notes,<sup>56</sup> thereby indicating that they contained a record of statements by Witness 81.

32. The Tribunal’s jurisprudence states that the Prosecution must disclose to the Accused all prior statements by a witness pursuant to Rule 66(A)(ii).<sup>57</sup> The statements that must be disclosed to the Defence are not limited to official statements that have been signed or adopted by a witness.<sup>58</sup> Anything that a witness says or writes which is relevant to an indictment is a statement and must be disclosed to the Defence, if coming in the possession or knowledge of the Prosecution, including when that statement has been transcribed or verbally reported by another person. The Prosecution should have disclosed the investigator’s notes to the Defence because they contained or summarised statements made by Witness 81.

<sup>53</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Joint Defence Motion for Relief From Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68bis, 12 October 2011 (“Rule 68 Decision of 12 October 2011”), paras 37-44.

<sup>54</sup> Rule 68 Decision of 12 October 2011, para. 38 (emphasis added). See also *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-T, Confidential Decision on Milan Lukić’s Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011 (“Lukić Decision”), para. 14.

<sup>55</sup> Response, para. 6.

<sup>56</sup> Response, para. 8.

<sup>57</sup> *Niyitegeka* Appeals Judgement, paras 13, 33-34; *Blaškić* Decision of 27 January 1997, paras 37-38.

<sup>58</sup> *Niyitegeka* Appeals Judgement, paras 13, 33-34; *Blaškić* Decision of 27 January 1997, paras 37-38.

33. In addition to the disclosure obligations raised by Rule 66(A)(ii), the Chamber emphasises that Rule 68(i) equally requires the Prosecution to disclose prior inconsistent statements and any other material relevant to a witness's credibility.<sup>59</sup> Here, the Prosecution was aware that the account by Witness 81 was not fully consistent, as it submits that the Second Statement "was taken for the purpose of addressing the inconsistencies in Witness 81's account during the First Interview".<sup>60</sup> Insofar as these inconsistencies were reflected in the investigator's notes, the notes should have been disclosed pursuant to Rule 68(i) as well.

**B. The Late Disclosure of the Attorney's Notes of the Initial Interview with Witness 81**

34. The Chamber underlines that the Prosecution's disclosure, on 19 October 2011, of the attorney's notes of the interview was not timely and therefore in violation of Rules 66(A)(ii) and 68(i). The attorney's notes contained statements by Witness 81.<sup>61</sup> The Prosecution therefore should have disclosed this evidence by 19 July 2011, by which date the protective measure of delayed disclosure granted to Witness 81 had expired. Considering that the Chamber affords all parties the presumption of integrity in the conduct of these proceedings, especially in relation to matters that go to rights of the accused, it cautions the Prosecution about its failure to disclose these notes until they were requested by the Defence, which marks the second occasion in which the Prosecution has failed to disclose material on its own initiative.<sup>62</sup>

**C. Haradinaj's Request for a Record of the Changes Made Before Witness 81 Signed the First Statement**

35. Haradinaj argues that he is entitled to a record of the changes made to the First Statement's draft before Witness 81 signed it.<sup>63</sup> The Prosecution counters that a record of all the changes made to the draft statement before Witness 81 signed it is unavailable because the Prosecution used the aforementioned "read-back" procedure in preparing the statement;<sup>64</sup> and that the working drafts of the statement have been deleted.<sup>65</sup>

36. The fundamental issue presented by Haradinaj's Motion is not the disclosure of earlier drafts of a witness's final statement, but rather the disclosure of any inconsistent statements by a witness. The Chamber is mindful that a witness may change his or her account in the course of an interview.

<sup>59</sup> See Rule 68 Decision of 12 October 2011, para. 38.

<sup>60</sup> Response, para. 6.

<sup>61</sup> Response, para. 8.

<sup>62</sup> See Rule 68 Decision of 12 October 2011.

<sup>63</sup> Motion paras 5(a), 16, 26.

<sup>64</sup> Response, paras 8-10.

<sup>65</sup> Response, para. 11.

Under these circumstances, a witness's original account could constitute a prior inconsistent statement that the Prosecution should disclose under Rules 66(A)(ii) and 68(i).

37. The Chamber underlines that the Prosecution has a general duty to make a record of any inconsistencies in a witness's account. For this reason, the Prosecution must ensure that any inconsistencies in a witness's account made during an interview with the OTP are clearly recorded and disclosed to the Defence pursuant to Rules 66(A)(ii) and 68(i).

38. The Prosecution concedes that it took the Second Statement from Witness 81 because "inconsistencies" existed in his account during the interviews that led to the First Statement.<sup>66</sup> The Prosecution submits that it disclosed, on 19 October 2011, the attorney's notes taken during the first interview with Witness 81. Because these notes are not before the Chamber, and it was, of course, not privy to the interview, it is unclear to the Chamber whether they adequately reflect the changes in Witness 81's account. Nor does the Prosecution provide any information about the material upon which it based its own determination of the inconsistencies in the First Statement that prompted it to obtain the Second Statement.

39. The Chamber, therefore, will grant, insofar as possible, Haradinaj's request for a record of the changes made to the First Statement's draft before Witness 81 signed it. The Prosecution affirms that the draft of the First Statement has been deleted<sup>67</sup> and therefore cannot be disclosed to the Defence. The Chamber has recently ordered the Prosecution to provide information identifying the file containing the draft statement that was read back to Witness 81 on 26 November 2010, and has asked the Tribunal's ITSS to advise the Chamber as to whether this file can be retrieved. The Chamber therefore will not make a further order on this matter at this time.

**D. Haradinaj's Request that the Prosecution Procure and Disclose Materials in the Possession of the Serbian Authorities**

40. Haradinaj has requested that the Prosecution procure and disclose records of interviews that the Serbian authorities conducted with Witness 81,<sup>68</sup> as well as other records that the Serbian authorities may have about Witness 81.<sup>69</sup>

41. The Chamber takes note of Haradinaj's submission that he "cannot realistically be left to obtain this information from the Serbian authorities as suggested by the Prosecution", and that these

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<sup>66</sup> Response, para. 6.

<sup>67</sup> Response, para. 11.

<sup>68</sup> Reply, para. 24.

<sup>69</sup> Reply, para. 26.

authorities allegedly “have not responded to any of the requests for information made by the Balaj Defence since July 2011”.<sup>70</sup>

42. Nevertheless, the Chamber underlines that Rule 66(B) stipulates that the Prosecution shall permit the Defence, on request, to inspect materials “in the Prosecutor’s custody or control”. Because these materials are in the custody and control of the Serbian authorities, not of the OTP, the Chamber finds that the Defence cannot compel the OTP to procure and disclose them. The Chamber underlines that the proper procedure would be for Haradinaj to file a motion asking the Chamber to issue a subpoena for these materials.

#### **E. Haradinaj’s Request for Other Information Concerning Witness 81**

43. At the outset, the Chamber rejects Haradinaj’s demand that the Prosecution be ordered to file a detailed disclosure report listing every single document in its possession concerning its dealings with Witness 81 and the Serbian authorities; providing a summary of the contents of each document; and specifying the reasons why the Prosecution claims that these materials should not be disclosed.<sup>71</sup> The Chamber finds such a measure unnecessary at this stage, as it has already reminded the Prosecution of its obligations under Rule 68.<sup>72</sup>

44. Haradinaj also seeks all records of contacts between the OTP and Witness 81.<sup>73</sup> The Chamber finds this request unjustified as well. The Prosecution is already bound to disclose materials and statements from Witness 81 falling within the scope of Rules 66(A)(ii) and 68(i). This request also does not fall within the scope of Rule 66(B), which compels the Prosecution to make available for inspection items that “are material to the preparation of the defence”.

45. Haradinaj seeks a record of all communications between the OTP and the Serbian authorities in relation to Witness 81’s testimony.<sup>74</sup> The Chamber again finds that this request is unjustified. The Prosecution need only disclose these communications insofar as they fall within the scope of Rules 66(A)(ii) and 68(i).

46. Finally, Haradinaj requests information on the circumstances in which the Prosecution learned of Witness 81’s existence and the Prosecution’s involvement in Witness 81’s “witness protection program”.<sup>75</sup> The Prosecution indicates that it has already disclosed this information to the

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<sup>70</sup> Reply, para. 26.

<sup>71</sup> Reply, para. 7.

<sup>72</sup> See Rule 68 Decision of 12 October 2011.

<sup>73</sup> Motion, para. 34.

<sup>74</sup> Motion, paras 34, 36.

<sup>75</sup> Motion, para. 35.



Defence.<sup>76</sup> This issue therefore appears to be moot. Haradinaj nonetheless contends that the Prosecution should “make available for cross-examination” Serbian officials who could shed light on how Witness 81 came forward as an OTP witness.<sup>77</sup> This particular claim is without merit and is addressed below.

**F. Haradinaj’s Request that the Prosecution Make Witnesses Available for Cross-examination**

47. Haradinaj contends that the Prosecution must “make available for cross-examination” the OTP investigator who interviewed Witness 81, as well as two senior Serbian officials who attended the interviews.<sup>78</sup>

48. The Chamber finds that this claim is without merit and not supported by the Tribunal’s legal practice on the presentation of evidence under Rule 85. The Prosecution need only make available for cross-examination a person who is a Prosecution witness at trial. If a witness has not been called by the Prosecution and the Defence wishes that person to testify, the Defence may the witness to testify in its own case. The Defence may also ask the Chamber to issue a subpoena ordering that person to appear as a witness, if he or she is unwilling to do so voluntarily.

49. While Rule 98 allows a Trial Chamber to order the Prosecution to produce additional evidence, it should not be invoked in an instance such as this, where Haradinaj seeks to compel the Prosecution to introduce evidence that he may present in his defence case. Further, while the Chamber may order the production of evidence pursuant to Rule 98, Rule 85 specifies that the Chamber may only do so once the presentation of evidence by the Parties, including evidence in rebuttal and rejoinder, is completed.

**G. Filing Status of the Present Decision**

50. While the Motion, Response and Reply were filed confidentially, the Chamber considers that the present decision may be filed publicly. The Chamber therefore orders the Parties to file, within a week, submissions indicating what passages of this decision, if any, should be redacted for the sake of confidentiality before the decision is made public.

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<sup>76</sup> Response, paras 4, 16.

<sup>77</sup> Reply, para. 34.

<sup>78</sup> Motion, paras 28, 33; Reply, paras 8, 10, 17, 33-35.

#### IV. DISPOSITION

51. For the foregoing reasons, the Chamber hereby

- a. **GRANTS** Haradinaj's request for leave to reply and takes note of the content of the Reply;
- b. **GRANTS** Haradinaj's request for an extension of the word limit for its filings;
- c. **INSTRUCTS** the OTP to take steps to ensure that all staff working on this case are made fully aware of the Chamber's decision and reminded of their obligations under Rules 66(A)(ii) and 68;
- d. **GRANTS** Haradinaj's Motion **IN PART**, as set out in paragraph 39 of this Decision;
- e. **DENIES** Haradinaj's Motion in all other respects;
- f. **ORDERS** the Parties to file, within a week, submissions indicating what passages of the present decision, if any, should be redacted and kept confidential.

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

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Judge Bakone Justice Moloto,  
Presiding

Dated this 18<sup>th</sup> day of November 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]