



**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: 7 November 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: 7 November 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**TRIAL CHAMBER'S ORDER CLARIFYING PROPER LATE DISCLOSURE
PROCEDURE UNDER RULE 67(C) AND/OR OTHER APPROPRIATE SANCTIONS**

Office of the Prosecutor

Mr David Re
Mr Gilles Dutertre
Mr Gramsci di Fazio
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 7 and 8 August 2007, the Defence for Mr Balaj (“Defence”) objected to the disclosure practice of the Prosecution in this case.¹ The Defence referred to an incident on 26 July 2007, where the Prosecution disclosed Rule 66(B) material (namely, material intended for use by the Prosecutor as evidence at trial) directly to the Trial Chamber without consulting the Defence.² The Defence refers to another such incident on 2 August 2007.³

2. The Defence applies for issuance of an order clarifying that it is improper under the Rules of Procedure and Evidence (“Rules”) for the Prosecution to provide Rule 66(B) material directly to the Trial Chamber, without any prior notice or consultation with the Defence and when it has previously failed to provide the material to the Defence in a timely manner.⁴ The Defence further requests that the Trial Chamber direct the Prosecution to cease disclosure of Rule 66(B) material directly to the Trial Chamber until the Trial Chamber has had the opportunity to rule on the merits of Mr Balaj’s Motion.⁵ The Defence also asks for any other relief that the Trial Chamber may deem necessary or appropriate.⁶ On 14 August 2007, the Prosecution filed its Response.⁷

3. Rule 67(C) provides that:

If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

4. The Defence, relying on a decision in the *Krajišnik* case,⁸ holds that disclosure of Rule 66(B) material (namely, material intended for use by the Prosecutor as evidence at trial) purportedly pursuant to Rule 67(C) directly to the Trial Chamber violates the purpose and the intent of Rule 67(C), which is to inform the Trial Chamber when late disclosure of

¹ Idriz Balaj’s Objection to Prosecution Disclosure Directly to Trial Chambers of Rule 66(B) Materials and Request for Order Clarifying Proper Late Disclosure Procedure under Rule 67(C) and/or Other Appropriate Sanctions, 7 August 2007 (“Motion”); Idriz Balaj’s Continuing Objection to Unilateral Disclosure of Rule 66(B) Materials Directly to Trial Chambers and Request that Such Disclosure Directly to the Trial Chambers Cease until the Question of Its Propriety is Resolved, 8 August 2007 (“Further Motion”).

² Motion, paras 1-4; Further Motion, para. 1.

³ Further Motion, paras 3-4.

⁴ Motion, paras 27-28.

⁵ Further Motion, para. 11.

⁶ Motion, para. 29, Further Motion, para. 12.

⁷ Prosecution’s Response to Idriz Balaj’s Objection to the Prosecution’s Disclosure of Rule 66(B) Material Directly to the Trial Chamber, 14 August 2007 (“Prosecution’s Response”).

⁸ *Prosecutor v. Krajišnik*, Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence with Confidential Annex, 2 June 2006, para. 13.

exculpatory Rule 68 material takes place so as to enable the Trial Chamber to fashion a remedy when appropriate.⁹ The Defence alleges that the Prosecution's practice to disclose other than exculpatory material directly to the Trial Chamber undermines the Rules of this Tribunal, which aim to keep irrelevant, unreliable or untested evidence from the Trial Chamber's attention.¹⁰

5. The Prosecution alleges that according to the *Krajišnik* Decision,¹¹ Rule 67(C) is not confined to exculpatory material, but also covers material that "could also be understood as supporting the Prosecution's case".¹² The Prosecution asserts that on 26 July 2007 it disclosed Rule 66(B) material directly to the Trial Chamber, as it considered that in two prior incidents of late disclosure to the Defence in this case the Trial Chamber had ordered such disclosure to the Trial Chamber to assess whether prejudice had arisen for the Defence.¹³

6. The wording of Rule 67(C) does not distinguish between transmission to the Trial Chamber of exculpatory and non-exculpatory material in case of late disclosure. The cited *Krajišnik* Decision¹⁴ indicates that disclosure of material which has the capacity to be understood as both exculpatory and inculpatory or which consists of both exculpatory and inculpatory elements directly to the Trial Chamber may violate the spirit of Rule 67(C), which seeks to protect the party to which the material was belatedly disclosed. The Prosecution appears to misunderstand the *Krajišnik* Decision when it asserts that the Decision orders disclosure directly to the Trial Chamber of both exculpatory material and material that "could also be understood as supporting the Prosecution's case".

7. Considering that the *Krajišnik* Trial Chamber held in its Decision that a party which belatedly discloses material of a mixed character, should obtain the consent of the other party prior to disclosing that material to the Trial Chamber, *a fortiori* material which is not of an exculpatory nature should not be transmitted directly to the Trial Chamber without the consent of the Defence. This does not prevent the disclosing party from seeking the admission into evidence of belatedly disclosed material in accordance with the relevant rules of evidence.

⁹ Motion, paras 5, 20-24; Further Motion, paras 5-7.

¹⁰ Motion, paras 25-26.

¹¹ See *supra* note 8.

¹² Prosecution's Response, para. 5.

¹³ *Ibid.*, paras 1-3.

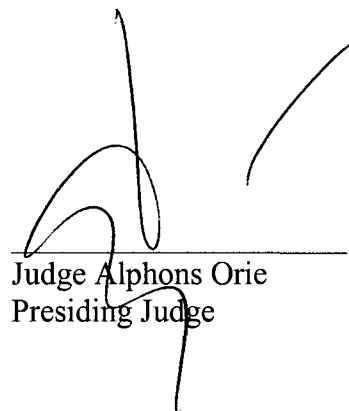
¹⁴ See *supra* note 8.

8. While the Trial Chamber's oral order of 28 June 2007¹⁵ might appear inconsistent with the Trial Chamber's construction of Rule 67(C) as set out above, and the Prosecution may have therefore been misled by that order, the Trial Chamber wishes to emphasize that it did not intend by that order to deviate from the way in which it construes Rule 67(C).

9. For the foregoing reasons, the Trial Chamber

AFFIRMS that it is improper under the Rules for the Prosecution to provide non-exculpatory material directly to the Trial Chamber pursuant to Rule 67(C) without the consent of the Defence. Direct provision of material by the Prosecution to the Trial Chamber under Rule 67(C) should be limited to material that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

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



Judge Alphons Orie
Presiding Judge

Dated this 7th day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ T. 6394-6396.