

IT-04-84-T  
D22033-D22029  
28 August 2007

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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: 28 August 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: 28 August 2007

PROSECUTOR

v.

RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ

*PUBLIC*

REASONS FOR THE ORAL DECISION OF 3 JULY 2007 ON THE DEFENCE  
MOTION TO EXCLUDE BALLISTICS EVIDENCE AND DECISION ON THE  
APPLICATION TO ADD A WITNESS

Office of the Prosecutor

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## I. Procedural history

1. On 28 June 2007, the Defence for Mr Haradinaj filed a confidential motion seeking exclusion of ballistics evidence referred to in paragraphs 184 to 190 of the Rule 92ter statement of Nebojša Avramović and in annexes 16 and 62 to 66 of the same statement.<sup>1</sup> In the above paragraphs, Avramović states that bullet casings were recovered from near the house of Mr Haradinaj in Glođane/Gllogjan at the end of March 1998, as well as from the exhumation sites in the vicinity of the Lake Radonjić/Radoniq canal, at the Ekonomija farm in Rznić/Irznici and in Dašinovac/Dashinoc in September 1998. Avramović describes how these sets of casings were compared by Milutin Višnjić, who according to Avramović was an expert in ballistics. The annexes to Avramović's 92ter statement consist of reports and correspondence relating to the discovery and analysis of these casings, including Annex 63, which is a one-page report by Višnjić. Counsel for the other two Accused joined the Motion in filings dated 29 June and 2 July 2007.<sup>2</sup>

2. The Prosecution responded to the Motion on 2 July 2007.<sup>3</sup> On 3 July 2007, the Chamber rendered its oral decision excluding Višnjić's report from admission at that time and denying other parts of the Motion.<sup>4</sup> The Chamber announced that detailed written reasons would follow.<sup>5</sup>

3. On 28 June 2007, the Prosecution filed a "Notification of Expert Report under Rule 94bis" in which it seeks that Višnjić's report, which is listed in the Prosecution's exhibit list of 29 January 2007, be treated as an expert report.<sup>6</sup> A statement of Višnjić dated 18 June 2007 is attached to this filing. On 2 July 2007, the Defence for Mr Balaj filed its opposition to this Notification, challenging the qualifications of Višnjić as an expert and requesting to cross-examine him.<sup>7</sup>

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<sup>1</sup> Motion on Behalf of Ramush Haradinaj to Exclude Ballistics Evidence Referred to in the Rule 92ter Statement of Nebojša Avramović, 28 June 2007 ("Motion").

<sup>2</sup> Idriz Balaj's Joinder in the Confidential Motion on Behalf of Ramush Haradinaj to Exclude Ballistics Evidence Referred to in the Rule 92ter Statement of Nebojša Avramović, 29 June 2007; Joinder on Behalf of the 3rd Defendant, Lahi Brahimaj, to Confidential Motion on Behalf of the 1st Defendant, Ramush Haradinaj, to Exclude Ballistics Evidence Referred to in the Rule 92ter Statement of Nebojša Avramović, 2 July 2007.

<sup>3</sup> Prosecution's Response to Motion on Behalf of Ramush Haradinaj to Exclude Ballistics Evidence Referred to in the Rule 92ter Statement of Nebojša Avramović, 2 July 2007 ("Response").

<sup>4</sup> T. 6571-6572.

<sup>5</sup> *Ibid.*

<sup>6</sup> Notification of Expert Report under Rule 94bis, 28 June 2007 ("Notification"), para. 6.

<sup>7</sup> Idriz Balaj's Notice of Opposition to Acceptance of Prosecution Expert Report under Rule 94bis Submitted on 28 June 2007, 2 July 2007.

4. On 13 July 2007, the Prosecution filed an application to add Višnjić to its witness list.<sup>8</sup> On 27 July 2007, the Defence for Mr Haradinaj filed its response to this application.<sup>9</sup> The Defence for Mr Balaj joined this filing on 30 July 2007.<sup>10</sup> The arguments in Mr Haradinaj's response are of the same nature as the arguments contained in the Motion.

## II. Submissions

5. The Defence argues, firstly, that Višnjić's ballistics report of 2 December 1998 is irrelevant since it concludes that certain casings found during the Lake Radonjić/Radoniq investigation match certain casings found in Pljančor/Plançar on 7 March 1998 and found in Gramočelj/Gramaqel on 24 March 1998 and that the report contains no finding that there is any match with casings found in Glođane/Gllogjan on 24 March 1998.<sup>11</sup> Therefore, according to the Defence, the statement by Avramović that some of the casings found during the Lake Radonjić/Radoniq investigation were identical to some of the casings found in Glođane/Gllogjan should be excluded.<sup>12</sup> The Prosecution responds that the house of Ramush Haradinaj is located between the villages of Glođane/Gllogjan and Gramočelj/Gramaqel, and that initial reports on the 24 March 1998 incident may have stated that the incident took place in Gramočelj/Gramaqel.<sup>13</sup>

6. Secondly, according to the Defence, Višnjić's report and his statement of 18 June 2007 lack probative value as they are not sufficiently specific, they contain no explanation of the analysis undertaken, and it is not clear whether Višnjić's conclusion is that the casings were fired from the same type of weapon or from the very same gun.<sup>14</sup> The Prosecution responds that Višnjić's report is relevant to the case, that both the report and the statement have probative value and that the Defence can test the contents of both the report and the statement in cross-examination.<sup>15</sup> The Prosecution adds that it does not seek to tender Višnjić's statement of 18 June 2007 through Avramović.<sup>16</sup>

<sup>8</sup> Prosecution's Corrigendum to the Amended Witness List and Application to Add Two Witnesses to the Witness List pursuant to Rule 94*bis* and Rule 92*bis*, 13 July 2007.

<sup>9</sup> Response on behalf of Ramush Haradinaj to Prosecution's Motion to Add Milutin Višnjić pursuant to Rule 94*bis* to Prosecution Witness List, 27 July 2007.

<sup>10</sup> Idriz Balaj's Joinder in the Public "Response on behalf of Ramush Haradinaj to Prosecution's Motion to Add Milutin Višnjić pursuant to Rule 94*bis* to Prosecution Witness List", 30 July 2007.

<sup>11</sup> Motion, para. 4.

<sup>12</sup> Motion, para. 5, referring to Avramović's 92*ter* statement, para. 184 and Annex 66.

<sup>13</sup> Response, para. 10.

<sup>14</sup> Motion, para. 7.

<sup>15</sup> Response, paras 16 and 22.

<sup>16</sup> Response, para. 3.

7. Thirdly, the Defence submits that there is no possibility for it to properly test the evidence because the personal notes that Višnjić took when he examined the casings have been destroyed, an additional ballistics report of the Glodane/Gllogjan investigation is missing and a report from a second examiner, who according to Višnjić gave a second opinion on Višnjić's conclusions, is missing as well.<sup>17</sup> The Prosecution responds that the absence of these documents is at most a factor which goes to the weight of the proposed evidence and not to its admissibility.<sup>18</sup>

8. Finally, the Defence states that the casings in question are no longer available as they were destroyed during the NATO bombing and there is thus no possibility for the Defence to analyse them.<sup>19</sup> The Prosecution responds that the fact that these casings are no longer available is not a reason for excluding Višnjić's statement or report.<sup>20</sup>

### III. Discussion

9. Even though the parties made submissions in relation to Višnjić's 18 June 2007 statement, the Prosecution did not seek to tender that statement through the evidence of Avramović. The Motion therefore does not concern that statement.

10. In paragraphs 184 to 190 of his Rule 92*ter* statement, Avramović states how he, together with his colleagues, collected bullet casings at Lake Radonjić/Radoniq, at Ekonomija Farm in Rznić/Irzniq and in Dašinovac/Dashinoc, and that the bullets were sent for examination to Višnjić. Having reviewed this part of Avramović's Rule 92*ter* statement and the attached annexes 16, 62, 64, 65, and 66, the Chamber was satisfied that the proposed evidence is relevant and has probative value as it is first hand and relates to important issues in the case. Therefore, the part of the Motion relating to this aspect of Avramović's proposed evidence was denied.

11. Even though Višnjić's report has been on the Prosecution's exhibit list for some time, and was disclosed to the Defence on 15 February 2006, it did not have the status of a proposed expert report within the meaning of the Rules. This changed on 28 June 2007 when the Prosecution filed its Notification. The addition of potential expert evidence is governed by Rule 94*bis* of the Rules. The specific procedure contained in that Rule must be followed when

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<sup>17</sup> Motion, paras 8-11.

<sup>18</sup> Response, paras 20-22.

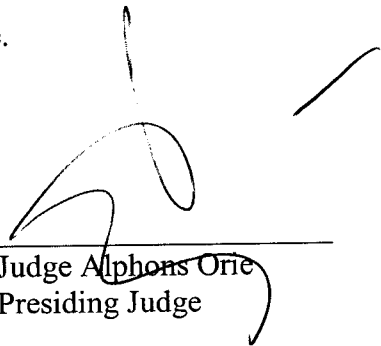
<sup>19</sup> Motion, paras 12-14.

<sup>20</sup> Response, para. 23.

proposing to add new expert evidence. A factual witness, such as Avramović, cannot be used as a vehicle for the admission of expert evidence within the meaning of the Rules. It is for this reason that the Chamber did not decide on the admission of Višnjić's report at the time of the testimony of Avramović.

12. The Chamber has considered the responses of the Defence for Mr Haradinaj and Mr Balaj to the Prosecution's application to add Višnjić to its witness list. The Chamber grants the request although, as noted recently in an oral decision, the Prosecution should from now on give detailed reasons for any further amendments to its witness list.<sup>21</sup> The Prosecution should also be mindful that the time it uses to establish Višnjić's credentials as an expert and to lead evidence from him in chief, whether as an expert or – should the Chamber decline to recognize him as an expert in the relevant sense – as a witness of fact, will be time already allocated to the Prosecution.

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



Judge Alphons Orie  
Presiding Judge

Dated this 28th day of August 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>21</sup> T. 7358-7360.