

IT-04-84-T
D28230-D28226
29 January 2008

28230



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-04-84-T
Date: 29 January 2008
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 29 January 2008

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON IDRIZ BALAJ'S REQUEST FOR EVIDENTIARY HEARING
REGARDING INTERVIEW OF CARLA DEL PONTE

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 30 October 2007, the Balaj Defence filed a motion requesting that the Chamber conduct an evidentiary hearing into Prosecutor Carla del Ponte's alleged violation of the Prosecution's Standards of Professional Conduct for Prosecution Counsel ("Standards").¹ The Balaj Defence further requested that the Chamber impose appropriate sanctions on Ms Del Ponte after such a hearing should it deem this proper.² The Balaj Defence submitted that in an interview given to "Der Spiegel" magazine on 15 October 2007, Ms Del Ponte commented on the merits of the *Haradinaj et al.* case, and in particular on the guilt of the Accused.³ The Balaj Defence further submitted that in the same interview Ms Del Ponte failed to correct an inaccurate comment by the interviewer that a number of witnesses in this case have been murdered.⁴ According to the Balaj Defence, Ms Del Ponte violated her ethical obligations under Rule 2 of the Standards.⁵ On 6 November 2007, the Brahimaj Defence joined in the Request.⁶

2. The Standards read, in relevant part:

1. The Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) makes this Regulation articulating the standards of professional conduct to which counsel in the Office of the Prosecutor (OTP) for both Tribunals will adhere.

(...)

2. In the conduct of investigations, and in the conduct of pre-trial, trial and appellate proceedings, prosecution counsel will adopt the highest standards of professional conduct. The Prosecutor expects them, consistent always with the letter and the spirit of the relevant Statute and Rules of Procedure and Evidence, and the independence of the Prosecutor:

a) to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of suspects and accused;

(...)

c) to be, and to appear to be, consistent, objective and independent, and avoid all conflicts of interest that might undermine the independence of the prosecutor – in particular prosecution counsel shall not allow themselves to be influenced by national, ethnic, racial, religious or political considerations;

(...)

h) to assist the Tribunal to arrive at the truth and do justice for the international community, victims and the accused;

(...)

¹ Idriz Balaj's Citation of Prosecutorial Violation of Ethical Code of Conduct and Request for Evidentiary Hearing Regarding Interview of Carla Del Ponte, 30 October 2007 ("Request"), para. 18. The Chamber notes that while Ms Del Ponte was Prosecutor at the time the Request was filed, she is no longer in office at the time of this decision.

² *Ibid.*, para. 18.

³ *Ibid.*, paras 1-2, 10-12. The Balaj Defence also quoted from an article on the "B-92" website, but that article was based on a news release by Radio Free Europe which, in its turn, quoted from the interview given to "Der Spiegel".

⁴ *Ibid.*, paras 2, 13-14; Annex A to the Request.

⁵ *Ibid.*, paras 12, 17.

⁶ Lahi Brahimaj's Joinder with Idriz Balaj's Citation of Prosecutor's Violation of Ethical Code of Conduct and Request for Evidentiary Hearing Regarding Interview of Ms Carla Del Ponte, 6 November 2007.

k) to avoid, outside the courtroom, making public comments or speaking to the media about the merits of particular cases or the guilt or innocence of specific accused while judgement in such matters is pending before a Chamber of the Tribunal;

(...)

4. Failure by prosecution counsel to observe the above standards will be dealt with by the Prosecutor, in the exercise of her discretion, and subject to staff rules of the United Nations, apart from any sanctions that may exceptionally be imposed upon prosecution counsel pursuant to Rules 46 or 77 of the Rules of Procedure and Evidence of both Tribunals (or other provisions of the Statutes and Rules).

3. The Request takes the violation of the provisions of Rule 2 of the Standards as its point of departure. However, it ignores Rule 4, according to which the Prosecutor will deal with the failure to observe the Standards. This is in accordance with the character of the Standards, set up by the Prosecutor to serve as guidance for Prosecution counsel, both in the conduct of investigations and trial proceedings.

4. The Balaj Defence has not invoked Rule 46 of the Tribunal's Rules of Procedure and Evidence ("Rules"). This Rule authorizes the Chamber to impose sanctions on counsel in case of misconduct and reads:

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University.

(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel.

5. The Chamber considers that while Rule 46 focuses on misconduct of Defence counsel,⁷ the question whether Rule 46 must exclusively be applied to Defence counsel or can also apply to Prosecution counsel is not decisive.⁸ According to Article 20 of the Tribunal's Statute the Chamber has an obligation to ensure that a trial is fair and expeditious and that the proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. It is therefore within the Chamber's inherent powers to respond to misconduct of counsel for the Prosecution that would negatively affect these interests, even without express powers of discipline over members of the Prosecution under

⁷ The term "counsel" is not defined in Rule 2 of the Rules and in Rule 46 this term seems to be understood as meaning "Defence counsel". See Rule 46(A)(ii) and (C).

Rule 46 of the Rules. In examining whether counsel for the Prosecution was engaged in such misconduct, Rule 46(A) of the Rules and the Standards can be of guidance to the Chamber.

6. A Chamber will primarily be concerned with the misconduct of counsel when it concerns offensive, abusive, or obstructive behaviour during court hearings. However, misconduct is not necessarily limited solely to behaviour in court. Professional misconduct of counsel outside court can also affect the above mentioned interests, provided it is directly or indirectly related to the proceedings.

7. Aside from Ms Del Ponte's appearance in court during the opening statement, the Prosecutor has in this case, as is the general practice, been represented in court by her trial attorneys. The Prosecutor, in addition to the normal prosecutorial duties, has the broader task of presenting her office's position both to the public and in forums such as the Security Council. In examining whether Ms Del Ponte has committed misconduct the Chamber will also consider the broader role that Ms Del Ponte had as the Prosecutor.

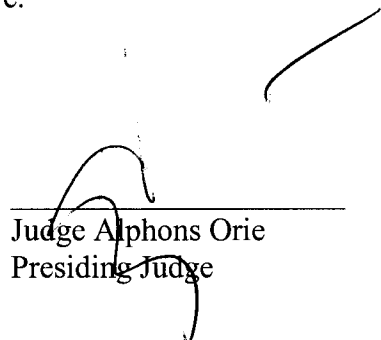
8. While Ms Del Ponte undoubtedly commented on the guilt or innocence of one of the Accused, the Chamber understands that this was done in the context of the Prosecutor emphasizing the position of the Office of the Prosecutor that it was in possession of sufficient evidence in order to prove the guilt of the Accused. Her statement, as cited from "Der Spiegel" magazine and only brought to the attention of the Chamber through the Request, has in no way affected the fairness or expeditiousness of the trial. The Chamber will not address in general terms the issue of the circumstances under which the Prosecutor has an obligation to correct inaccurate statements or questions made by journalists. It establishes that in this particular case Ms Del Ponte did not confirm the interviewer's comment on the murder of several witnesses, but rather explained that her office has encountered serious difficulties in securing the testimony of witnesses. Ms Del Ponte went on to point out that while a witness protection program existed, witnesses were still apprehensive and often unwilling to leave Kosovo for this purpose. The Chamber finds that Ms Del Ponte's explanation and comments did not affect the fairness or expeditiousness of trial.

9. In conclusion, the Chamber finds that the statement made by Ms Del Ponte and addressed in the Request was in no respect of such a nature that it would negatively affect a fair and expeditious trial and would therefore justify conducting an evidentiary hearing.

⁸ The Chamber notes that the Prosecutor, according to Rule 4 of the Standards, assumes that Rule 46 of the Rules does apply to Prosecution counsel.

10. For the foregoing reasons the Request is **DENIED**.

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



Judge Alphons Orie
Presiding Judge

Dated this 29th day of January 2008
At The Hague
The Netherlands

[Seal of the Tribunal]