



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: 30 September
2003
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. Hans Holthuis

Decision of: 30 September 2003

PROSECUTOR

v

**ENVER HADŽIHASANOVIĆ
AMIR KUBURA**

**DECISION ON THE 'APPLICATION OF AMIR KUBURA FOR
CERTIFICATION OF THE TRIAL CHAMBER'S DECISION
ON FORM OF INDICTMENT OF 17 SEPTEMBER 2003'**

The Office of the Prosecutor:

Mr Ekkehard Withopf
Mr David Re

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 (“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”),

BEING SEISED OF the “Application of Amir Kubura for Certification of the Trial Chamber’s Decision on Form of Indictment of 17 September 2003”, (“Application”), filed on 23 September 2003,

NOTING the Trial Chamber’s “Decision on Form of Indictment”, filed on 17 September 2003, wherein the Trial Chamber, *inter alia*, granted leave pursuant to Rule 50 of the Rules of Procedure and Evidence (“Rules”) to the Prosecution to amend the Indictment by charging the Accused Kubura (“Accused”) with responsibility under Article 7(3) for the crimes allegedly committed in Miletići,

CONSIDERING that in the Application the Accused, pursuant to Rule 72(B) of the Rules, requests the Trial Chamber to grant certification to appeal the Decision, in particular in relation to the question whether the test for adding new charges adopted by the Trial Chamber is correct and whether the Trial Chamber erred in finding that the Prosecution’s evidence is sufficient to support the new charges,

CONSIDERING that Rule 72(B) of the Rules reads that the decisions on preliminary motions are without appeal save in [...] cases where certification has been granted 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,

CONSIDERING that there is no evidence that the Prosecution is randomly seeking amendments,

CONSIDERING that the test is not, as argued by Defence, that there may be prejudice for the Accused,

REITERATING, as set out in the Decision, that the question as to when the material was in possession of the Prosecution is not a relevant issue, but that the fundamental question in relation to

granting leave to amend an indictment is rather whether the amendment will prejudice the accused *unfairly*,¹

REITERATING the Trial Chamber's opinion that in the present case there is no suggestion that this amendment causes an unfair prejudice to the Accused, as the Accused has been given an adequate time to prepare himself a defence to the newly added charges,

CONSIDERING that the Defence's argument that the exercise of the Trial Chamber's discretion to assess whether there is sufficient evidentiary basis for new charges should be refuted by the Appeals Chamber, is an untenable one,

CONSIDERING that such a decision is comparable to a decision on the confirmation of an indictment, for which there lies no right to appeal,

REITERATING the Trial Chamber's view that the supporting material submitted by the Prosecutor provides a sufficient basis to support the new charges, which allows the Defence to meet the case,²

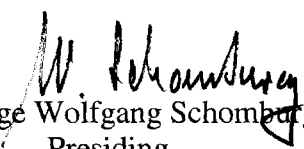
CONSIDERING that, in any event, whether the Prosecutor succeeds in proving its case with respect to these allegations is a matter for trial,

CONSIDERING that the Accused in his Application, has not raised an issue in respect of the Decision that meet the requirements set out in Rule 72(B) of the Rules,

HEREBY DENIES the Application for certification.

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

Dated this thirtieth day of September 2003,
At The Hague
The Netherlands


Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]

¹ *Brdanin and Talić* Decision on Form of Further Amended Indictment, para. 50; *Prosecutor v Naletilić and Martinović*, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, Case IT-98-34-PT, 14 February 2001, pp 4-7.

² See, *inter alia*, *Prosecutor v. Mrkšić*, Decision of Form of the Indictment, Case No. IT-95-13/1-PT, 19 June 2003, paras 22-24