

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-04-84bis-PT

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Date Filed: 11 July 2011

THE PROSECUTOR

v.

**Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ**

PUBLIC

PRE-TRIAL BRIEF OF IDRIZ BALAJ

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Ramush Haradinaj:

Mr. Ben Emmerson QC
Mr. Rodney Dixon

Counsel for Idriz Balaj:

Mr. Gregor Guy-Smith
Ms. Colleen Rohan

Counsel for Lahi Brahimaj:

Mr. Richard Harvey
Mr. Paul Troop

I. Introduction

1. In response to the Prosecution's Pre-Trial Brief dated 20 June 2011,¹ Counsel for Mr. Idriz Balaj file this Pre-Trial Brief pursuant to Rule 65ter(F). As required by this Rule, the Defence addresses the factual and legal issues, and sets out in general terms the nature of the defence for Mr. Balaj, the matters with which the Defence takes issue in the Prosecution Brief and the reasons therefore.
2. Unless an assertion by the Prosecution is expressly agreed in this brief, it is not admitted by the Defence.
3. At the time of the filing of this Pre-Trial Brief, Mr. Balaj has not had the opportunity to review the Pre-Trial Brief or briefs to be filed on behalf of the Accused Haradinaj and Brahimaj. There may be matters of law and fact contained in their brief or briefs with which Mr. Balaj agrees. Mr. Balaj reserves the right to file a joinder with respect to any such matters at a later time.

II. Procedural background to this re-trial

4. On 1 March 2007 Mr. Balaj pled not guilty to the indictment filed in this case.² Thereafter, after a trial spanning approximately 10 months, which included the testimony, both written and oral, of 97 witnesses the Trial Chamber acquitted Mr. Balaj of all 37 counts alleged in the indictment.³
5. The Prosecution appealed only a portion of these acquittals. Specifically, it appealed Counts 24, 26, 28, 30, 32 and 34 as to all three Accused. It appealed Counts 14, 36 and 37 as to Mr. Balaj alone.

¹ *Prosecutor v Haradinaj et al*, IT-04-84bis-PT, Annex I, Amended Prosecution Pre-Trial Brief with Annexes A and B, 20 June 2011 (hereinafter "OTP Pre-Trial Brief").

² *Prosecutor v Haradinaj et al*, IT-04-84-PT, Pre-Trial Conference 1 March 2007, T: 265-266. The indictment was amended in various ways thereafter, none of which alleged new charges or required the entry of new not guilty pleas. The Fourth Amended Indictment, filed 16 October 2007, was the operative indictment at trial and at the time the Trial Judgement was returned.

³ *Prosecutor v Haradinaj et al*, IT-04-84-T, Judgement, 3 April 2008, paras 6, 503 (hereinafter "Haradinaj Trial Judgement").

6. On 19 July 2010 the Appeals Chamber returned its Judgement upholding Mr. Balaj's acquittals for counts 14, 36 and 37. Based on the narrow legal ground of trial management error, a majority of the Appeals Chamber, Judge Robinson dissenting, reversed Counts 24, 26, 28, 30, 32, and 34. It ordered a retrial on those counts, all of which are related to events which allegedly took place in the village of Jabllanice.⁴
7. On 21 January 2011 the Prosecution filed its "Submission of Revised Fourth Amended Indictment" which reflects the reduction in the indictment in light of the 31 acquittals upheld on appeal as to Mr. Balaj. The counts for which retrial has been ordered are renumbered as Counts 1 through 6.
8. On 20 June 2011 the Prosecution filed its amended pre-trial brief.⁵
9. The pre-trial conference is currently scheduled to take place on Wednesday 17 August 2011.

III. The Presumption of Innocence and the Burden of Proof at Trial

10. The provisions of Article 21(3) of the Statute presume the innocence of the Accused unless and until he is proven guilty.⁶
11. The Prosecution must, in accordance with Rule 87(A) of the Rules and the fundamental principle of the presumption of innocence, prove every element of each offence alleged against Mr. Balaj beyond a reasonable doubt.
12. As the *Celibici* Trial Chamber held:

⁴ *Prosecutor v Haradinaj et al*, IT-04-84-A, Appeal Judgement, 19 July 2010, para 377, (hereinafter "Haradinaj Appeal Judgement").

⁵ OTP Pre-Trial Brief. The 20 June 2011 filing amended the Prosecution Pre-Trial Brief filed on 3 December 2010. The Prosecution did not amend its *65ter* witness summaries or exhibit list as part of the 20 June 2011 version.

⁶ *See also, Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Judgement, 30 November 2005, para. 10.

It is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction. As a matter of common sense, therefore, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings.⁷

13. The Prosecution, in sum, is required “to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”⁸
14. The Retrial Chamber must determine in respect of each of the counts charged against Mr. Balaj, whether it is satisfied beyond a reasonable doubt, on the basis of the whole of the admissible evidence, that every element of that crime and the forms of liability charged in the indictment have been established.⁹
15. This principle is well established in the jurisprudence of this Tribunal as well as international and domestic law. As explained in the *Celibici* case, quoting with approval from *Miller v. Minister of Pensions*, “proof beyond a reasonable doubt”:

...[N]eed not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice.¹⁰

16. In the instant case, the Prosecution must prove, beyond reasonable doubt the commission of the crimes alleged in Counts 1 through 6 of the indictment, any individual responsibility alleged as to Mr. Balaj under Article 7(1) and the existence of JCE liability under Article 7(1).

⁷ *Prosecutor v. Mucic et al* (“Celibici”), Case No. IT-96-21-T, Judgement, 16 November 1998, para. 599.

⁸ *Ibid.*, para. 601.

⁹ See *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Judgement, 30 November 2005, para. 10.

¹⁰ *Celibici*, para. 600; and see *Prosecutor v Halilovic*, Case No. IT-01-48-T, Trial Judgement, 16 November 2005, para. 12.

IV. Statement of the nature of Mr. Balaj's Defence

17. Mr. Balaj is charged in the Indictment under Article 7(1) of the Statute for liability for all six counts as a participant in a Joint Criminal Enterprise (“JCE”). In addition, it is alleged that Mr. Balaj is individually criminally responsible for committing or aiding and abetting the commission of Counts 1 and 6, as well as planning for Count 6.
18. Mr. Balaj asserts that he has no individual criminal responsibility for the crimes alleged against him in the Indictment under any of these theories. As a matter of fact and law, Mr. Balaj asserts he is not guilty of the following allegations as set out in the Indictment:
- a) Under Common Article 3(1)(a) of the Geneva Conventions of 1949 Mr. Balaj is charged with Murder, Cruel Treatment and Torture as to Counts 1, 2, 4, and 5 punishable under Articles 3 and 7(1) of the Statute.
 - b) Under Common Article 3(1)(a) of the Geneva Conventions of 1949 Mr. Balaj is charged with Cruel Treatment and Torture as to Counts 3 and 6, punishable under Articles 3 and 7(1) of the Statute.
 - c) Under Article 7(1) Mr. Balaj is alleged to have committed or aided and abetted the execution of the crimes alleged in Counts 1 and 6, pursuant to Article 3 of the Statute. “Committing” includes the physical perpetration of a crime, either by act or omission, or by participation by an Accused in a joint criminal enterprise. Mr. Balaj is accused with committing all six counts as a participant in a joint criminal enterprise. The “common criminal purpose” of the joint criminal enterprise, as alleged in the indictment, was to consolidate total control of the KLA over the Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA. To fulfill this criminal purpose it is alleged that each of the accused, and other individuals named in the Indictment, shared the intent to commit crimes that were within the common purpose of the JCE, participated in the

execution of the crimes set forth in this indictment, or otherwise contributed to achieving the purpose of the JCE.

- d) In addition it is alleged that each Accused is also individually responsible for the acts and omissions of other persons, who were not members of the JCE, but who were used by one or more members of the JCE, to carry out crimes committed in furtherance of the common criminal purpose that were either within the scope of the joint criminal enterprise or that were the natural and foreseeable consequences thereof.
19. With the exception of the matters contained in paragraphs 22 and 23 of this Defence Pre-Trial Brief, Mr. Balaj contests the truth and accuracy of all factual allegations made by the Prosecution in the Indictment and the Prosecution's Pre-Trial Brief. He rejects the legal assessment of those factual allegations made by the Prosecution. Mr. Balaj asserts that he has no individual criminal responsibility for the crimes alleged against him in the Indictment in that he did not physically commit the alleged crimes, he did not aid and abet the alleged crimes, he did not plan the crimes and he did not participate in nor was he a member of any joint criminal enterprise.

V. Evidentiary Matters

20. In addition, Mr. Balaj rejects and will object to any Prosecution attempt to prove its case through the use of un-sourced, and multiple, un-sourced hearsay and rumor-mongering—"evidence" which by definition cannot be confirmed, is impervious to investigation or verification and is therefore unreliable on its face and inadmissible. It is not a matter of the weight to be attached at the end of the trial; such evidence does not meet the threshold requirements for admissibility.
21. He also rejects and will object to any Prosecution claims that it may base its case on "propensity for violence" allegations.¹¹ The Prosecution must base its case on evidence of the charged crimes, not inflammatory conclusions as to the character of the Accused. The allegations substitute a conclusion for evidence, are

¹¹ OTP Pre-Trial Brief, para. 21.

irrelevant, and lead to distortion and/or unreliable elaboration of the relevant facts. The Prosecution has a duty to fairly present its case in conformance with the law. These kinds of allegations muddy the waters.

VI. Matters not in Dispute

22. Mr. Idriz Balaj, born on 23 August 1971, a Kosovar living in Croatia before 1998, came to Kosovo to support, defend and assist the Kosovars from the onslaught of the Serbian forces deployed in Kosovo in general and in the Dukagjin zone in April of 1998, after the Serb massacre of the Adem Jashari family at the Jashari compound.¹²
23. He ultimately became the leader of the Black Eagles, a special, rapid intervention group of KLA volunteers trained for combat operations. The Black Eagles would often operate in small groups, providing support to villages under Serb attacks. The municipalities and villages in the Dukagjin area included the municipalities of Pec/Peje, Decani/Decan, Dakovica/Gjakove, Istok/Istog and part of the municipality of Klina/Kline. It included the villages of Glodane/Gllogjan, Dasinovac/Dashinoc, Dolac/Dolc, Ratis/Ratishe, Dubrava/Dubrave, Grabinica/Grabanice, Locane/Ilocan, Babaloc/Baballoq, Rznic/Irzniq, Pozar/Poahare, Zabelj/Zhabel, Zahac/Zahaq, Zdrelol/Zhdrelle, Gramocelj/Gramaqel, Dujak/Dujake, Piskote/Piskote, Pljancor/Planqar, Napolje/Nepole, Kosuri/Kosuriq, Loda/Loxhe, Barane/Baran, the Lake Radonjic/Radoniq area and Jablanica/Jabllanica. After the NATO bombing in 1999 Mr Balaj joined the KPC and held the rank of major.

VII. Matters with which Mr. Balaj takes issue in the Prosecution Pre-Trial Brief

24. Other than the factual matters set out in paragraphs 22 and 23 above, no admissions are made as to the truth or accuracy of the factual allegations in the

¹² The burden remains on the Prosecution to prove Mr. Balaj's presence and actions at a specific time.

Indictment or the Prosecution Pre-trial Brief. Mr. Balaj rejects the legal assessment of those factual allegations made by the Prosecution. Consequently, the Prosecution is put to strict proof of each and every element of fact it relies on in its case against Mr. Balaj.

25. Mr Balaj asserts, as a member of the KLA, he did not physically commit, plan or aid and abet any of the alleged offences nor was he a member of any joint criminal enterprise as charged in the Indictment under Article 7(1) of the Statute.

VIII. Article 3 of the ICTY Statute

26. Mr. Balaj is charged with murder, cruel treatment, and torture, under Article 3. Article 3 has been interpreted as a general and residual clause covering all violations of humanitarian law not falling under Articles 2 , 4 or 5 of the Statute, and more specifically:

- (a) violations of the Hague law on international conflicts;
- (b) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions;
- (c) violations of common Article 3 of the Geneva Conventions and other customary rules on internal conflicts;
- (d) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law.¹³

27. For a crime to be adjudicated under Article 3, two preliminary requirements must be satisfied. First, there must have been an armed conflict,¹⁴ “whether internal or

¹³ *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadic* Jurisdiction Decision"), para 89.

¹⁴ The original Trial Chamber found the KLA qualified as an organized armed group under the *Tadic* test as of 22 April 1998. Haradinaj Trial Judgement, para 89. It found that an armed conflict existed from and including 22 April 1998 onward. Haradinaj Trial Judgement, para 100. Mr. Balaj, in light of these findings, has entered into agreed facts with the Prosecution, agreeing that an armed conflict existed as of 22 April 1998.

international in character,"¹⁵ at the time the offences were allegedly committed.¹⁶ Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities.¹⁷

28. Furthermore, four additional requirements must be satisfied pursuant to Article 3.

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions proscribed by treaty must be met;¹⁸
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;¹⁹
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.²⁰

IX. Definitions of the crimes charged

29. The Prosecution pre-trial brief summarizes the legal definition of the crimes charged against Mr. Balaj. Mr. Balaj takes no position on the legal definitions of Murder, Cruel Treatment and Torture under the applicable Articles. He reserves the right to make further submissions on the law regarding the crimes for which

¹⁵ *Tadic* Jurisdiction Decision, para. 137: "under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict".

¹⁶ *Tadic* Jurisdiction Decision, para. 67. The Appeals Chamber held that the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.

¹⁷ *Tadic* Jurisdiction Decision, para. 170. The Appeals Chamber deemed it "sufficient that the alleged crime were closely related to the hostilities occurring in other parts of the territories".

¹⁸ In this respect, the Appeals Chamber added that a charge based on treaty law would necessitate that two additional requirements be met, namely, that the agreements (i) were unquestionably binding on the parties at the time of the alleged offence and (ii) are not in conflict with or derogate from peremptory norms of international law, see *Tadic* Jurisdiction Decision, para. 143.

¹⁹ See Article 1 of the Statute, which gives the Tribunal jurisdiction over "serious violations of international humanitarian law".

²⁰ *Tadic* Jurisdiction Decision, para. 94.

- he is charged at the appropriate time.
30. Mr. Balaj asserts that he is not guilty of the crimes charged in the Indictment and he contests all factual allegations and legal assessments of those factual allegations made by the Prosecution in relation to those charges.

X. The correct definition of the charged JCE

31. The issue of whether the allegations relating to the common purpose of the charged JCE could or should be altered for purposes of this re-trial of six counts from the original indictment, was litigated in the Retrial Chamber and by interlocutory appeal in the Appeals Chamber.
32. Despite the resolution of this issue in the Appeals Chamber the Prosecution improperly seeks, by way of its Pre-Trial Brief, to once again alter the common purpose of the alleged JCE in violation of the Appeals Chamber's clear direction.
33. At the time of the original trial the common purpose of the alleged JCE was described as follows:

The common criminal purpose of the JCE was to consolidate the total control of the KLA over the Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA. The common criminal purpose involved the commission of crimes against humanity under Article 5 and violations of the laws or customs of war under Article 3, including murder, persecution, inhumane acts, cruel treatment, unlawful detention and torture. The JCE included the establishment and operation of KLA detention facilities and the mistreatment of detained person at these facilities, including at the KLA's headquarters at Jablanica/Jabllanice and Glodane/Gilodjan and at the Black Eagles headquarters in Rznice/Irznik.²¹

²¹ *Prosecutor v Haradinaj et al.* IT-04-84-T, Fourth Amended Indictment, 16 October 2007, para 26.

34. After reversal of the six counts on appeal the Prosecution filed a shortened form of the Indictment, for the re-trial, in which it significantly changed the allegations regarding the common purpose of the JCE. It alleged:

The common criminal purpose of the JCE was to mistreat Serb civilians and Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA. The common criminal purpose involved violations of the laws and customs of war under Article 3, including murder, cruel treatment and torture. The JCE included the establishment and operation of and the mistreatment of detained persons at the KLA's headquarters at Jablanice/Jabllanice.²²

35. The Appeals Chamber held that in reversing the six counts of acquittal which are the subject of this re-trial it “did not intend to alter the scope of the JCE...”²³ It therefore upheld the Retrial Chamber’s Decision of 14 January 2011, holding that the common criminal purpose of the JCE, as alleged for purposes of the re-trial, remains the same as that alleged at the original trial.²⁴
36. Nonetheless, at the beginning of its Pre-Trial Brief the Prosecution states that the three Accused and “other KLA soldiers pursued the common criminal purpose to suppress real or perceived opposition through the mistreatment of civilians who were, or were perceived to be collaborating, with Serbian forces or otherwise not supporting the KLA. The aim was to consolidate KLA control over the Dukagjin zone.”²⁵
37. The Prosecution repeats the same allegation at paragraph 28 of its pre-trial brief, when it states that the three Accused “and other KLA soldiers, including other members of the Brahimaj family, worked together to suppress and eliminate perceived opponents. In doing so they implemented the common criminal

²² *Prosecutor v Haradinaj et al*, IT-04-84bis-PT, Submission of New Version of the Revised Fourth Amended Indictment, 9 November 2010, para 24.

²³ *Prosecutor v Haradinaj et al*, IT-04-84bis-AR73.1, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, 31 May 2011, para 32.

²⁴ *Ibid*, paras 32-34; and see *Prosecutor v Haradinaj et al*, IT-04-84bis-PT, Decision on Shortened Form of the Fourth Amended Indictment, 14 January 2011, para 30.

²⁵ Prosecution pre-trial brief, para 1.

- purpose to mistreat civilians who were or were perceived to be collaborating with Serbian forces or otherwise not supporting the KLA at the detention facility in the KLA barracks in Jablanica/Jabllanice.”²⁶
38. The common criminal purpose as pled in the operative indictment is “to consolidate the total control of the KLA over the Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA..”²⁷ It is not simply to mistreat KLA opponents, as alleged in paragraphs 1 and 28 of the Prosecution Pre-Trial Brief.
39. Mr. Balaj disputes and rejects the mischaracterisations by the Prosecution of the common criminal purpose of the JCE that is the subject matter of this retrial. Mr. Balaj does not accept paragraphs 1 and 28 of the Prosecution Pre-Trial Brief as clarifying, elaborating, or in any way providing notice of a new JCE or any JCE other than the JCE pled in paragraph 24 of the Revised Fourth Amended Indictment. It is that JCE which is pled in accordance with the Appeals Chamber Decision of 31 May 2011.²⁸

XI. The scope of the admissible evidence at the re-trial

40. The Prosecution at present intends to present evidence from 56 witnesses at the re-trial. This evidence will be presented by way of written statements offered under Rules 89(F), *92bis*, *92ter* and *92quater* or *viva voce* by the personal appearance of the witness. Forty-six of these witnesses testified at the original trial. The Prosecution has stated its intention not to present the evidence of one witness, Fadil Fazliu, whose evidence is directly relevant to the “Jabllanice

²⁶ *Ibid*, para 28.

²⁷ Prosecution Revised Fourth Amended Indictment, 21 January 2011, para. 24 [emphasis added].

²⁸ *Prosecutor v Haradinaj et al*, IT-04-84bis-AR73.1, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, 31 May 2011, para 31-34.

- counts”.²⁹
41. Mr. Balaj points out that in its original appeal the Prosecution contention that it was denied a fair trial was premised on an extremely narrow legal ground; to wit, trial mismanagement based on the original Trial Chamber refusing to continue to provide the Prosecution with additional time to obtain the testimony of two specific witnesses.³⁰
42. During the interlocutory appeal proceedings held in this case the Appeals Chamber dismissed the argument that the Appeals Chamber should hold, prior to the commencement of the re-trial, that the evidence at the re-trial must be limited to the testimony of the two witnesses who were the subject of the Prosecution’s appeal.³¹
43. It upheld the Retrial Chamber’s Decision that the Order for Partial Retrial did not impose limitations on the evidence to be adduced at the retrial beyond those “applicable to any trial before the Tribunal.”³²
44. Mr. Balaj continues to dispute the Prosecution contention that it is free to expand the retrial by augmenting the original trial record with any new evidence beyond the testimony of the two witnesses which were the subject of the Prosecution appeal. Objections to attempts to introduce such evidence will be raised at re-trial and be subject to the discretionary rulings of the Retrial Chamber, as the Appeals Chamber Decision anticipates as the appropriate procedure.

XII. Standard of prejudice applicable to the admission of evidence at this re-trial following reversal of acquittals

45. Mr. Balaj points out that in discussing what evidence may or may not be admissible at the re-trial the Appeals Chamber “underscore[d] that whether a

²⁹ Mr. Balaj expects the evidence of this witness will likely be the topic of a motion *in limine*.

³⁰ *Prosecutor v Haradinaj et al*, IT-04-84-A, Judgement, 19 July 2010, para. 17.

³¹ Decision on Haradinaj’s Appeal on Scope of Partial Re-Trial, paras 13-27.

³² *Ibid*, para 24. [Emphasis Added]

- retrial follows acquittal or conviction is *not necessarily insignificant*.³³
46. The Appeals Chamber left it to the discretion of the Retrial Chamber to determine what evidence would be admitted at the re-trial, and, in doing so, emphasized the Retrial Chamber's "continuing duty to apply fair trial principles."³⁴
47. In that regard, and in light of the fact that this case involves a retrial following *acquittals*, the Appeals Chamber held:
- In this context, the Appeals Chamber directs the Trial Chamber, when determining the admissibility of evidence in the retrial, to be particularly mindful of any potential prejudice that the admission of new evidence may cause to the fair trial rights of the Accused.³⁵
48. Regarding evidence which was excluded from the original trial, the Appeals Chamber held:
- Where the Prosecution seeks to introduce evidence that was excluded in the prior proceedings, the Trial Chamber should explicitly consider whether re-litigation of the same issue in the retrial would be unduly prejudicial. If such is the case, the evidence must be excluded.³⁶
49. Mr. Balaj submits that two directions emerge regarding the significance of the fact that this re-trial involves re-litigation of counts for which Mr. Balaj has already been acquitted.
50. The first is that when the Prosecution seeks to adduce *new* evidence not presented at the original trial, the Prosecution has the burden of establishing that such *new* evidence is not prejudicial to the fair trial rights of the accused. It is envisioned that this type of evidence will fall into two categories: 1) witnesses never called at the original trial and 2) augmentation to testimony presented by witnesses who

³³ *Ibid*, para 26.

³⁴ *Ibid*, para 26.

³⁵ *Ibid*, para 26.

³⁶ *Ibid*, para 26.

- testified at the original trial.³⁷
51. In engaging in the balancing test for determining admissibility when dealing with the two categories of evidence just discussed, the Retrial Chamber must, in view of the Appeals Chamber's observations, more readily find prejudice when the Prosecution seeks to introduce this type of evidence, as this retrial follows acquittals on the same charges.
 52. The second is that the same heightened attention to prejudice to the accused applies to the re-litigation of evidentiary matters resolved at the original trial.
 53. There is a reason for the Appeals Chamber recognition of this concern. The reversal of a *conviction* places the Accused in the precise position he was in prior to the reversal. That is not the case when, as here, there has been a reversal of *acquittals*. The reversal of acquittals of necessity raises different concerns, including fundamental questions as to the application of internationally recognized principles of customary law regarding *res judicata*, collateral estoppel, burden of proof, double jeopardy and abuse of process. It is in this context that sensitivity to potential prejudice from the introduction of new evidence should be of paramount importance in determining the admissibility of new evidence and its impact on the fair trial rights of the Accused.
 54. In the *Muvunyi* case, which unlike Mr. Balaj's case involved a retrial following a *conviction*, a number of factors were cited as cause to find no prejudice arising from the Prosecution presenting new evidence, at a retrial, which had not been presented at the original trial. *Muvunyi*, also unlike Mr. Balaj's case, involved reversal of convictions based on the very broad legal error by the Trial Chamber of failing to provide a reasoned decision to support its judgement of guilt.³⁸
 55. *Muvunyi* held no prejudice would arise from the introduction of new evidence at

³⁷ Mr. Balaj has objected to the introduction of this evidence in his response to the OTP 92ter motion. Idriz Balaj's Response to Prosecution Motion for Admission of Evidence Pursuant to Rule 92ter, 11 July 2011, paras. 13-18.

³⁸ *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeal Judgement, 29 August 2008, para. 148.

the retrial following Muvunyi's conviction because, among other factors (a) the Accused in *Muvunyi* had been in possession for several years of the statements of the three witnesses who did not appear in his original trial but whom the Prosecution proposed to call during the retrial, and (b) Muvunyi never suggested that the addition of the three new *known* witnesses at the retrial would require significantly more investigation on his part in order to be prepared for trial.³⁹

56. These factors do not apply in Mr. Balaj's case. He will assert them, at the appropriate time at trial when and if the Prosecution seeks to introduce any new evidence beyond or in addition to testimony from the two witnesses who were the subject of the Prosecution's appeal from the acquittals.

XIII. The Military and Political Context of this Case

57. The Prosecution in its pre-trial brief selectively presents evidence it claims it will prove in an apparent effort to influence the Retrial Chamber's thinking before the retrial begins.
58. Persuasive argument based on the facts in a party's possession is acceptable. However in the instant case, where there has already been a trial, exclusion or diminution of facts that contradict or disprove part of the Prosecution's case, by means of the selective presentation of the facts, is unacceptable, constitutes abuse of process and is directly contrary to the fair trial rights of the Accused. It also detrimentally impacts upon the truth-seeking function of the Retrial Chamber.
59. The Prosecution has failed to provide the Retrial Chamber with the historical context for this case in the re-trial Indictment or in its present pre-trial brief. The following are allegations which the Office of the Prosecutor has alleged as fact in other trials at this Tribunal. There was a persecutory campaign of ethnic cleansing committed by forces of the Federal Republic of Yugoslavia (FRY) and

³⁹ *Prosecutor v Muvunyi*, ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009, para 18.

- Republic of Serbia (Army of Yugoslavia and forces of the Ministry of Internal Affairs - MUP) against the Kosovar Albanian people.⁴⁰ The campaign commenced in 1989. Throughout the 1990's up to and including 1999 and, in particular, throughout the period of time encompassed by the Indictment in Mr. Balaj's case, Kosovar Albanians were the victims of widespread discrimination and serious human rights abuses.⁴¹
60. The Prosecution is aware that in 1998, forces of the FRY and Serbia (including MUP special units) engaged in a campaign of persecutions against Kosovar Albanian civilians, including the shelling of predominantly Kosovar Albanian towns and villages, widespread destruction of property, and expulsion and killing of civilians. As a result by October 1998, over 298,000 people had been internally displaced within Kosovo or had left the province.⁴²
61. The campaign of terror and violence carried out by forces of the FRY and Serbia in Kosovo resulted in refugees fleeing Kosovo and large numbers of internally displaced persons.⁴³ It culminated in 1999 with up to 800,000 ethnic Albanians from Kosovo being forcibly expelled from their homes and many hundreds (if not thousands) being killed or becoming the victims of violence and sexual assault by Serb forces. Monuments and sites of cultural and religious value to the Albanian community were destroyed by Serb forces.⁴⁴
62. Massive, widespread human rights abuses were committed by forces of the FRY and Serbia in Kosovo in 1998. Almost every independent observer of the conflict in Kosovo in 1998 expressed concern about the widespread abuses of the Kosovar Albanian population by Serb forces in Kosovo at that time. It is widely accepted that the most egregious human rights abuses committed in Kosovo in 1998 were committed by the forces of the FRY and Serbia. To insinuate in this pre-trial brief

⁴⁰ *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-PT, Prosecution Pre-Trial Brief, 26 November 2001, paras. 2-5.

⁴¹ *Ibid.*, para. 23.

⁴² *Ibid.*, paras. 30-31, 46, 52.

⁴³ *Ibid.*, para. 115.

⁴⁴ *Ibid.*, para. 111.

that members of the KLA were responsible for the most serious and widespread human rights abuses in Kosovo in 1998 is factually erroneous. It does not serve the interests of justice or the historical mandate of the Tribunal to compile a *true* account of the conflict in Kosovo.

63. In referring to these events, the Defence does not raise a defence of *tu quoque*.⁴⁵ It does, however, emphasize that in order to do justice in this case, the Retrial Chamber must at all times bear in mind the context of the appalling reality of the human rights situation for Kosovar Albanians in Kosovo during the time period alleged in this Indictment. It is of vital importance to understand and recognize that some of the evidence offered by the Prosecution in this re-trial, as in the original trial, comes from members of FRY forces and the MUP (i.e. members of the forces responsible for widespread atrocities against ethnic Albanian civilians in Kosovo). Their impartiality and credibility remains in issue at this re-trial, just as it was at the original trial, as is any evidence presented by the Prosecution generated as a result of investigations by such forces.

XIV. This pre-trial brief is filed without prejudice to amending it in light of future, anticipated disclosure in this case

64. This pre-trial brief has been ordered to be filed before the Prosecution has disclosed to Mr. Balaj the identities of the new witnesses it intends to call at trial. As to one of those witnesses—Witness 77—the Prosecution has not disclosed the witness statement in any form. The remaining witness statements have been disclosed only in heavily redacted form.
65. Given these limitations it has been impossible for the Defence for Mr. Balaj to investigate the claims made in the new disclosure which has been provided. It is *per force* impossible for the Defence for Mr. Balaj to provide an informed response to the entirety of the Prosecution pre-trial brief which repeatedly refers

⁴⁵ Mr. Balaj is aware that the defence of *tu quoque*, i.e. that the other party has committed atrocities, is not a defence to a charge of war crimes at the ICTY.

to and incorporates statements obtained from these as yet unknown individuals.

66. Given these circumstances Mr. Balaj specifically reserves the right to amend this pre-trial brief, if need be, in conformance with his rights to the effective assistance of counsel of his choice and his right to the time and facilities to prepare a defence.

Respectfully submitted this 11th day of July 2011,



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