

**UNITED
NATIONS**

IT-04-84bis-T
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31 October 2011

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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: 31 October 2011
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 31 October 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON LAHI BRAHIMAJ'S URGENT MOTION
SEEKING MEMORIALISATION OF FURTHER CONTACT
BETWEEN PROSECUTION AND WITNESS 3**

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 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 (“Chamber” and “Tribunal” respectively) is seised of Brahimaj’s “Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3” with confidential Annexes A-F and public Annexes G-I (“Motion”), filed on 25 October 2011. Brahimaj requests an order from the Chamber prohibiting the Prosecution from conducting any proofing or memory-refreshing with Witness 3, and an order that the Prosecution record, in video and audio form, contact between the Prosecution and Witness 3, as well as disclosure of this material to the Defence.

I. PROCEDURAL BACKGROUND

1. On 26 October 2011, the Prosecution filed publicly the “Prosecution Response to Brahimaj’s Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3”, with confidential Annex A, opposing the Motion.¹ On 27 October 2011, the Prosecution filed publicly a “Corrigendum to Prosecution Response to Brahimaj’s Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3”.

II. SUBMISSIONS

2. Brahimaj requests the Chamber to prohibit the Prosecution from engaging in any further proofing or memory-refreshing process with Witness 3.² In addition, or in the alternative, Brahimaj requests the Chamber to order the Prosecution to “memorialise by way of video and audio recording [...] any and all contact between the Prosecutor and Witness 3”,³ and to disclose to the Defence this material, once recorded.⁴ Brahimaj also seeks an “Urgent Order” for the Prosecution to make such recordings, pending this decision, “in order that the motion is not rendered moot”.⁵ In addition, or in the alternative, Brahimaj requests that the Chamber order the Prosecution to make such recordings, and to preserve them intact for the purposes of resolving any subsequent dispute as to whether the testimony of Witness 3 in court is inconsistent with anything he said during the course of any contact with the Prosecution.⁶

¹ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Prosecution Response to Brahimaj’s Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness, 26 October 2011 (“Response”).

² Motion, para. 18.

³ Motion, paras 2(a), 19(a).

⁴ Motion, paras 2(a), 19(a).

⁵ Motion, paras 2(b), 19(b).

⁶ Motion, para. 20.

3. Brahimaj notes that Witness 3 gave evidence in the first *Haradinaj et al.* trial, and is scheduled to be called imminently in the present proceedings.⁷ Brahimaj recalls the objections by the Defence to the possibility of the Prosecution conducting witness proofing with Witness 3 in these circumstances, and notes the Prosecution's intention to do so nonetheless, and its refusal to record such contact despite requests to the Prosecution to that effect by Balaj and Brahimaj, on 14 and 28 September 2011, respectively.⁸ Brahimaj also notes that the Prosecution has stated that the Defence "will be provided with such proofing notes as arise from any proofing session held with the witness in accordance with the established practices of [the Prosecution]".⁹

4. Brahimaj argues that the considerations that justify prohibition of contact between a party and a witness after testimony has begun are also relevant to the situation in which a witness, who gave evidence in a trial, is recalled to give evidence in a retrial of the same Accused persons – as is the case with regard to Witness 3 in the *Haradinaj et al.* retrial.¹⁰ He contends that parties are prohibited from communicating with a witness on the subject of the content of the witness's testimony after he/she has made the solemn declaration, except with the leave of the Chamber, noting that the rationale for this prohibition is to avoid damaging the credibility or reliability of the witness's testimony.¹¹ He asserts, in this regard, that "[a]lthough this is a trial *de novo* and thus not identical in form to the circumstances where orders on prohibition on contact between a party and a witness have been made, the same rationale applies as when a witness is recalled to give evidence during trial".¹² Brahimaj refers to the appearance of Witness PW-9 in the case of *Delić*, in particular the Chamber's finding that the re-appearance of this witness was "tantamount to a continuation of his previous testimony in [the *Delić*] case", and that, therefore, "both the Prosecution and Defence should abide by that prohibition, the rationale of which is to avoid the risk of affecting or calling into question the integrity of the witness's testimony".¹³

5. Brahimaj notes that Witness 3 has already given evidence before a previous Trial Chamber on identical issues, and argues that there is, consequently, a risk that the Prosecution may influence

⁷ Motion, paras 1, 4. Brahimaj refers, in this regard, to statements given to the Prosecution in the original *Haradinaj et al.* trial and testimony given between 3 and 5 September 2001 (Motion, para. 4).

⁸ Motion, paras 1, 6-9, referring to Confidential Annex E, Public Annexes G-I.

⁹ Motion, para. 9, referring to Public Annex I (email correspondence between the Prosecution and the Brahimaj Defence, dated 28 September).

¹⁰ Motion, paras 3(a), 14.

¹¹ Motion, paras 10, 13, referring to *Prosecutor v. Kupreškić et al.* Case No. IT-95-16, Decision on Communications Between the Parties and Their Witnesses, 21 September 1998, ("Kupreškić Decision"); *Prosecutor v. Jelisić*, Case No. IT-95-10, Decision on Communication Between Parties and Witnesses, 11 December 1998; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Decision on Prosecutor's Motion on Trial Procedure, 19 March 1999 ("Kordić & Čerkez Decision"); *Prosecutor v. Gotovina et al.*, Case No. IT-06-90, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009 ("Gotovina Decision"), para. 16, fn. 33.

¹² Motion, paras 3(a), 14.

¹³ Motion, para. 12, citing *Prosecutor v. Delić*, Case No. IT-04-83-T, Decision on Defence Motion to Recall Witness, 4 April 2008 ("Delić Decision"), para. 7.

the witness's testimony in a manner not consonant with the spirit of the Statute and Rules.¹⁴ He refers to the public perception of fairness of proceedings, and asserts that this concern is heightened due to (i) the fact that the proceedings are a retrial; and (ii) the Prosecution's determination "to ensure that no record is made of what transpired during communication between the Prosecution and Witness 3".¹⁵ Brahimaj also argues that Witness 3 has a particular motive to give evidence that he believes to be favourable to the Prosecution because in return for his testimony, the Prosecution took "exceptional steps to assist Witness 3 and his family in obtaining relocation to two separate countries".¹⁶ Brahimaj asserts that this is indicated by four letters: three letters from the Prosecution to the governments of two countries, which were disclosed to the Defence on 4 September 2007 and 19 October 2011 and a response from one of the countries concerned.¹⁷ These letters are confidential Annexes A-D to the Motion.¹⁸ He argues, in particular, that they demonstrate that a previous Prosecutor, and a previous Chief of Prosecution Investigations, wrote to the governments of two countries, seeking to assist in the relocation of Witness 3 and his family.¹⁹

6. Brahimaj argues, further, that "memorialising contact between the Prosecution and a recalled witness has been demonstrated to have particular value in the present case" because "Prosecution Counsel Paul Rogers, perhaps unwittingly, assisted a [different] witness to change his evidence so as to be more consistent with what that witness had previously said to the Prosecutor".²⁰ In support of this, Brahimaj refers to confidential Annex F, which is an extract from the transcript of the interview concerned.²¹

7. In its Response, the Prosecution argues that Brahimaj's Motion should be denied, as there is no legitimate basis for the memorialisation sought or for prohibition of proofing of Witness 3.²² It notes that practice at this Tribunal indicates that witnesses are entitled to review prior testimony and statements in order to prepare for testimony, and that this applies irrespective of whether they have previously testified in a related trial at the Tribunal.²³

¹⁴ Motion, para. 14(a).

¹⁵ Motion, para. 14(b).

¹⁶ Motion, paras 3(b), 5, 15, 16.

¹⁷ Motion, para. 5.

¹⁸ Motion, para. 5.

¹⁹ Motion, para. 5(a), (b).

²⁰ Motion, paras 3(c), 17.

²¹ Motion, para. 17.

²² Response, paras 1, 5, 6, 11, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007.

²³ Response, para. 6, referring to *Prosecutor v. Limaj*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, 10 December 2004, p. 2 ("Limaj Decision"); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, paras 20, 22 ("Milutinović Decision").

8. The Prosecution contends that Witness 3 is not being recalled but is scheduled to testify in the retrial, which is a trial *de novo*.²⁴ It submits, therefore, that the prohibition of contact between a party and a witness following commencement of testimony, does not apply to the current situation, and that the Chamber has already found that, “the requirements that apply to a recalling of witnesses do apply to the situation of a retrial only where witnesses have already been heard in the retrial and should be recalled in the same proceedings”.²⁵

9. The Prosecution argues that Brahimaj has no basis for his assertion that the Prosecution may influence the witness, whether unwittingly or through improper witness coaching.²⁶ As to the extract of an interview to which Brahimaj refers, the Prosecution contends that the transcript as a whole shows that the Prosecution was seeking proper clarification of the witness’s evidence.²⁷ The Prosecution refers to the Trial Chamber’s view in the *Milutinović* and *Limaj* cases, that reviewing a witness’s evidence prior to testimony can be a useful practice,²⁸ which assists in reviewing the relevance of facts in light of the precise charges to be tried, aiding recollection, enabling more accurate, complete, orderly and efficient presentation of evidence, and identifying and putting the Defence on notice of differences in recollection thereby preventing undue surprise.²⁹ The Prosecution argues that during proofing, the Prosecution is permitted to seek clarification from a witness on aspects of his or her evidence.³⁰ The Prosecution argues that Brahimaj’s argument concerning the Prosecution’s contact with another witness is inapposite and mischaracterises the Prosecution’s objective of obtaining clarification.³¹

10. The Prosecution notes that, in accordance with normal practice, it will disclose, in the form of a proofing note or supplementary information sheet, any “additional, supplementary or exculpatory information [provided by the witness] during the proofing session”.³² The Prosecution notes also that “Brahimaj is free to explore in cross-examination any motivations Witness 3 might have to testify in the retrial”.³³

11. The Prosecution argues that there is no good reason for Brahimaj to have filed the Motion only one week before Witness 3’s scheduled testimony on 31 October 2011, and that Brahimaj’s

²⁴ Response, paras 1, 4.

²⁵ Response, para. 4, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Confidential Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 23 August 2011, (“Rule 92ter Decision”), para. 35.

²⁶ Response, paras 6, 7.

²⁷ Response, para. 7.

²⁸ Response, para. 7, referring to *Milutinović* Decision, para. 20.

²⁹ Response, para. 7, referring to *Limaj* Decision, p. 2.

³⁰ Response, para. 8, referring to *Milutinović* Decision, paras 16, 20.

³¹ Response, para. 8

³² Response, para. 5.

³³ Response, paras 1, 9.

aim in so-doing is to delay the testimony.³⁴ The Prosecution contends that Brahimaj has been aware of the matters raised concerning Witness 3's motivation since September 2007.³⁵ The Prosecution refers, in this regard, to three letters dated 16 February 2005, 11 April 2005, 6 May 2005, redacted versions of which it supplied to Brahimaj on 3 September 2007.³⁶ The Prosecution also notes that, in response to a request from Brahimaj, it supplied these letters again, on 4 September 2007, with minimal redactions, and that these letters are annexed to the Response as confidential Annex A.³⁷ The Prosecution argues that Brahimaj has been aware of the substance of these letters since 2007, and that this was a line of his cross-examination of Witness 3 during the original trial.³⁸ The Prosecution asserts that, despite this knowledge, Brahimaj did not request that these redactions be further lifted until 12 October 2011.³⁹ The Prosecution adds that unredacted versions of the letters were provided to the Defence on 19 October 2011, and that the following day, the Prosecution also provided to the Defence another letter which confirms the temporary relocation arrangements for the witness and his family as envisaged in the letters of 16 February and 6 May 2005.⁴⁰

12. The Prosecution also avers that Brahimaj has been aware of the Prosecution's intention to proof the witness without audio and or video recording since 14 September 2011, and refers, in this regard to public Annex I to the Motion, which is email correspondence between the Prosecution and the Brahimaj Defence, dated 28 September.⁴¹

13. The Prosecution contends, further, that it stated in advance its intention to commence the proofing of Witness 3 on 27 October 2011, and that failure to do so would have delayed commencement of Witness 3's testimony.⁴²

III. APPLICABLE LAW

14. Pursuant to Rule 54, a Trial Chamber may issue such orders as may be necessary for the purposes of preparation or conduct of a trial. The practice of the Tribunal is to bar the parties from contacting a witness once his or her testimony has begun, in order to avoid the risk of affecting or calling into question the integrity of the witness's pending testimony.⁴³

³⁴ Response, para. 2.

³⁵ Response, para. 3.

³⁶ Response, para. 9, referring to Motion, para. 5.

³⁷ Response, para. 9.

³⁸ Response, para. 9, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Witness SST7/3, T. 8022, 8031; 5 September 2007.

³⁹ Response, para. 10.

⁴⁰ Response, para. 10, referring to Motion, confidential Annex A.

⁴¹ Response, paras 3. 5.

⁴² Response, para. 3.

⁴³ *Kupreškić* Decision, p. 4; *Kordić & Čerkez* Decision, p. 5; *Delić* Decision, para. 7; *Gotovina* Decision, para. 16.

15. With regard to the practice of witness proofing, “[d]espite the fact that the practice of proofing witnesses, by both the Prosecution and the Defence, has been in place since the inception of the Tribunal, there is no set definition of proofing at the Tribunal”.⁴⁴ ICTR and ICTY jurisprudence has given a number of accounts of the acceptable limitations as regards interactions between the parties and witnesses in advance of testimony.⁴⁵ It is apparent from the jurisprudence that certain types of communication between parties and witnesses are not permitted. The jurisprudence states such communication should not consist of the rehearsal, practice, or coaching of witnesses;⁴⁶ should not be considered as permission to train or tamper with a witness before he or she gives evidence;⁴⁷ must not be used by the Prosecution “to mould its case against the Accused in the course of a trial”;⁴⁸ and must not “amount to the manipulation of a witness’ evidence”.⁴⁹ In this regard, the jurisprudence of the tribunal is in line with the decision of a Trial Chamber of the International Criminal Court in *Lubanga*, which prohibited interactions with witnesses which involve substantive preparation of testimony, but not those which are aimed at preparing the witness to give oral evidence before the Court.⁵⁰

IV. DISCUSSION

16. The Chamber notes, with concern, that whilst Brahimaj has been apprised of the issues that underlie the Motion since 14 September 2011,⁵¹ the Motion was filed on 25 October 2011, two days before the scheduled proofing session to which it relates. Whilst not moot at the time of filing, the Motion was not filed in a timely manner. Nonetheless, given that the disposition of the Motion is unaffected by this, the Chamber will set out its reasons.

17. The Chamber understands Brahimaj to seek the imposition of three types of limitations or conditions upon the Prosecution’s interactions with Witness 3, prior to his appearance before the Chamber. In particular, he seeks (i) complete prohibition of such interactions for the purposes of proofing or memory-refreshing; (ii) recording of any such interactions; and (iii) disclosure of these recordings, once made, or for them to be kept by the Prosecution pending further submissions.

⁴⁴ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence request for audio-recording of Prosecution witness proofing sessions, 23 May 2007.

⁴⁵ See, e.g., *Milutinović* Decision; *Prosecutor v. Karemra et al.* Case No. ICTR-98-44-AR73.8, 11 May 2007; *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para. 74.

⁴⁶ *Milutinović* Decision, para. 16.

⁴⁷ *Prosecutor v. Karemra et al.* Case No. ICTR-98-44-T, 15 December 2006 (“*Karemra* Trial Decision”), paras 11, 12, 15.

⁴⁸ *Karemra* Trial Decision, paras 11, 12, 15.

⁴⁹ *Karemra* Trial Decision, paras 11, 12, 15.

⁵⁰ *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007.

⁵¹ Motion, Annexes G, I.

18. The Chamber will now address Brahimaj's argument that the Prosecution should be prohibited from engaging in any proofing session on the basis that the Tribunal's practice of barring the parties from contacting a witness is applicable because the impending appearance of Witness 3 before the Trial Chamber is in a retrial. Whilst Brahimaj appeared to argue that the position of Witness PW-9 in the *Delic* case was analogous to that of Witness 3 in the current proceedings, the Chamber notes that the decision cited concerned a request, by the Defence, for further cross-examination of Witness PW-9.⁵² It is irrelevant to the situation of Witness 3. Moreover the Chamber has already held that

The requirements that apply to a recalling of witnesses do apply to the situation of a retrial only where witnesses have already been heard *in the retrial* and should be recalled in the same proceedings. This is not the case here. Therefore, the Chamber rejects Brahimaj's arguments in this respect, including those that allege that the witnesses' testimony may possibly be tainted through contacts with the calling party or by allowing the witnesses the opportunity to revise their evidence in light of the trial record of the initial case.⁵³

19. To the extent that Brahimaj's objection is to either the Rule 92ter Decision, or to the occurrence or nature of the retrial *per se*, a motion in relation to Witness 3 is without merit. The Chamber notes that Brahimaj did not file a motion for certification to appeal of the Rule 92ter Decision, and that the deadline for such a motion has long expired. Further, Brahimaj gives no indication of why his request related to Witness 3 in particular, rather than to every witness who also appeared in the original *Haradinaj et al.* trial.

20. Brahimaj offers no other reason as to why the Prosecution should be prohibited from conducting any form of proofing. Brahimaj makes no argument that the Prosecution's interactions with Witness 3 would amount to rehearsal, practice, coaching, training, tampering, or manipulation, or that the Prosecution would attempt to use its meeting with Witness 3 in order to mould its case against the Accused during the course of a trial. The mere fact that Witness 3 has already given evidence before a previous Trial Chamber on identical issues does not demonstrate that this would occur. Arguments concerning the motivations of Witness 3, whilst potentially relevant to the credibility of the witness in general, do not suggest that the Prosecution would act improperly in its interactions with him. The Chamber notes that to the extent that any material or information, in the possession of the Prosecution, might affect the credibility of Witness 3, this must be disclosed to the Defence pursuant to Rule 68. This includes material or information arising from the pre-testimony interactions between the Prosecution and Witness 3. The Chamber finds, therefore, that Brahimaj has not provided the Chamber with any reason to depart from the usual approach to pre-testimony

⁵² *Delic* Decision, para. 1.

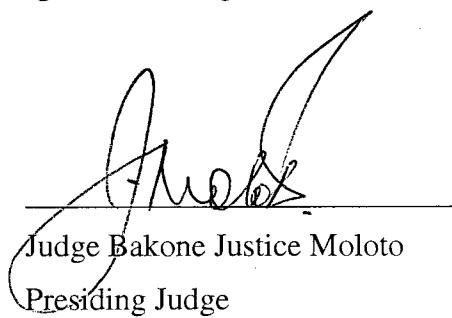
⁵³ Rule 92ter Decision, para. 35.

interactions between the Parties and witnesses. There is, therefore, no reason to impose an exceptional requirement of recording such interactions.

V. DISPOSITION

21. For the foregoing reasons and pursuant to Rule 54 of the Rules, the Trial Chamber hereby **REJECTS** Brahimaj's Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this thirty-first day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]