



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-PT

Date: 3 February 2011

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 3 February 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON APPLICATION ON BEHALF OF RAMUSH HARADINAJ
FOR CERTIFICATION PURSUANT TO RULE 73(B)**

Office of the Prosecutor

Mr. Paul Rogers

Counsel for the Defence:

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 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 “Application on Behalf of Ramush Haradinaj for Certification of Appeal pursuant to Rule 73(B)” filed on 18 January 2011 (“Motion”) and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 19 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj on certain counts and ordered a partial retrial.¹ On 15 September 2010 the Trial Chamber ordered that the Fourth Amended Indictment shall be the operative indictment in the partial retrial.² On 9 November 2010 the Prosecution filed “tracked” and “clean” versions of a Shortened Indictment corresponding to what was at issue in the partial retrial (“Indictment”).³
2. On 14 January 2011 the Trial Chamber issued “Decision on Shortened Form of the Fourth Amended Indictment” (“Impugned Decision”), in which it ordered revisions of the Indictment.⁴
3. In the Motion the Accused Ramush Haradinaj (“Accused”) has sought certification of certain parts of the Impugned Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”).⁵
4. On 26 January 2011 the Prosecution filed “Prosecution Response to Application on Behalf of Ramush Haradinaj for Certification of Appeal pursuant to Rule 73(B)” (“Response”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

5. The Accused requests certification to appeal the following findings in the Impugned Decision:

¹ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-A, Judgement, 19 July 2010 (“Appeal Judgement”), para. 377.

² Order regarding the Operative Indictment and Pleas, 15 September 2010.

³ Submission of New Version of the Revised Fourth Amended Indictment, 9 November 2010, Appendices A and B.

⁴ Impugned Decision, para. 42.

⁵ Motion, para. 1.

- (i) the order in paragraph 42(2)(b) of the Impugned Decision to replace paragraph 24 of the Indictment by paragraph 26 of the Fourth Amended Indictment;
- (ii) the denial in paragraph 42(4) of the Impugned Decision of the request of the Accused to strike out all allegations in the Indictment that concern incidents unrelated to Jablanica/Jabllanicë; and
- (iii) the rejection in paragraphs 41 and 42(4) of the Impugned Decision of the Accused's submission that the Trial Chamber should only hear the two witnesses who were the subject of appeal by the Prosecution.⁶

6. The Accused submits that these findings involve issues that must be resolved before the commencement of the partial retrial so that he is fairly on notice of the case that he has to meet and that a decision by the Appeals Chamber at this stage will allow the proceedings to start with absolute clarity as to the scope of the partial retrial as ordered by the Appeals Chamber.⁷

7. The Accused contends that the replacement of paragraph 24 of the Indictment by paragraph 26 of the Fourth Amended Indictment would require the Prosecution to seek to prove allegations that are plainly outside the order of the Appeals Chamber for the retrial of the Accused in relation to the six counts relating to Jablanica/Jabllanicë.⁸ On the grounds that the Appeals Chamber could not have envisaged a retrial on the Joint Criminal Enterprise ("JCE") as alleged in paragraph 26 of the Fourth Amended Indictment, the Accused requested that the Prosecution be ordered to revise or strike out all allegations that do not relate to Jablanica/Jabllanicë.⁹ The Accused submits that his challenges to the Indictment on the grounds that it does not correspond to what was ordered by the Appeals Chamber, directly affect the fair and expeditious conduct of the partial retrial.¹⁰

8. With regard to his submission that the Trial Chamber should only hear the two witnesses who were the subject of the appeal, the Accused contends that it is "fully ripe" for resolution before the start of the partial retrial.¹¹

B. Response

9. The Prosecution submits that the issues that the Accused seeks to appeal will not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the partial

⁶ *Ibid.*, paras. 3, 4.

⁷ *Ibid.*, para. 4. *See also Ibid.*, para. 9.

⁸ *Ibid.*, para. 6.

⁹ *Ibid.*, paras. 7-8.

¹⁰ *Ibid.*, para. 9.

¹¹ *Ibid.*, para. 10.

retrial and that he is on notice of the case that he needs to meet because the Impugned Decision does not broaden his alleged criminal responsibility beyond his participation in the crimes committed at Jablanica/Jabllanicë.¹²

10. In the submission of the Prosecution, certification should not be granted in relation to allegations which extend beyond Jablanica/Jabllanicë or the question whether the Prosecution should call any witnesses in addition to Shefqet Kabashi and the other witness during the partial retrial.¹³

11. The Prosecution contends that, to the extent that it delays the start of the partial retrial, an appeal of the Impugned Decision will not materially advance the proceedings in the partial retrial, but risks jeopardising the integrity of the proceedings by increasing the difficulty of securing the attendance of witnesses.¹⁴

III. APPLICABLE LAW

12. Pursuant to Rule 73(B), “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification 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 by the Appeals Chamber may materially advance the proceedings”.

13. Rule 73(B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that even where both requirements of Rule 73(B) are met certification remains in the discretion of the Trial Chamber.¹⁵ Certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not.¹⁶

¹² Response, para. 2 See also *Ibid.*, para. 3.

¹³ *Ibid.*, para. 5.

¹⁴ *Ibid.*, para. 6.

¹⁵ See, for example, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2; *Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 *bis* Decision, 14 June 2007 (“Decision of 14 June 2007”), para. 4. See also, Decision on Miletić’s Request for Certification of the Decision on Defence Objections to the Admission of the Expert Statement of General Rupert Smith, 15 April 2008 (“Decision of 15 April 2008”), p. 4.

¹⁶ See, for example, *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, 20 June 2005, para. 4; Decision of 15 April 2008, p. 4; Decision of 14 June 2007, para. 4.

IV. DISCUSSION

14. The findings of the Trial Chamber regarding the Indictment which the Accused alleges do not correspond to the order of the Appeals Chamber concern the revision of the scope of the JCE in paragraph 24 and the denial of the request of the Accused to strike out all allegations concerning incidents unrelated to Jablanica/Jabllanicë.¹⁷ Both affect in a major way the case against the Accused. In each of the Counts of the Indictment it is alleged that the Accused committed crimes as part of a JCE and the revision of paragraph 24 ordered by the Trial Chamber substantially alters the scope of the JCE. Moreover the denial of the request of the Accused to strike out all allegations concerning incidents unrelated to Jablanica/Jabllanicë implies the retention of extensive allegations of the participation by the Accused in the JCE. The Trial Chamber concludes that an erroneous interpretation of the order of the Appeals Chamber in these respects would significantly affect the fair and expeditious conduct of the proceedings.

15. The Impugned Decision found that the submissions on the admissibility of evidence were premature and do not concern the content of the Indictment.¹⁸ However, the Trial Chamber does not infer from this that the Impugned Decision does not involve such issues.¹⁹ The question whether the Trial Chamber should only hear Shefqet Kabashi and the other witness pertains to the scope of the order of the Appeals Chamber for a partial retrial which is the subject of the Impugned Decision. It is also subsumed in the broader issue of the evidence that is admissible pursuant to the order of the Appeals Chamber for a partial retrial, which is addressed in paragraph 41 of the Impugned Decision.

16. The question whether the Trial Chamber should only hear Shefqet Kabashi and the other witness affects fundamentally the nature and scope of the partial retrial. As such, it significantly affects the fair and expeditious conduct of the proceedings and the outcome of the partial retrial.

17. Any delay that may result from granting certification as requested by the Accused will be relatively minor by comparison with the delays that may arise through not resolving the issues he raises before the commencement of the partial retrial. Whilst the Trial Chamber acknowledges that witness intimidation remains a serious concern, delay resulting from granting certification will not risk jeopardising the integrity of the proceedings by increasing the difficulty of securing the attendance of witnesses, as alleged by the Prosecution.²⁰

¹⁷ Motion, paras. 5–9.

¹⁸ Impugned Decision, para. 41.

¹⁹ Cf. Response, para. 5.

²⁰ Response, para. 6.

18. The immediate resolution by the Appeals Chamber of each of the three issues raised by the Accused may materially advance the proceedings by dispelling uncertainty over an important aspect of the case against him.

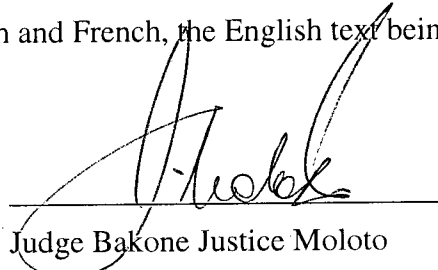
19. Accordingly, the criteria for certification set forth in Rule 73(B) have been met in relation to the three issues raised by the Accused.

V. DISPOSITION

20. For these reasons, pursuant to Rule 73(B), the Trial Chamber hereby **GRANTS** the Motion and **ORDERS** that certification be granted in respect of:

- (a) the order in paragraph 42(2)(b) of the Impugned Decision to replace paragraph 24 of the Indictment by paragraph 26 of the Fourth Amended Indictment; and
- (b) the denial in paragraph 42(4) of the Impugned Decision of the request of the Accused to strike out all allegations in the Indictment that concern incidents unrelated to Jablanica/Jabllanicë; and
- (c) the rejection in paragraphs 41 and 42(4) of the Impugned Decision of the submission that the Trial Chamber should only hear Shefqet Kabashi and the other witness in the partial retrial.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this third day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]