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31 MAY 2007

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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 Former Yugoslavia since 1991	Case No.	IT-04-84-T
		Date:	31 May 2007
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: **Mr Hans Holthuis**

Decision of: **31 May 2007**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON NOTIFICATION OF CROSS-EXAMINATION MATERIAL

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

1. On 23 March 2007, the Prosecution moved the Chamber to order the Defence to disclose to the Prosecution in advance of the cross-examination of witnesses the documents which the Defence intends to use with each witness in cross-examination.[1] The Prosecution contends that there is an established practice at the Tribunal of providing such documents to the Prosecution in advance.[2] While this is factually correct and is not resisted as such by the Defence, the question remains how far in advance. Here the Prosecution concedes that the practice is not so well established.[3]

2. Different Trial Chambers have set different deadlines: after the witness is sworn in but before examination-in-chief begins;[4] immediately after examination-in-chief ends;[5] at least twenty-four hours before a document is due to be used in cross-examination;[6] before cross-examination begins;[7] and piecemeal disclosure in the course of cross-examination.[8] The

[1] Prosecution's Motion for a Cross-Examining Party to Provide Advance Copies of Documents Used to Cross-Examine Witnesses, 23 March 2007.
[2] Ibid., paras 3-4.
[3] Ibid., paras 6-9.
[4] *Prosecutor v. Milutinović et al.*, Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence, 16 August 2006 ("A list of documents or other material to be used by a party when cross-examining a witness must be disclosed to the opposing party or parties at the commencement of the direct examination of that witness and after he or she has made the solemn declaration ... At the same time, the cross-examining party must release to the opposing party or parties, via the eCourt system, any documents or other material not already in the possession of the opposing party or parties that form part of the list"). Orders by two other Trial Chambers closely follow the *Milutinović* wording: *Prosecutor v. Popović et al.*, Order on Production of Defence Documents Used in Cross-Examination of Prosecution Witnesses, 24 August 2006 ("a list of documents or other material to be used by the Defence when cross-examining a Prosecution witness must be disclosed to the Prosecution at the commencement of the examination in chief of that witness, after the witness has made the solemn declaration ... concurrently, the Defence must release to the Prosecution, via the eCourt system, any documents or other material not already in the possession of the Prosecution that form part of the list"); and *Prosecutor v. Dragomir Milošević*, Decision on Time-Limits for Disclosure of Documents to be Used During a Witness's Testimony, 18 January 2007 ("the Defence [is] to provide the Prosecution, the Registry, and the Trial Chamber with a list of exhibits it intends to use in court during cross-examination at the commencement of the examination-in-chief of that witness and after he or she has made the solemn declaration ... [and] to release to the Prosecution, the Registry and the Trial Chamber, via the eCourt system, any documents or material that form part of the list ... insofar as they are not already in the possession of the Prosecution, the Registry, and the Trial Chamber").
[5] *Prosecutor v. Prlić et al.*, Oral Decision, 8 May 2006, T. 1475 ("these documents [which the Defence intends to use in the course of cross-examination] will be disclosed before the beginning of the cross-examination, but also just after the end of the examination-in-chief. That means that if the examination-in-chief is concluded at 1500 hours, at 1500 hours and one second Defence counsel shall disclose the documents. But if the examination-in-chief is concluded at 1900 hours, in that case the Defence shall disclose the documents at 1900 hours and one second. The cross-examination shall then commence on the following day").
[6] *Prosecutor v. Mrkšić et al.*, Oral Decision, 6 December 2005, T. 2953 ("from the 23rd of January on, applying equally to both sides, documents ought to be subject to 24 hours' notice").
[7] *Prosecutor v. Martić*, Oral Decision, 20 February 2006, T. 1578-1579 ("the Prosecution requested that the Trial Chamber rule ... that the cross-examining party should provide to the opposing party no later than the commencement of the cross-examination, a list of those documents or exhibits which it intends to use during the cross-examination of a witness. ... The Trial Chamber notes that the Defence ... has agreed ... Considering the above positions of the parties, the Trial Chamber grants the motion").
[8] *Prosecutor v. Naletilić and Martinović*, Decision on the Accused Naletilić's Request for Enforcement of Trial Chamber's Previous Order Regarding Documents During Cross-Examination, 3 May 2002 ("the party

Prosecution asks for the earliest of these deadlines, namely provision of the relevant information just prior to the commencement of examination-in-chief.[9] It sees such a deadline as necessary to ensure procedural fairness and efficiency in complex, document-heavy trials.[10] It maintains that without timely notification it might not be in a position to make informed objections on authenticity or content, or to adequately re-examine witnesses.[11]

3. Mr Haradinaj's response to the Prosecution's motion was joined by the other Accused.[12] The Defence does not object to disclosure of the relevant information to the Prosecution at the conclusion of the examination-in-chief of a witness.[13] However, it submits that the obligation at that point is to reveal to the Prosecution only those documents which the Defence has "definitively" resolved to use in cross-examination.[14] The Defence does not explain why it should not also reveal documents that it is likely, or very likely, to use.

4. In opposing disclosure at any earlier point in time, the Defence relies on the argument that "If a witness is given advance notice of a line of cross-examination which the opposing party intends to pursue, he/she will have the opportunity to prepare a response in advance and to tailor his/her evidence accordingly".[15] This argument could have been expressed more accurately; for once a witness is sworn in, the Prosecution's communication with that witness is so heavily regulated that "advance notice" of an intended line of cross-examination – even if the line were evident to the Prosecution from a reading of the document – could not so

conducting the cross-examination may give to the other party and to the Chamber the exhibits it intends to use during the cross-examination at the time that the document is submitted to the witness; that an earlier distribution is encouraged as it facilitates the conduct of the proceedings; and that a list of the exhibits intended to be used should be distributed in advance to allow the Chamber as well as the other party to bring the relevant documents into court"); *Prosecutor v. Blagojević and Jokić*, Oral Decision, 28 April 2004, T. 8406-8407 ("before the cross-examination, the party conducting the cross-examination should furnish at least a list of the documents they are going to use during the cross-examination, which will greatly facilitate the proceedings of the present case"); and *Prosecutor v. Halilović*, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, 9 May 2005, para. 9 ("during the Prosecution case the Defence is not obliged to provide in advance (not even at the beginning of cross-examination) the Prosecution with the documents or a list of documents which it intends to use during cross-examination of a witness ... The Defence is therefore entitled to provide the Prosecution only with those documents actually used in court during cross-examination, at the time the documents are shown to the witness").

[9] Prosecution's motion, paras 4, 17.

[10] Ibid., paras 10-12, 14.

[11] The Prosecution would also dismiss as misguided and internally inconsistent a decision in the *Halilović* case which declined to order notification of cross-examination material prior to the actual use of such material (ibid., para. 13). Considering that the Defence in the present case is not pressing for an order in line with *Halilović*, this argument need not be evaluated here.

[12] Confidential Response on Behalf of Ramush Haradinaj to Prosecution Motion for a Cross-Examining Party to Provide Copies of Documents Used to Cross-Examine Witnesses, 30 March 2007; the notifications by Mr Balaj and Mr Brahimaj, joining the main response, were filed on the same date.

[13] Response, para. 2.

[14] Ibid., para. 3.

[15] Ibid., para. 4, grounded in *R. v. Brown*, [1998] AC 367, at 380A (per Lord Hope).

easily be communicated to the witness. Moreover, the suggestion that the benefit to the court of cross-examination is attenuated in cases where the Prosecution examiner modifies a line of questioning (or abandons it) in light of documents disclosed by the Defence following the swearing in of a witness is too speculative.

5. While the Chamber generally agrees with the Defence that a witness must not be "forewarned and afforded an opportunity to prepare a response" to cross-examination,[16] it does not follow from this principle alone that Defence material should not be turned over to the Prosecution prior to the conclusion of examination-in-chief. The usual objectives of the Prosecution's examination of witnesses, pursued in the context of significant communication constraints between examiner and witness, ensure that if early disclosure by the Defence makes the lines of witness cross-examination less surprising overall for Prosecution counsel, the possibilities of exposure of the witness to unexpected challenges by the Defence remain largely unaffected. Additionally, while it is true, as the Defence observes, that the Prosecution "seek[s] to elicit answers which are aimed at weakening or undermining the line of cross-examination to be pursued",[17] this is true *generally*, and experienced Prosecution counsel anticipate lines of cross-examination even without full knowledge of the documents to be used by the Defence. This does not lessen the effectiveness or value of cross-examination.

6. The Defence cites an English authority, *R. v. Brown*,[18] to the effect that, in the common law, not even the *prosecutor* is under a legal duty to disclose material which adversely affects only the credibility of defence witnesses (and is thus detrimental only to the defence case). The burden of such a duty is seen in the common law to be excessive and unnecessary. A fortiori, goes the Defence argument, the Accused are under no legal duty to disclose material relevant to the credibility of Prosecution witnesses.

7. *Brown* concerned a question of disclosure prior to testimony – had the relevant information in the prosecutor's possession about two defence witnesses been disclosed to the defence, the defence would not have called those two witnesses.[19] Thus *Brown* answers a question about how far the prosecutor must go to assist the defence case in deciding which witnesses to call. But that aspect of the law does not generate an argument relevant to the present case, because the question here is not how far the Defence must go to assist the Prosecution case but the extent to which the Defence is entitled to ambush the Prosecution

[16] Response, para. 7; the argument is developed ibid., paras 10-17.
[17] Ibid., para. 14.
[18] [1998] A.C. 367.

when the Prosecution's witness is already in the box. The Defence[20] cites the Canadian case of *R. v. Stinchcombe*[21] for the proposition that "the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution".[22] Yet in the same case the Supreme Court of Canada made the following observation:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on.[23]

8. As is evident from the ICTY decisions cited above in footnotes 4 through 8, the practice at this Tribunal has changed over time, with the three most recent decisions (footnote 4) shifting the deadline for disclosure of cross-examination material to the moment following the swearing in of a witness. The Defence, in expounding the asymmetrical disclosure obligations found in the Tribunal's Rules of Procedure and Evidence, implies that this trend rests not on legal principle but on grounds of pragmatism and efficient trial management.[24] Yet the Rules do require the Defence to notify the Prosecution about a range of matters concerning the Defence case.[25] These requirements are not reducible to pragmatism but underscore the legal principle that for the purposes of fair play the Defence must show part of its hand to the Prosecution. Disclosure obligations may be asymmetrical at this Tribunal but they are not entirely one-sided. The Defence does acknowledge that its preferred later deadline may at times prove unfair to the Prosecution,[26] thus recognizing the possibility, at least, that legal principle is involved in the observed trend towards early disclosure.

9. The Defence notes that it is only when a witness has completed his or her evidence-in-chief that a final decision can be made about documents to be put to the witness in cross-examination.[27] The consequence, however, is not a later deadline, but that the Defence

[19] Ibid., at 378E.
[20] Response, para. 21.
[21] [1991] 3 S.C.R. 326.
[22] Ibid., at 333.
[23] Ibid., at 332.
[24] Response, paras 20-24.
[25] Chiefly Rules 65 ter (F)-(G) and 67.
[26] Response, paras 27-29; hence the need for the compensation discussed in these paragraphs of the Defence response.
[27] Ibid., para. 18.

notifies the Prosecution of the material which it is *likely* to use with each witness, and not only of the material which it has definitively resolved to use. Use of unannounced material is not foreclosed, as seen from the *Milutinović* order:

> A list of documents or other material to be used by a party when cross-examining a witness must be disclosed to the opposing party or parties at the commencement of the direct examination of that witness and after he or she has made the solemn declaration pursuant to Rule 90(A). At the same time, the cross-examining party must release to the opposing party or parties, via the eCourt system, any documents or other material not already in the possession of the opposing party or parties that form part of the list of documents or material for use during cross-examination. Should a party seek to use a document or material during cross-examination that has not been so listed and disclosed, that party may be permitted to do so on showing good cause for not so listing and disclosing it. The opposing party or parties may then request a short adjournment in order to examine the material.[28]

FOR THE FOREGOING REASONS,

The motion is **ALLOWED**. The procedure to be followed in the present case is that set out in the *Milutinović* order, quoted above.

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

Judge Alphons Orie
Presiding Judge

Dated this 31st day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

[28] *Prosecutor v. Milutinović et al.*, Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence, 16 August 2006, para. 4.