

IT-01-47-PT  
D 5326 - D 5323  
25 JULY 2003

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**UNITED  
NATIONS**



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-01-47-PT  
Date: 25 July 2003  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Wolfgang Schomburg, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Carmel Agius

**Registrar:** Mr. Hans Holthuis

**Order of:** 25 July 2003

**PROSECUTOR**

v.

**ENVER HADŽIHASANOVIĆ  
AMIR KUBURA**

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**DECISION ON "JOINT DEFENCE REQUEST FOR  
CERTIFICATION OF THE 'DECISION ON MOTION FOR  
LEAVE TO AMEND THE AMENDED INDICTMENT' DATED  
18 JUNE 2003"**

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**The Office of the Prosecutor:**

Mr. Ekkehard Withopf

**Counsel for the Accused:**

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović  
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

**TRIAL CHAMBER II** 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”),

**BEING SEIZED** of the “Joint Defence Request for Certification of the ‘Decision on Motion for Leave to Amend the Amended Indictment’ Dated 18 June 2003”, filed jointly by the defence for Enver Hadžihasanović and Amir Kubura (“Joint Defence”) on 26 June 2003 (“Joint Request”), whereby the Joint Defence requests the Trial Chamber to certify its “Decision on Motion for Leave to Amend the Amended Indictment”, dated 18 June 2003 (“Impugned Decision”), with a view to allowing the matter to be raised before the Appeals Chamber by way of an interlocutory appeal pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”),

**NOTING** the “Motion for Leave to Amend the Amended Indictment”, filed by the Office of the Prosecutor (“Prosecution”) on 25 March 2003 (“Prosecution Motion”), and the “Prosecution’s Corrigenda to Motion for Leave to Amend the Amended Indictment”, filed on 31 March 2003,

**NOTING** that the Prosecution Motion aims at the amendment of the Amended Indictment in various aspects, including (i) the pleading of “an international armed conflict as the alternative to the presently pleaded unclassified armed conflict”; and (ii) the charging of “the Accused Amir Kubura with responsibility under Article 7 (3) of the Statute of the Tribunal, for the alleged Miletići crimes already alleged against the Accused Enver Hadžihasanović”,

**NOTING** the “Defence Response to Prosecution Motion for Leave to Amend the Amended Indictment and Request for Stay of Proceedings”, filed by the defence for Enver Hadžihasanović (“Hadžihasanović Defence”) on 25 April 2003, in which it requested, *inter alia*, an immediate stay of proceedings on the basis of the abuse of process doctrine,

**NOTING** the “Prosecution Response and Reply to ‘Defence Response to Amend the Amended Indictment and Requested Stay of Proceedings’ and Reply to ‘Response of Amir Kubura to Prosecution Motion for Leave to Amend the Amended Indictment’”, filed on 12 May 2003, in which the Prosecution argued, *inter alia*, that the allegations of Prosecution misconduct are baseless, that the Hadžihasanović Defence has not demonstrated why the Trial Chamber should not exercise its jurisdiction to hear the case, and that the request for stay of proceedings is without merit and frivolous,

**NOTING** the “Defence ‘Motion Seeking Leave to Reply’ and ‘Reply’ to ‘Prosecution Response and Reply to Defence Response to Amend the Amended Indictment and Requested Stay of Proceedings’”, filed on 14 May 2003, in which the Hadžihasanović Defence argues that, *inter alia*,

the Prosecution's improprieties clearly amount to an abuse of the Tribunal's process and warrant a stay of proceedings, as they undermine the integrity of the proceedings,

**NOTING** the "Defence Motion Seeking Leave to Reply and the Defence Reply to 'Prosecution Response and Reply to 'Defence Response to Amend the Amended Indictment and Requested Stay of Proceedings' and Reply to 'Response of Amir Kubura to Prosecution Motion for Leave to Amend the Amended Indictment'", filed by the defence for Amir Kubura ("Kubura Defence") on 14 May 2003, in which the Kubura Defence supports the request for stay of proceedings of the Hadžihasanović Defence,

**NOTING** that pursuant to Rule 73 (B) of the Rules, the Impugned Decision is without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Impugned 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,

**CONSIDERING** that the Joint Request was based on (i) the alleged applicability of the abuse of process doctrine to proceedings before the Tribunal; (ii) the alleged interference of the Prosecution in the administration of justice and the alleged consequences thereof on the integrity of proceedings before the Tribunal and judicial independence; (iii) the allegedly unreasonable delay caused by the alleged improprieties of the Prosecution removing *proprio motu* the principal allegation of international armed conflict and attempting to reinsert this allegation some 14 months later; and (iv) the allegedly resulting prejudice to Enver Hadžihasanović and Amir Kubura,

**CONSIDERING** that in the Joint Request, the Joint Defence submits, *inter alia*, that (i) it is essential for the Trial Chamber to pronounce on these issues in dismissing the request for stay of proceedings, if only to determine whether the Prosecution's request did constitute an infringement on judicial independence; and (ii) that the integrity of the proceedings before the Tribunal demands that the Appeals Chamber be given an opportunity to assess whether the concerns of the Joint Defence with respect to the above issues were legitimate,

**CONSIDERING FURTHER** that in the Joint Request, the Joint Defence asserts that the Impugned Decision involves issues which could significantly affect the outcome of the trial, and for which an immediate resolution by the Appeals Chamber – before trial – is necessary,

**CONSIDERING** that in the Impugned Decision, the Trial Chamber considered that, *inter alia*, "although the request to grant leave to amend the Amended Indictment on this issue prior to a

decision by the Appeals Chamber on the interlocutory appeal is an inappropriate one, nothing in this request would justify a stay of proceedings, as requested by the Defence for the accused Enver Hadžihasanović”, and dismissed the request for stay of proceedings,

**CONSIDERING FURTHER**

- (i) that it is not the purpose of Rule 73 (B) of the Rules to give the Appeals Chamber the opportunity to assess whether concerns of one or more of the parties with respect to an issue involved in the impugned decision were “legitimate”; and
- (ii) that the standard that has to be met pursuant to Rule 73 (B) of the Rules is not whether an immediate resolution by the Appeals Chamber of an issue involved in the impugned decision is “necessary”,

but rather that, in the opinion of the Trial Chamber, an immediate resolution of an issue involved in the impugned decision may materially advance the proceedings,

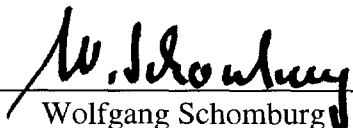
**CONSIDERING** that the Trial Chamber is of the opinion that an immediate resolution of an issue involved in the Impugned Decision by the Appeals Chamber may not materially advance the proceedings, irrespective of the Appeals Chamber either granting or dismissing the request for stay of proceedings, or referring the issue back to the Trial Chamber for reconsideration,

**FOR THE FOREGOING REASONS**

**PURSUANT TO** Rules 54 and 73 (B) of the Rules,

**DENIES** the Joint Request.

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

  
Wolfgang Schomburg  
Presiding

Dated this twenty-fifth day of July 2003,  
At The Hague  
The Netherlands

[Seal of the Tribunal]