

IT-04-84bis-T
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28 September 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: 28 September 2011
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 28 September 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON JOINT DEFENCE ORAL MOTION PURSUANT
TO RULE 89(D)**

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

1. This decision of Trial Chamber II (“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 in respect of a joint Defence oral motion of 24 August 2011, pursuant to Rule 89(D) of the Rules of Procedure and Evidence (“Rules”), to exclude the transcript of Shefqet Kabashi’s evidence in the *Limaj* case (“Motion”).

I. PROCEDURAL BACKGROUND

2. On 24 August 2011 the Chamber admitted into evidence pursuant to Rule 89(C) of the Rules the transcript of Shefqet Kabashi’s testimony in the *Limaj* case.¹ On the same day, following the completion of the evidence of Shefqet Kabashi before the Chamber, Counsel for Haradinaj moved orally for the exclusion of the transcript of Shefqet Kabashi’s testimony in the *Limaj* trial from the evidence in the present proceedings, or, in the alternative, for the exclusion of all portions of the transcript other than the ones concerning Skender Kuçi and Pal Krasniqi, relied upon by the Prosecution in court.² Counsel for Balaj³ and Counsel for Brahimaj⁴ joined in the application made by Counsel for Haradinaj. The Prosecution opposed the Motion.⁵

II. SUBMISSIONS

3. Counsel for Haradinaj submits that Shefqet Kabashi has refused to be cross-examined by counsel in the present proceedings and as a result the Defence has been denied the opportunity to cross-examine the witness. Counsel for Haradinaj submits that in light of the considerable importance, attached to this witness, this denial strikes at the root of the fair trial rights.⁶ It is submitted further that while Kabashi was cross-examined in the *Limaj* case, the events in Jablanica/Jabllanicë did not form part of the *Limaj* indictment, the vast bulk of Kabashi’s evidence in *Limaj* does not concern events in Jablanica/Jabllanicë and the witness was not cross-examined by counsel in *Limaj* on matters of relevance to the present proceedings.⁷ Counsel for Haradinaj also submits that not all of Shefqet Kabashi’s evidence in the present proceedings suggests that his testimony in the *Limaj* case was true and refers, in particular, to transcript pages 424, lines 1 to 3, and 425, lines 10 to 15 and 21 to 25, where, he submits, the witness was not prepared to say which

¹ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 454-462. The transcript of Kabashi’s evidence in the *Limaj* case (*Prosecutor v Limaj et al.*, Case No. IT-03-66-T) was admitted as Exhibit P119 for the public redacted version of the transcript and Exhibit P120 under seal for the confidential unredacted version of the transcript.

² *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 469.

³ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 476-478.

⁴ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 479.

⁵ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 482.

⁶ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 469, 470.

⁷ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 470.

parts, if any, of the *Limaj* transcript were accurate and which were not.⁸ It is submitted that the admission of documents that could have been put to the witness in cross-examination cannot substitute for the right to cross-examine.⁹ In support of this application Counsel for Haradinaj relies on a decision in the original *Haradinaj* trial which excluded pursuant to Rule 89(D) of the Rules the evidence of a witness whose cross-examination was not able to be completed.¹⁰ Finally, it is submitted that anything in the transcript of Kabashi's evidence in the *Limaj* case that does not concern Jablanica/Jabllanicë is irrelevant and has no probative value and that everything that concerns Jablanica/Jabllanicë but is uncorroborated is of very limited probative weight. It is submitted that the only part of Kabashi's evidence in the *Limaj* case which is capable of some corroboration is the part concerning Skender Kuçi and Pal Krasniqi at transcript pages 4255 to 4260 of the *Limaj* case.¹¹

4. Counsel for Balaj submits that the right to cross-examination is a minimum guaranteed right under the Statute of the Tribunal, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and that this right is important because it allows the fact-finder to have a full and complete record and understanding of a witness's testimony.¹² He submits further that in another case before the Tribunal, where the transcript of the evidence of a witness was admitted without there being a complete cross-examination, counsel was able to engage in some cross-examination on issues that were relevant to that case.¹³ Counsel for Brahimaj joins in the submissions made by Counsel for Haradinaj and Counsel for Balaj. He submits that Kabashi gave evidence in the *Limaj* trial before any of the three Accused appeared before the Tribunal and therefore none of them had representation at that time.¹⁴

5. The Prosecution responds that counsel for the Accused had not been deprived of the right to cross-examine the witness. It is submitted that the Defence had an opportunity to explore with the witness the reasons for his wish not to continue to testify and to test them on any of the matters contained in the *Limaj* trial, but instead they had chosen to ask a single question (namely, whether the witness's position, expressed in response to a question from the Prosecution, that the witness felt unable to answer any further questions, remained the same) and had meekly accepted his

⁸ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, 470-471, 473-474, 495-496.

⁹ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 474.

¹⁰ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 471, referring *Prosecutor v Haradinaj et al.*, Case No. IT-04-84-T, Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 under Rule 89(D) and Deny His Testimony pursuant to Rule 92 Quater, 14 December 2007 ("*Haradinaj* Trial Decision").

¹¹ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 474-475, 476, 497-498.

¹² *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 476-477.

¹³ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 477-478, 480, referring to *Prosecutor v Martić*, Case No. IT-95-11-T, Decision on Defence Motion to Exclude the Testimony of Witness Milan Babić, together with Associated Exhibits, from Evidence, 9 June 2006.

¹⁴ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 479.

answer.¹⁵ With respect to the proposition advanced by the Defence that Kabashi's answers in the present proceedings did not confirm that his evidence in the *Limaj* trial was true, the Prosecution submits that the portions of the transcript relied on by the Defence do not indicate that what the witness said in the *Limaj* trial was not true but that he cannot remember today how things were then and that the witness has clearly confirmed that he stands by what he had said in the *Limaj* case.¹⁶ It is submitted that the witness's demeanour and his manner tend to suggest that he had a variety of reasons as to why he was not prepared to testify, that the witness's ability to remember was not a main factor for his position and that it was open to the Defence to explore this in cross-examination.¹⁷ The Prosecution submits that counsel for the Accused made a tactical decision in the best interests of their clients to accept that the witness feels unable to answer any questions and that objectively they had an opportunity to deal with the witness in any way they see fit.¹⁸ The Prosecution submits that the decision in the original *Haradinaj* trial, cited by the Defence in support of their position, is not relevant as in that case the witness did not return for cross-examination whereas the witness in the present case was in the courtroom ready and able to be questioned.¹⁹

6. Counsel for Haradinaj replies that in light of the numerous refusals by Shefqet Kabashi to answer questions put to him by the Prosecution and his clear answer that he was maintaining the same position when the Defence attempted to cross-examine him, the course taken by the Defence was what any responsible practitioner in this situation would do.²⁰ Counsel for Balaj and Brahimaj join in these submissions.²¹ Counsel for Haradinaj also submits that the Prosecution's position that the witness was lying about his reasons in part is inconsistent with the Prosecution's position in support of its application to admit the transcript of the witness's evidence in the *Limaj* trial as the witness was having trouble with his recollection.²² It is submitted further that a proper assessment under Rule 89(D) would require the Chamber to determine whether it accepts Kabashi's answers on transcript pages 424 to 426, which would undermine the probative weight [of the transcript of Kabashi's evidence in the *Limaj* case] or whether it rejects those answers in which case they would undermine the probative weight of his evidence as this would suggest that the witness was lying on oath.²³

¹⁵ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 482-483, 484.

¹⁶ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 483-485.

¹⁷ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 485, 486, 490.

¹⁸ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 485-486.

¹⁹ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 490-491.

²⁰ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 492.

²¹ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 499-501, 501.

²² *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 493.

²³ *Prosecutor v Haradinaj et al.*, Case No. IT-04-84bis-T, T 497.

III. LAW AND DISCUSSION

7. Pursuant to Rule 89(C) the Chamber may admit any relevant evidence which it deems to have probative value. Under Rule 89(D) the Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Rule 89(D) is thus concerned with situations where the probative value of a piece of evidence is substantially outweighed by the need to ensure a fair trial. The jurisprudence of the Tribunal has found this to be the case in situations where a failure to comply with disclosure obligations would cause prejudice to the defence to such an extent that the fairness of the trial would be at stake, or where restrictions on the content and manner of presentation of the testimony of a witness may cause undue prejudice to the defence thus adversely affecting the fairness of the trial.²⁴ The jurisprudence of the Tribunal has also excluded, pursuant to Rule 89(D), a statement to the Office of the Prosecutor given by an accused in his capacity of a witness, before he became a suspect or an accused, which was subsequently tendered by the Prosecution from the bar table in the trial against him.²⁵

8. The main argument relied on by the Defence in support of the present application under Rule 89(D) is that the Defence has been denied the opportunity to cross-examine the witness. There is disagreement between the parties as to whether the Defence had an opportunity to cross-examine the witness and whether instead it chose not to cross-examine him. Without making a finding on this matter, the Chamber accepts that the witness was not cross-examined in the present case.

9. The right of an accused to cross-examine witnesses against him is a fundamental right enshrined in the Statute of the Tribunal and international human rights treaties.²⁶ This right, however, is not absolute.²⁷ The Appeals Chamber has confirmed that (1) a complete absence of, or deficiency in, the cross-examination of a witness will not automatically lead to exclusion of the evidence, and, (2) evidence which has not been cross-examined and goes to the acts and conduct of

²⁴ *Prosecutor v Milutinović et al.*, Case No. IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007, paras 17, 18. See also *Prosecutor v Milutinović*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65ter Witness List, 20 April 2007, para 17.

²⁵ *Prosecutor v Halilović*, Case No. IT-01-48-A, Judgement, 16 October 2007, paras 36-40. See also *Prosecutor v Halilović*, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005.

²⁶ Article 21(4)(e) of the Statute of the Tribunal; Article 6(3)(d) of the European Convention on Human Rights; Article 14(3)(e) of the International Covenant on Civil and Political Rights.

²⁷ *Prosecutor v Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber's Oral Decision of 8 May 2006 relating to Cross-Examination by Defence and on Association of Defence Counsel's Request for Leave to file an Amicus Curiae Brief, 4 July 2006, p 3; *Prosecutor v Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 (*Martić* Decision), para 12.

the accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction.²⁸

10. In assessing whether the probative value of the evidence Kabashi has given in the *Limaj* case substantially outweighs the need to ensure a fair trial in the present proceedings the Chamber notes that this evidence was given under oath before a Trial Chamber of the Tribunal. In his testimony in the *Limaj* case Kabashi further explained that this was an international tribunal and not a court about Serbia as it has been called in Kosovo and apologized if he made any mistakes or gave inaccurate dates because the events had happened a long time ago and he was very excited and nervous at that moment.²⁹

11. The Defence submits that not all of Shefqet Kabashi's evidence in the present proceedings suggests that his evidence in the *Limaj* case was true. The point is made that because Kabashi said he could not tell whether what he said in the *Limaj* case was true, it cannot be readily accepted that his evidence in the *Limaj* trial is credible and reliable. The Chamber cannot accept this argument. The relevant attestation to the truthfulness of Kabashi's testimony is the one made when he gave evidence in the *Limaj* case, not when he testified in the present proceedings. The transcript of Kabashi's evidence in the *Limaj* case was not admitted to replace his oral evidence-in-chief pursuant to Rule 92ter of the Rules. What is material is the witness's state of mind at the time of testimony. If a witness's state of mind is subsequently affected, this does not have an effect on statements the witness has made prior to that moment.

12. The transcript pages quoted by the Defence in their submissions refer to Kabashi's answers to the question whether his memory in 2005, when he testified in the *Limaj* trial, was better than it is today. The Chamber will take these answers into account in its assessment of the whole of Kabashi's evidence and the ultimate weight, if any, it will attach to his evidence.

13. The Chamber is mindful that Kabashi was not cross-examined in the *Limaj* trial on any matters of relevance to the present case.³⁰ The issues addressed in Kabashi's evidence in the *Limaj* case include matters of pivotal importance for the Prosecution case in the present proceedings, including acts and conduct of Lahi Brahimaj and Idriz Balaj as charged in the present Indictment.

²⁸ *Martić* Decision, para 20.

²⁹ Exhibit P120 (Transcript of Kabashi's testimony in the *Limaj* case), T 4264.

³⁰ Counsel for Fatmir Limaj and Counsel for Isak Musliu specifically placed on the record statements that they would not cross-examine the witness on the events in Jablanica/Jabllanicë because they were not in a position to challenge that evidence, Exhibit P120 (Transcript of Kabashi's testimony in the *Limaj* case), T 4277, 4298. Counsel for Haradin Bala made no such statement but he did not cross-examine Kabashi on any matter of relevance to the present proceedings. (See Exhibit P120 (Transcript of Kabashi's testimony in the *Limaj* case), T 4292-4298)

The Chamber will not be able to give any weight to this evidence unless it is corroborated by credible evidence received in the present trial.

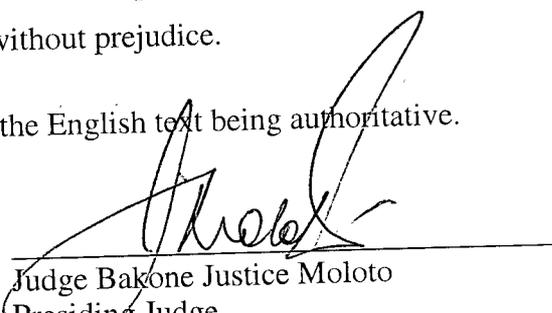
14. The Defence relies in its submissions on a decision in the original *Haradinaj* trial to exclude the evidence of a witness who did not return for cross-examination. This decision was based on the finding of the Chamber in the original *Haradinaj* trial that many of the substantive parts of that witness's testimony were uncorroborated by other evidence and that serious questions remained as to the reliability of this witness's testimony.³¹ This Chamber notes that unlike the present case, the witness subject of the decision in the original *Haradinaj* trial, testified at the end of the Prosecution case. The Trial Chamber in that case was in a position to assess whether the evidence in question had been corroborated by other evidence. In the present proceedings Kabashi was the first witness called by the Prosecution and the Chamber is unable at present to assess whether his evidence in the *Limaj* case would be corroborated or not. It finds the Defence motion premature in this respect.

15. After the completion of the presentation of evidence, in the exercise of its functions pursuant to Article 20(1) of the Statute of the Tribunal, the Chamber will assess whether Kabashi's evidence in the *Limaj* case has been corroborated by credible evidence in the present proceedings. The Chamber invites, nevertheless, the Defence to raise the issue at the appropriate stage of the proceedings.

IV. DISPOSITION

16. For the foregoing reasons and pursuant to Rules 89(C) and Rule 89(D) of the Rules the Chamber denies the Motion without prejudice.

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


 Judge Bakone Justice Moloto
 Presiding Judge

Dated this twenty-eighth day of September 2011
 At The Hague
 The Netherlands

[Seal of the Tribunal]

³¹ *Haradinaj* Trial Decision, para 15.