



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: 15 March 2012
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 15 March 2012

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
CERTIFICATION OF DECISION ON PROSECUTION
MOTION TO ADMIT EVIDENCE FROM THE BAR TABLE,
REVISE ITS RULE 65 *TER* WITNESS AND EXHIBIT LISTS
AND ADMIT EVIDENCE PURSUANT TO RULE 92 *TER***

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 Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

THIS TRIAL CHAMBER (“Chamber”) of the 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 (“Tribunal”) is seised of the “Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65*ter* Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92*ter*” filed publicly by the Office of the Prosecutor (“Prosecution”) on 2 February 2012 (“Prosecution Motion”) and hereby renders its decision.

I. PROCEDURAL BACKGROUND

1. On 5 October 2011, the Prosecution filed publicly the “Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65*ter* Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92*ter*”, with public Annexes A and B seeking, *inter alia*, the admission into evidence of excerpts of a book entitled “A Narrative about War and Freedom (Dialogue with the commander Ramush Haradinaj)” (“Book”) (Rule 65*ter* number 3002) and requesting leave to add Marlène Schnieper to its Rule 65*ter* witness list and to call her pursuant to Rule 92*ter*(A) of the Rules of Procedure and Evidence (“Rules”) and to add to its Rule 65*ter* exhibit list a copy of the Book signed by Haradinaj and a letter from the Haradinaj Defence dated 9 January 2007 (“Letter”) (Rule 65*ter* numbers 3112 and 3113, respectively).

2. On 26 January 2012, the Chamber issued a decision denying these requests by majority, Judge Delvoie dissenting (“Impugned Decision”).¹ On 3 February 2012, Judge Delvoie issued his partially dissenting opinion.²

3. On 2 February 2012, the Prosecution filed the present Motion. On 16 February 2012, Haradinaj filed the “Defence response on Behalf of Ramush Haradinaj to the Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65*ter* Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92*ter*” (“Haradinaj Response”). On 22 February 2012, the Prosecution filed the “Request for Leave to Reply and Reply to Ramush Haradinaj’s Response to Prosecution Motion for Certification” (“Prosecution Reply”).

¹ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion to Admit Evidence from the Bar Table, Révise its 65*ter* Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92*ter*, 26 January 2012.

² *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Judge Delvoie’s Partially Dissenting Opinion on the Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65*ter* Witness and Exhibit Lists and Admit Evidence pursuant to Rule 92*ter*, 3 February 2012.

II. SUBMISSIONS

4. The Prosecution requests that the Trial Chamber certify an interlocutory appeal of the majority's Decision denying the admission of tendered extracts from the Book and the related decisions denying the addition of Schnieper to its Rule 65*ter* witness list, leave to call her pursuant to Rule 92*ter*(A), and to add to its Rule 65*ter* exhibit list a copy of the Book which Haradinaj inscribed and gave to Schnieper as well as the Letter written by Haradinaj's counsel communicating Haradinaj's admission that he did not dispute the authenticity and admissibility of the Book in its entirety.³

5. The Prosecution submits that the Impugned Decision concerns evidence which is potentially significant to the Trial Chamber's Judgement. It is submitted that the account in the Book is reliable as Counsel for Haradinaj in a letter to the Prosecution indicated that there is no dispute that the Book is authentic and admissible in its entirety and that agreed facts based upon it were unnecessary. It is argued that failing to admit the tendered extracts from the Book, given their importance to matters in dispute in this trial, significantly affects both the fairness of the proceedings and outcome of the trial.⁴ In support of this, the Prosecution refers to the contents of the book and submits that it is relevant to specific issues in dispute.⁵

6. In regard to the second condition of the certification test, it is argued, that if certification is not granted, this may result in further unnecessary appellate proceedings, and hence the outcome of the proceedings could be materially affected if this issue is not resolved at this stage. The Prosecution submits that the "significance of this evidence", could result in the need to reconsider all of the related evidence which would further complicate and delay a final determination of the Revised Indictment.⁶

7. Haradinaj submits that the Prosecution Motion should be denied because the Prosecution failed to satisfy the legal requirements under Rule 73(B) and the Trial Chamber did not err in its reasoning and applied the correct legal standard for the admission of evidence.⁷ It is argued that the first condition of the certification test has not been met as the Prosecution Motion simply makes the same arguments advanced in its application for the admission of the extracts of the book, emphasising at length why the admission of the extracts of the book were important to its case.⁸ Haradinaj further submits that the Prosecution has not singled out an issue that significantly affects

³ Prosecution Motion, paras. 1-2.

⁴ Prosecution Motion, para. 4.

⁵ Prosecution Motion, paras. 5-7.

⁶ Prosecution Motion, para. 8.

⁷ Haradinaj Response, para. 3.

the proceedings or the outcome of the trial, and instead has only set forth its disagreement with the conclusion reached by the majority of the Chamber.⁹ With regard to the second condition of the certification test, Haradinaj asserts that there is no basis to suggest that granting the Prosecution request would materially advance the proceedings. It is submitted that, to the contrary, an interlocutory appeal at this stage would further delay the proceedings for no good reason.¹⁰ In Haradinaj's submission, the Prosecution wrongly argues that should there be an acquittal based on the exclusion of this evidence, this would further complicate the proceedings. Such reasoning, he argues, does not exist in ICTY case law, nor does the Impugned Decision prevent the possibility for the "Prosecution to attempt to persuade the Appeals Chamber that had it not been for the exclusion of evidence, in light of all the evidence in the case convictions would have been entered".¹¹

8. In its Reply the Prosecution submits that Haradinaj is wrong to argue that the Prosecution must identify an error in order to obtain certification. In support of this position, it is asserted that this Chamber has adopted the position that the "correctness of a decision is not a relevant consideration in determining whether to grant certification". The Prosecution also submits that the Haradinaj Response was wrong to suggest that the Prosecution cannot rely on arguments relating to the Book's importance because the importance of the Book is critical to the Chamber's determination of the Rule 73(B) test.¹²

III. APPLICABLE LAW

9. Pursuant to Rule 73(B) of the Rules, a Trial Chamber may grant certification to Appeal "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the proceedings". The effect of Rule 73(B) is to preclude certification unless the two conditions set out in this Rule are satisfied, but, even where these conditions have been satisfied, certification remains at the discretion of the Chamber.¹³ A request for certification is not concerned with whether a decision was correctly reasoned or not, which is a matter for appeal whether interlocutory or after the final judgement has

⁸ Haradinaj Response, para. 10.

⁹ Haradinaj Response, para. 11.

¹⁰ Haradinaj Response, para. 14.

¹¹ Haradinaj Response, para. 13, citing, *Prosecutor v Karadžić*, Case No. IT-95-5/18-1, Decision on Prosecution Motion for Reconsideration, alternatively, for Certification of the Decision Concerning the evidence of Miroslav Deronjić, 20 April 2010, para. 15.

¹² Prosecution Reply, 22 February 2012, para. 2.

¹³ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65ter Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, para. 13; see also *Prosecutor v Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *Prosecutor v*

been rendered.¹⁴ Nor is a request for certification a further opportunity for a party to inform the Trial Chamber that it disagrees with the decision that has been made.¹⁵

IV. DISCUSSION

10. The submissions put forward by the Parties have been considered by the Chamber. The Prosecution argues, in relation to the first condition of the certification test, that failing to admit the extracts from the Book, given its importance to matters in dispute, significantly affects both the fairness and outcome of the proceedings.

11. The Chamber finds that the Prosecution has not explained how or why the exclusion of the evidence will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁶ The Prosecution Motion, while arguing that the evidence is important, in fact merely reprises arguments submitted in the original motion, as to the authenticity, probative value and reliability of the proposed evidence.¹⁷ The Prosecution submits that the account in the Book is reliable as Counsel for Haradinaj represent in a Letter to the Prosecution that there is no dispute about the authenticity and admissibility of the Book. The Chamber has rejected this argument. The letter relied on by the Prosecution was part of privileged pre-trial communications between the parties during previous proceedings. The admissibility of the Book is opposed by Haradinaj in the present proceedings. The Chamber recalls that a request for certification is not an opportunity for a party to inform the Trial Chamber that it disagrees with the decision that has been made.¹⁸ The Chamber is not persuaded that the Prosecution has shown that the exclusion of this material would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial. The first condition of the certification test has not been met.

Stanišić and Župljanin, Case No. IT-08-91-PT, Decision on Defence Motion for Certification (“Decision”), 22 April 2009, para. 11.

¹⁴ *Stanišić and Župljanin* Decision, para. 11; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings (“Decision June 2005”), 20 June 2005 para. 4; *Prosecutor v. Čermak and Markač*; *Prosecutor v. Gotovina*, Case No. IT-03-73-PT; IT-01-45-PT, Decision on Defence Application for Certification to Appeal Decision on the Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006, para. 10; *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision (“Decision”), 14 June 2007, para. 4.

¹⁵ *Prosecutor v. Milošević*, Decision June 2005, para. 3; *Prosecutor v. Milosević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Litnchy, 18 May 2005, p. 5; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Decision on Motion for Certification to Appeal Trial Chamber’s Decision Re Stay of Proceedings for Abuse of Process, 13 May 2009, para. 3.

¹⁶ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Denying Prosecution’s Motion Requesting Certification to Appeal Decision of 14 April 2010 (Amendment of Exhibit List), 18 June 2010, para. 10.

¹⁷ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65^{ter} Witness and Exhibit Lists and admit Evidence pursuant to Rule 92^{ter}, 5 October 2011, paras. 6-7; Prosecution Motion, paras. 4-7.

¹⁸ *See supra*, para. 9.

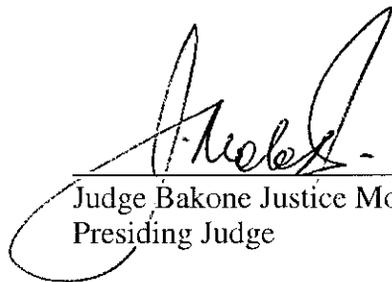
12. In light of the above finding the Chamber need not discuss the further requirement of Rule 73(B).

V. DISPOSITION

13. For the foregoing reasons and pursuant to Rules 73(B), 89(C) and 126*bis* of the Rules the Chamber hereby

- a. **GRANTS** the Prosecution request for leave to reply and takes note of the Reply; and
- b. **DENIES** the Prosecution Motion in its entirety.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fifteenth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]