



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: 14 December 2010

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision: 14 December 2010

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**CONSOLIDATED DECISION ON THE DEFENCE MOTIONS FOR
EXTENSION OF TIME AND RAMUSH HARADINAJ'S MOTION
REGARDING THE DETERMINATION OF THE SCOPE OF THE
PARTIAL RETRIAL**

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 Request for Additional Time in which to File his Pre-trial Brief” filed on 7 December 2010 (“Balaj’s Motion Seeking Extension of Time”),¹ “Motion on Behalf of Ramush Haradinaj for Extension of Time Limit to File Defence Pre-Trial Brief”, filed confidentially on 8 December 2010 (“Haradinaj’s Motion Seeking Extension of Time”) and “Lahi Brahimaj’s Application for Extension of Time to File Pre-Trial Brief”, filed on 8 December 2010 (“Brahimaj’s Motion Seeking Extension of Time”) (collectively “Defence Motions Seeking Extension of Time”); and “Motion on Behalf of Ramush Haradinaj for Determination of Scope of Retrial”, filed confidentially on 8 December 2010 (“Haradinaj’s Motion on Determination of Scope”).

A. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber held that the failure of the Trial Chamber to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution’s requests to secure the testimony of Kabashi and another witness resulted in a miscarriage of justice.² It, therefore, quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj on certain counts of the Indictment and ordered a partial retrial.³
2. At the Status Conference held on 23 September 2010 the Pre-Trial Judge ordered the Prosecution to file by 30 November 2010 its Pre-Trial Brief and its lists of witnesses and exhibits pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence (“Rules”)⁴ and ordered the Defence to file its pre-trial brief by 14 December 2010.⁵
3. In “Submission of New Version of the Revised Fourth Amended Indictment”, filed on 9 November 2010, the Prosecution submitted “tracked” and “clean” versions of the Fourth Amended Indictment which, in its submission, corresponded to what is at issue in the partial retrial (“shortened Indictment”).

¹ Balaj’s Motion Seeking Extension of Time was filed publicly on 7 December 2010. On 8 December 2010 Balaj filed “Notification and Request to Change the Status of Idriz Balaj’s Request for Additional Time in which to File his Pre-trial Brief”, in which he requested the Registry to redesignate his Motion as confidential.

² Appeal Judgement, paras. 37, 49.

³ *Ibid.*, para. 377.

⁴ Status Conference, T. 6 (23 September 2010).

⁵ *Ibid.*, T. 23–24 (23 September 2010).

4. On 23 November 2010 Ramush Haradinaj filed the “Submission on Behalf of Ramush Haradinaj on the new Version of the Indictment for the Partial Retrial”; Idriz Balaj filed “Idriz Balaj’s Motion Challenging the new Version of the revised Fourth Amended Indictment”; and Lahi Brahimaj filed “Response to Prosecution Indictment Motion on behalf of Lahi Brahimaj” (collectively “Defence Submissions on the shortened Indictment”). On 7 December 2010 the Prosecution filed the “Prosecution Consolidated Response to the Defence Submissions on the New Version of the Revised Fourth Amended Indictment”.

5. In the “Decision on Motion for Extension of Time to File the Pre-Trial Brief, the Exhibit List and the Witness List” issued on 29 November 2010, the Trial Chamber extended the time within which the Prosecution was to file its Pre-Trial Brief and its lists of witnesses and exhibits pursuant to Rule 65 *ter* to 3 December 2010. On this date the Prosecution filed “Prosecution’s Submission Pursuant to Rule 65 *ter* (E)”, which contained the Pre-Trial Brief, the 65 *ter* Witness List and the 65 *ter* Exhibit List.

6. On 10 December 2010 the Prosecution filed confidentially “Prosecution Consolidated Response to the Defence Motions for Extension of Time and to Haradinaj’s Motion for Determination of Scope of Re-Trial” (“Consolidated Response”).

7. On 13 December 2010 Balaj filed confidentially “Idriz Balaj’s Request for Permission to Reply and Reply to Prosecution’s Consolidated Response to Defence Motions for Extension of Time to File the Defence Pre-Trial Briefs” (“Balaj’s Reply”) and Haradinaj filed confidentially “Reply on Behalf of Ramush Haradinaj to Prosecution Consolidated Response to Defence Motions for Extension of Time and to Haradinaj’s Motion for Determination of Scope of Retrial” (“Haradinaj’s Reply”).

B. SUBMISSIONS

1. Defence Motions Seeking Extension of Time

8. Balaj submits that he cannot file his Pre-Trial Brief by 14 December 2010 on the grounds that challenges to the substance of the shortened Indictment are still pending⁶ and that he has recently been disclosed incomplete information about witnesses that the Prosecution intends to call.⁷ In his submission, challenges or other objections to an indictment must be resolved before a

⁶ Balaj’s Motion Seeking Extension of Time, paras. 8–9.

⁷ *Ibid.*, paras. 10–14.

Prosecution Pre-Trial Brief can reliably set forth the nature and parameters of the charges and before the defence can file an informed and reasoned response.⁸ Balaj requests that the present date for the filing of his Pre-Trial Brief be vacated and that a new date be set after the challenges to the shortened Indictment have been resolved.⁹

9. Haradinaj submits that the following reasons necessitate an extension of the time limit for filing the Pre-Trial Brief:

- (a) Neither the form of the Indictment nor the permissible scope of the partial retrial has yet been settled;¹⁰
- (b) On 3 December 2010 the Prosecution for the first time identified six “new” witnesses it intends to call at the partial retrial;¹¹
- (c) He objects to this evidence on a number of grounds and these objections can only be determined in light of a proper interpretation of the order of the Appeals Chamber;¹²
- (d) He is unable to investigate the new evidence so as to be in a position to present his defence in the Pre-Trial Brief by 14 December 2010;¹³ and
- (e) He needs time to deal with the report of an expert the Prosecution indicated on 3 December 2010 that it would be calling for the first time.¹⁴

10. Haradinaj requests that the date for filing his Pre-Trial Brief be postponed and replaced by an order that it be filed within 14 days of the determination by the Trial Chamber of the form of the Indictment and the permissible scope of the partial retrial¹⁵ and in any event not before 14 January 2011.¹⁶

11. Brahimaj submits that he is deprived of substantial and significant portions of new evidence that the Prosecution seeks to proffer in the partial retrial.¹⁷ He submits that the issues raised in the “Response to Prosecution Indictment Motion on behalf of Lahi Brahimaj” should be resolved in advance of the deadline for the submission of his Pre-Trial Brief. He requests that the date currently

⁸ *Ibid.*, para. 9.

⁹ *Ibid.*, para. 15.

¹⁰ Haradinaj’s Motion Seeking Extension of Time, para. 2(i).

¹¹ *Ibid.*, para. 2(ii).

¹² *Ibid.*, para. 2(iii). *See Ibid.*, para. 8.

¹³ *Ibid.*, para. 2(iv). *See Ibid.*, paras. 13, 17.

¹⁴ *Ibid.*, para. 2(v).

¹⁵ This is requested in Haradinaj’s Motion on Determination of Scope.

¹⁶ Haradinaj’s Motion Seeking Extension of Time, paras. 12, 20.

¹⁷ Brahimaj’s Motion Seeking Extension of Time, paras. 4–5.

set for filing his Pre-Trial Brief be vacated and a new date be set after the challenges to the shortened Indictment have been resolved.¹⁸

2. Prosecution Response to Defence Motions Seeking Extension of Time

12. The Prosecution submits that the Accused have failed to show good cause to extend the time for filing the Pre-Trial Briefs beyond the three extra days that were granted to the Prosecution.¹⁹ In its submission, the possibility of amending indictments to include new charges during trial shows that challenges to an indictment are not a bar to filing Defence Pre-Trial Briefs.²⁰ The Prosecution argues that to the extent that the Accused take issue with matters in the Prosecution Pre-Trial Brief, they can indicate this in their Pre-Trial Briefs and, if any of these challenges to the shortened Indictment is successful, the Trial Chamber may order the parties to supplement their Pre-Trial Briefs as appropriate.²¹

13. With regard to specific points made in the Defence Motions Seeking Extension of Time, the Prosecution submits:

(a) The Accused were provided with the identity and unredacted statements of two of the six witnesses who were previously unknown to the Accused and the application by the Prosecution for delayed disclosure of the identity of the other four is not a bar to filing the Defence Pre-Trial Briefs;²²

(b) The Accused have been given material pursuant to rules 65 *ter* (ii)(b) and 65 *ter* (ii)(c) for these four witnesses;²³

(c) As to the Haradinaj's argument concerning the Prosecution expert witness, Rule 94*bis* does not require that the opposing party file its notice before or at the same time as its Pre-Trial Brief.²⁴

3. Balaj's Reply

14. Balaj requests permission to file a Reply.²⁵ He submits that where a new charge is added to the indictment, the rules anticipate and allow challenges to such amendments and postponement of

¹⁸ Brahimaj's Motion Seeking Extension of Time, para. 9.

¹⁹ Consolidated Response, para. 1.

²⁰ *Ibid.*, para. 4.

²¹ *Ibid.*, para. 4.

²² *Ibid.*, para. 5.

²³ *Ibid.*, para. 5.

²⁴ *Ibid.*, para. 5.

²⁵ Balaj's Reply, para. 17.

trial if necessary²⁶ and that the Prosecution has not argued convincingly that Pre-Trial Briefs should be filed now rather than after challenges to the Indictment are resolved.²⁷ He submits that until challenges to the shortened Indictment are resolved, he is not in a position to file a Pre-Trial Brief as it is not yet resolved whether the allegations regarding the Joint Criminal Enterprise in the shortened Indictment will be permitted or not.²⁸ He opposes the argument that if his challenges are upheld the parties can revise their Pre-Trial Briefs, on the grounds that there is no logical reason for adopting that procedure rather than resolving the pending issues in an orderly, chronological fashion, avoiding the risk of wasting time and resources.²⁹

4. Haradinaj's Motion on Determination of Scope

15. Haradinaj submits that on 3 December 2010 the Prosecution for the first time identified six new witnesses it intends to call at the partial retrial, while disclosing incomplete information about them³⁰ and that the Prosecution Pre-Trial Brief covers evidence that is outside the scope of the partial retrial.³¹ In Haradinaj's submission, the Trial Chamber must determine the admissibility of the evidence of the new witnesses before the commencement of the partial retrial and before he is required to file his Pre-Trial Brief.³²

16. Haradinaj requests that the Trial Chamber urgently direct that:

- (a) The parties file written submissions on the scope of the partial retrial, the admissibility of new evidence in respect of the Jablanica/Jabllanicë counts, and the admissibility of evidence about alleged incidents falling outside of the Jablanica/Jabllanicë counts by 17 December 2010, or by a date to be determined;
- (b) A preliminary hearing be convened to hear the parties on this matter;
- (c) The time limit for filing the Accused's Pre-trial Brief be extended until a date 14 days after the Trial Chamber has ruled on this matter;
- (d) Alternatively, in the event that the Trial Chamber does not make these orders, the date for filing the Accused's Pre-trial Brief be extended until at least 14 January 2011; and

²⁶ *Ibid.*, para. 11.

²⁷ *Ibid.*, para. 12.

²⁸ *Ibid.*, para. 14.

²⁹ *Ibid.*, paras. 15–16.

³⁰ Haradinaj's Motion on Determination of Scope, para. 2.

³¹ *Ibid.*, para. 3.

³² *Ibid.*, para. 5.

(e) The Defence be permitted to make submissions on the trial date before it is fixed to take account of the time required fairly and effectively to prepare the defence for the partial retrial.³³

5. Response to Haradinaj's Motion on Determination of Scope in Consolidated Response

17. The Prosecution considers Haradinaj's request for submissions on the scope of the partial retrial and the admissibility of evidence to be premature.³⁴ The Prosecution submits that if Haradinaj disagrees with the position of the Prosecution that the witnesses in the partial retrial do not need to be restricted to Shefqet Kabashi and the other witness referred to by the Appeals Chamber, he should file a challenge.³⁵ It submits that the only reason put forward by Haradinaj for determining the scope of the partial retrial before he submits his Pre-Trial Brief is the need to conduct investigations regarding the new witnesses and that there is no requirement for these investigations to be completed before his Pre-Trial Brief is filed.³⁶ The Prosecution further submits that the determination of the admissibility of evidence is normally a matter for trial and in any event should not be decided before the filing of the Defence Pre-Trial Briefs.³⁷

6. Haradinaj's Reply

18. Haradinaj requests leave to reply³⁸ and requests that the Trial Chamber reject the Consolidated Response and make the orders sought in Haradinaj's Motion Seeking Extension of Time and Haradinaj's Motion on Determination of Scope.³⁹ Haradinaj submits that the procedural decisions in *Prosecutor v. Muvunyi* at the International Criminal Tribunal for Rwanda directly support his request for a determination of the scope of the partial retrial before its commencement⁴⁰ and that the procedure in this case also supports his request that the scope of the partial retrial be determined before the proceedings in his case are to progress further in any orderly or proper manner.⁴¹

³³ *Ibid.*, para. 20.

³⁴ Consolidated Response, paras. 8–12.

³⁵ *Ibid.*, para. 9.

³⁶ *Ibid.*, para. 10.

³⁷ *Ibid.*, para. 12.

³⁸ Haradinaj's Reply, para. 1.

³⁹ *Ibid.*, para. 8.

⁴⁰ *Ibid.*, para. 2.

⁴¹ *Ibid.*, para. 4.

C. DISCUSSION

19. In the Defence Submissions on the shortened Indictment each of the Accused challenges the manner in which the Joint Criminal Enterprise is pleaded.⁴² In addition, Brahimaj challenges the inclusion of charges 3 and 5 against him.⁴³ In the “Prosecution Consolidated Response to the Defence Submissions on the New Version of the Revised Fourth Amended Indictment” the Prosecution opposes these submissions. The issues raised have not been decided upon by the Trial Chamber. If the Trial Chamber were to accept the submissions of the Accused, significant revisions of the shortened Indictment might be called for.

1. Requests for an Extension of Time to File Pre-Trial Briefs

20. The scope of the trial in the instant case is unique in that it has been circumscribed specifically and in some detail by a Judgement of the Appeals Chamber. Moreover, there are substantive disagreements between the parties as to the scope of the partial retrial that was ordered in that Judgement. Under these circumstances, the Trial Chamber considers that in order to maintain the efficiency of the proceedings and the clarity of the issues, there should be an authoritative determination of the version of the Fourth Amended Indictment that corresponds to what is at issue in the partial retrial before the Defence is obliged to decide upon its case. This determination may require a revision of the Prosecution Pre-Trial Brief⁴⁴ as well as of the shortened Indictment. The Trial Chamber concludes that the Accused should not yet be obliged to file their Pre-Trial Briefs and should only be obliged to do so pursuant to a new order to be issued by the Trial Chamber no earlier than its decision on the Defence Submissions on the shortened Indictment.

2. Haradinaj’s Request Regarding Determination of the Scope of the Partial Retrial

21. The Trial Chamber agrees with the Prosecution submission that the determination of the admissibility of evidence is normally a matter for trial and does not need to be decided before the filing of the Defence Pre-Trial Briefs.⁴⁵ There is no rule of procedure which requires that the question of the admissibility of the evidence of witnesses proposed by the Prosecution be resolved before the Accused file their Pre-Trial Briefs. Also, until the Trial Chamber has decided upon the Defence Submissions on the shortened Indictment, the precise scope of the Prosecution case and,

⁴² Submission on Behalf of Ramush Haradinaj on the new Version of the Indictment for the Partial Retrial, 23 November 2010, paras. 4–17; Idriz Balaj’s Motion Challenging the new Version of the revised Fourth Amended Indictment, 23 November 2010, paras. 12–29; Response to Prosecution Indictment Motion on behalf of Lahi Brahimaj, 23 November 2010, paras. 43–63.

⁴³ Response to Prosecution Indictment Motion on behalf of Lahi Brahimaj, 23 November 2010, paras. 14–39.

⁴⁴ Cf. *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, Decision on Accused’s Preliminary Motion Pursuant to Rule 72(A)(ii), 10 February 2010, paras. 17, 18.

⁴⁵ Consolidated Response, para. 12.

therefore, the identity of the witnesses that it may call remain uncertain. The Defence Submissions on the shortened Indictment concern the scope of the indictment and, accordingly, the scope of the partial retrial. Therefore, further submissions on the scope of the partial retrial, to the extent that they do not concern the admissibility of evidence, are not necessary at the present stage in the proceedings.

22. For the foregoing reasons the Trial Chamber does not accept Haradinaj's submission that the time limit for filing his Pre-Trial Brief should be extended until a date 14 days after it has ruled on admissibility of the evidence of witnesses that he identifies and the scope of the partial retrial nor does it accept that a preliminary hearing to hear the parties on the matter would be appropriate at this stage.⁴⁶ Equally, the Trial Chamber considers that the Accused may mount challenges in due course to the admissibility of the evidence of witnesses proposed by the Prosecution.

23. The Trial Chamber accepts Haradinaj's request that he be permitted to make submissions on the trial date before it is fixed.⁴⁷

D. DISPOSITION

24. For the foregoing reasons and pursuant to Rules 54, 65*ter*, 126*bis* and 127 the Trial Chamber:

GRANTS Balaj and Haradinaj leave to reply;

GRANTS IN PART the Defence Motions Seeking Extension of Time in that it:

- (a) **REVOKES** the order for the Accused to file their Pre-Trial Briefs by 14 December 2010;
- (b) **DECIDES** that it shall issue an order regarding the timing of the filing of the Defence Pre-Trial Briefs no earlier than its decision on the Defence Submissions on the shortened Indictment; and
- (c) **DENIES** the Defence Motions Seeking Extension of Time in all other respects; and

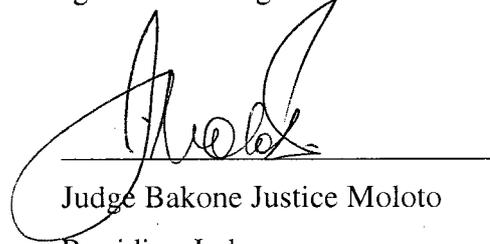
GRANTS IN PART Haradinaj's Motion on Determination of Scope in that it:

⁴⁶ Haradinaj's Motion on Determination of Scope, para. 20(iii).

⁴⁷ *Ibid.*, para. 20(v).

- (a) **ORDERS** that the Accused may make submissions on the trial date before it is fixed; and
- (b) **DENIES** Haradinaj's Motion on Determination of Scope in all other respects.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fourteenth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]