

IT-04-84-R77.1
D385-D377
16 September 2011

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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-04-84-R77.1
Date: 16 September 2011
Original: English

IN A TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge O-Gon Kwon
Judge Howard Morrison

Registrar: Mr John Hocking

Judgement of: 16 September 2011

PROSECUTOR

v.

SHEFQET KABASHI

PUBLIC

SENTENCING JUDGEMENT

Office of the Prosecutor

Ms Joanna Korner

Counsel for Shefqet Kabashi

Mr Michael Karnavas

I. Procedural History, Relevant Facts and Guilty Plea

1. On 5 June 2007, Mr Shefqet Kabashi appeared before Trial Chamber I as a witness for the Prosecution in the *Haradinaj et al.* case. Before appearing, Mr Kabashi had requested that his existing protective measures be varied.¹ This request was granted and Mr Kabashi accordingly appeared without identity protection and in open session.² After making a solemn declaration pursuant to Rule 90 (A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), Mr Kabashi refused to testify.³ Mr Kabashi explained that he was neither psychologically nor morally capable to give testimony.⁴ For this refusal, the *Haradinaj et al.* Trial Chamber decided to prosecute Mr Kabashi with contempt of the Tribunal pursuant to Rule 77 (D) (ii) of the Rules and summoned him to appear on 7 June 2007 ("Order in Lieu of Indictment").⁵ On 7 June 2007, Mr Kabashi failed to appear before the Chamber, having returned to his place of residence in the United States of America. On the same day, the Chamber issued a warrant for Mr Kabashi's arrest.⁶

2. On 20 November 2007, Mr Kabashi appeared before the *Haradinaj et al.* Trial Chamber by video-conference link as a witness in the *Haradinaj et al.* case. On that day, Mr Kabashi failed to testify and answer questions put to him.⁷

3. On 11 December 2007, the Chamber referred the case to the Prosecution to further investigate and prosecute the matter.⁸ It also directed the Prosecution to investigate Mr Kabashi's behaviour from 5 June 2007 onwards, since it had reason to believe that Mr Kabashi had committed contempt on 20 November 2007.⁹ The Chamber informed the Prosecution that it could view the Order in Lieu of Indictment as a

¹ *Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-T, T. 5406-5407 (5 June 2007).

² *Prosecutor v. Fatmir Limaj, Haradin Bala, and Isak Musliu*, Case no. IT-03-66-A, Decision on Prosecution's Motion for Variance of Protective Measures, 30 May 2007 ("Limaj Decision"), p. 2; *Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-T, T. 5406-5407, 5441-5442 (5 June 2007). Mr Kabashi did not appear entirely without protective measures as the Limaj Decision left some limited protective measures intact, see Limaj Decision, p. 2.

³ *Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-T, T. 5441-5443, 5445-5448 (5 June 2007).

⁴ *Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-T, T. 5441 (5 June 2007).

⁵ Order in Lieu of Indictment on Contempt Concerning Shefqet Kabashi, 5 June 2007.

⁶ Warrant of Arrest and Order for the Surrender of Shefqet Kabashi, 7 June 2007. On 18 October 2007, the Chamber, in accordance with Rules 77 (E) and 63 of the Rules, conducted a video-conference link interview with Mr Kabashi in his contempt case. During this interview, the Chamber gave Mr Kabashi an opportunity to explain his reasons for refusing to testify in the *Haradinaj et al.* case. Mr Kabashi explained that he had been physically and morally unable to answer the questions based in part on the fact that he was deeply frustrated with the Prosecution's selective approach to bringing justice.

⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-T, T. 10939-10941 (20 November 2007).

⁸ Decision to Refer the Case to the Prosecution, 11 December 2007 ("Referral Decision"), para. 7.

confirmed indictment and that it could use its full powers under the Rules to amend or withdraw it as it deemed appropriate.¹⁰

4. On 13 December 2007, the Prosecution submitted an indictment against Mr Kabashi (“Submission”).¹¹ 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.¹² On 19 December 2007, the Prosecution filed an addendum to its Submission (“Addendum”).¹³ In the Addendum, the Prosecution explained that its Submission was in substance a request for leave to amend the Order in Lieu of Indictment.¹⁴ On 18 February 2008, the Chamber granted the Prosecution leave to amend the Indictment.¹⁵

5. On 16 April 2008, the Presiding Judge, considering that Judge Höpfel’s mandate as an *ad litem* judge at the Tribunal had expired with the rendering of the Judgement in the *Haradinaj et al.* case on 3 April 2008, recomposed the bench in this case as follows: Judge Alphons Orié, Judge Ole Bjørn Støle, and Judge Bakone Justice Moloto.¹⁶ On 5 March 2010, the Presiding Judge recomposed the bench as follows: Judge Alphons Orié, Judge Bakone Justice Moloto, and Judge Guy Delvoie.¹⁷

6. On 17 August 2011, Mr Kabashi, having travelled from the United States of America, was arrested in the Netherlands and on 18 August 2011 he was transferred to the United Nations Detention Unit. On 19 August 2011, the Presiding Judge held the Initial Appearance.¹⁸ At the Initial Appearance, Mr Kabashi decided to defer his plea to the Indictment and a Further Appearance was scheduled for 26 August 2011.¹⁹

7. At the Further Appearance, Mr Kabashi pleaded guilty to both counts in the Indictment.²⁰ The Presiding Judge informed Mr Kabashi that the Chamber would consider whether the requirements of Rule 62 *bis* of the Rules for a guilty plea had been

⁹ Ibid.

¹⁰ Referral Decision, para. 6.

¹¹ Prosecution’s Submission of an Indictment Against Shefqet Kabashi, 13 December 2007, Annex A.

¹² Submission, para. 11.

¹³ Prosecution’s Addendum to 13 December 2007 Motion Concerning Indictment of Shefqet Kabashi, 19 December 2007.

¹⁴ Addendum, paras 3, 11.

¹⁵ Decision Granting Leave to Amend the Indictment, 18 February 2008.

¹⁶ Order Composing a Chamber, 16 April 2008.

¹⁷ Order Re-composing a Chamber, 5 March 2010.

¹⁸ T. 43-56 (19 August 2011).

¹⁹ T. 46, 49, 56 (19 August 2011).

²⁰ T. 58-59 (26 August 2011).

met and that a hearing for this purpose had been scheduled on the same day.²¹ At this hearing, Judges Moloto and Delvoie withdrew from the case pursuant to Rule 15 (A) of the Rules.²² At the Further Appearance earlier that day, Judge Orié had given a statement explaining why he did not feel the need to withdraw from the case.²³

8. On 29 August 2011, the Acting President of the Tribunal composed the following bench for the case: Judge Alphons Orié, Judge O-Gon Kwon, and Judge Howard Morrison.²⁴

9. On 31 August 2011, the Chamber accepted Mr Kabashi's plea, noting *inter alia* that the parties agreed that the factual basis underlying the charges against Mr Kabashi was to be found in the transcripts of 5 June 2007 and 20 November 2007 in the *Haradinaj et al.* case and entered a finding of guilt for contumaciously refusing or failing to answer questions as a witness.²⁵ On the same day, the Chamber heard the parties' submissions on sentencing. The Prosecution asked for a custodial sentence reflecting the gravity of the crime, while the Defence requested an immediate release of Mr Kabashi, who had spent two weeks in detention at that time.²⁶ The Chamber then adjourned until 16 September 2011 for the pronouncement of the Judgement.²⁷

II. Applicable Law

10. Rule 77 (G) of the Rules provides that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

III. Sentencing Discussion

11. The Defence submitted that in contempt cases, deterrence, and not retribution, should be the most important purpose for sentencing.²⁸ The case law of the Tribunal

²¹ T. 59 (26 August 2011).

²² T. 68-69 (26 August 2011).

²³ T. 62-64 (26 August 2011).

²⁴ Order Replacing Judges in a Case Before a Trial Chamber, 29 August 2011.

²⁵ T. 75-76, 87-95 (31 August 2011).

²⁶ T. 93-94, 96 (31 August 2011).

²⁷ T. 111 (31 August 2011).

²⁸ T. 99 (31 August 2011).

indicates that the two primary purposes of sentencing are retribution and deterrence.²⁹ As a form of retribution, the sentence expresses society's condemnation of the criminal act and of the person who committed it.³⁰ To fulfil the objective of retribution, the Chamber must therefore impose a sentence which properly reflects the personal culpability of the wrongdoer.³¹ The Chamber considers that this purpose is reflected in the obligation that the Chamber has to take into account the gravity of the offences and the totality of the culpable conduct.³² Both special and general deterrence are important purposes of sentencing in criminal law.³³ The *rationale* of special deterrence is to dissuade the wrongdoer from recidivism in the future, whereas general deterrence aims at discouraging others from committing similar crimes.³⁴ The Chamber considers that Mr Kabashi may still be (re-)called as a witness in the *Haradinaj et al.* re-trial or any other case. In light of that, the Chamber considers that special deterrence is still a valid factor in the present case. As far as general deterrence is concerned, persons who believe themselves to be beyond the reach of the International Tribunal must be warned that they have to abide by its orders or face prosecution and, if convicted, sanctions.³⁵ The Chamber considers that an appropriate sentence for Mr Kabashi in this case essentially contributes to achieving a general deterrent effect. Rehabilitation is also considered to be a relevant, though less important, purpose of sentencing.³⁶

12. The Chamber has paid specific attention to the gravity of the offence and the totality of the culpable conduct and the individual circumstances of the convicted person, including mitigating circumstances, when determining the appropriate sentence.³⁷

13. The Chamber first considers the gravity of the crime committed by Mr Kabashi and the totality of his culpable conduct. On two occasions in 2007, Mr Kabashi

²⁹ *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806; *Stakić* Appeal Judgement, para. 402; *Krajišnik* Appeal Judgement, paras 775, 803.

³⁰ *Jokić* Trial Sentencing Judgement, para. 31; *Mrđa* Sentencing Judgement, para. 14; *Milutinović et al.* Trial Judgement, volume 3, para. 1145.

³¹ *Kordić and Čerkez* Appeal Judgement, para. 1075.

³² See *Haradinaj et al.* Trial Judgement, para. 485.

³³ *Kordić and Čerkez* Appeal Judgement, para. 1076.

³⁴ *Kordić and Čerkez* Appeal Judgement, paras 1077-1078; *Dragan Nikolić* Appeal Sentencing Judgement, para. 45; *Krajišnik* Appeal Judgement, paras 776, 805.

³⁵ Cf. *Kordić and Čerkez* Appeal Judgement, para. 1078.

³⁶ *Čelebići* Appeal Judgement, para. 806; *Kordić and Čerkez* Appeal Judgement, para. 1079; *Stakić* Appeal Judgement, para. 402; *Hadžihasanović and Kubura* Appeal Judgement, paras 325, 328; *Krajišnik* Appeal Judgement, para. 806.

contumaciously refused or failed to answer questions as a witness in the *Haradinaj et al.* case. In doing so, Mr Kabashi deprived the *Haradinaj et al.* Trial Chamber of evidence relevant for an effective ascertainment of truth in the adjudication of that case. The Chamber considers the Defence's sentencing submissions offering explanations for Mr Kabashi's reasons for not answering questions as a witness. The Defence submitted that Mr Kabashi was deeply disappointed and frustrated that his expectations in relation to investigations into and prosecution of crimes such as the "Dubrava prison massacre" were not met.³⁸ Although it contended that Mr Kabashi had expressed repeatedly that he was not afraid for his own safety, it pointed out that when asked in the *Haradinaj et al.* re-trial whether he was afraid for his family's safety he responded "I don't know".³⁹ The Defence submitted that witness intimidation coupled with Mr Kabashi's distrust in the effectiveness of the Tribunal's system of protective measures may have contributed to his refusal or failure to answer questions.⁴⁰ The Defence also stated that Mr Kabashi's war experience considerably contributed to his feeling of inability to answer questions in the courtroom.⁴¹ Despite these submissions, the Chamber finds that any additional motives Mr Kabashi may have had for refusing or failing to answer questions remain vague. As a result, the Chamber finds that any such additional motives, while not affecting Mr Kabashi's criminal responsibility for contempt of the Tribunal, also cannot be considered in determining the appropriate sentence.

14. In relation to mitigating circumstances, the Chamber admitted into evidence two reports describing Mr Kabashi's medical situation.⁴² Exhibit D1, a report by the United Nations Detention Unit, concludes that as a result of Mr Kabashi's previous three-year-long imprisonment, which, as submitted, included him being tortured, he suffers from Post-Traumatic Stress Disorder. Exhibit D2, a compilation of medical records from the past two years, further indicates that Mr Kabashi suffered from an anxiety disorder. The Chamber considers in particular that Mr Kabashi's medical disorders seem to worsen in a detention environment, due to his previous detention experiences. The Chamber

³⁷ See generally *Čelebići* Appeal Judgement, para. 429; *Blaškić* Appeal Judgement, para. 679; *Hadžihasanović and Kubura* Appeal Judgement, para. 301; *Martić* Appeal Judgement, para. 325; *Krajišnik* Appeal Judgement, para. 733; *Dragomir Milošević* Appeal Judgement, para. 296.

³⁸ T. 100-101 (31 August 2011).

³⁹ T. 81 (31 August 2011).

⁴⁰ T. 100 (31 August 2011).

⁴¹ T. 101-102 (31 August 2011).

⁴² Exhibits D1 and D2.

accepts that Mr Kabashi suffers from medical disorders and gives this due weight in the determination of the sentence to be imposed.

15. The Defence further submitted that Mr Kabashi is a man of character and recounted an incident where Mr Kabashi, having been given an execution order as a member of the Kosovo Liberation Army, warned the target about the execution and told the individual to leave.⁴³ The Chamber considers that it is not in a position to assess Mr Kabashi's character on the basis of one un-documented example of his past conduct. Accordingly, the Chamber considers the above as a neutral factor in the determination of the sentence to be imposed.

16. Furthermore, the Defence submitted that Mr Kabashi's family situation, in particular the fact that he has a four-week-old son, should be considered in mitigation.⁴⁴ The Chamber gives due weight to Mr Kabashi's family situation in mitigation.

17. Finally, the Chamber considers whether Mr Kabashi showed any signs of remorse for his conduct. He addressed the Chamber on 31 August 2011, offering a genuine apology for his crime.⁴⁵ Furthermore, he pleaded guilty to the charges against him, thus showing acceptance of the criminality of his conduct. However, the Chamber considers that Mr Kabashi's remorse is reduced in its mitigating weight by the fact that he failed to appear in The Hague to face his charges for more than four years.

⁴³ T. 101 (31 August 2011).

⁴⁴ T. 97, 103 (31 August 2011).

⁴⁵ T. 109 (31 August 2011).

IV. Disposition

18. For the foregoing reasons, the Chamber, having found Shefqet Kabashi **GUILTY** on two counts of Contempt of the Tribunal pursuant to Rule 77 (A) of the Rules, hereby **SENTENCES** Shefqet Kabashi to a single sentence of **two** months of imprisonment.

19. Shefqet Kabashi has been detained since 17 August 2011. Pursuant to Rule 101 (C) of the Rules, he is entitled to credit for the time spent in detention, which as of the date of this judgement amounts to 31 days.

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

Dated this Sixteenth of September 2011
At The Hague,
The Netherlands



Judge O-Gon Kwon

Judge Alphons Orie
Presiding

Judge Howard Morrison

[Seal of the Tribunal]

Annex: Table of cases* with abbreviations

* ICTY cases

<i>Aleksovski</i>	Appeal Judgement: <i>Prosecutor v. Zlatko Aleksovski</i> , Judgement, 24 March 2000
<i>Blaškić</i>	Appeal Judgement: <i>Prosecutor v. Tihomir Blaškić</i> , Judgement, 29 July 2004
<i>Čelebići</i>	Appeal Judgement: <i>Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo</i> , Judgement, 20 February 2001
<i>Hadžihasanović and Kubura</i>	Appeal Judgement: <i>Prosecutor v. Enver Hadžihasanović and Amir Kubura</i> , Judgement, 22 April 2008
<i>Haradinaj et al.</i>	Trial Judgement: <i>Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj</i> , Judgement, 3 April 2008
<i>Jokić</i>	Trial Sentencing Judgement, <i>Prosecutor v. Miodrag Jokić</i> , Judgement, 18 March 2004
<i>Kordić and Čerkez</i>	Appeal Judgement: <i>Prosecutor v. Dario Kordić and Mario Čerkez</i> , Judgement, 17 December 2004 (with corrigendum of 26 January 2005)
<i>Krajišnik</i>	Appeal Judgement: <i>Prosecutor v. Momčilo Krajišnik</i> , Judgement, 17 March 2009
<i>Martić</i>	Appeal Judgement: <i>Prosecutor v. Milan Martić</i> , Judgement, 8 October 2008
<i>Dragomir Milošević</i>	Appeal Judgement: <i>Prosecutor v. Dragomir Milošević</i> , Judgement, 12 November 2009
<i>Milutinović et al.</i>	Trial Judgement: <i>Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanović, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić</i> , Judgement, 26 February 2009
<i>Mrđa</i>	Sentencing Judgement, <i>Prosecutor v. Darko Mrđa</i> , Judgement, 31 March 2004
<i>Dragan Nikolić</i>	Appeal Sentencing Judgement: <i>Prosecutor v. Dragan Nikolić</i> , Judgement, 4 February 2005
<i>Stakić</i>	Appeal Judgement: <i>Prosecutor v. Milomir Stakić</i> , Judgement, 22 March 2006