



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: 27 February 2012
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 27 February 2012

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
RECONSIDERATION OF MAJORITY DECISION DENYING
ADMISSION OF DOCUMENT RULE 65 *TER* NUMBER 03003
OR IN THE ALTERNATIVE CERTIFICATION OF THE
MAJORITY DECISION
WITH PARTLY DISSENTING OPINION OF JUDGE DELVOIE**

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 a “Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65*ter* Number 03003 or in the Alternative Certification of the Majority Decision” filed publicly by the Office of the Prosecutor (“Prosecution”) on 13 October 2011 (“Motion”) and hereby renders its decision.

I. PROCEDURAL BACKGROUND

1. On 27 June 2011 the Prosecution filed confidentially its “Prosecution Motion for Admission of Evidence pursuant to Rule 92*ter*”, seeking, *inter alia*, the admission into evidence of a handwritten diary allegedly belonging to Idriz Balaj (“Diary”) as an associated exhibit to the proposed written statement of Prosecution witness Mehmet Togonal. On 23 August 2011 the Chamber issued its “Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92*ter*” in which it deferred its decision on the admissibility of the Diary until hearing the evidence of Mehmet Togonal.¹ On 28 September 2011 the Chamber heard the evidence of Mehmet Togonal and after further submissions by the Parties,² by majority, Judge Delvoie dissenting, denied admission of the Diary.³ On 6 October 2011 the Chamber issued written reasons for the Majority Decision to deny admission of the document (“Impugned Decision”).⁴

2. The Prosecution filed the present Motion on 13 October 2011 requesting the Chamber to reconsider its Decision denying admission of the Diary or, in the alternative, to certify an interlocutory appeal against the Decision. On 27 October 2011 Haradinaj and Balaj filed public responses requesting the Chamber to refuse the Motion (“Haradinaj Response” and “Balaj Response”, respectively)⁵.

¹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92*ter*, issued confidentially on 23 August 2011, para. 47.

² *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1349-1351 (Balaj), 1351-1353 (Haradinaj), 1353-1356 (Prosecution).

³ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, T. 1356.

⁴ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Reasons for Decision Denying Admission of Document Rule 65*ter* Number 03003, issued publicly on 6 October 2011 (“Written Reasons”). For present purposes, the Chamber will refer to its oral decision of 28 September 2011 and the Written Reasons collectively as the “Decision” or “Impugned Decision”.

⁵ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Defence Response on Behalf of Ramush Haradinaj to the Prosecution’s Motion for Reconsideration of Majority Decision Denying Admission of Document 65*ter* Number 03003 or in the Alternative Certification of the Majority Decision, filed publicly on 27 October 2011 (“Haradinaj Response”); *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Idriz Balaj’s Opposition to Reconsideration of the Decision Denying Admission of Document 65*ter* 03003 or to Certification of that Decision for Interlocutory Appeal filed publicly on 27 October 2011 (“Balaj Response”).

II. SUBMISSIONS

3. The Prosecution submits that the reasons given by the Majority reflect a clear error of reasoning as, contrary to the Impugned Decision, there is sufficient evidence to conclude that the Diary is *prima facie* reliable and thus admissible under Rule 89(C) of the Rules of Procedure and Evidence (“Rules”). It is submitted in particular that by its incorrect reasoning that the Diary “must bear indicia of *ex facie* authenticity to be *prima facie* reliable,”⁶ the Majority placed undue emphasis on the document itself and failed to adequately consider the surrounding circumstances.⁷ In the Prosecution’s submission, while the question of whether an exhibit bears basic features indicative of *prima facie* authenticity may be relevant to determining the exhibit’s reliability, authenticity is not restricted to the authorship of a document, but relates to whether a document is what it professes to be in either origin or authorship.⁸

4. The Prosecution further submits that irrespective of whether Balaj is the author of the Diary, the totality of the circumstances demonstrates to a *prima facie* standard that the Diary is reliable because Balaj is the origin of its contents.⁹ In support of this submission the Prosecution argues that the Diary was found in Balaj’s bedroom on the same table as his KLA identification card, that it contains his name, place and date of birth, that the Diary’s contents are written from Balaj’s perspective, and that the author refers to himself as the commander of the “special unit” which is consistent with Balaj’s alleged role.¹⁰ The Prosecution submits that the Appeals Chamber has upheld a decision admitting evidence in similar circumstances, referring in particular to a decision of the Appeals Chamber in the case of *Prosecutor v Delalić et al.*¹¹

5. The Prosecution also refers to the contents of the Diary and submits that a number of passages of the Diary are consistent with evidence admitted by the Chamber.¹² Finally, it submits that the contents of the Diary in conjunction with other evidence are relevant to establishing the close association between the Accused, which is an issue in dispute in the present proceedings, and

⁶ Motion, paras 1, 4.

⁷ Motion, para. 4.

⁸ Motion, para. 4, citing *Prosecutor v Prlić*, case No. IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, filed publicly on 3 November 2009 (“*Prlić Appeal Decision of 3 November 2009*”), para 34.

⁹ Motion, para. 5.

¹⁰ Motion, para. 5.

¹¹ Motion, para. 6, citing *Prosecutor v Delalić et al.*, Case No. IT-96-21-AR73.2, 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, issued publicly on 4 March 1998.

¹² Motion, para. 7.

accordingly, unless reconsideration is granted, an injustice will result in that the Chamber will be deprived of important evidence, relevant and probative to issues in dispute.¹³

6. In support of its alternative request that the Chamber grant certification for interlocutory appeal, the Prosecution submits that the Decision significantly affects the fair and expeditious conduct of the proceedings or the outcome of the retrial and that the immediate resolution by the Appeals Chamber may materially advance the proceedings. In the Prosecution's submission, the Chamber applied incorrectly the *prima facie* standard in determining the Diary's admissibility, which raises an important issue as to the proper standard to be applied for admission of evidence pursuant to Rule 89(C) of the Rules.¹⁴ The Prosecution submits that a clear, coherent and correct application of the principles governing admissibility is necessary to avoid uncertainty and thus the Decision affects the fair and expeditious conduct of the proceedings.¹⁵ It is submitted further that the Chamber's Decision unfairly restricts the presentation of the Prosecution evidence by excluding important evidence on Balaj's role pertaining to matters in dispute.¹⁶ It is submitted that the Chamber will thus be deprived of evidence that will aid its analysis which may in turn affect the outcome of the retrial.¹⁷ The Prosecution further submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings as, in its submission, the formulation of the correct legal standard for admissibility determined by the Appeals Chamber at the earliest opportunity would allow for a more effective remedy of the issues involved in the Decision.¹⁸ It also submits that the issues involved in the Decision are more effectively remedied at this stage of the proceedings as if the Diary is not admitted the Chamber will be deprived of the opportunity to evaluate it together with the totality of evidence and that the Chamber is better placed to evaluate all the evidence than the Appeals Chamber, should it later find an error.¹⁹

7. Haradinaj submits that both Prosecution requests should be denied. He submits that the Prosecution has not established any basis for the Chamber to exercise its exceptional powers to reconsider its Decision. In his submission, the Prosecution has not shown that there was any clear error of logic or reasoning in the Decision. Haradinaj submits, in particular, that the fact that the information in the document may be consistent with other evidence is only one factor to be taken into account when determining whether the standard of *prima facie* reliability has been met.²⁰ In his submission, the Chamber has taken this factor into account together with all relevant factors,

¹³ Motion, para. 8.

¹⁴ Motion, para. 11.

¹⁵ Motion, paras 11, 12.

¹⁶ Motion, para. 13.

¹⁷ Motion, para. 13.

¹⁸ Motion, paras 14, 15.

¹⁹ Motion, para. 15.

including the lack of evidence about the handwriting in the book, the source of the information and the way the source and the author may have communicated.²¹ According to Haradinaj, the Prosecution is merely repeating the same arguments it presented in support of its motion to admit the Diary, in particular that the information in the document should be considered with other evidence admitted in the retrial and that the reliability of the document is established because “Balaj is the origin of its contents.”²² Haradinaj contends that the Motion does not take into account the case law which establishes that requests for reconsideration must not become a mechanism to redress the imperfections in the parties’ motions and submissions.²³ He further submits that the factual circumstances in the present case are in no way analogous to the Appeals Chamber decision in the *Delalić* case cited by the Prosecution as in that case the authors of the documents were known and the central issue was whether the chain of custody of the documents had been proven to establish their reliability and link to the accused.²⁴

8. In response to the Prosecution’s alternative request for certification, Haradinaj submits that the Prosecution has not identified any issue that would significantly affect the fair and expeditious conduct of the proceedings or outcome of the trial.²⁵ He submits that the Prosecution has not shown any error of law in the Decision and the fact that it disagrees with the Majority’s application of the legal principles to the specific factual circumstances does not raise any matter of general concern or importance for the rest of the trial.²⁶ In his submission, the Prosecution has also failed to satisfy the second requirement of Rule 73(B), as the Parties will have the opportunity to litigate the admissibility of each document when they are tendered in the retrial and consequently, its argument that an immediate resolution by the Appeals Chamber is required to prevent further litigation is misconceived.²⁷

9. Balaj opposes both requests in the Motion. In relation to the request for reconsideration, he submits, that the Prosecution’s argument that the Chamber committed a legal error in its reasoning that the Diary “must bear indicia of *ex facie* authenticity to be *prima facie* reliable” ignores the factual circumstances related to the specific document. In his submission, the Diary, on its face, was apparently written by more than one person as it reflects more than one styles of handwriting, none of which has been identified, and refers to Balaj in both the first and third person.²⁸ He further

²⁰ Haradinaj Response, para. 13, citing *Prosecutor v Ntahobali*, Case No. ICTR-98-42-T, Decision on Ntahobali’s Motion for Admission of Documents into evidence, 30 September 2008, para. 25.

²¹ Haradinaj Response, para. 13.

²² Haradinaj Response, paras 4, 11, 12, 13, 14.

²³ Haradinaj Response, para. 13.

²⁴ Haradinaj Response, para. 14.

²⁵ Haradinaj Response, para. 17.

²⁶ Haradinaj, Response, paras 17, 18.

²⁷ Haradinaj Response, para. 19.

²⁸ Balaj Response, paras 8, 9, 10.

submits that the Majority properly considered that the document, on its face, does not reflect the source of the information contained in it or how the source and the author communicated.²⁹ Further, according to Balaj, the Prosecution has presented no evidence that Balaj is the origin of the contents of this Diary as it submits.³⁰ In his submission, Mehmet Togonal, the witness through whom the Prosecution intended to tender the Diary, could give no evidence as to the contents of the Diary and the contents of the Diary itself involve incidents and meetings, which, if accepted as true, were known to individuals other than Balaj.³¹ Balaj further submits that the Prosecution's reliance on the Appeals Chamber decision in the *Delalić* case is entirely misplaced as that case involved the question of whether business records created in the daily course and scope of business, seized from a business linked to the accused were properly authenticated and whether their chain of custody was properly established.³²

10. Balaj further submits that the Prosecution's request for certification to appeal should be denied, as it is based on the incorrect assumption that the Majority applied an incorrect legal standard when it refused admission of the Diary. In particular, he submits that the Prosecution has failed to point to any cause to believe that there is any uncertainty as to what the legal standards for admissibility of evidence will be at the retrial. He also submits that a ruling from the Appeals Chamber on the issue would not materially advance the proceedings because it is not established that the Majority applied an incorrect legal standard.³³

III. APPLICABLE LAW

11. A Chamber has an "inherent" discretionary power to reconsider previous decisions.³⁴ In order to succeed in a request for reconsideration, an applicant "must satisfy the [Trial] Chamber of the existence of a clear error of reasoning in the [impugned decision], or of particular circumstances

²⁹ Balaj Response, para. 11.

³⁰ Balaj Response, paras 13, 14.

³¹ Balaj Response, paras 14, 15, 16, 17.

³² Balaj Response, paras 19-23.

³³ Balaj Response, paras 29-35.

³⁴ *Prosecutor v. Mucić et al*, Case No. IT-96-21A^{bis}, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić* Sentencing Appeal Judgement"), para. 49; *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004 ("*Galić* Decision of 16 July 2004"); *Prosecutor v. Popović et al*, Case No. IT-05-88-T, Decision of Defence motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92^{bis}, 19 October 2006 ("*Popović* Decision of 19 October 2006"); *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Prosecution Request for Reconsideration or in the Alternative Certification to Appeal the Decision of 22 December 2010 in Respect of Witness VS-037, 25 July 2011 ("*Šešelj* Decision of 25 July 2011"), para. 34; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Granting Prosecution Request for Partial Reconsideration of the Decision of 21 July 2011, 22 August 2011 ("*Stanišić and Župljanin* Decision of 22 August 2011"), para. 15.

justifying its reconsideration in order to avoid injustice”.³⁵ “Particular circumstances” may include new facts or new arguments that have arisen since the issuance of the previous decision.³⁶ However, an applicant must demonstrate how any new facts or arguments submitted in a request for reconsideration justify reconsideration.³⁷ The party seeking reconsideration bears the burden of showing that the Chamber clearly erred or that reconsideration is necessary in order to avoid injustice.³⁸ A Trial Chamber may refuse reconsideration in circumstances where, in submitting new information, the appellant patently failed to demonstrate that it was of such a nature as to constitute a new circumstance warranting the Trial Chamber’s reconsideration.³⁹

12. The principle of finality dictates that the power to reconsider previous decisions should be exercised sparingly.⁴⁰ Parties may not use requests for reconsideration as a “mechanism [...] to redress the imperfections contained in the parties’ motions or to challenge a decision of the Chamber and circumvent the rules of procedure governing certification to appeal decisions rendered by the Trial Chambers”.⁴¹ In response to a substantial increase in the number of requests for reconsideration, in *Prosecutor v. Prlić et al.*, Trial Chamber III placed restrictions on the parties’ right to file such motions.⁴² The restrictions included disallowing requests for reconsideration that resulted from the parties’ own errors.⁴³

13. Pursuant to Rule 73(B) of the Rules decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber. The effect of Rule 73(B) is to preclude

³⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 (“Prlić Appeal Decision of 3 November 2009”), para. 18; *Galić* Decision of 16 July 2004; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Decision on Appellant’s Motion for Reconsideration and Extension of Time Limits, 30 January 2007 (“Hadžihasanović Appeal Decision of 30 January 2007”), para. 9; *Mucić* Sentencing Appeal Judgement, para. 49; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Request for Reconsideration and Certification to Appeal the Decision for Admission of the Statement of Jadranko Prlić, 8 October 2007, para. 11; *Šešelj* Decision of 25 July 2011, para. 37; *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Decision on Defence Extremely Urgent Motion for Reconsideration of Decision dated 16 December 2003, 19 December 2003, p. 3.

³⁶ *Popović* Decision of 19 October 2006, p. 4; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Defence Motion for Reconsideration of Document Admitted *Proprio Motu*, 28 February 2011, para. 12; *Stanišić and Župljanin* Decision of 22 August 2011, para. 15; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002, para. 8; *Prlić* Appeal Decision of 3 November 2009, para. 18; *Galić* Decision of 16 July 2004, p. 2.

³⁷ *Prlić* Appeal Decision of 3 November 2009, para. 18; *Galić* Decision of 16 July 2004, p. 2; *Hadžihasanović* Appeal Decision of 30 January 2007, para. 9; *Prosecutor v. Milošević*, Case Nos IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, paras 4, 5.

³⁸ *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Vlastimir Đorđević’s Motion for Reconsideration or Certification to Appeal Regarding Proposed Expert Mr Aleksandar Pavić, 23 April 2010, para. 6.

³⁹ *Prlić* Appeal Decision of 3 November 2009, para. 19.

⁴⁰ *Semanza* Decision, para. 8.

⁴¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 2 April 2009 (“Prlić Decision of 2 April 2009”), p. 3.

⁴² *Prlić* Decision of 2 April 2009, p. 3.

⁴³ *Prlić* Decision of 2 April 2009, pp 3, 4.

certification unless the conditions set out in this Rule are satisfied, but, even where these conditions have been satisfied, certification remains in the discretion of the Trial Chamber.⁴⁴ Rule 73(B) requires that two criteria be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (a) the decision in question involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and (b) an immediate resolution of the issue by the Appeals Chamber may, in the opinion of the Trial Chamber, materially advance the proceedings. 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 one after the final judgement has been rendered.⁴⁵

IV. DISCUSSION

A. The Prosecution's request for reconsideration

14. The Prosecution submits that a clear error of reasoning exists as the Majority placed undue emphasis on the document itself and failed to adequately consider the surrounding circumstances, the totality of which, in its view, demonstrate the *prima facie* reliability of the Diary because Balaj is the origin of its contents. It submits that the Majority incorrectly reasoned that the Diary "must bear indicia of *ex facie* authenticity to be *prima facie* reliable" which demonstrates the "undue emphasis" which the Majority placed on the document itself.⁴⁶

15. The Majority recalls that in the Impugned Decision it specifically addressed the arguments the Prosecution advances in support of its assertion that Balaj is the origin of the Diary's contents, namely that the Diary contains his name, date and place of birth, that it was written from Balaj's perspective and that it was seized from Balaj's bedroom.⁴⁷ The Majority considered these factors together with factors weighing against admission, namely that the authorship of the Diary was not established, that it was uncertain what the source of information contained in the Diary was and in

⁴⁴ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-PT, Decision on Defence Motion for Certification, issued publicly on 22 April 2009 ("*Stanišić and Župljanin Decision*"), para. 11; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

⁴⁵ *Stanišić and Župljanin Decision*, para. 11; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005 para. 4; *Prosecutor v. Ivan Čermak and Mladen Markač*; *Prosecutor v. Ante Gotovina*, Case Nos. 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. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision, 14 June 2007, para. 4.

⁴⁶ Motion, para. 4

⁴⁷ Written Reasons, para. 9.

which way the author and the source communicated.⁴⁸ Contrary to the Prosecution's submission,⁴⁹ the Majority did not limit its consideration of the authenticity of the document to its authorship but it considered arguments relevant to establishing both its origin and authorship.⁵⁰ On balance, the Majority concluded that the document did not bear sufficient indicia of *ex facie* authenticity to meet the *prima facie* reliability standard.

16. This finding follows the Appeals Chamber jurisprudence that "whether a document bears basic features indicative of *prima facie* authenticity may, in the individual circumstances facing a Trial Chamber, be relevant to the underlying factor of *prima facie* reliability⁵¹ and is within the Trial Chamber's discretion pursuant to Rule 89(C).⁵² The Prosecution does not dispute that the factors considered by the Chamber are relevant to a determination of whether the document meets the *prima facie* reliability test but disagrees with the weight the Majority has given to some of these factors. In the view of the Majority, the Prosecution has not established a clear error in the Chamber's reasoning.

17. The Prosecution argues further that reconsideration is necessary to prevent an injustice, namely, that unless the Impugned Decision is reconsidered, the Chamber will be deprived of important evidence that is relevant and probative to issues in dispute. The Majority is not persuaded by this argument. It recalls that the Prosecution has presented no evidence to establish the author of the Diary and the source of the information contained in it. The Prosecution submits that matters within the Diary are consistent with the evidence admitted by the Chamber. However, as held by the Appeals Chamber "[c]orroboration is neither a condition nor a guarantee of reliability of a single piece of evidence."⁵³ In conclusion, the Majority is not satisfied that reconsideration of the Decision is necessary to prevent an injustice.

B. The Prosecution's request for certification

18. The Prosecution requests in the alternative that the Chamber grant the Prosecution certification to appeal the Decision. It argues, in relation to the first requirement of Rule 73(B), that the Chamber incorrectly applied the *prima facie* reliability standard for the purposes of the admission of the Diary which leads to uncertainty as to the proper standard of admissibility in the retrial and deprives the Chamber of important evidence. In relation to the second requirement of

⁴⁸ Written Reasons, para. 9.

⁴⁹ Motion, para. 4.

⁵⁰ Written Reasons, para. 9.

⁵¹ *Prlić* Appeal Decision of 3 November 2009, para. 34.

⁵² See *Prlić* Appeal Decision of 3 November 2009, para. 27.

⁵³ *Prosecutor v Limaj et al*, Case No. IT-03-66-A, Judgement, 27 September 2007, para. 203.

Rule 73(B) the Prosecution submits that a formulation of the correct legal standard for admissibility by the Appeals Chamber at this stage will materially advance the proceedings.

19. The Prosecution submits that the Decision raises an important issue as to the proper standard for admissibility of evidence pursuant to Rule 89(C) and argues that a clear, coherent and correct application of the principle governing the admissibility of evidence during the retrial is essential. While the Chamber agrees that a clear, coherent and correct application of the principles governing admissibility of evidence is essential for any trial, it is not persuaded that the Decision raises issues of lack of coherence or consistency in relation to admissibility of evidence in the present retrial. The Chamber has set out the legal standard for admissibility of evidence pursuant to Rule 89(C) at the pre-trial stage of the present proceedings⁵⁴ and has applied this standard consistently ever since.⁵⁵ The Prosecution makes no specific submissions related to lack of coherence and refers instead to the Chamber's alleged failure to apply the correct legal standard in its Decision. The Chamber recalls that a request for certification is not concerned with whether a decision was correctly reasoned or not, which is a matter for appeal, interlocutory or after the final judgement, but with whether the requirements of Rule 73(B) are satisfied.⁵⁶ The Chamber, therefore, is not persuaded that the arguments advanced by the Prosecution satisfy the first requirement of Rule 73(B).

20. As the Chamber must be satisfied that both requirements of Rule 73(B) are met before it exercises its discretion pursuant to the Rule, the Chamber will deny the Prosecution's request for certification.

V. DISPOSITION

For the foregoing reasons and pursuant to Rules 54, 73(B), and 89(C) of the Rules the Chamber

- (1) By Majority, Judge Delvoic dissenting, **DENIES** the Prosecution's request for reconsideration;
- (2) Unanimously, **DENIES** the Prosecution's request for certification.

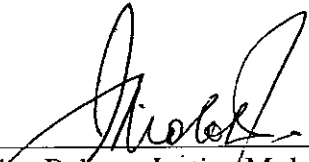
Judge Delvoic appends a partly dissenting opinion.

⁵⁴ *Prosecutor v Haradinaj et al*, Case No. IT-04-84bis-T, Decision on Prosecution's Motion for Admission of Transcripts of Evidence in Lieu of *Viva Voce* Evidence pursuant to Rule 92bis, 22 July 2011.

⁵⁵ *See Prosecutor v Haradinaj et al*, Case No. IT-04-84bis-T, Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule 92ter, 23 August 2011; *Prosecutor v Haradinaj et al*, Case No. IT-04-84bis-T, Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule 89(F), 5 September 2011.

⁵⁶ *See supra*, para. 10.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-seventh day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE DELVOIE

1. I respectfully disagree with the Majority's finding on the Prosecution request for reconsideration of the Majority Decision,¹ to which I had appended a dissenting opinion.² In my opinion, the Prosecution has demonstrated a "clear error of reasoning" in the Majority Decision meriting reconsideration of the decision to exclude the Diary from evidence under Rule 89(C).

2. I recall that the testimony of Mehmet Togonal sufficiently satisfied the Chamber as to the Diary having been found in Balaj's bedroom together with his KLA identification, and to its chain of custody since the seizure. The Chamber then looked at the Diary and other supporting evidence to further verify its *prima facie* reliability and relevance at the time of admission.

3. As stated in my previous dissenting opinion, the *prima facie* reliability of the Diary is borne out by the following facts: (i) the Diary was found in the bedroom of Balaj; (ii) it bears the name, date and place of birth of Balaj; (iii) the author refers to himself as the commander of the "special unit"; and (iii) a number of entries in the Diary can be verified against and are consistent with other evidence on the record.

4. While I am of the view that authenticity is not required to be established at this stage, I agree with the Majority that *ex facie* authenticity maybe considered when determining the *prima facie* reliability of tendered material. However, in my humble opinion, while finding that the Diary lacked *ex facie* authenticity, the Majority in fact applied a higher standard – one that amounts to proof beyond reasonable doubt – of the authenticity of the Diary rather than the one stated. Moreover, the question of authenticity is not restricted to the authorship of the Diary or source of the information contained therein, and most certainly not concerned with the "way of communication between the source and the author".

5. The Tribunal has in the past admitted diaries and handwritten notebooks of accused persons and applied varying tests for the verification of their authenticity. The standard applied by the Majority in rejecting the Diary is not consistent with the Tribunal's practice in general, where Trial Chambers have relied on supporting evidence such as the testimony of a handwriting expert³ or that of a close associate of the author,⁴ and considered the location of and authority responsible for the

¹ Decision on Prosecution Motion for Admission of Evidence pursuant to Rule 92ter, issued confidentially on 23 August 2011; Reasons for Decision Denying Admission of Document Rule 65ter Number 03003, issued publicly on 6 October 2011 ("Majority Decision").

² Majority Decision, p. 6.

³ *Prosecution v. Prlić et al.*, Case No. IT-04-74-T, Décision Portant Sur la Requête de L'accusation en Réouverture de sa Cause, 6 October 2010, paras 46-50.

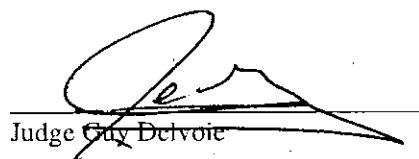
⁴ *Prosecution v. Stanišić & Župljanin*, Case No. IT-08-91-T, Order Requiring the Prosecution to Select the Relevant Portions of the Mladić Notebooks and to Provide English Translations thereof, 29 June 2010, p. 4; *Prosecution v.*

seizure of the material.⁵ It would appear that the Majority Decision places the Diary, a handwritten account of certain events purportedly by an accused in this case, in a special category somehow distinct from other documentary evidence which are based on unknown or hearsay sources of information (intelligence reports or news articles) or where the author is unknown or unestablished (intercepts, including those which allegedly contain the voice of one of the accused),⁶ but have nevertheless been admitted as evidence in the jurisprudence of this Tribunal.

6. Bearing in mind the potential probative value of the Diary, the Chamber ought to have considered allowing the Prosecution an opportunity, in the interests of justice, to address the inconsistencies in references to Balaj in both first and third person or in the apparently different handwritings through the presentation of further supporting evidence. I would have directed the Prosecution, pursuant to Rule 89(E), to present the evidence of a suitably qualified witness under Rule 94*bis* to clarify the issue of the seemingly different handwritings found in the Diary in order to assist the Chamber in arriving at a determinative position on the prospective probative value of the Book.

7. Accordingly, I am of the view that reconsideration of the Majority's Decision is merited in order to prevent an injustice that deprives the Prosecution and the Chamber of potentially important evidence, relevant and probative to issues in dispute in this case.

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



Judge Guy Delvoie

Dated this twenty-seventh day of February 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

Stanišić & Simatović, Case No. IT-03-69-T, Decision on Sixteenth Prosecution for Leave to Amend its Rule 65 *ter* Exhibit List With Confidential Annex (Mladić Notebooks) 7 October 2010, para. 13.

⁵ *Prosecution v. Stanišić & Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motion for Admission of Excerpts from Mladić Notebooks and Second Prosecution Notification of Excerpts from Mladić Notebooks, 10 March 2011, para. 12.

⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on admissibility of intercepted communications, 7 Dec 2007, para. 32; *Prosecution v. Stanišić & Župljanin*, Case No. IT-08-91-T, Decision denying the Stanišić Motion for exclusion of recorded intercepts, 16 December 2009, paras 18-19.