



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-04-84bis-PT
Date: 14 January 2011
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IN TRIAL CHAMBER II

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

Registrar: **Mr. John Hocking**

Decision: **14 January 2011**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

**DECISION ON SHORTENED FORM OF THE FOURTH AMENDED
INDICTMENT**

Office of the Prosecutor
Mr. Paul Rogers

Counsel for the Defence:
Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seised of the “Submission on Behalf of Ramush Haradinaj on the New Version of the Indictment for the Partial Retrial” filed on 23 November 2010 (“Haradinaj’s Submission”), the “Response to Prosecution Indictment Motion on Behalf of Lahi Brahimaj” filed on 23 November 2010 (“Brahimaj’s Submission”) and “Idriz Balaj’s Motion Challenging the New Version of the Revised Fourth Amended Indictment” filed on 23 November 2010 (“Balaj’s Submission”) (collectively “Defence Submissions”) and hereby renders its consolidated decision thereon.

I. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj on certain counts and ordered a partial retrial.¹
2. The Trial Chamber ordered on 15 September 2010 that the Fourth Amended Indictment shall be the operative indictment in the partial retrial.²
3. At the Status Conference held on 23 September 2010 the Pre-Trial Judge ordered the parties to jointly file by 28 October 2010 a shortened form of the operative indictment corresponding to what is at issue in the partial retrial.³ The Pre-Trial Judge at the Status Conference held on 26 October 2010 modified the order issued on 23 September 2010 by requiring that the amended indictment be filed by the Prosecution alone.⁴
4. The Prosecution filed the “Submission of Revised Fourth Amended Indictment” on 28 October 2010, in which it submitted a revised version of the Fourth Amended Indictment “to correspond to the Appeals Chamber’s order for a partial retrial”. This revised version of the Fourth Amended Indictment contained revisions made using “tracking” and the paragraphs and counts were not numbered consecutively.
5. On 3 November 2010 the Pre-Trial Judge ordered that the Prosecution file “tracked” and “clean” versions of the Fourth Amended Indictment corresponding to what is at issue in the partial retrial, with the paragraphs and counts numbered consecutively (“new version of the Indictment”)

¹ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-A, Judgement, 19 July 2010 (“Appeal Judgement”), para. 377.

² Order regarding the Operative Indictment and Pleas, 15 September 2010.

³ T. 5 (23 September 2010).

and that the Defence file submissions stating whether they consider that the new version of the Indictment corresponds to what is at issue in the partial retrial ordered by the Appeals Chamber.⁵

6. The Prosecution filed on 9 November 2010 the “Submission of New Version of Revised Fourth Amended Indictment” which contained “tracked” and “clean” versions of the Fourth Amended Indictment corresponding to what was at issue in the partial retrial (“Shortened Indictment”).⁶

7. Following the Defence Submissions filed on 23 November 2010, the Prosecution filed the “Prosecution Consolidated Response to the Defence Submissions on the New Version of the Revised Fourth Amended Indictment” on 7 December 2010 (“Response”).

8. On 13 December 2010 Idriz Balaj filed “Idriz Balaj’s Request for Permission to Reply and Reply to Prosecution’s Consolidated Response to the Defence Submissions on the New Version of the Revised Fourth Amended Indictment” (“Balaj’s Reply”). On 14 December 2010 Lahi Brahimaj filed confidentially “Lahi Brahimaj’s Request for Leave to Reply and Reply to Prosecution Consolidated Response to the Defence Submissions on the New Version of the Revised Fourth Amended Indictment” (“Brahimaj’s Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Defence Motions Challenging the Shortened Indictment

9. Ramush Haradinaj submits that the Shortened Indictment contains allegations which are outside the scope of the retrial as ordered by the Appeals Chamber and as pleaded by the Prosecution in the appellate proceedings.⁷ In this regard Haradinaj submits that the allegations concerning the Joint Criminal Enterprise (“JCE”), his participation in it, and the statement of facts that extend beyond Jablanica/Jabllanicë and the particular incidents alleged to have taken place there should be revised and/or struck from the Shortened Indictment.⁸

⁴ T. 45–46 (26 October 2010).

⁵ Order Regarding the Revised Fourth Amended Indictment, 3 November 2010 (“Order of 3 November 2010”).

⁶ Submission of New Version of the Revised Fourth Amended Indictment, 9 November 2010 (“Prosecution’s Submission”), Appendices A and B.

⁷ Haradinaj’s Submission, paras. 3, 6–8, 10.

⁸ *Ibid.*, paras. 3, 13, 15–17.

10. Haradinaj argues that the Appeals Chamber “plainly 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.”⁹ He submits that the scope of the JCE is confined by the Appeals Chamber’s Order to the commission of these crimes in Jabllanicë.¹⁰ Haradinaj further submits that by alleging that the JCE “included” Jablanica/Jabllanicë, the Prosecution has left open the possibility of leading evidence which would fall outside of the scope of the retrial ordered by the Appeals Chamber.¹¹

11. Additionally, Haradinaj argues that evidence which is not relevant to the Jablanica/Jabllanicë area should be excluded.¹²

12. Idriz Balaj submits that the alteration of the common plan or purpose of the JCE as set out in the Shortened Indictment violates the Trial Chamber’s order of 15 September 2010, the principle of *res judicata*, and is legally barred.¹³ Balaj argues that the Appeal Judgment does not permit the Prosecution to change the alleged common plan or purpose of the JCE on which the Accused stood trial¹⁴ and that any such change is also barred by the principles of *res judicata*.¹⁵ Balaj submits that the principle of *non bis in idem* prohibits the Prosecution from alleging in the Indictment and/or producing evidence at trial concerning factual allegations for which he was acquitted in the first trial.¹⁶ Balaj requests that the Trial Chamber order the Prosecution to amend the Shortened Indictment so that it contains the same allegations regarding the common plan or purpose of the JCE as were made at the initial trial.¹⁷

13. Lahi Brahimaj submits that retrying him under Counts 3 and 5 as foreseen in the Shortened Indictment does not comply with the Appeal Judgement and violates the principle of *ne bis in idem*.¹⁸ Brahimaj states that Count 3 still includes the allegation that he committed cruel treatment and torture, even though the Prosecution claims that it is not seeking a conviction against him for crimes charged in this Count.¹⁹ He submits that the Appeals Chamber specifically stated that he would not be retried on Counts 3 and 5 and therefore the Shortened Indictment does not comply with the Appeal Judgement.²⁰ He contends that in Count 5 the Prosecution is seeking to amend the

⁹ *Ibid.*, para. 8.

¹⁰ *Ibid.*, para. 8.

¹¹ *Ibid.*, para. 14.

¹² *Ibid.*, paras. 3, 21.

¹³ Balaj’s Submission, para. 11.

¹⁴ *Ibid.*, para. 15.

¹⁵ *Ibid.*, paras. 19–23.

¹⁶ *Ibid.*, para. 29.

¹⁷ *Ibid.*, para. 30.

¹⁸ Brahimaj’s Submission, para. 2. See also *Ibid.*, paras. 14–39.

¹⁹ *Ibid.*, para. 14.

²⁰ *Ibid.*, para. 34.

original count so that he may be tried again on a count on which he has already been found guilty and for which he has served his sentence.²¹

14. Brahimaj submits that paragraphs 30(b) and 41 of the Shortened Indictment contain conflicting material dates and he seeks a clarification as to when the Prosecution alleges that there was a detention facility in Jablanica/Jabllanicë.²²

15. In Brahimaj's submission, paragraph 24 of the Shortened Indictment is materially and substantially different from the corresponding paragraph of the previous indictment.²³ He submits that while his Defence envisaged that the geographical scope of the JCE would be limited to the area of Jablanica/Jabllanicë, it was not expected that a substantively different form of JCE would be pleaded.²⁴ In Brahimaj's submission, this revision has the effect of changing the pleading of the JCE by alleging a whole new mode of liability,²⁵ thereby exposing him to an additional risk of conviction.²⁶ He further submits that because the pleading of the JCE does not adequately articulate the requisite mental element,²⁷ the Shortened Indictment fails to provide sufficient information for him to understand the nature and cause of the charges against him and is therefore defective.²⁸ Brahimaj contends that because the Prosecution has not sought permission for an amendment of the indictment it has not complied with Rule 50 of the Rules of Procedure and Evidence ("Rules")²⁹ and has not demonstrated due diligence³⁰ and that permitting the amendment would cause delay to the proceedings.³¹

16. Brahimaj requests that the Trial Chamber strike out the allegations in the Shortened Indictment which do not comply with the Appeals Chamber's Order or alternatively to order the Prosecution to delete his name from the list of accused under Counts 3 and 5; to define whether it alleges that a prison in Jablanica/Jabllanicë was instituted from April 1998 or mid-May 1998; and to amend the Shortened Indictment to conform with the allegations concerning the common plan or purpose of the JCE as previously set out in the Fourth Amended Indictment; and to enable Brahimaj to know the extent and scope of the charges he is confronted with.³²

²¹ *Ibid.*, para. 38.

²² *Ibid.*, paras. 2.c., 40–42.

²³ *Ibid.*, para. 53.

²⁴ *Ibid.*, para. 53.

²⁵ *Ibid.*, para. 54.

²⁶ *Ibid.*, para. 55.

²⁷ *Ibid.*, para. 56.

²⁸ *Ibid.*, paras. 57–58.

²⁹ *Ibid.*, para. 59.

³⁰ *Ibid.*, para. 60.

³¹ *Ibid.*, paras. 61–63.

³² *Ibid.*, para. 64.

B. Response

17. The Prosecution submits that by limiting the JCE to the crimes committed at Jablanica/Jabllanicë the Shortened Indictment complies with the Appeals Chamber's order for the retrial.³³ In the submission of the Prosecution, Balaj's argument that the principle of *res judicata* bars the Prosecution from the current pleading in paragraph 24 is unclear.³⁴ The Prosecution submits that the Shortened Indictment does not contain any new charges and that the Prosecution has not failed to apply for leave to amend the Indictment because it has acted under the Trial Chamber's order.³⁵ In its submission, the JCE is not new and Brahimaj's argument regarding the need to show due diligence when including new allegations is inapposite.³⁶

18. The Prosecution submits that it does not seek to retry Brahimaj on Count 3 or on those charges in Count 5 relating to the crimes against Witness 3, but on the charges in Count 5 relating to Pal Krasniqi and Skender Kuqi.³⁷ The Prosecution further submits that a challenge to the use of Brahimaj's convictions and the evidence underlying them to prove his guilt in the retrial is premature.³⁸ In its submission, the use of evidence concerning the charges of which Brahimaj was previously convicted does not violate the principle of *non bis in idem*³⁹ and that this principle is not violated either by retrying Brahimaj on the charges in Count 5 relating to the crimes against Pal Krasniqi and Skender Kuqi.⁴⁰ The Prosecution submits that the Appeal Judgment does not preclude a retrial on the charges in Count 5 of which Brahimaj was acquitted.⁴¹

19. The Prosecution argues that the Shortened Indictment is not defective because it sufficiently pleads the material facts and that further particulars are given in the Prosecution's Rule 65 *ter* (E) submissions⁴² and that the submissions of Haradinaj and Balaj concerning the exclusion of evidence fall outside the scope of the Trial Chamber's order to the Defence to state whether the Shortened Indictment corresponds to what is at issue in the partial retrial.⁴³

³³ Response, para. 2.

³⁴ *Ibid.*, para. 7.

³⁵ *Ibid.*, para. 8.

³⁶ *Ibid.*, para. 9.

³⁷ *Ibid.*, para. 11.

³⁸ *Ibid.*, para. 11.

³⁹ *Ibid.*, para. 12.

⁴⁰ *Ibid.*, para. 13.

⁴¹ *Ibid.*, para. 14.

⁴² *Ibid.*, para. 17.

⁴³ *Ibid.*, para. 18.

C. Replies of the Defence

1. Balaj's Reply

20. Idriz Balaj requests permission to reply.⁴⁴ He submits that the acquittals on six Counts were reversed because the majority of the Appeals Chamber found that the Trial Chamber abused its discretion by not giving the Prosecution more time in which to obtain the appearance of two witnesses at trial⁴⁵ and that the Appeals Chamber did not direct that the Prosecution was free to amend the JCE allegations in the Fourth Amended Indictment.⁴⁶

21. In response to the Prosecution argument that the JCE is “not new”, because the objective to commit crimes at Jablanica/Jabllanicë was “always an essential component in the Prosecution’s case”, Balaj submits that this proves his point because the allegations related to Jablanica/Jabllanicë were and remain only one underlying “component” of the Prosecution’s JCE allegations.⁴⁷

2. Brahimaj's Reply

22. Lahi Brahimaj requests permission to reply.⁴⁸ Brahimaj submits that the Prosecution does not adequately address the inaccuracy and vagueness of the form of the alleged JCE⁴⁹ and that its lack of precision renders it defective.⁵⁰ In Brahimaj’s submission, the Prosecution has been ordered to shorten the Indictment and not to change it⁵¹ and that the jurisprudence of the Tribunal requires the Prosecution to apply for leave when it proposes any material amendment of the indictment.⁵²

23. Brahimaj submits that the pleading of Count 3 shows that he remains charged under this count⁵³ and that this is a violation of the principle of *ne bis in idem*;⁵⁴ and that the Appeals Chamber did not order his retrial under Count 5 and yet the Prosecution is seeking to try him under this Count.⁵⁵

⁴⁴ Balaj’s Reply, paras. 5, 18.

⁴⁵ *Ibid.*, para. 9.

⁴⁶ *Ibid.*, para. 10.

⁴⁷ *Ibid.*, paras. 12–13.

⁴⁸ Brahimaj’s Reply, para. 16.

⁴⁹ *Ibid.*, para. 7.

⁵⁰ *Ibid.*, para. 8.

⁵¹ *Ibid.*, para. 9.

⁵² *Ibid.*, para. 10.

⁵³ *Ibid.*, para. 11.

⁵⁴ *Ibid.*, para. 12.

⁵⁵ *Ibid.*, paras. 14–15.

III. DISCUSSION

A. Findings of the Appeals Chamber

24. The Appeals Chamber concluded as follows in regard to the First Ground of Appeal:
50. The Appeals Chamber, Judge Robinson dissenting, accordingly grants this ground of appeal and quashes the Trial Chamber's decisions to: (a) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of participation in a JCE to commit crimes at the KLA headquarters and the prisons in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Indictment; (b) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of individual criminal responsibility under Counts 24 and 34 of the Indictment; and (c) acquit Lahi Brahimaj of individual criminal responsibility under Count 26 of the Indictment. The Appeals Chamber therefore orders that Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj be retried on these counts.
51. The Appeals Chamber, however, will not construe the Prosecution's Appeal as a request to quash the convictions of Lahi Brahimaj on two of the above counts for which he was convicted, namely Counts 28 and 32. Lahi Brahimaj will therefore not be re-tried in relation to those two counts.⁵⁶

25. In the Disposition the Appeals Chamber held, *inter alia*, that it:

GRANTS Prosecution Ground of Appeal 1, Judge Robinson dissenting, and **QUASHES** the Trial Chamber's decisions to: (a) acquit Ramush Haradinaj and Idriz Balaj 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 34 of the Indictment; (b) acquit Lahi Brahimaj of participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë under Counts 24, 26, 30, and 34 of the Indictment; (c) acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj of individual criminal responsibility under Counts 26 and 34 of the Indictment; and (d) acquit Lahi Brahimaj of individual criminal responsibility under Count 26 of the Indictment, and **ORDERS** that Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj be retried on these counts;⁵⁷

B. Scope of the Joint Criminal Enterprise

26. In paragraph 24 of the Shortened Indictment, paragraph 26 of the Fourth Amended Indictment was amended 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 persons at these facilities, including at the~~

⁵⁶ Appeal Judgement, paras. 50–51.

⁵⁷ *Ibid.*, para. 377.

~~KLA's headquarters at Jablanica/Jabllanicë and Gledane/Gliedjan, and at the Black Eagles headquarters at Rznić/Iržniq.~~

27. The common criminal purpose of the JCE in the Fourth Amended Indictment concerned the control of the KLA over the Dukagjin Operational Zone; whereas in the Shortened Indictment it is the mistreatment of various categories of civilians.

28. The Appeals Chamber found that the failure, in particular, to secure the testimony of Shefqet Kabashi and the other witness resulted in a miscarriage of justice and for this reason ordered a partial retrial.⁵⁸ It considered that the testimony of the two witnesses would have potentially been significant for the Accused's responsibility for "crimes committed at KLA headquarters and the prison in Jablanica/Jabllanicë, including through the alleged JCE".⁵⁹ The Appeals Chamber ordered a retrial in relation only to the counts in the Indictment which alleged such crimes. In other words, the Appeals Chamber held that in the partial retrial the charges of participation in a JCE on which the Accused were to be retried should be limited to those acts of participation in a JCE that amounted to crimes committed at KLA headquarters and the prison in Jablanica/Jabllanicë. In holding this the Appeals Chamber was not thereby also holding that the common purpose of the JCE should be in any way altered. Indeed the Appeals Chamber referred to "the alleged JCE" without indicating that this was anything other than the JCE that was alleged in the Fourth Amended Indictment which was the operative indictment at the time of the initial trial.

29. In the Order of 3 November 2010 the Trial Chamber noted that the Fourth Amended Indictment was the operative indictment⁶⁰ and, considering that it was in the interests of justice and the expeditious conduct of the proceedings for there to be clarity as to the scope of the partial retrial ordered by the Appeals Chamber, the Trial Chamber ordered that the Prosecution file versions of the Fourth Amended Indictment corresponding to what is at issue in the partial retrial.⁶¹ It was the intention of the Trial Chamber that the Prosecution file a version of the operative indictment addressing what is at issue in the partial retrial ordered by the Appeals Chamber and this was how the Prosecution understood the Order of 3 November 2010.⁶² An amendment of the operative indictment pursuant to Rule 50 is not excluded at this stage, but the Trial Chamber did not invite the Prosecution to make, nor did the Prosecution purport to seek, any such amendment.

30. The Prosecution submits that the Appeals Chamber has restricted the scope of the partial retrial to "the Jablanica/Jabllanicë component of the JCE" and cites paragraph 50 of the Appeal

⁵⁸ *Ibid.*, paras. 49–50.

⁵⁹ *Ibid.*, para. 38.

⁶⁰ Order of 3 November 2010, p. 1.

⁶¹ *Ibid.*, p. 2.

⁶² Prosecution's Submission, para. 1; Prosecution's Response, paras. 4, 5,

Judgement in support of this.⁶³ Any interpretation of the phrase "participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë" in paragraphs 50 and 377 of the Appeal Judgement to mean that the Appeals Chamber envisioned a narrower JCE than the one set out in the Fourth Amended Indictment is misplaced. What is envisioned by the Appeals Chamber is a narrower *participation* by the Accused and not a narrower JCE. Therefore the JCE is as defined in the Fourth Amended Indictment, but the crimes for which the Accused are to be retried relate only to their participation, if any, in the crimes committed at the KLA headquarters and the prison in Jablanica/Jabllanicë. In other words, the phrase "participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë" implies that the commission of crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë fell within the common criminal purpose of the JCE but it does not imply that the common purpose of the JCE was solely constituted by such acts. In both paragraphs 50 and 377 the phrase is used to refer to the criminal responsibility of which the Trial Chamber acquitted the Accused. It would therefore only refer to the JCE as set out in the Fourth Amended Indictment. The Appeals Chamber's order for a partial retrial relates only to the *participation of the Accused* in the JCE and not to the JCE itself. Accordingly, the Trial Chamber finds that the Appeals Chamber did not order amendments to the common purpose or to the crimes within its scope.

C. Charges in the Shortened Indictment

31. In paragraph 50 of the Appeal Judgement the Appeals Chamber, with Judge Robinson dissenting, *inter alia*, "[quashed] the Trial Chamber's [decision] to [...] acquit Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj 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 34 of the Indictment" and ordered that they be retried on these counts. In the next paragraph the Appeals Chamber qualifies this statement by asserting that it "will not construe the Prosecution's Appeal as a request to quash the convictions of Lahi Brahimaj on two of the above counts for which he was convicted, namely Counts 28 and 32" and that "Lahi Brahimaj will therefore not be re-tried in relation to those two counts".⁶⁴ This is reflected in the Disposition of the Appeals Judgement in which the Appeals Chamber ordered Brahimaj's retrial only in relation to Counts 24, 26, 30, and 34 and not in relation to Counts 28 and 32.⁶⁵ The Trial Chamber considers that it is evident from a straightforward reading of the Appeal Judgement that a retrial of Brahimaj was not ordered in respect of Counts 28 and 32 of the Fourth Amended Indictment, which have become respectively Counts 3 and 5 of the Shortened Indictment.

⁶³ Response, para. 4.

⁶⁴ Appeal Judgement, para. 51.

⁶⁵ *Ibid.*, para. 377.

32. In regard to the submission of the Prosecution that it does not seek to retry Brahimaj on Count 3 or on those charges in Count 5 relating to the crimes against Witness 3,⁶⁶ the Trial Chamber observes that while this is specified in paragraph 23 of the Shortened Indictment, it is not pleaded later in relation to the Counts concerned, where Brahimaj is charged with having committed the crimes enumerated under each Count as part of a JCE.⁶⁷ Given the significance of the indictment as the primary accusatory instrument,⁶⁸ the Trial Chamber finds that it should not contain any possible ambiguity as to what an accused is charged with and that the parts of the Shortened Indictment relating to Counts 3 and 5 do not sufficiently reflect the Prosecution's intentions in this regard.

33. In addition, the Trial Chamber does not accept the submission of the Prosecution that the Appeals Chamber has ordered that Brahimaj be retried on the part of Count 5, formerly Count 32, on which he was acquitted in the initial trial.⁶⁹ The Trial Chamber is not persuaded that this is implied by paragraph 51 of the Appeal Judgement, where the Appeals Chamber asserted that it "will not construe the Prosecution's Appeal as a request to quash the *convictions* of Lahi Brahimaj on [...] Counts 28 and 32 [and] Lahi Brahimaj will therefore not be re-tried in relation to those two counts".⁷⁰ The statement of the Appeals Chamber that Brahimaj will not be retried on the two counts contains no qualification to indicate that he is nevertheless to be retried on part of one of these counts. Moreover the reference to convictions on Counts 28 and 32 is to be understood in terms of the Disposition of the Trial Judgement where Brahimaj was found guilty of the two Counts, again without any qualification.⁷¹

34. In short, since the Appeals Chamber has not ordered the retrial of Brahimaj on Counts 3 and 5, the passages in the Indictment that relate to these Counts should be revised so that they do not assert that he has committed crimes under them as part of the JCE.

⁶⁶ Response, para. 11.

⁶⁷ Immediately following paragraph 52 of the Shortened Indictment the Prosecution alleges:

By these acts and omissions **Ramush Haradinaj**, **Idriz Balaj**, and **Lahi Brahimaj** committed as part of the JCE defined in paragraphs 23 to 25 above, the following crimes:

Count 3: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR, Cruel Treatment and Torture, as recognised by Common Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Article 3 and Article 7(1) of the Statute of the Tribunal.

Immediately following paragraph 63 of the Shortened Indictment the Prosecution alleges:

By these acts and omissions **Ramush Haradinaj**, **Idriz Balaj**, and **Lahi Brahimaj** committed as part of the JCE defined in paragraphs 23 to 25 above, the following crimes:

Count 5: A VIOLATION OF THE LAWS OR CUSTOMS OF WAR, Murder, and Cruel Treatment, and Torture, as recognised by Common Article 3(1)(a) of the Geneva Conventions of 1949, punishable under Article 3 and Article 7(1) of the Statute of the Tribunal.

⁶⁸ *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, Šantić*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("Kupreškić et al. Appeal Judgement"), para. 114.

⁶⁹ Response, para. 14.

⁷⁰ *Ibid.*, para. 14.

⁷¹ Trial Judgement, para. 504.

35. Lahi Brahimaj submits that his retrial under Counts 3 and 5 violates the principle of *ne bis in idem*⁷² and this is opposed by the Prosecution.⁷³ The Trial Chamber considers it unnecessary to address the application of the principle of *ne bis in idem* to the retrial of Brahimaj on Counts 3 and 5 since the Appeals Chamber so clearly did not order his retrial on these Counts.

D. Alleged Defects in the Form of the Shortened Indictment

36. Brahimaj's submission that the Shortened Indictment contains conflicting material dates in paragraphs 30(b) and 41⁷⁴ amounts to an allegation of a defect in the form of the indictment. He also submits that the Shortened Indictment is deficient in its pleading of the mental element in the JCE.⁷⁵

37. Both the conflicting material dates and the alleged defect in the pleading of the mental element in the JCE were present in the Fourth Amended Indictment. Pursuant to Rule 72(A)(ii), preliminary motions alleging defects in the form of the indictment shall be brought no later than thirty days after the disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i). The Pre-Trial Judge declared at the Status Conference on 23 September 2010 that the disclosure pursuant to Rule 66(A)(i) had been completed.⁷⁶ Therefore Brahimaj's submissions that relate to defects in the Shortened Indictment have been made after the expiration of the time provided for in Rule 72(A)(ii). The Trial Chamber nevertheless considers that it is not in the interests of justice for Brahimaj's submissions to be dismissed for this reason.

38. Article 18(4) of the Statute and Rule 47(C) provide that an indictment shall contain a concise statement of the facts of the case and the crimes with which the accused is charged. The Appeals Chamber has held that the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.⁷⁷ It further held that the materiality of a particular fact is dependent on the nature of the Prosecution case and that a factor in determining the degree of specificity with which the

⁷² Brahimaj's Submission, para. 2.b. *See also Ibid.*, paras. 14–39.

⁷³ Response, para. 13.

⁷⁴ Brahimaj's Submission, paras. 2.c., 40–42.

⁷⁵ *Ibid.*, paras. 56–58.

⁷⁶ T. 21 (23 September 2010).

⁷⁷ *Kupreškić et al.* Appeal Judgement, para. 88.

Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged against the accused.⁷⁸

39. Paragraphs 30(b) and 41 of the Shortened Indictment are inconsistent as to the date from which the KLA detention facility at Jablanica/Jabllanicë began to be operated: in paragraph 30(b) Brahimaj is alleged to have run the detention facility from at least April 1998 and in paragraph 41 the detention facility is alleged to have been established in mid-May 1998. The date is material because paragraph 30(b) alleges that Brahimaj participated in the JCE by running the detention facility for the purpose of detaining and mistreating civilians. The Prosecution submits that the Prosecution Pre-Trial Brief provides further particulars in paragraph 50⁷⁹ which states that the detention facility “was in operation” by at least April 1998. The Trial Chamber does not, however, find that this cures the defect. Paragraph 50 of the Prosecution Pre-Trial Brief suggests that paragraph 41 requires revision, but the specific revision required is not evident from paragraph 50. While it has been held that a pre-trial brief can cure vagueness in an indictment,⁸⁰ an inconsistency such as there is between paragraphs 30(b) and 41 can only be properly cured by revision of the indictment itself.

40. Brahimaj alleges that the pleading of the mental element of the JCE in paragraph 23 of the Shortened Indictment is such that the mental element is not adequately articulated⁸¹ and it is “no longer possible for the defence to know what mode of JCE is alleged”.⁸² In paragraph 23 the Prosecution alleges that “each Accused shared the intent with the other co-perpetrators to commit the crimes within the common criminal purpose of the JCE” and that “[a]lternatively, to the extent that some of the crimes charged did not fall within the JCE, they were the natural and foreseeable consequences of the JCE and each Accused was aware that these crimes were the natural and foreseeable consequences of the execution of the JCE.” This sets out with sufficient clarity the mental element and its scope on each of the two alternatives and the Trial Chamber does not find that the Shortened Indictment is defective in this respect.

⁷⁸ *Kupreškić et al.* Appeal Judgement, para. 89.

⁷⁹ Response, para. 17.

⁸⁰ *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, paras. 82, 201, 223; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 48. See also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 45.

⁸¹ Brahimaj’s Submission, para. 56.

⁸² *Ibid.*, para. 57.

E. Admissibility of Evidence

41. Haradinaj submits that on the basis of the order of the Appeals Chamber any evidence which is not relevant to the Jablanica/Jabllanicë area should be excluded⁸³; and Balaj submits that the Prosecution is precluded from producing evidence at the partial retrial regarding any factual allegation of which he was directly or indirectly acquitted in the initial trial.⁸⁴ The Trial Chamber agrees with the Prosecution that these submissions are premature.⁸⁵ They lie outside the scope of what was ordered in the Order of 3 November 2010 and do not concern the content of the Shortened Indictment. Moreover, the Trial Chamber notes that the Appeals Chamber ordered a partial retrial and not just a referral back of the decisions of the Trial Chamber that were quashed for the evidence of Sheqfet Kabashi and the other witness to be heard. The Trial Chamber further notes that the order for the partial retrial does not by itself set limits to the evidence that the Prosecution might adduce to establish what it alleges in the indictment in the Counts on which the retrial has been ordered.

IV. DISPOSITION

42. For these reasons, pursuant to Article 18(4) of the Statute and Rules 47(C), 54, 72(A) and 126*bis*, the Trial Chamber hereby

(1) **GRANTS** Balaj and Brahimaj leave to reply;

(2) **ORDERS** that the Prosecution revise the Shortened Indictment as follows:

- (a) Paragraph 23 shall be revised so as not to allege that Lahi Brahimaj was criminally responsible for any of the crimes charged in Count 5;
- (b) Paragraph 24 shall be replaced by paragraph 26 of the Fourth Amended Indictment;
- (c) The inconsistency in the dates given in paragraphs 30(b) and 41 shall be removed;
- (d) The sentence immediately following paragraph 52 shall be revised so that it does not allege that Lahi Brahimaj committed the crimes charged in Count 3; and

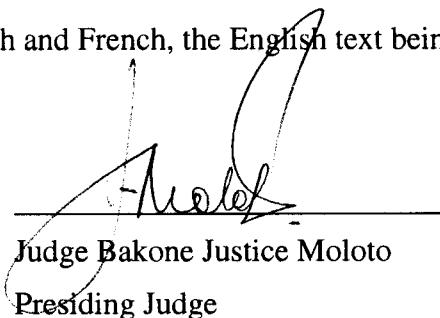
⁸³ Haradinaj's Submission, paras. 3, 21.

⁸⁴ Balaj's Submission, para. 29.

⁸⁵ Response, paras. 18-19.

- (e) The sentence immediately following paragraph 63 shall be revised so that it does not allege that Lahi Brahimaj committed the crimes charged in Count 5;
- (3) **ORDERS** that the Prosecution file by 21 January 2011 the revised Shortened Indictment in a "clean" version and in a version in which the revisions to the Fourth Amended Indictment are indicated by "tracking"; and
- (4) **DENIES** the Defence Submissions in all other respects.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fourteenth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]