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

**CASE NO. IT-04-84*bis*-AR73.1**

**IN THE APPEALS CHAMBER**

**Before:** A Panel of the Appeals Chamber

**Registrar:** Mr. John Hocking

**Date filed:** 10 February 2011

**THE PROSECUTOR**

**v.**

**RAMUSH HARADINAJ**
**IDRIZ BALAJ**
**LAHI BRAHIMAJ**

***PUBLIC***

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# APPEAL BRIEF ON BEHALF OF RAMUSH HARADINAJ ON SCOPE OF PARTIAL RETRIAL

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## Introduction

1. The issues that have been certified by the Trial Chamber for this appeal all concern the nature and scope of the partial retrial that has been ordered by the Appeals Chamber following the Prosecution's limited appeal against Mr. Haradinaj's acquittal. Like any person on trial for criminal offences, Mr. Haradinaj retains his rights including the right to see the ordeal of his trial reach a conclusion that is final. All legal systems recognise the need for finality by having laws prohibiting re-litigation of any determination in criminal proceedings without an express order from an appellate court, and by enacting clear rules to govern any retrial proceedings following an acquittal. The rationale for these rules rests on the dual imperatives of protecting the integrity of the legal system and respecting the right to liberty of the individual. Retrials on the same charges for which a person has been finally acquitted would involve a fundamental conflict with the most basic principles underlying the rule against double jeopardy.

2. The principle of finality is expressed not only in the rule against double jeopardy but in numerous related legal concepts in criminal proceedings including waiver, issue estoppel, *res judicata*, *ne bis in idem*, the law of remedies, non-retroactivity of criminal offences, abuse of process and various procedural rules designed to complement these legal concepts (including special rules for the admission of fresh evidence under narrowly defined conditions). This collection of principles are all directed to securing certainty and finality in criminal litigation, and in this sense are closely related to the presumption of innocence, and the uncompromising principle that the Prosecution bears the burden of proving guilt to a high standard. Exceptions to the principle that a final decision in criminal proceedings has the force of *res judicata* are very rare and only apply in the most extraordinary circumstances.[1]

[1] The principle of finality has its roots in Roman law and the common law since the 12th century. As has been held by the European Court of Human Rights (ECtHR), it prescribes that where an issue has been finally determined it cannot be called into question in any subsequent proceedings (see *Brumarescu v Romania*, Judgment, ECHR, G Ch, 28 October 1999, para. 61). A departure from this principle is justified only by circumstances of a substantial and compelling nature. The ECtHR has emphasised that the reopening of a case

3. A corollary of this principle is that where a retrial is ordered in criminal proceedings, as a remedy during the appellate process, the scope of the retrial must be clearly defined and narrowly construed. Since a retrial is a departure from the principles of finality, it should provide a tailored remedy capable of rectifying a clearly identified error in the original proceedings, and no more. In particular, where the identified error does not impugn the original proceedings as a whole, but affects only a circumscribed and severable aspect of those proceedings, the appropriate remedy will not be a general retrial in which all issues are at large, but a partial retrial which puts right what the Appeals Chamber finds to have gone wrong. In such a case, it becomes essential to distinguish between those findings of the original Trial Chamber which remain binding, and continue to have the force of *res judicata*, and those which have been set aside on appeal by reason of a clearly identified error.

4. Plainly, since a partial retrial is intended to be a tailored remedy to put right a clearly identified error, and no more, the scope of a partial retrial will be determined by the error which was the subject of the appeal. That is, in essence, the simple answer to all of the issues raised in the present appeal. The clearly identified error was a failure on the part of the Trial Chamber to afford the Prosecution a fair opportunity to call two named witnesses. The only appropriate remedy for that error is an order for a partial retrial to enable those witnesses to be called, and their evidence considered against the record of the original trial to see whether (as the Prosecution contended in its appeal) the evidence of those two witnesses would have made any difference to the original Trial Chamber's verdict. If they would, then there would have been a miscarriage of justice capable of being remedied at the retrial. If, on examination of their evidence, it would have made no difference to the outcome of the trial, then there was no miscarriage of justice. This was precisely the remedy sought and granted on appeal in the present proceedings. However, the Prosecution has sought to extend the scope of the retrial significantly beyond the remedy it sought and obtained for putting right

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following a final decision is an "extraordinary remedy" (see *Radchikov v Russia*, Judgment, ECHR, 65582/01, 24 May 2007, para. 48).

the legal wrong that was found to have occurred at trial. And the Trial Chamber in the Impugned Decision has failed to set proper limits on the scope of the retrial so as to prevent the Prosecution from proceeding in a manner which amounts to an abuse of the process of the Tribunal.

5. Before the ICTY the Prosecution is entitled to appeal against an acquittal and the Rules permit a retrial to be ordered in "appropriate circumstances" (Rule 117(C)). The question of law to be determined is what form of remedy is "appropriate" in a case where the Prosecution has expressly confined its appeal to a circumscribed and severable issue involving the non-availability of the testimony of two individual witnesses. In the Appellant's submission the answer is obvious. The appropriate remedy is one that is proportionate to the legal wrong (or error) which was the basis of the successful ground of appeal. In this case, that can only mean putting right the deficit which the Prosecution relied upon, by enabling it to have a full opportunity to call those two witnesses.

6. The meaning and ambit of Rule 117(C) is untested in the context of a retrial following an acquittal. The issue raised is particularly acute in the present case since this is a partial retrial, ordered to meet a circumscribed and severable complaint about the original trial, applicable to certain counts only on the original Indictment, and based solely on the unavailability of two particular witnesses. Consistent with the international human rights protections that underpin the ICTY's Statute and with the general practice in criminal proceedings, a narrow interpretation of the Prosecution's rights in the conduct of a retrial following an acquittal should be applied before the ICTY. It would be a dangerous incursion into the rights of the Accused to deny a person before the ICTY the protections afforded to citizens under international legal instruments and in domestic criminal law systems which in general only permit a retrial after an acquittal in the most extreme and limited circumstances. A failure to uphold these rights would undermine the integrity of the ICTY and adversely affect the credibility of international criminal justice generally.

7. It is thus the Appellant's primary submission in this appeal that the Prosecution's right to a retrial following an acquittal should be narrowly construed and limited to the specific relief sought by the Prosecution on appeal from the acquittal in Mr. Haradinaj's case. Any alternative course would allow the Prosecution to use a circumscribed and severable ground of appeal as a pretext for (a) seeking to take a "windfall benefit" by adducing evidence that goes well beyond remedying the defect which was the justification for the retrial in the first place and (b) reopening issues that have been finally determined and have therefore acquired the quality of *res judicata*. The Prosecution should not in the circumstances of the present case be permitted to use the narrow and tailored form of relief it requested and was granted on appeal as a "Trojan horse" to bring a second case against Mr. Haradinaj in the partial retrial by relying on evidence that was not the subject of its appeal.

8. It is perhaps the most fundamental principle in the law of remedies, universally applicable in both civil and criminal proceedings of all kinds, that the purpose of a judicial remedy is to put right a legal wrong. The aim is to put the injured party, as far as possible, into the position he would have been in if the legal wrong had not occurred. Nothing less, but certainly nothing more. It follows that subject to certain very limited exceptions[2], the law sets its face against disproportionate remedies which go beyond correcting a legal wrong and which afford a "windfall benefit" to a party to the proceedings, (that is, a benefit or advantage which goes beyond that which is strictly necessary to put right a clearly identified legal wrong).

9. Applying this principle to a criminal case it is clear that if the legal wrong identified on appeal is such that it strikes at the whole of the original trial proceedings, or undermines the whole of the original judgment, then the

[2] In the Anglo-American tradition, for example, civil courts can exceptionally make a reward of exemplary damages. A typical example is an award of damages against a public authority for gravely unconstitutional conduct. An award of exemplary damages is separate from and additional to an award of compensation to right the legal wrong. The purpose of exemplary damages is to punish and deter. Yet, anomalously, the award of exemplary damages is paid to the claimant and represents a windfall benefit in his hands. However, all of the leading authorities recognise this is a wholly exceptional departure from the fundamental principle that judicial remedies should go no further than is necessary to put the injured party in the position they would have been in had the legal wrong not occurred.

commensurate remedy will be a full retrial in which all issues are open for re-determination. But the legal defect identified in the present case is the circumscribed and severable error committed by the Trial Chamber in failing to secure the testimony of the two witnesses. That is an identifiable error with an obvious remedy.

10. It was for this reason that the Appeals Chamber ordered only a partial retrial. It would be wholly formalistic to say that the appropriate remedy was a retrial at large on those counts to which the evidence could have been relevant. That would be to elevate issues of form (the counts to which the evidence was potentially relevant) above substance (the essence of the complaint itself that two particular witnesses had not been heard). The remedy must be proportionate and strictly tailored to address the legal wrong that was identified on appeal by providing the Prosecution with an opportunity to present the evidence of the two witnesses in a retrial, and nothing more. Anything beyond that would constitute an unjustified windfall benefit to the Prosecution and (as more fully explained below) would infringe the principles of *res judicata* and finality in criminal proceedings.

11. One of the means by which the Appeals Chamber has observed the principle of finality before the ICTY is by holding that "a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance".[3] Where the Prosecution did not file any submissions in the underlying proceedings before the Trial Chamber the Appeals Chamber has found that the Prosecution is deemed to have waived its right to appeal. Indeed, the Appeals Chamber in the present case refused to hear the Prosecution's "new" ground that it raised before the Appeals Chamber for the first time at the oral hearing of the appeal (namely that the Trial Chamber should have received the written statements of the two witnesses *proprio motu* under Rule 89(F)). In its Judgment the Appeals Chamber stated that the "parties should not raise new arguments during an appeal hearing

[3] *Prosecutor v Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6. Also see *Édouard Karamera v. The Prosecutor*, Case No. ICTR-98-44-AR72.2, Decision on Validity of Appeal of Preliminary Motion of Édouard Karemera Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 11 June 2004, p. 4; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 21.

that are not contained in their written briefs" (para. 19). The same principle applies with even greater force to a retrial ordered on appeal. The Prosecution cannot be permitted to circumvent this important waiver principle by simply re-litigating issues on a retrial which they could have (but chose not to) raise during the course of the appeal in which the retrial was ordered. It would make a mockery of the waiver principle if the Prosecution could side-step the requirement to raise all issues in its grounds of appeal, by simply pursuing one ground in order to secure a retrial, and then misusing the opportunity of a retrial to pursue other grounds of challenge to the original decision without having an order from the Appeals Chamber re-opening that aspect of the proceedings. By not seeking any remedy beyond a retrial in order to hear the testimony of the two witnesses, the Prosecution in the present case has unequivocally waived its right to pursue any other remedies at the retrial, including calling any new witnesses who make fresh allegations.

12. Accordingly, for all of the reasons explained in this Brief, the Appellant respectfully requests the Appeals Chamber to make the orders set out below in respect of each of the issues that have been certified for this appeal.

Word limit

13. The questions of law that have to be dealt with are complex and have not arisen at the ICTY before. The Appellant applies for an extension of the word limit in the exceptional circumstances of this appeal. There are three separate issues that have been certified for appeal, each of which involves novel questions of considerable importance. It has been necessary to go into some detail concerning the procedural history, the findings of the original Trial Chamber and the resulting evidential issues, in order to illustrate the consequences of the Impugned Decision for the conduct of the partial retrial. In order to appreciate the implications of the Impugned Decision it has also been necessary to draw the Appeals Chamber's attention to the Prosecution's strategy for the retrial (which, in the Appellant's submission, flouts fundamental principles of law and amounts to an abuse of the

process of the Tribunal). For all of these reasons the Appellant requests that it be granted an extension of the 9000 word limit to 14000 words.[4]

**Procedural history**

14. On 3 April 2008 Mr. Haradinaj was acquitted of all counts on his Indictment (the Fourth Amended Indictment). The Prosecution appealed against Mr. Haradinaj's acquittal on the grounds that the Trial Chamber erred when it refused the Prosecution's requests for additional time to exhaust all reasonable steps to secure the testimony of two "crucial" witnesses, Shefqet Kabashi and another witness, and ordered the close of the Prosecution case before such reasonable steps could be taken. It requested a retrial on Counts 24, 26, 28, 30, 32 and 34 solely in order for the evidence of these two witnesses to be heard in respect of these counts.

15. On 19 July 2010 the Appeals Chamber quashed the Trial Chamber's decisions to "acquit Ramush Haradinaj ... of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jabllanicë under Counts 24, 26, 28, 30, 32 and 34 of the Indictment" as well as of individual criminal responsibility under Counts 24 and 34, and the Appeals Chamber ordered that Mr. Haradinaj be retried on these 6 counts.[5]

16. On 15 September 2010 the Trial Chamber ordered that the Fourth Amended Indictment shall be the operative Indictment for the partial retrial. The Trial Chamber requested the Prosecution to file a shortened Indictment corresponding to what was at issue in the partial retrial as ordered by the Appeals Chamber. On 9 November 2010 the Prosecution filed a shortened Indictment. The Prosecution deleted all of the counts from the original trial except Counts 24, 26, 28, 30, 32 and 34 for which the retrial has been ordered, and renumbered them as Counts 1-6 (hereinafter referred to as "the 6 Jabllanicë counts"). The Haradinaj Defence filed its response thereto on 23 November 2010 in which it requested that the JCE as

[4] The Appellant makes this application in its Brief given the short 7 day period within which to file the Brief and as the word limit was exceeded as the preparation of the Brief and the inclusion of all necessary materials approached the deadline for filing.
[5] Para. 377. The Appeals Chamber used the same language in its conclusion to Ground 1 of the appeal at para. 50 of its Judgment.

alleged and various other allegations be struck from the Indictment on the grounds that they did not comply with the Appeals Chamber's Order for the retrial. The Haradinaj Defence submitted that the scope of the retrial should be limited to hearing the evidence of the two witnesses, Shefqet Kabashi and the other witness, who had been the subject of the Prosecution's appeal, and that no new evidence could be relied by the Prosecution.

17. On 14 January 2011 the Trial Chamber issued its decision on the shortened Indictment and the manner in which it should correspond to what is at issue in the partial retrial: "Decision on Shortened Form of the Fourth Amended Indictment" (the "Impugned Decision").

18. Pursuant to this decision the Prosecution on 21 January 2011 filed a revised shortened Indictment to comply with the orders of the Trial Chamber, which is currently the operative Indictment for the retrial (hereinafter referred to as "the operative shortened Indictment").

**The issues on appeal**

19. On 3 February 2011 the Trial Chamber certified three issues for appeal arising from the Trial Chamber's decision of 14 January 2011. These issues and the Appellant's main submissions in respect of each are the following[6]:

First issue: The Trial Chamber's rejection of the Appellant's submission that the evidence at the retrial should be limited to the testimony of Shefqet Kabashi and the other witness and that no new evidence can be relied on by the Prosecution.

20. When it filed its Pre-trial Brief for the retrial, at the beginning of December 2010, the Prosecution disclosed to the Defence for the first time 6 new witnesses of fact that it seeks to call in the partial retrial. They are entirely new witnesses who were never relied on or even identified in the original trial. Nor was any attempt

[6] The order of the issues as set out by the Trial Chamber in its decision to grant certification has been changed in this brief with the third issue being addressed first so as to present the Appellant's argument in the most logical sequence.

made to introduce these witnesses as fresh evidence during the appeal proceedings (a course which would have required the Prosecution to satisfy the Appeals Chamber that the requirements of Rule 115 were met). Their witness statements cover not only the alleged incidents at Jabllanicë that form the basis for the 6 Jabllanicë counts, but also other incidents that allegedly occurred outside of Jabllanicë and which do not form part of the 6 Jabllanicë counts. Some of these allegations are entirely new and involve alleged crimes that were not even the subject of the original Indictment. In addition, the Prosecution seeks to (i) call an expert witness who although disclosed to the Appellant at the original trial was not relied on by the Prosecution, (ii) recall certain witnesses from the original trial having taken new statements from them and also have their testimony in other cases admitted, and (iii) admit evidence that was ruled inadmissible at the original trial – the Prosecution wants to call one of the new witnesses specifically for this purpose.

21. The determination of the issue whether the Prosecution can call any evidence at the retrial other than that of Kabashi and the other witness will once and for all define the nature and scope of the retrial. The Trial Chamber in granting certification recognised that the question "whether the Trial Chamber should only hear Shefqet Kabashi and the other witness affects fundamentally the nature and scope of the partial retrial". For this reason the Appellant seeks an order from the Appeals Chamber before the commencement of the retrial. The Trial Chamber should not have rejected the Appellant's submission as being premature. The certification decision recognises explicitly that the issue is intimately bound up with its assessment of the proper scope of the retrial. In the Appellant's submission the two questions are inseparable since the scope of the retrial is to be determined according to the principle that it is a remedy to put right a specific, identified legal wrong. The matter has to be ruled on at this stage so that the Trial Chamber is clear as to the scope of the trial it must hear. Any uncertainty as to the permissible parameters for the retrial would inevitably lead to the proceedings becoming a broader trial than was envisaged by the Appeals Chamber and to successive interlocutory appeals. That is, no doubt, why the Trial Chamber has certified all three issues for appeal at this stage of the proceedings, effectively reversing its own decision that the evidential issue was premature.

22. The Appellant's primary submission is that it would be fundamentally wrong for the Prosecution to use its limited appeal against an acquittal (to call the two witnesses) to seek to introduce a new case against Mr. Haradinaj with new witnesses and additional evidence (including evidence in respect of allegations that do not even form part of the 6 Jabllanicë counts) for the following reasons:

- The Prosecution did not seek permission to present a new case on appeal under the Statute and Rules. On the contrary, the Prosecution expressly confined its appeal to the errors committed by the Trial Chamber in failing to secure the testimony of the two "crucial witnesses" and requested that a retrial be ordered as it would provide a "reasonable possibility" of hearing their testimony. Indeed, the Prosecution submitted in its appeal that the failure to hear these two witnesses resulted in the acquittal and that if these witnesses were heard it would lead to the Accused being convicted of the 6 Jabllanicë counts. The retrial ordered by the Appeals Chamber is thus described by the Appeals Chamber as a "partial" one and not a general retrial. The Prosecution must be taken to have waived any alternative or additional grounds of challenge to the Trial Chamber's final judgment, such that any finding of the original Trial Chamber which was not appealed is to be regarded as final and binding and to have acquired the quality of *res judicata*.

- On a straightforward application of orthodox principle, the Prosecution's approach to the partial retrial fundamentally undermines the rule of finality in criminal proceedings. It is the duty of the Prosecution under the Statute and Rules to appeal any findings of the Trial Chamber that it believes constitute errors of law or fact. It is the Prosecution that must elect which findings to appeal, as it has done in the present case, focussing only on the errors committed in respect of the two witnesses. The Prosecution's election to limit its appeal to the errors committed in respect of the two witnesses in order that their evidence could be heard at a retrial finally determines the scope of the case the Prosecution can still pursue against Mr. Haradinaj. It guarantees that the principle of finality in criminal

proceedings is observed. The principle is an essential safeguard that protects the Accused against double jeopardy, encourages the efficient investigation and prosecution of crimes and ensures that the integrity of the proceedings and the public's respect for and confidence in the legal system is maintained. The Prosecution is instead misusing the relief it requested and obtained as a vehicle to introduce a new and broader case against Mr. Haradinaj. That amounts to an abuse of the process of the Tribunal which it is the Appeals Chamber's responsibility to prevent.

- The Prosecution's disregard of the principle of finality in the proceedings is further illustrated by its reliance in its Pre-trial Brief on evidence that was ruled inadmissible in the original trial. None of these rulings was appealed by the Prosecution at the time or during the appeal against the Trial Judgment. They must stand as final, thus barring the Prosecution from attempting to have a second opportunity to use this evidence against Mr. Haradinaj. The Prosecution's request to call new evidence and re-introduce evidence that was ruled inadmissible is a manifest violation of the core human rights protections that underpin the criminal justice system before the ICTY, and shows a complete disregard for, and disrespect to, the Judgment and decisions of the Trial Chamber that the Prosecution deliberately chose not to appeal. For the Prosecution to attempt to re-litigate these rulings without first having them set aside through proper avenues of appeal is a further abuse of the Tribunal's process which it is the Appeals Chamber's responsibility to prevent.

- Given that there is no question of a general retrial having been either sought from or granted by the Appeals Chamber, it would plainly be wrong to allow a retrial granted due to the absence of the two witnesses to expand into a retrial with new and additional witnesses (and on allegations beyond those originally subject to appeal). This would create a very dangerous precedent. Any Prosecution dissatisfied with the result of a trial, and having at least one technically arguable ground of appeal on a single issue, however narrow, could obtain a retrial and then use the retrial

to correct defects in the case the Prosecution lost by additional evidence of any kind. Moreover, this would occur in the setting of a retrial that inevitably rebalances the proceedings in favour of the Prosecution. Any retrial represents an advantage to the Prosecution because it provides an opportunity to identify weaknesses in the original Prosecution case, and to seek to plug the gaps with knowledge of the strategy adopted by the Defence. The Prosecution's right to a retrial must therefore be narrowly construed. A general and open-ended retrial would permit the Prosecution to seek to repair the shortcomings of the evidence of the original trial. This is precisely what the Prosecution in the present case is seeking to do. Again, that is an abuse of the Tribunal's jurisdiction.

23. The relief sought by the Appellant is an order before the commencement of the partial retrial which limits the scope of the retrial to hearing the two witnesses the Prosecution singled out. The Trial Chamber should be directed to consider this evidence in conjunction with all other evidence on the record from the original trial that was admitted and which is relevant to the 6 Jabllanicë counts. That is precisely what the Prosecution asked for and was granted on appeal. More importantly, it is the "appropriate" remedy (within the meaning of Rule 117(C)) for the only legal wrong which the Prosecution relied on in its appeal against Mr. Haradinaj's acquittal.

24. The Appellant accepts that it will be for the Trial Chamber to determine, having heard from the parties, which parts of the evidence *from the original trial* it should take into consideration. That will depend upon whether the evidence is relevant. Relevance in turn depends upon the proper scope of the retrial. The Appellant does not ask the Appeals Chamber to determine which parts of the Trial record should be admitted at the retrial. That is an issue for the Trial Chamber to determine. But the Appellant does request the Appeals Chamber to determine the proper scope of the retrial, so that the Trial Chamber's decisions on admission of the trial record can be made on a clear and secure footing. Accordingly, the Appellant asks the Appeals Chamber to direct that the Trial Chamber (i) cannot accept any evidence beyond the two witnesses and the record of admissible and

relevant evidence from the original trial, and (ii) may not seek to go behind findings of fact or law made by the original Trial Chamber which the Prosecution did not appeal at the appropriate time (thereby waiving any subsequent right to challenge those findings).

Second issue: The Trial Chamber's order that the operative shortened Indictment for the partial retrial must include the same JCE as was alleged during Mr. Haradinaj's original trial.

25. The Trial Chamber's order which is the subject of this appeal is that Mr. Haradinaj should be tried on the basis of the JCE as alleged in the operative shortened Indictment at paragraph 24:

> "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 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 persons at these facilities, including at the KLA's headquarters at Jablanica/Jabllanicë and Glođane/Gllogjan, and at the Black Eagles headquarters at Rznic."

26. Given the terms of the Appeals Chamber's ruling (at paragraphs 50 and 377), the Appellant submits that the operative Indictment for the retrial must limit the JCE to a common purpose to commit the crimes alleged in the 6 Jabllanicë counts. The Appeals Chamber expressly quashed the Trial Chamber's decision to acquit the accused "of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32 and 24 of the Indictment" and ordered that they be retried on those counts. It thus follows that any JCE liability must be confined to a JCE to commit crimes at Jabllanicë. Mr Haradinaj has been acquitted of all of the other allegations that are encompassed within the JCE pleaded at paragraph 24 of the operative shortened Indictment (including, for example, crimes against humanity, and alleged crimes at Gllogjan

and Irzniq). He has also been acquitted of the wide-ranging JCE alleged in the Fourth Amended Indictment (the operative Indictment at the original trial) which alleged that the common purpose was "to consolidate the total control of the KLA over the Dukagjin Operational Zone" through the commission of a variety of crimes across a wide geographical area. The Prosecution did not appeal these findings of the Trial Chamber. They are final. These findings have thus acquired the quality of *res judicata* and are irrevocable. Mr. Haradinaj cannot be retried for any of these allegations and they cannot be reopened in the retrial that has been ordered. Yet that is precisely what the Prosecution is seeking to do, and it is precisely what the Trial Chamber has authorised it to do by ordering that the retrial should proceed on the JCE as pleaded in the original Indictment.

Third issue: The Trial Chamber's denial of the Appellant's request to strike out all allegations in the Indictment that concern incidents unrelated to the 6 Jabllanicë counts that are the subject of the retrial.

27. The Appellant requests that certain paragraphs relating to Mr. Haradinaj's alleged participation in the JCE and which appear in the Statement of Facts be struck from the Indictment as they include allegations of unlawful conduct wholly unrelated to the Jabllanicë counts and for which Mr. Haradinaj has been acquitted without any appeal from the Prosecution.

**The relief sought**

28. Accordingly, for all of the reasons set out herein, the relief sought by the Appellant is for an order in the following terms:

a. The scope of the retrial is limited by the express terms of the Prosecution's own appeal (and the resulting order of the Appeals Chamber) to the calling of two witnesses, Shefqet Kabashi and the other witness, which evidence should be considered in conjunction with the admissible evidence on the record from the original trial that is relevant to 6 Jabllanicë counts;

b. The alleged JCE for the retrial must be limited to a JCE to commit the crimes charged in the 6 Jabllanicë counts, and cannot by virtue of the Prosecution's own appeal be pleaded to include criminal conduct unrelated to those counts, or conduct for which Mr. Haradinaj has been finally acquitted; and,

c. All of the allegations that concern criminal conduct wholly unrelated to the 6 Jabllanicë counts and for which Mr. Haradinaj has been finally acquitted should be struck from the operative Indictment for the retrial.

**Legal framework and applicable principles of law**

29. The rulings that have been certified for appeal raise fundamental issues of principle about the nature of trial and appellate proceedings before the ICTY following an acquittal. Mr. Haradinaj's case is the very first retrial that has been ordered following an acquittal before the ICTY, and for that matter before any international court. The Statute and Rules of the ICTY provide that "In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law". The reference to "law" must be to international law, in particular international human rights law, generally recognised principles of criminal law, and the procedural safeguards provided by the Statute and Rules. The resolution of the issues in the present appeal depends on the straightforward application of the basic and core principles and safeguards that are enshrined in the ICTY's Statute and Rules, read in conjunction with (and subject to) general and internationally recognised principles of criminal law (including the principles of finality, waiver, issue estoppel, *res judicata*, *ne bis in idem* and double jeopardy).

30. It must be recalled that the ICTY was established by the Security Council to take effective measures to bring to justice the persons responsible for serious violations of international humanitarian law in the former Yugoslavia. The Security Council's intention was to establish the Tribunal as a judicial mechanism to punish those who were guilty of committing the most serious crimes. To this end the Statute of the ICTY put in place a system of criminal justice to prosecute and

try such persons. Significantly for the purposes of the present appeal, it provided for an independent Prosecutor to be responsible for the investigation and prosecution of crimes within the court's jurisdiction (Article 16). One of the Prosecutor's duties under the Statute is to bring an appeal following an acquittal if s/he believes that there has been an error of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice (Article 25). The Rules also permit the Prosecutor to present additional evidence before the Appeals Chamber which can be taken into account in arriving at a final judgment if the evidence "was not available at trial and is relevant and credible" and "it could have been a decisive factor in reaching the decision at trial" (Rule 115). Both of these powers are distinct from the provisions on review proceedings that permit the Prosecution to bring an application for review of any judgment within one year of the final judgment if a new fact has been discovered which was not known at the time of the proceedings and which could have been a decisive factor in reaching the decision (Article 26 and Rule 119).

31. These provisions taken together demarcate the extent of the Prosecutor's powers to take any further action after an Accused has been acquitted. More importantly, the appellate procedures are decisive for determining when the proceedings can be considered as being final. The proceedings cannot be regarded as final until the appellate procedures have been exhausted or the time limit for initiating any of these procedures has expired. Under these provisions it is the Prosecutor who shoulders the responsibility of determining what steps if any the Prosecution will seek to take to keep a case open following an acquittal, and thus when an acquittal will be considered final. It is the Prosecution that must decide whether any appeal will be filed and on what grounds. If any new evidence is available that meets the standard of Rule 115, it is the Prosecution who must apply for its admission before the Appeals Chamber.

32. In the event that the Prosecution decides not to appeal the acquittal, it is clear that the judgment becomes final. It is regarded as irrevocable and it thus acquires the quality of *res judicata*.

33. In the Appellant's submission, that principle plainly applies not only where the Prosecution decides not to appeal at all, but also where it deliberately confines its appeal to certain specific counts, issues or grounds of appeal which are circumscribed and severable. To the extent that the Prosecution mounts no challenge, final findings of the Trial Chamber are binding unless or until disturbed on appeal. If the Prosecution succeeds on appeal on one ground only, it is not then open to it, during the course of a retrial, to seek to go behind final and binding decisions of the original Trial Chamber which have acquired the quality of *res judicata*. In particular, it is not open to the Prosecution in those circumstances to subvert the Statute and the Rules by seeking to relitigate matters that could have formed alternative grounds of appeal (including fresh evidence grounds and admissibility rulings) when it chose not to appeal those issues within the time limits laid down by the Statute and the Rules. In those circumstances, as in any other legal system, the Prosecution must be taken (at least for the purposes of the case in issue) to have waived the opportunity to challenge the original ruling. A decision by the Prosecution not to pursue an arguable ground of appeal constitutes, on any view, an unequivocal waiver of his rights.

34. It cannot be disputed that once the Prosecution has elected to appeal on a circumscribed and severable ground of appeal in order to obtain a partial retrial pursuant to Rule 117(C), and once the Appeals Chamber has granted limited relief in response to a limited ground of appeal, the Prosecution is thereafter barred from pursuing a retrial for any other purpose than the one that formed the basis of its ground of appeal. The Prosecution must necessarily be limited by the grounds of its appeal and the relief obtained. Otherwise there would be no restriction on the Prosecution keeping a case open indefinitely, or pursuing other grounds of challenge to the original judgment, by misusing the opportunity of a retrial granted on limited grounds to mount a broad-ranging prosecution without the authority of an appeal judgment enabling it to do so. The Prosecution would, in effect, be usurping the proper powers of the Appeal Chamber by acting *proprio motu* in re-opening issues that have been finally determined.

35. The procedural provisions following an acquittal do not exist in a vacuum. Their purpose is to ensure certainty and finality in the legal system. While the pursuit of the guilty is the Tribunal's mandate from the Security Council, these provisions exist to guarantee that an Accused cannot be placed in jeopardy of being prosecuted again for any alleged criminal conduct of which he has been finally acquitted. It is often called the protection against "double jeopardy" in common law systems or *ne bis in idem* in other systems. The ICTY Statute expressly incorporates the principle of *ne bis in idem* in the context of proceedings before national jurisdictions (Article 10), as does the Rome Statute of the ICC (Article 20). This principle has a long history having been recognised in early Greek and Roman law. Since the 18th century it has taken the form of the special pleas in bar of *autrefois acquit* (a former acquittal) and *autrefois convict* (a former conviction) in the common law. The protection is embodied in the principle of *ne bis in idem* in civil law systems. It is now widely recognised in international instruments and the law of domestic jurisdictions. In particular, Article 14(7) of the ICCPR provides that no one shall be liable to be tried for an offence for which he has already been finally convicted or acquitted. In general, exceptions to the double jeopardy rule are rare and are very narrowly construed to protect the rights of Accused. For example, Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that a final acquittal can only be reopened in accordance with the law if there is evidence of new or newly discovered facts or there has been a fundamental defect in the previous proceedings which could affect the outcome of the case.[7] Many States have legislation permitting a final decision to be reopened in very limited circumstances but where this is provided for, domestic law invariably requires the involvement of an appellate court. It does not allow the Prosecution to commence a fresh prosecution, or to go behind final and binding decisions of a court of competent jurisdiction, on its own initiative.

[7] The European Court of Human Rights has held that "a review of a final and binding judgment should not be granted merely for the purpose of obtaining a rehearing and a fresh determination of the case," but only in accordance with the exceptions provided in the Protocol, and that the power to reopen proceedings must be exercised to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice : see for example *Radchikov v. Russia*, supra note 1 at para. 43.

36. The Appellant does not suggest that Mr. Haradinaj's acquittal is final in respect of the 6 Jabllanicë counts. However, it is final in respect of all of the other counts and the allegations that formed the basis of those counts. The findings in respect of all the other counts and allegations are *res judicata*. Moreover, what is often regarded as the primary motivation for the rule against double jeopardy, the preservation of finality in criminal proceedings, is clearly applicable to determining the scope of the retrial in the present case. That is so because a decision is final when it is irrevocable. A decision is irrevocable "when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them".[8] The Prosecution's decision only to appeal the Trial Judgment on the basis that the original Trial Chamber failed to afford it a fair opportunity to call the two witnesses has the inevitable consequence that no further remedies are now available to the Prosecution and no further grounds of appeal can be raised. If these matters cannot now be raised on appeal then *a fortiori* they cannot simply be re-litigated by the Prosecution without a prior order of the Appeals Chamber re-opening the proceedings on those grounds.

37. It has been widely accepted that the principle of finality in criminal proceedings operates as a powerful incentive to the Prosecution to investigate and prosecute diligently and efficiently the first time round. Conversely, a permissive approach to retrials would encourage careless investigation and prosecution. The objective of promoting effective and efficient prosecution serves the interests of justice by ensuring that the Prosecution is required to present its best case once only, and by ensuring that the accused is not repeatedly put in jeopardy. These important objectives would be severely undermined if the Prosecution knew that it would get a "second bite at the cherry" (in the form of a general retrial without clearly defined evidential limits) providing it could identify at least one ground of appeal (however narrowly circumscribed and severable). The solution is to ensure that

[8] Commentary on Article 1.a: Explanatory Report of the European Convention on the International Validity of Criminal Judgments, publication of the Council of Europe, 1970, p. 22. This definition is cited with approval in the Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 117). This definition originates from the commentary to Article 14(7) of the ICCPR: see "Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies", HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, p. 259.

the remedy properly corresponds to the error, and that the Prosecution secures only what it is entitled to, namely a fair hearing of the evidence that it would have adduced at the first trial if the Trial Chamber had not fallen into error. Anything beyond that is an encouragement to lazy prosecution. It would also enable the Prosecution (as here) to change its legal team and see whether, with a fresh pair of eyes, it can improve its case with a second try. That is not a proper use of the appellate process in criminal proceedings.

38. It is equally important that the Accused must know where he or she stands in the proceedings, and should not be subjected to the distress of the trial process and be put in jeopardy of a wrongful conviction by the Prosecution making repeated attempts to convict him or her. Such an approach would undermine the presumption of innocence and the high burden of proof which the Prosecution must discharge in criminal proceedings. The principle of finality is in harmony with these axioms of criminal law. The approach adopted in the Impugned Decision and the trial strategy being pursued by the Prosecution are anathema to the basic principles of criminal law, and the trial and appellate processes.

39. The need to preserve finality in criminal proceedings serves to protect the integrity of the system of justice itself. By preventing the harassment of individuals, and by ensuring legal certainty, it reduces the risk of a miscarriage of justice and promotes public confidence in the international system for the enforcement of humanitarian law through criminal prosecutions. The international community would rightly lose respect for a legal system that did not respect the finality of proceedings and in particular failed to place clear limits on the Prosecution's powers to conduct retrials of those who have been acquitted.

40. As already noted, there is no ICTY authority on the proper scope of a retrial following an acquittal. The decision of the Appeals Chamber in *Muvunyi* concerned the scope of the evidence to be heard in a retrial following an appeal by the Accused against a conviction.[9] The principles applicable to an appeal against

[9] *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009.

acquittal were not in issue in that case. There was no issue of the Accused's protection against double jeopardy, and the retrial was not a partial retrial ordered so as to provide a remedy for a circumscribed and severable error. The Accused in that case had not limited his ground of appeal to the need to hear particular witnesses on a retrial as the Prosecution has done in the present case. Moreover, the "new" witnesses who the Prosecution sought to call had been disclosed to the Defence at the original trial (in contrast to the entirely new witnesses the Prosecution is seeking to call in the present case). To that extent, the rationale underlying the principle of finality was not in play in the same way at all. The Prosecution had already identified the witnesses at the time of the original trial. The issue was whether the Prosecution was entitled to call them to meet the fresh evidence presented by the accused. The situation in *Muvunyi* was thus wholly different from the situation that prevails in the present case. It is nevertheless significant that in their dissenting opinion Judges Shahabuddeen and Meron commented that "When a retrial is ordered, it is particularly important to safeguard defendants' rights through means such as limitations on which evidence the Prosecution may adduce" (para. 6).

**Issue 1: The scope of the evidence to be heard at the retrial**

41. It is the Appellant's submission that for the purposes of the retrial the Prosecution is bound by, and must be limited to, the relief it sought and that it was granted by the Appeals Chamber in its appeal against Mr. Haradinaj's acquittal. The Prosecution only appealed on a single ground (which it characterised as a "limited appeal" against the acquittal) namely that, as stated in the Judgment of the Appeals Chamber, "the Trial Chamber erred when it refused the Prosecution's requests for additional time to exhaust all reasonable steps to secure the testimony of two "crucial" witnesses, Shefqet Kabashi and another witness, and ordered the close of the Prosecution case before such reasonable steps could be taken" (para. 14).

42. The Judgment notes that the Prosecution contended that the Trial Chamber's error invalidated the verdict by precluding the Prosecution from presenting this

"crucial" evidence in respect of the 6 Jabllanicë counts that have become the subject of the present retrial. The Appeals Chamber was thus requested to reverse the acquittals on these counts only, and to remand the matter to a Trial Chamber for a retrial on the basis that the Prosecution asserted "that a retrial would provide the reasonable possibility of hearing these crucial witnesses" (para. 15).

43. In his oral submissions before the Appeals Chamber on 28 October 2009, Mr. Kremer on behalf of the Prosecution emphasised that "This appeal is about the two crucial witnesses that did not testify, Shefqet Kabashi and the other witness. Their evidence was central to the Jabllanicë counts".[10] He went on:

> "The Prosecution says that this Chamber has the opportunity to correct the injustice of the fair trial on the Jabllanicë count. The victims of those counts were denied justice because crucial witness evidence was never received."[11]

The Prosecution contended that the Accused had been acquitted because the two witnesses were not heard and that the Accused would be convicted of the 6 Jabllanicë counts if the evidence of the two witnesses could be called at the retrial.

44. The Prosecution's request could not have been put more clearly. It sought the specific remedy of a retrial solely in order to hear these two "crucial" witnesses whose testimony the Trial Chamber had failed to take reasonable steps to secure at the original trial. The Appeals Chamber granted this request holding that the Trial Chamber failed to take sufficient steps "to facilitate the Prosecution's requests to secure the testimony of Kabashi and the other witness" and that:

> "Given the potential importance of these witnesses to the Prosecution's case, the Appeals Chamber finds that, in the context of this case, the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice" (para. 49).

45. In other words, there would have been no miscarriage of justice but for the error of the Trial Chamber in respect of the two witnesses. There would otherwise have been no legal wrong requiring a remedy and no basis for granting a partial retrial.

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[10] T27:7-9.
[11] T126:23 – 127:1.

The scope of the retrial must correspond to the nature of the error which justified it. It must be limited to addressing and providing a remedy for the miscarriage of justice, and nothing more. That means affording the Prosecution a fair opportunity to call the two witnesses. That was the reason for the order for the retrial in the first place.

46. The Prosecution did not ask for new evidence to be admitted on appeal. Nor did it suggest to the Appeals Chamber that it would or might seek to adduce new evidence at a retrial. It did not ask for a further opportunity to investigate its case, or for any other remedy. It did not appeal any of the other findings or rulings of the Trial Chamber that could have provided it with an opportunity to call any evidence other than that of the two particular witnesses.

47. The Prosecution did not ask for Lahi Brahimaj's convictions for Counts 28 and 32 of the original Indictment to be disturbed. The Appeals Chamber decided that these convictions would not be the subject of the partial retrial on the basis that the Prosecution's appeal could not be construed as a request to quash these convictions. The retrial as ordered is thus not a rehearing of the entire case in respect of the Jabllanicë counts. It has been specifically limited by the grounds of the Prosecution's appeal as construed by the Appeals Chamber. If that was the consequence of the limited way in which the Prosecution put its appeal in relation to Lahi Brahimaj, then the same approach must apply to the limited way in which the Prosecution put its appeal in relation to the Appellant. Accordingly, just as the partial retrial does not encompass a reconsideration on the counts of which Mr. Brahimaj was convicted (because the Prosecution did not ask for this), so it cannot fairly encompass a retrial extending beyond a fair opportunity to call the two witnesses (because the Prosecution did not ask for this either).

48. In an appeal against acquittal it is the Prosecution's duty to define the issues on which it intends to appeal. In the present case, the Prosecution's election of its grounds of challenge drew a final line under all other aspects of Mr. Haradinaj's acquittal. That in turn means that the Prosecution is now precluded from raising other issues, which it did not raise on appeal, during the retrial. The approach advocated by the Appellant fits the scope of the remedy to the nature of the legal

wrong identified by the Appeals Chamber, properly observes the principle of finality in the criminal proceedings, and provides legal certainty for the retrial. Mr. Haradinaj was and is entitled to proceed on the basis that the Prosecution elected the remedy it sought from the Appeals Chamber following his acquittal – a retrial to hear the two witnesses. The Prosecution cannot now (after the retrial has been ordered) shift the goalposts and request any other remedies (such as calling new witnesses or admitting other evidence) it could have pursued in the appellate proceedings.

49. It would be contrary to fundamental principles of criminal law and procedure for the Prosecution to use the granting of its specific and limited request for a partial retrial to hear two particular witnesses to be permitted to attempt to relitigate its case (after Mr. Haradinaj was acquitted, and after its appeal was disposed of) by identifying completely new witnesses and seeking to make good inadequacies in the original trial with additional evidence (including an expert witness which it elected not to call at the original trial). It must be taken into account that the 6 new witnesses have only been disclosed to the Appellant in December 2010, more than two years after Mr. Haradinaj was acquitted. The Prosecution's investigations in this case stretch back to before 2004.

50. The fallacy of the Prosecution's approach is demonstrated by considering what would be the position if the Prosecution was unable to call or adduce the evidence of either of the witnesses during the course of the retrial.[12] If the testimony of neither witness was available to the Prosecution at the retrial, so that the *raison d'etre* for the retrial had disappeared, it would plainly be abusive for the Prosecution to seek to take advantage of an order for partial retrial obtained on a limited basis in order to proceed on wholly different evidence from that which had been the subject of its appeal. That would be the clearest possible abuse of the appellate and trial processes.

51. If that proposition is correct (as the Appellant submits it must be) then it follows that the scope of the retrial in the present case is properly confined to the calling

[12] This is not a purely hypothetical proposition. At the time of writing Shefqet Kabashi has not confirmed that he is prepared to testify at the retrial.

of the two witnesses. Otherwise the fact that the Prosecution happens to be in a position to call one or other of the two witnesses would operate as an arbitrary trigger enabling a wholly different case to be presented. That would amount to an unjust windfall benefit to the Prosecution, contrary to the basic principles of a fair trial.

52. Moreover, the retrial has been ordered in respect of 6 counts only on the basis that the Prosecution requested that the acquittals in respect of those counts, and no others, be reversed. The Prosecution is not suggesting that Mr. Haradinaj should be retried for any counts other than those 6. Those counts were the limit of its appeal. A clear nexus exists between the counts for which the acquittals were reversed (and for which a retrial was ordered) on the one hand and the two witnesses on the other. The very purpose of the retrial on the 6 counts is to hear the "crucial" evidence of the two witnesses in respect of these counts.

53. To allow the Prosecution to go further would circumvent the requirements of Rule 115 by permitting the Prosecution to rely on new evidence which it did not seek to have admitted before the Appeals Chamber. Had the Prosecution sought to adduce this evidence during its appeal it would have been required to show that the threshold test under Rule 115 was met (a topic that was touched upon during the appeal hearing, although in the event the Prosecution made no application). In particular, the Prosecution would have been required to show before the Appeals Chamber that the additional evidence was not available at trial *and not discoverable through the exercise of due diligence*. If the Prosecution had not been able to satisfy these requirements, the Appeals Chamber would have refused the admission of the evidence. The Prosecution now seeks simply to sidestep this threshold test by seeking to have "fresh" evidence admitted not on appeal, but at the partial retrial. It is using the limited order for retrial, granted to remedy a specific wrong, as an excuse to sidestep the procedural protections which the Statute and the Rules afford to an acquitted person.

54. The Prosecution also seeks the admission of evidence from the original trial that was ruled inadmissible. This is a further indication of its determination to

circumvent the principle of finality. The Prosecution did not appeal any of these admissibility rulings, either at the time they were made (by means of an interlocutory appeal), or in the subsequent appeal against Mr. Haradinaj's acquittal on the Jabllanicë counts. This was presumably because the Prosecution either (i) did not consider it had an arguable ground to appeal these admissibility rulings or (ii) did not at that time consider the excluded evidence to be relevant and probative on the Jabllanicë counts. Despite this, and in flagrant disregard of *res judicata* principles, the Prosecution now thinks it fit to apply to admit the evidence at the partial retrial. For example:

- The Trial Chamber ruled inadmissible various reports and statements that the Prosecution sought to introduce through Zoran Stijović on the grounds that they lacked reliability and were irrelevant (Decision on the Admission of Zoran Stijović's Rule 92ter Statement and its Annexes, 29 November 2007). The Prosecution did not appeal this decision at any stage. Yet it seeks to introduce much of this evidence again in the retrial. It has also taken new statements from Mr. Stijović in respect of some of materials that were not admitted and new materials that he produces, and it seeks to rely on testimony he has given in other cases. The Prosecution should not be permitted to use any of this evidence in the retrial because (i) it had an opportunity to obtain all relevant material from this witness at the original trial when his evidence was presented – it would amount to having "a second bite at the cherry", (ii) it did not appeal the ruling on admissibility at the time, nor did it raise in its appeal of the Trial Judgment any ground in relation to this evidence, and (iii) it did not apply to have any of the supposedly new material introduced as fresh evidence on appeal.

- The Trial Chamber ruled inadmissible various documents including a book written about Mr. Haradinaj and a notebook allegedly seized at Mr. Balaj's home (Decision on Prosecution's Motion to Tender Documents on its Rule 65ter Exhibit List, 30 November 2007). The Prosecution did not appeal this decision at any stage, nor raise the issue

in any ground of appeal against the final judgment of the Trial Chamber. Instead, the Prosecution considers itself free simply to make another attempt to introduce this evidence in the retrial. In fact the Prosecution seeks to call a new witness to bolster its case for the admissibility of the notebook – a transparent example of the Prosecution attempt to alter its case after the matter in question has been finally determined.

55. The Appeals Chamber is accordingly requested to direct that such evidence cannot be admitted at the retrial. The scope of the retrial must be restricted to the evidence of the two witnesses and the relevant evidence from the record of the original trial.

**Issue 2: The alleged JCE from the original trial**

56. As explained above, the Appellant's submission is that the Prosecution is only entitled to call the evidence of the two witnesses at the retrial which can be considered by the Trial Chamber solely in light of any other evidence relevant to the Jabllanicë counts that was admitted at the original trial. The Trial Chamber cannot take into account evidence concerning allegations about which there has been a finding by the Trial Chamber that was not appealed by the Prosecution and which is final. The Trial Chamber at the retrial cannot reconsider the evidence as though there was no final finding of the Trial Chamber. It follows that all such allegations should be struck from the Indictment for the retrial. No evidence can be led in respect of these allegations, or considered by the Trial Chamber, and there is hence no justification for their inclusion in the Indictment.

57. The JCE as alleged in operative shortened Indictment at paragraph 24 must for these reasons be struck out and replaced by a JCE limited to the 6 Jabllanicë counts about which the two witnesses can testify. It is of fundamental importance that such an order is made because Mr. Haradinaj has been acquitted of the JCE as alleged in the Fourth Amended Indictment. The Prosecution did not appeal this acquittal. The finding must therefore be regarded as final, and the finality of the

judgment must be preserved. It would amount to a clear violation of the principle of *non bis in idem* for the Appeals Chamber to permit the OTP to re-prosecute Mr. Haradinaj on the same JCE as alleged in the original Indictment for which he has been finally acquitted.

58. It is no doubt in recognition of this axiomatic principle that the Prosecution initially narrowed the Fourth Amended Indictment (following the Trial Chamber's order to produce a shortened Indictment that corresponds to what is at issue in the retrial) by pleading that the common agreement 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 Serbian Forces or otherwise not supporting the KLA ... The JCE **included** the establishment and operation of and the mistreatment of detained persons at the KLA's headquarters at Jabllanicë." [emphasis added]

59. The Appellant submitted in response that the Indictment had to further limit the JCE to the allegations concerning the establishment and operation of, and the mistreatment of, detained persons at the KLA's headquarters at Jabllanicë only. By alleging that the JCE "included" Jabllanicë, the Prosecution had left open the possibility of leading evidence of other alleged crimes and unlawful conduct which would fall outside of the scope of the retrial as ordered by the Appeals Chamber and for which the Appellant had been finally acquitted.

60. The Appeals Chamber expressly stated in its Judgment that it quashed the Trial Chamber's decisions to acquit Mr. Haradinaj "of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jabllanicë under Counts 24, 26, 28, 30, 32 and 34 of the Indictment". In the Appellant's submission the Appeals Chamber thereby restricted the scope of the retrial to the crimes specified in Counts 24, 26, 28, 30, 32 and 34 on the basis of the alleged participation of the accused in a JCE to commit these particular crimes at the KLA headquarters and the alleged prison in Jabllanicë. The allegations set forth in Counts 24, 26, 28, 30, 32 and 34 only concern specific incidents that it is alleged occurred in Jabllanicë

and the scope of the JCE is confined by the Appeals Chamber's Order to the commission of these crimes in Jabllanicë.

61. In the Impugned Decision, however, the Trial Chamber ordered the Prosecution to replace this revised JCE allegation with the original JCE as alleged in the Fourth Amended Indictment. This JCE is currently the operative JCE for the retrial. It reads 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 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 persons at these facilities, including at the KLA's headquarters at Jablanica/Jabllanicë and Glođane/Gllogjan, and at the Black Eagles headquarters at Rznic."

62. If this alleged JCE were to remain as the operative JCE for the retrial, the Prosecution would be required to prove all of the allegations included in it. The purpose of an Indictment is to put the Accused on notice of the case that the Prosecution will seek to prove at trial. It is also the touchstone against which questions of relevance and admissibility are to be determined. In order to prove the JCE currently pleaded the Prosecution would have to prove allegations that are plainly outside of the Appeals Chamber's Order to retry Mr. Haradinaj in respect of the 6 Jabllanicë counts only. Such allegations would include:

- An agreement to control and dominate the whole Dukagjin Zone;
- The removal and mistreatment of Serb civilians in this Zone;
- The removal and mistreatment of alleged collaborators in this Zone;
- The commission of crimes against humanity including persecution;
- The commission of other crimes throughout this Zone; and,

- The operation of detention facilities and mistreatment of prisoners in this Zone at locations other than Jabllanicë (including at Gllogjan and at the Black Eagles Headquarters at Irzniq).

63. To prove these allegations it is obvious that the Prosecution would have to call evidence well beyond the Accused's participation in the crimes as charged in the 6 counts that relate solely to Jabllanicë, and for which Mr. Haradinaj has been finally acquitted.

64. At the time of writing, the Prosecution's position on this fundamental issue is unknown. Despite the stance it took before the Trial Chamber, the Prosecution has not sought to appeal the Impugned Decision enlarging the JCE. The Defence awaits clarification of the Prosecution's position. If the Impugned Decision is permitted to stand however the currently pleaded JCE would provide an open door for the Prosecution to introduce evidence of allegations for which Mr. Haradinaj has already been finally acquitted in breach of the principle of *res judicata*.

65. Accordingly, the Appellant requests the Appeals Chamber to strike out the JCE as alleged and to replace it with the JCE that it ordered should be the subject the retrial, namely, "a JCE to commit crimes at the KLA headquarters and the prison in Jabllanicë under Counts 24, 26, 28, 30, 32 and 34 of the Indictment".

**Issue 3: Allegations of criminal conduct beyond 6 Jabllanicë counts**

66. Certain of the allegations of Mr. Haradinaj's participation in the JCE as well as particular allegations in the Statement of Facts of the operative shortened Indictment include allegations for which Mr. Haradinaj has been finally acquitted. These allegations, as set out below, should all be struck from the Indictment to prevent Mr. Haradinaj from being tried twice for allegations for which he has been found not guilty before the ICTY.

67. As already noted, the Appellant accepts that it is for the Trial Chamber to decide, having heard from the parties, what relevant evidence it can take into account

from the record of the original trial. However, it is the Appellant's submission that the Appeals Chamber must direct that evidence in relation to allegations about which there have been findings made by the Trial Chamber that have not been appealed by the Prosecution, cannot be taken into account. It follows that allegations based on such evidence cannot be included in the operative Indictment. To do otherwise would contradict the findings of the original Trial Chamber which are final. It would run counter to the principled and orderly conduct of trial and appellate proceedings and would amount to an abuse of process of the Tribunal.

Participation in the alleged JCE

68. The particular paragraphs of the operative shortened Indictment that the Appellant submits should be struck out are the following:

- Paragraphs 28(a)-(f) contain allegations with no reference to Jabllanicë whatsoever and which would permit the Prosecution to lead evidence about alleged unlawful conduct well beyond the Jabllanicë area for which Mr Haradinaj has been finally acquitted.

- Paragraphs. 28(j)-(m) are allegations that mention or refer to Jabllanicë but as an illustration of one place where unlawful acts were committed as part of a broader agreement to commit unlawful acts in other places. The wording "including" in Jabllanicë is used repeatedly.

In the paragraphs which follow the Appellant sets out some of the more egregious examples of the Prosecution's approach in order to illustrate just how far the scope of the retrial (as proposed by the Prosecution, and as authorised in the Impugned Decision) extends beyond the remedy which was granted by the Appeals Chamber.

FARK

69. Para. 28(c) contains allegations about FARK forces in the Dukagjin Operational Zone and Mr. Haradinaj's alleged exclusion of such forces from the Zone in order to allow his soldiers "the ability to dominate the area and to persecute civilians". These allegations concern events far beyond the Jabllanicë area. On the Prosecution's own case these incidents had no relevance whatever to the alleged incidents in Jabllanicë. A vast amount of evidence was presented at the original trial about FARK which included its arrival as an independent armed force in Western Kosovo, its relationship to the KLA, various disputes and conflicts that occurred between the KLA and FARK, and the resolution of these conflicts. The evidence was wide-ranging and often inconsistent. None of this evidence has the slightest bearing on a JCE to commit the crimes alleged in the 6 Jabllanicë counts, a point acknowledged by the Prosecution in the JCE it initially alleged (before being ordered by the Trial Chamber in the Impugned Decision to revert to the JCE from the original trial). The JCE from the original trial alleges that the common purpose was "to consolidate the total control of the KLA over the Dukagjin Operational Zone" which included the exclusion of FARK from the Zone as a rival force to the KLA. The revised JCE initially alleged by the Prosecution had, however, abandoned this allegation.

70. In its Pre-trial Brief for the retrial the Prosecution seeks to rely on evidence on the record, as well as new evidence, in respect of FARK (one of the new witnesses is listed to deal with this issue). The particular FARK-related incident that the Prosecution has selected to rely on involves an alleged assault on FARK members during an early period of conflict between the two forces. The alleged victims were combatants and not civilians, and they were not detained in Jabllanicë or elsewhere in KLA custody when the alleged incident occurred. The Prosecution's attempt to relate this incident to the issues in the partial retrial is contrived and lacks any proper foundation.

71. For these reasons alone, the original evidence concerning this incident, as well the evidence of the new witness, is inadmissible as falling outside the scope of the retrial ordered by the Appeals Chamber. It covers an alleged conflict between KLA soldiers and FARK soldiers on the opposite side of the Dukagjin Zone from Jabllanicë (FARK having had no involvement in the Jabllanicë area at all).

72. More importantly, the allegation was relevant to the JCE as it stood at the time of the original trial (consolidation of military power over the zone to the exclusion of FARK). Mr. Haradinaj was acquitted of that JCE and the Prosecution did not seek to appeal this acquittal. Allowing this evidence to be adduced would require a consideration (and an opening-up) of the body of evidence adduced during the original trial concerning the FARK-KLA relationship which is not permissible. The Prosecution's reliance on this material demonstrates both how far outside the scope of the Appeal Chamber's Order it is proposing to invite the Trial Chamber to travel, and the Prosecution's disregard for the finding of the original Trial Chamber that acquitted Mr. Haradinaj of the alleged JCE.

Statement of Facts

73. The Statement of Facts in the operative shortened Indictment also contains allegations that are not confined to Jabllanicë and which in fact cover many other areas and alleged unlawful conduct which the Appeals Chamber did not order should be the subject of the partial retrial, and for which Mr. Haradinaj has been finally acquitted. Jabllanicë is mentioned for the first time in paragraph 39 of the Statement of Facts. The preceding paragraphs (32-38) concern allegations about the persecution of Serb and other civilians in many other locations. Mr. Haradinaj was acquitted of these allegations and the Appeals Chamber did not order any retrial on these allegations. The allegations that follow about bodies being found at the canal area and elsewhere (paras. 42-46) are similarly too broad as they incorporate allegations about individuals which do not form any part of the partial retrial and in respect of whose deaths Mr. Haradinaj has been finally acquitted.

74. In the Appellant's submission all of these paragraphs in the Statement of Facts, with the exception of paras. 39-41 which concentrate on Jabllanicë, should be struck from the Indictment. Mr. Haradinaj cannot be subjected to a retrial on allegations of which he has been acquitted, which the Prosecution did not appeal, and for which no retrial has been ordered.

Other allegations: for example the Stojanovićs

75. Although not included as allegations in the Indictment, there are other allegations and materials relied on by the Prosecution in its Pre-trial Brief which relate to findings made by the Trial Chamber. The Appellant's submission is that the evidence pertaining to these allegations cannot be admitted in the retrial. As requested above and for the same reasons, the Appellant invites the Appeals Chamber to direct that any evidence in respect of allegations that relate to findings that were not appealed by the Prosecutor cannot be taken into account by the Trial Chamber in the retrial.

76. A prime example of such evidence is the reliance the Prosecution seeks to place on the statements and testimony of members of the Stojanović family about Mr. Haradinaj's alleged involvement in beatings (charged in the original trial as Counts 3 and 4 of the Indictment). This evidence plainly cannot be relied upon in the retrial because:

a. Mr. Haradinaj has been acquitted of these counts, on the ground that the Prosecution evidence of identification was unreliable, his acquittal was not the subject of any appeal, and the Prosecution is not entitled to re-litigate these allegations as evidence of his participation in a JCE.

b. The allegations have nothing to do with Jabllanicë and therefore fall outside the scope of the partial retrial as ordered by the Appeals Chamber.

c. The alleged incident occurred on a date before a state of armed conflict existed (on the findings of the Trial Chamber which the Prosecution accepts) and thus was not subject to International Humanitarian Law.

d. The evidence is in any event irrelevant to a JCE to commit crimes at Jabllanicë. The alleged attack on the Stojanović family was *sui generis*. It was common ground at the trial that their house had been used by Serb forces (in effect, as a military facility) from which to attack the Haradinaj family compound, during the assault on the village of Gllogjan on 24 March 1998. The attacks alleged in Counts 3 and 4 of the original Indictment were alleged to be an act of opportunistic retaliation for the involvement of the Stojanović family in the Serb assault on 24 March 1998, which had resulted in the deaths of a number of young Kosovar Albanians, and the destruction of a great deal of property in the village. The incident was not alleged to have been pre-planned, and (on the original Trial Chamber's findings) it was not part of a general attack on the Serb civilian population in that area. There is no evidence (and in view of the findings at the original trial, there can be no allegation) that Mr. Haradinaj was present at, or party to, the conduct alleged. Nor is there any allegation that Mr. Haradinaj ordered or was otherwise in command of the events which occurred. The Prosecution's reliance on this incident well illustrates the error of its general approach to the partial retrial. The evidence relevant to Counts 3 and 4 of the original Indictment (and the considerable body of background evidence relating to the attack on 24 March 1998) has nothing whatever to do with the alleged mistreatment of civilians in Jabllanicë. The Prosecution's attempt to introduce this evidence ignores the clear terms of the Appeals Chamber's Order for a retrial in respect of a JCE to detain and mistreat civilians at Jabllanicë, and would widen the scope of the retrial very considerably, extending it far beyond that contemplated by the Appeals Chamber.

**Conclusion**

77. Accordingly, for all of the reasons herein, the Appellant respectfully requests the Appeals Chamber to grant its appeal in respect of each of issues that were certified for appeal and to order the relief requested as set out above at paragraph 28.

**Word count: 13, 925**

**Dated this day the 10th day of February 2011,**

**Counsel for Mr. Ramush Haradinaj,**

Ben Emmerson QC.

**Ben Emmerson QC**

**Rodney Dixon**