



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: 24 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: 24 February 2011

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON IDRIZ BALAJ'S APPLICATION PURSUANT TO RULE
73(B) FOR CERTIFICATION TO APPEAL THE TRIAL CHAMBER'S
DECISION OF 8 FEBRUARY 2011**

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 “Idriz Balaj’s Application Pursuant to Rule 73(B) for Certification to Appeal the Trial Chamber’s Decision of 8 February 2011” filed on 15 February 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 Fourth Amended Indictment corresponding to what was at issue in the partial retrial (“Shortened Indictment”).³
2. On 14 January 2011 the Trial Chamber issued “Decision on Shortened Form of the Fourth Amended Indictment” (“Decision on the Indictment”), in which it ordered revisions of the Shortened Indictment.⁴
3. On 18 January 2011 Haradinaj filed “Application on Behalf of Ramush Haradinaj for Certification of Appeal Pursuant to Rule 73(B)” (“Haradinaj’s Motion for Certification”) seeking certification in respect of, *inter alia*, the order in the Decision on the Indictment that paragraph 24 of the Shortened Indictment be replaced by paragraph 26 of the Fourth Amended Indictment (“Decision Impugned by Haradinaj”).⁵ On 3 February 2011 the Trial Chamber issued “Decision on Application on Behalf of Ramush Haradinaj for Certification pursuant to Rule 73(B)” (“Haradinaj Certification Decision”) in which certification was granted.
4. On 21 January 2011 the Prosecution filed “Submission of Revised Fourth Amended Indictment” in which it submitted “tracked” and “clean” versions of the revised Shortened

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 Decision on the Indictment, para. 42.

⁵ Haradinaj’s Motion for Certification, paras. 3, 4.

Indictment (“Revised Shortened Indictment”),⁶ which it submitted were in compliance with the Decision on the Indictment.

5. On 26 January 2011 Balaj filed “Idriz Balaj’s Request for Clarification of the Decision of 14 January 2011 Regarding Paragraph 24 of the Revised Shortened Indictment and for Order to the Prosecution to Amend the New Version of the Revised Shortened Indictment” (“Balaj’s Motion for Clarification”).

6. On 8 February 2011 the Trial Chamber issued “Decision on Idriz Balaj’s Request for Clarification of the Decision Regarding Paragraph 24 of the Revised Shortened Indictment” (“Impugned Decision”) in which it denied Balaj’s Motion for Clarification.

7. On 15 February 2011 Brahimaj filed “Lahi Brahimaj’s Joinder in Idriz Balaj’s Application Pursuant to Rule 73(B) of the Rules for Certification to Appeal the Trial Chamber’s Decision of 8 February 2011” (“Joinder”) in which he joins in the arguments and authorities submitted in the Motion.

8. On 18 February 2011 the Prosecution indicated that it did not intend to file a Response.⁷

II. SUBMISSIONS OF THE PARTIES

9. Balaj seeks certification to appeal the Trial Chamber’s denial of the request for clarification of the Decision on the Indictment, and request for an Order for the Prosecution to redact specific portions of paragraph 24 of the Revised Shortened Indictment.⁸

10. Balaj submits that paragraph 24 of the Revised Shortened Indictment appears to place him at risk of re-prosecution for crimes for which he has been finally acquitted⁹ and that clarification of the nature and scope of the allegations and/or charges in the indictment is fundamental to the fair and expeditious conduct of the partial retrial as well as his right to fair notice of the precise charges he must prepare for at the partial retrial.¹⁰ He further submits that an immediate resolution and clarification of this issue by the Appeals Chamber will materially advance the trial proceedings.¹¹

⁶ Submission of Revised Fourth Amended Indictment, 21 January 2011, Annexes A and B.

⁷ Email communication of 18 February 2011.

⁸ Motion, paras. 1, 13-15.

⁹ *Ibid.*, para. 23.

¹⁰ *Ibid.*, para. 24.

¹¹ *Ibid.*, para. 30.

11. In the Joinder, Brahimaj submits that the interests of justice are manifestly served by granting him permission to join in the arguments and authorities submitted in the Motion.¹²

III. APPLICABLE LAW

12. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”), “[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.¹³ Certification pursuant to Rule 73(B) is not concerned with whether a decision was correctly reasoned or not.¹⁴

IV. DISCUSSION

14. The Impugned Decision with regard to paragraph 24 of the Revised Shortened Indictment involves an issue that significantly affects the case against Balaj. In each of the Counts of the Indictment it is alleged that Balaj committed crimes as part of a joint criminal enterprise (“JCE”) and the revision of paragraph 24 sought by Balaj would substantially alter the scope of the JCE. The Trial Chamber concludes that the question whether to make the revision sought by Balaj would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.

15. While the Motion and Haradinaj’s Motion for Certification in effect seek the same content for the second and third sentences of paragraph 24 of the Revised Shortened Indictment, they differ

¹² Joinder, para. 15.

¹³ 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.

¹⁴ 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.

in regard to the first sentence, which purports to delineate the common criminal purpose.¹⁵ The denial of the Motion would prevent Balaj from making submissions to the effect that the JCE should have a fundamentally different ambit from that sought by Haradinaj. The Trial Chamber finds that the validity of the denial of Balaj's request for a revision of paragraph 24 of the Revised Shortened Indictment is an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

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

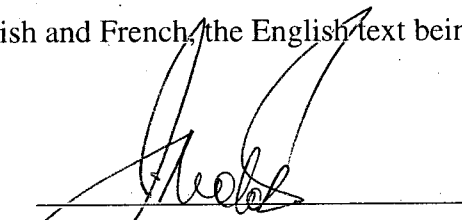
V. DISPOSITION

17. For these reasons, pursuant to Rule 73(B), the Trial Chamber hereby

(1) **GRANTS** Brahimaj permission to join in the arguments and authorities submitted in the Motion; and

(2) **GRANTS** the Motion and **ORDERS** that certification be granted in respect of the Trial Chamber's denial of the requests for clarification of the Decision on the Indictment, and an Order for the Prosecution to redact specific portions of paragraph 24 of the Revised Shortened Indictment.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twenty-fourth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Motion, para. 14; Haradinaj's Motion for Certification, para. 3.