



**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: 21 December 2007
Original: English

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D25834-D25831
21 December 2007

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IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 21 December 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PROSECUTION'S REQUEST TO REOPEN ITS CASE TO HEAR
EVIDENCE OF SHEFQET KABASHI AND FOR A JUDICIAL REPRESENTATION
TO THE AUTHORITIES OF THE UNITED STATES OF AMERICA**

Office of the Prosecutor

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Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

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Counsel for Idriz Balaj

Mr Gregor Guy-Smith
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Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

1. The Trial Chamber is seized of a request by the Prosecution to reopen its case to hear the evidence of Mr Shefqet Kabashi.¹
2. On 5 June 2007, Mr Kabashi appeared before the Trial Chamber as a witness for the Prosecution in the *Haradinaj et al.* case. After making a solemn declaration pursuant to Rule 90 (A) of the Rules of Procedure and Evidence, Mr Kabashi refused to answer questions put to him by the Prosecution and the Trial Chamber relating to the substance of the case. For this reason, the Trial Chamber decided to prosecute Mr Kabashi for contempt, pursuant to Rule 77(D)(ii) of the Rules, summoning Mr Kabashi to appear before the Chamber on 7 June 2007.² Mr Kabashi failed to appear before the Trial Chamber on the set date, having returned to his place of residence in the United States of America.
3. On 20 November 2007, Mr Kabashi appeared before the Trial Chamber through a video-link as a witness in the *Haradinaj et al.* case, and again failed to answer questions on the substance of the case.³
4. On 23 November 2007, the Prosecution applied for an extension of its case in order to allow for further attempts to secure the testimony of Mr Kabashi at an unspecified date in the future.⁴ On 26 November 2007, the Trial Chamber denied this request.⁵ The Trial Chamber's decision was based on Mr Kabashi's continued unwillingness to testify.⁶ The Trial Chamber further considered that the Prosecution had exceeded the hours allotted to it and that the Prosecution's case was closed, but for the exceptional extension in order to hear the evidence of Witness 30.⁷ On 30 November 2007, the Prosecution submitted a request for certification to appeal this decision⁸. The Trial Chamber denied this request on 5 December 2007.⁹
5. On 17 December 2007, the Prosecution applied to reopen its case to hear the evidence of Mr Kabashi, should the Prosecution be able to secure his evidence before the filing of final

¹ Prosecution's Request to Reopen its Case to Hear the Evidence of Shefqet Kabashi and for a Judicial Representation to the Authorities of the United States, 17 December 2007 ("Request").

² Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007.

³ T. 10939-10941.

⁴ Prosecution's Motion to Extend the Prosecution Case to Secure the Testimony of Shefqet Kabashi, 23 November 2007.

⁵ T.10977.

⁶ T. 10977-10978.

⁷ T. 10978.

⁸ Prosecution's Request for Certification for Interlocutory Appeal of Trial Chambers Decision Re Shefqet Kabashi, 30 November 2007.

⁹ Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision concerning Shefqet Kabashi, 5 December 2007.

trial briefs on 14 January 2007.¹⁰ The Prosecution further requested that the Trial Chamber provide the authorities of the United States of America with a judicial representation stating that it would allow the Prosecution to reopen its case to hear Mr Kabashi's evidence.¹¹ The Prosecution submitted that Mr Kabashi may be willing to testify if he faces contempt of court proceedings in the United States of America.¹² In this respect, the Prosecution referred to the judicial proceedings against Mr Kabashi in the United States, in which a District Court Judge indicated that Mr Kabashi may be held in contempt of court in the United States, if the *Haradinaj et al.* case were reopened.¹³

6. In its Decision of 26 November 2007, the Trial Chamber rejected the Prosecution's request for an extension of the case since it was based on the mere expectation that further contact between Mr Kabashi and his counsel, during which Mr Kabashi would be further informed as to his legal position, would lead him to change his mind about not testifying. However, Mr Kabashi had reiterated on several occasions that he was not willing to testify. Therefore, the Trial Chamber could not find any change of circumstance that would warrant an extension of the case. Similarly, with regard to the current Request, it is clear that Mr Kabashi is still not willing to testify and has given the Prosecution no reason to believe that this situation will change. Despite this, the Prosecution argues that new circumstances do exist, these being that contempt proceedings against Mr Kabashi could be initiated in the United States of America.¹⁴ The Prosecution states that a District Court Judge has indicated that he would, if the *Haradinaj et al.* case is reopened, "in all likelihood, issue an order compelling Mr Kabashi to testify" and should he fail to do so, Mr Kabashi would be held in contempt.¹⁵ The Trial Chamber understands that the possible contempt would be civil in nature, rather than criminal, and that Mr Kabashi could therefore only be held in contempt for as long as the *Haradinaj et al.* case remained open in order to secure his compliance with an order compelling him to testify.¹⁶

7. Mr Kabashi was under an obligation to testify in the *Haradinaj et al.* case from the moment he was first called as a witness. He has repeatedly stated that he is unwilling to testify

¹⁰ Request, paras 1, 9.

¹¹ *Ibid.*, paras 1-10.

¹² *Ibid.*, para. 6.

¹³ *Ibid.*, para. 4.

¹⁴ *Ibid.*, para. 3.

¹⁵ *Ibid.*, para. 4.

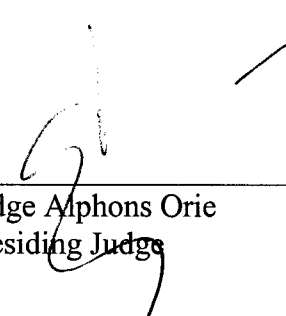
¹⁶ *Ibid.*, Confidential Annex A, p. 1-2. For the distinction between civil and criminal contempt in U.S. federal courts, see *Nabkey v. Hoffius*, 827 F. Supp. 450, 452 (S.D. Mich 1993); *U.S. v. Saccoccia*, 342 F. Supp. 2d 25,

and, according to the information available to the Trial Chamber, remains unwilling. Mr Kabashi is also charged with contempt of the Tribunal as a result of his refusal to testify on 5 June 2007, and contempt proceedings will be initiated upon his arrest and transfer to The Hague. The mere possibility of contempt proceedings before a national court does not constitute new circumstances of such a nature that it would warrant a reopening of the *Haradinaj et al.* case.

8. For the foregoing reasons, the Trial Chamber,

DENIES the Request.

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



Judge Alphons Orié
Presiding Judge

Dated this 21st day of December 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

30-31 (D.R.I. 2004); U.S. v. Marquado, 149 F.3d 36, 39-40, 43 (1st Cir. 1998); Goya Foods v. Wallack Management, 344 F.3d 16, 20-21 (1st Cir. 2003).