

IT-04-84-R77.1
D244-D241
18 FEBRUARY 2008

244 AT



**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-04-84-R77.1
Date: 18 February 2008
Original: English

IN TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle**

Registrar: Mr Hans Holthuis

Decision of: 18 February 2008

**IN THE CONTEMPT CASE OF
SHEFQET KABASHI**

PUBLIC

DECISION GRANTING LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor

Mr Serge Brammertz
Mr David Re

1. On 5 June 2007, Mr Shefqet Kabashi appeared before the Chamber as a witness for the Prosecution in the *Haradinaj et al.* case. After making a solemn declaration pursuant to Rule 90(A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), Mr Kabashi refused to answer questions relating to the substance of the case put to him by the Prosecution and the Chamber. For this reason, the Chamber subsequently decided to prosecute Mr Kabashi with contempt, pursuant to Rule 77(D)(ii) of the Rules, summoning Mr Kabashi to appear before the Chamber on 7 June 2007.¹ Mr Kabashi failed to appear before the Chamber on the set date, having returned to his place of residence. On 7 June 2007, the Chamber issued a warrant for the arrest of Mr Kabashi.² On 20 November 2007, Mr Kabashi appeared before the Chamber by video-link as a witness in the *Haradinaj et al.* case, but again failed to answer questions put to him on the substance of the case.³

2. On 11 December 2007, the Chamber referred the case to the Prosecutor to further investigate and prosecute the matter.⁴ The Chamber also directed the Prosecutor to investigate Mr Kabashi's behavior from 5 June 2007 onwards, since it had reason to believe that Mr Kabashi had committed contempt on 20 November 2007.⁵ The Chamber informed the Prosecutor that it could view the Order in Lieu of Indictment as a confirmed indictment and that it could use its full powers under the Rules to amend or withdraw it as it deemed appropriate.⁶

3. On 13 December 2007, the Prosecution submitted an indictment against Shefqet Kabashi.⁷ The Prosecution requested the Chamber to i) confirm the new indictment; ii) issue a warrant for Mr Kabashi's arrest, detention and transfer to the Tribunal; and iii) make the indictment public upon confirmation.⁸ On 19 December 2007, the Prosecution filed an addendum to its Submission.⁹ In the Addendum the Prosecution explained that its Submission was in substance a request for leave to amend the Order in Lieu of Indictment.¹⁰

¹ Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007 ("Order in Lieu of Indictment").

² Warrant of Arrest and Order for the Surrender of Shefqet Kabashi, 7 June 2007.

³ T. 10939-10941.

⁴ Decision to Refer the Case to the Prosecution, 11 December 2007 ("Referral Decision"), para. 7.

⁵ *Ibid.*, para. 7.

⁶ *Ibid.*, para. 6.

⁷ Prosecution's Submission of an Indictment Against Shefqet Kabashi, 13 December 2007 ("Submission"), Annex A

⁸ Submission, para. 11.

⁹ Prosecution's Addendum to 13 December 2007 Motion Concerning Indictment of Shefqet Kabashi, 19 December 2007 ("Addendum").

¹⁰ *Ibid.*, paras 3, 11.

4. Rule 50 of the Rules governs the amendment of an indictment and reads, in relevant part:

- (A) (i) The Prosecutor may amend an indictment:
- (a) at any time before its confirmation, without leave;
 - (b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
 - (c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
- (ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
- (iii) Further confirmation is not required where an indictment is amended by leave.

5. The Order in Lieu of Indictment constitutes a confirmed indictment.¹¹ Besides editorial changes, the Prosecution seeks to make one substantive change to the Order in Lieu of Indictment. Count 2 of the proposed amendment is a new charge. It concerns the alleged contempt committed by Mr Kabashi on 20 November 2007. The Order in Lieu of Indictment did not encompass this behaviour.

6. Mr Kabashi is still at large and has not been transferred to the seat of the Tribunal. Under these specific circumstances, the Chamber agrees with the Prosecution that Rule 50(A)(i)(b) is the most appropriate procedure and Mr Kabashi need not be heard on the proposed amendments.

7. Under Rule 50 of the Rules, a Chamber has wide discretion to grant leave to amend an indictment.¹² Such leave will normally be granted where (i) the proposed amendment will facilitate the determination of the issues in the case,¹³ (ii) the proposed amendment is supported by material meeting the *prima facie* standard,¹⁴ and (iii) the proposed amendment does not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole.¹⁵

¹¹ Referral Decision, para. 6.

¹² *Prosecutor v. Popović et al.*, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“Popović Decision”), para. 8; *Prosecutor v. Haradinaj et al.*, Decision on Motion to Amend the Amended Indictment, 12 January 2007 (“Haradinaj Decision”), para. 12.

¹³ *Prosecutor v. Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 50; Haradinaj Decision, para. 12.

¹⁴ Popović Decision, para. 8; Haradinaj Decision, para. 12.

¹⁵ *Prosecutor v. Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 22; Popović Decision, para. 8.

8. The Trial Chamber has examined the proposed amendments and considers that they do facilitate the determination of the issues in this case by putting the initial contempt charges in a broader context. Furthermore, extension of the existing indictment is preferable to the Prosecution submitting a new indictment consisting only of the charge relating to the events on 20 November 2007. The Trial Chamber has also examined the supporting material submitted by the Prosecution and finds that it establishes a *prima facie* case for the proposed amendments. Since Mr Kabashi is still at large and his trial has not started, amending the indictment will not deprive Mr Kabashi of an adequate opportunity to prepare his defence or cause undue delay. Mr Kabashi will be in a position to enter a plea on each count upon his transfer to the Tribunal. In conclusion, the Trial Chamber finds that the requirements of Rule 50 of the Rules have been met.

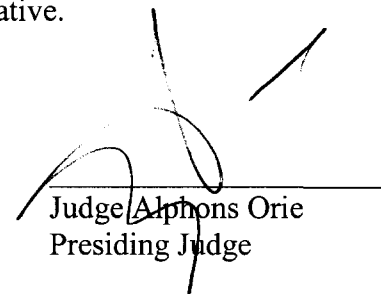
9. Therefore, pursuant to Rules 50 and 52 of the Rules:

GRANTS leave to amend the indictment;

ORDERS the Prosecution to make the amended indictment public;

The Amended Indictment shall henceforth be the operative indictment in this case.

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



Judge Alphons Orie
Presiding Judge

Dated this 18th day of February 2008
At The Hague
The Netherlands

[Seal of the Tribunal]