

**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: 6 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: 6 October 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**REASONS FOR DECISION DENYING ADMISSION OF
DOCUMENT RULE 65 TER NUMBER 03003**

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

I. PROCEDURAL HISTORY

1. On 27 June 2011, the Prosecution filed its “Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter” (“Rule 92ter Motion”) confidentially. With this Rule 92ter Motion, the Prosecution sought, *inter alia*, the admission into evidence of a handwritten diary allegedly belonging to the Accused Balaj (Document Rule 65ter Number 03003), pursuant to Rule 92ter of the Rules of Procedure and Evidence (“Rules”).¹ Haradinaj responded to this request,² as did Balaj.³ The Prosecution made further submissions in relation to this request on admission in its reply to the Rule 92ter Motion.⁴

2. On 23 August 2011, the Chamber issued its “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter” (“Rule 92ter Decision”), in which it deferred its decision on the admissibility of the handwritten diary.⁵ In the same Rule 92ter Decision, the Chamber decided to grant the Prosecution’s request to hear Mehmet Togonal pursuant to Rule 92ter of the Rules. Togonal, a police officer of the United Nations Peacekeeping Mission in Kosovo (“UNMIK”); had conducted a search on the home of the Accused Balaj and seized, *inter alia*, the handwritten diary at issue. The Chamber considered that the expected evidence of Togonal may shed light on the circumstances in which he discovered the diary, and assist in determining the diary’s probative value and, ultimately, admissibility.⁶

3. On 28 September 2011, the Chamber heard witness Mehmet Togonal, who gave evidence on the search he conducted on the Accused’s Balaj’s home and the seizure of the diary.⁷ On the same day, the Parties made further oral submissions on the admissibility of the diary.⁸ The Chamber denied the admission of the diary in a majority decision, Judge Delvoie dissenting.⁹ Following a request by the Prosecution, the Chamber announced that written reasons were to follow.¹⁰

¹ Rule 92ter Motion, para. 10 in particular.

² *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Response on Behalf of Ramush Haradinaj to Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 11 July 2011 (“Haradinaj Response”), paras 27-29.

³ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Idriz Balaj’s Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 11 July 2011 (“Balaj Response”), paras 9-10, 19-22.

⁴ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Prosecution Request for Leave to Reply and Consolidated Reply to Responses to Motion for Admission of Evidence Pursuant to Rule 92ter, 14 July 2011 (“Reply”), paras 8-9, 15.

⁵ Rule 92ter Decision, para. 47.

⁶ Rule 92ter Decision, para. 47.

⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1348; Exhibit P302, paras 10-11.

⁸ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1349-1351 (Balaj), 1351-1353 (Haradinaj), 1353-1356 (Prosecution).

⁹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1356.

¹⁰ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1357.

II. SUBMISSIONS

4. The Chamber recalls the Parties' submissions as contained in their filings in relation to the Prosecution's Rule 92ter Motion,¹¹ as summarized in the Rule 92ter Decision,¹² and in particular, Haradinaj's submission that account must be taken of the original Trial Chamber's decision not to admit the diary because it was uncertain whether the notebook was in Balaj's handwriting, because of uncertainties with regard to the author of the document, the source of the information and about the way in which the source and the author communicated.¹³ The Chamber recalls further Balaj's submissions that the deficiencies because of which the document was rejected in the initial trial have not been remedied,¹⁴ that the document has not been authenticated and is prejudicial.¹⁵ The Chamber recalls also the Prosecution's contention in its reply to the Rule 92ter Motion that whilst reliability is one factor to decide on admission, only a *prima facie* showing of reliability is required at this stage.¹⁶

5. In his oral submissions of 28 September 2011, Balaj asserted that the diary is inadmissible and that there is contention that it is authored by him.¹⁷ Haradinaj reiterated his submissions in relation to the Prosecution's Rule 92ter Motion.¹⁸ He asserted that the context has not changed and the ruling of the Trial Chamber in the original trial should be followed.¹⁹ According to Haradinaj's reading of the Appeals Chamber ruling on conflicting evidentiary decisions in this and the previous trial, a different evidentiary ruling in the retrial would only be justified and not unfair if the Prosecution could show a change in the "relevance matrix".²⁰ Haradinaj considered this to mean that in the retrial the item is tendered as being relevant to a different issue.²¹ He further asserted that Togat's evidence would not touch upon the reasons because of which the original Trial Chamber had denied admission of the item at issue.²²

6. The Prosecution averred that the suggested reading of the Appeals Chamber ruling would be incorrect. In the Prosecution's submissions, by referring to the "different context" in which the two trials are held, the Appeals Chamber in fact meant only that evidentiary decisions proper in one case

¹¹ In particular Rule 92ter Motion, para. 10; Haradinaj Response, paras 27-29; Balaj Response, paras 9-10, 19-22; Brahimaj Response, paras 1-2, 23; Reply, paras 1, 8-9, 15, 17.

¹² Rule 92ter Decision, paras 44-46.

¹³ Haradinaj Response, para. 27.

¹⁴ Balaj Response, paras 20-21.

¹⁵ Balaj Response, paras 21-22.

¹⁶ Reply, paras 8-9.

¹⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1349-1351.

¹⁸ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1351.

¹⁹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1351-1352.

²⁰ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1351-1353, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011 ("Decision on Scope of Partial Retrial"), para. 25.

²¹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1352-1353.

may not be proper in the other.²³ It submitted that the diary's probative value must be determined at a *prima facie* standard,²⁴ and that Togonal's testimony would establish that he had seized the diary among Balaj's personal items in his bedroom.²⁵ The Prosecution submitted further that considering that the diary is written from Balaj's perspective and contains his name, date and place of birth on page 3, the *prima facie* standard for admissibility is met.²⁶ The Prosecution noted that the Trial Chamber treated this and other associated exhibits tendered for admission by the Prosecution in its Rule 92ter Motion in the same way.²⁷ The Prosecution clarified that it tendered the diary for the truth of its contents.²⁸ That Togonal has no knowledge of the content of the diary, would go to the weight of the notebook, in the Prosecution's submissions.²⁹

III. APPLICABLE LAW AND DISCUSSION

7. The Chamber notes that the diary was tendered as an associated exhibit pursuant to Rule 92ter of the Rules. It recalls the applicable law in relation to Rule 92ter as set out in its Rule 92ter Decision.³⁰ The evidence sought to be admitted pursuant to Rule 92ter must also fulfil the general requirements of admissibility.³¹ That is, the proposed evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial.³² The standard for admission under Rule 89(C) of the Rules is a *prima facie* standard, that requires a tendered item to be *prima facie* credible, *i.e.* while proof of authenticity is not required, there must be sufficient indicia of reliability to make out a *prima facie* case.³³

8. The Defence suggests that this Trial Chamber follow the decision of the previous Trial Chamber in determining admissibility of the diary because there has been no change in

²² *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1351-1352.

²³ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1353-1354.

²⁴ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1354-1355.

²⁵ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1355.

²⁶ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1355.

²⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1355.

²⁸ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1354, 1356.

²⁹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1356.

³⁰ Rule 92ter Decision, III. Applicable Law.

³¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92ter, 9 July 2008, para 20; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92bis and/or 92ter, 2 September 2008, para. 13.

³² Rule 89(C) and (D) of the Rules.

³³ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-AR 73.2, Decision on Application of Defendant Zejnil Delalić for leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 5 March 1998, paras 17, 20; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Appeals Chamber Judgement, 3 May 2006, para. 402; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR 73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 15; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR 73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the *Decision on Prlić Defence Motion for*

circumstances. This Trial Chamber does not consider that to be a factor in determining admissibility. The Chamber will make such determination according to the Rules of Procedure and Evidence and the jurisprudence of the Tribunal.

9. The Chamber by Majority, Judge Delvoie dissenting, is not satisfied that the document tendered meets the *prima facie* reliability test, even if, as the Prosecution asserts, the diary is written from Balaj's perspective, and contains his name, date and place of birth. While proof of authenticity (that is whether the document is what it professes to be in origin or authorship) is not required at the admissibility stage, the Majority considers that the document in the present circumstances must bear indicia of *ex facie* authenticity to be *prima facie* reliable.³⁴ The Majority notes in this respect that the Defence avers that it is uncertain whether the notebook was written in Balaj's hand, what the author's source of information was, and in which way the source and the author communicated. The authorship of the diary is not known. The evidence of Mehmet Togonal, who seized the notebook in the Accused Balaj's bedroom,³⁵ lends only limited support to the proposition that the author of the diary in fact is the Accused Balaj. Mehmet Togonal is not aware of the contents of the diary which are in a language he does not understand. He only heard from a colleague that it contains information about KLA trainings.³⁶ The Prosecution seeks to tender the diary for the truth of its contents.³⁷ The Prosecution accepts that Togonal does not give evidence as to the contents of the diary; moreover, it has not advanced that it is in a position to provide any such evidence, but, nevertheless, argues that these deficiencies go only to weight.

Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("Prlić Decision of 3 November 2009"), para. 27.

³⁴ Cf. Prlić Decision of 3 November 2009, para 34.

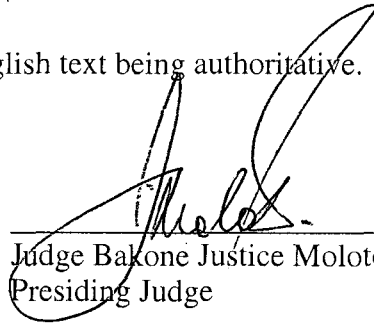
³⁵ Exhibit P302, paras 10-11.

³⁶ Exhibit P302, para. 10 *lit. e.*

³⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1354, 1356.

10. Considering the above, and the purpose for which it is being tendered, the Majority is satisfied that the document should not be admitted. In the view of the Majority, the *prima facie* standard of reliability required for admission has not been met.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this sixth day of October 2011
At The Hague
The Netherlands

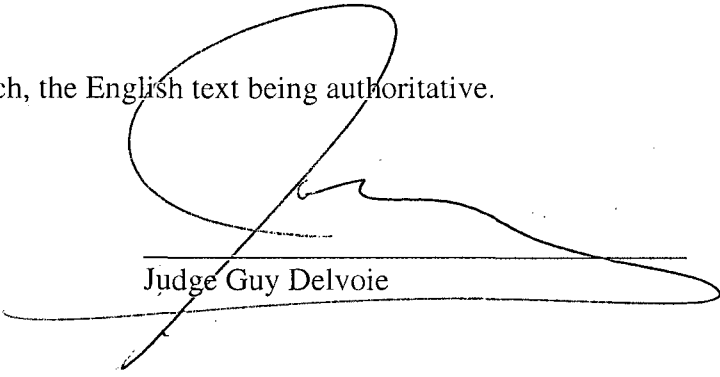
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IV. DISSENTING OPINION JUDGE DELVOIE

1. I respectfully disagree with the Majority's finding on the issue of the diary's probative value. In this regard I would particularly like to stress that the standard for admission under Rule 89(C) of the Rules is a *prima facie* standard that requires a tendered item to be credible on the face of it, as set out in greater detail above. In my opinion, Mehmet Tugal's account that he seized the diary in the Accused's Balaj's bedroom, taken at face value, and without further evidence or information to the contrary, sufficiently supports the proposition that the Accused Balaj is the author of these notes. In this regard I also note instances in the document where the author speaks in the first person and refers to himself as a commander of the "special unit",³⁸ which is consistent with the alleged role of the Accused Balaj.

2. In my view, the tendered item shows indicia of reliability and is sufficiently probative to be admitted pursuant to Rules 92ter and 89(C) of the Rules, with its weight to be evaluated at the end of the trial, in the context of the other evidence that will then be before the Chamber. This other evidence might, at that time, include graphology evidence or other evidence on the handwriting. I am also, most respectfully, of the opinion that if the source of information contained in a diary is not the author of the diary himself, the fact that the source of that information or the way in which the source and the author of the diary communicated are unknown, goes to the weight of that part of the information contained in the diary, but has no bearing on the admissibility of the diary as such.

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



Judge Guy Delvoie

Dated this sixth day of October 2011
At The Hague
The Netherlands

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³⁸ Rule 65ter Number 03003, pp 26, 29.