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UNITED NATIONS

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

Case No. IT-04-84bis-AR73.1

Date: 31 May 2011

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IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Decision of: **31 May 2011**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON HARADINAJ'S APPEAL ON SCOPE OF PARTIAL RETRIAL

The Office of the Prosecutor:

Mr. Paul Rogers

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of an appeal[1] filed by Ramush Haradinaj ("Haradinaj" or "Accused") on 10 February 2011 against the "Decision on Shortened Form of the Fourth Amended Indictment" issued by Trial Chamber II of the Tribunal ("Trial Chamber") on 14 January 2011 ("Impugned Decision").[2] The Prosecution filed its response on 21 February 2011,[3] and Haradinaj filed his reply on 25 February 2011.[4] On 3 March 2011, the Prosecution filed a sur-reply.[5]

I. BACKGROUND

2. On 3 April 2008, Trial Chamber I of the Tribunal ("Trial Chamber I") acquitted Haradinaj on all counts alleged in the Fourth Amended Indictment.[6] In its Judgement of 19 July 2010, the Appeals Chamber found that Trial Chamber I failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of two witnesses, Shefqet Kabashi ("Kabashi") and another witness, who allegedly possessed direct evidence relating to the guilt of Haradinaj.[7] Given the potential importance of the two witnesses to the Prosecution's case, the Appeals Chamber found that the error undermined the fairness of the proceedings and resulted in a miscarriage of justice.[8] As a result, the Appeals Chamber reversed Trial Chamber I's decision to acquit Haradinaj and ordered a retrial limited to: (a) Haradinaj's participation in a joint criminal enterprise ("JCE") to commit crimes at the Kosovo Liberation Army ("KLA") headquarters in Jablanica/Jabllanicë under Counts 24, 26, 28, 30, 32, and 34 of the Fourth Amended Indictment; and (b) Haradinaj's individual criminal responsibility under Counts 24 and 34 of the Fourth Amended Indictment ("Order for the Partial Retrial").[9]

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[1] Appeal Brief on Behalf of Ramush Haradinaj on Scope of Partial Retrial, 10 February 2011 ("Appeal").
[2] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Shortened Form of the Fourth Amended Indictment, 14 January 2011.
[3] Prosecution Response to Haradinaj's Appeal on Scope of Partial Retrial, 21 February 2011 (confidential). *See also* Prosecution Response to Haradinaj's Appeal on Scope of Partial Retrial, 22 February 2011 (public redacted version) ("Response").
[4] Reply Brief on Behalf of Ramush Haradinaj on Scope of Partial Retrial, 25 February 2011 ("Reply").
[5] Prosecution Motion for Leave to File Sur-Reply and Sur-Reply to Haradinaj's Reply Brief on Scope of Partial Retrial, 3 March 2011 ("Sur-Reply"). The Sur-Reply was limited to contesting Haradinaj's request for an oral hearing, raised in his Reply. *See* Sur-Reply, para. 1.
[6] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008 ("Trial Judgement"), para. 502; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Fourth Amended Indictment, 16 October 2007 ("Fourth Amended Indictment"). The Fourth Amended Indictment was the operative indictment at trial.
[7] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010 ("Appeal Judgement"), paras 34-48.
[8] *Ibid.*, para. 49.
[9] *Ibid.*, paras 50, 377.

3. On 21 July 2010, the Trial Chamber was assigned to hear the partial retrial.[10] On 15 September 2010, the Trial Chamber ordered that the operative indictment in the partial retrial should be the Fourth Amended Indictment, and held that, as there had been no amendments to the Indictment amounting to new charges, the pleas of not guilty which Haradinaj had entered on all counts on 14 March 2005 and 1 March 2007 should continue to stand for the counts on which the Appeals Chamber had ordered that Haradinaj be retried.[11]

4. On 9 November 2010, pursuant to orders by the Trial Chamber,[12] the Prosecution filed a new and shortened version of the Fourth Amended Indictment for the partial retrial ("Indictment of 9 November 2010").[13] In the Indictment of 9 November 2010 the Prosecution renumbered Counts 24, 26, 28, 30, 32 and 34 of the Fourth Amended Indictment as Counts 1 to 6. All other Counts in the Fourth Amended Indictment were deleted.[14] In compliance with the Trial Chamber's order, Haradinaj filed a motion, submitting that the Indictment of 9 November 2010 contained allegations which fell outside the scope of the retrial as ordered by the Appeals Chamber and as pleaded by the Prosecution in the appellate proceedings.[15] Specifically, Haradinaj submitted that any evidence which was not relevant to the Jablanica/Jabllanicë area should be excluded from his retrial and that allegations concerning the JCE, the participation of the accused, and the statement of facts which extended beyond Jablanica/Jabllanicë should be revised or struck from the Indictment of 9 November 2010.[16]

5. On 14 January 2011, the Trial Chamber issued the Impugned Decision in which it addressed Haradinaj's request to revise or strike from the Indictment of 9 November 2010 allegations that fall outside the scope of the retrial. On the basis that the Appeals Chamber did not intend to alter the common purpose of the JCE in the retrial but rather merely envisioned a narrower participation of

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[10] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Order Assigning Judges to a Case Before a Trial Chamber, 21 July 2010.
[11] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Order Regarding the Operative Indictment and Pleas, 15 September 2010, p. 3.
[12] *See* Status Conference, T. 5 (23 September 2010); Status Conference, T. 45-46 (26 October 2010); *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Order Regarding the Revised Fourth Amended Indictment, 3 November 2010 ("Order of 3 November 2010"), p. 2.
[13] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Submission of New Version of the Revised Fourth Amended Indictment, 9 November 2010 ("Submission of Revised Fourth Amended Indictment"). The Prosecution initially filed a revised version of the Fourth Amended Indictment on 28 October 2010 "in which revisions have been made using 'tracking' and the paragraphs and counts are not numbered consecutively"; because of this, the Trial Chamber ordered that the Prosecution file a new version of the Fourth Amended Indictment "in which the paragraphs and counts are numbered consecutively and from which tracking has been removed". *See* Order of 3 November 2010, p. 2. *See also Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Submission of Revised Fourth Amended Indictment, 28 October 2010.
[14] Submission of Revised Fourth Amended Indictment, Appendix B.
[15] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Submission on Behalf of Ramush Haradinaj on the New Version of the Indictment for the Partial Retrial, 23 November 2010, paras 3-17.
[16] *Ibid.*, paras 3-17, 23.

the Accused in the JCE,[17] the Trial Chamber: (a) ordered that paragraph 24 of the Indictment of 9 November 2010 be replaced by paragraph 26 of the Fourth Amended Indictment so that the common criminal purpose of the JCE would include "the control of the KLA over the Dukagjin Operational Zone" and not be limited to the mistreatment of various categories of civilians;[18] and (b) denied Haradinaj's request to revise or strike from the Indictment of 9 November 2010 allegations concerning incidents unrelated to Jablanica/Jabllanicë.[19] Furthermore, the Trial Chamber held that the Order for the Partial Retrial did not set limits on the evidence that the Prosecution might adduce during the retrial.[20]

6. In compliance with the Impugned Decision, the Prosecution filed a revised version of the Indictment of 9 November 2010, which is currently the operative indictment in the case ("Operative Indictment").[21]

7. Haradinaj's request for certification of an interlocutory appeal against the Impugned Decision was granted on 3 February 2011.[22] Certification was granted with respect to: (a) the order in paragraph 42(2)(b) of the Impugned Decision to replace paragraph 24 of the Indictment of 9 November 2010 with paragraph 26 of the Fourth Amended Indictment; (b) the denial in paragraph 42(4) of the Impugned Decision of Haradinaj's request to strike out all allegations in the Indictment of 9 November 2010 concerning incidents unrelated to Jablanica/Jabllanicë; and (c) the rejection in paragraphs 41 and 42(4) of the Impugned Decision of Haradinaj's submission that the Trial Chamber should only hear Kabashi and the other witness in the partial retrial.[23]

II. STANDARD OF REVIEW

8. The Appeals Chamber recalls that under Rule 54 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a Trial Chamber may issue such orders as may be necessary for the purposes of an investigation or the preparation or conduct of a trial. In order to successfully challenge such a discretionary decision, a party must demonstrate that the Trial Chamber has committed a "discernible error".[24] The Appeals Chamber will only overturn a Trial Chamber's

[17] Impugned Decision, paras 28-30.
[18] *Ibid.*, paras 27, 42(2)(b).
[19] *Ibid.*, para. 42(4).
[20] *Ibid.*, para. 41.
[21] *Prosecutor v. Ramush Haradinaj et al*, Case No. IT-04-84bis-PT, Submission of Revised Fourth Amended Indictment, 21 January 2011, Annex B.
[22] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Application on Behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B), 3 February 2011.
[23] *Ibid.*, para. 20.
[24] *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011 ("*Gotovina* Decision"), para. 14; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.8, Decision on Appeal from Order on the Trial Schedule, 19 July 2010 ("*Karadžić* Decision"), para. 5.

discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[25]

III. PRELIMINARY ISSUE

9. Haradinaj has sought an extension of the 9000 word limit of his Appeal to 14000 words based on the submission that the three questions certified for appeal raise complex questions of law not yet addressed by the Tribunal and which are "novel questions of considerable importance", thereby constituting exceptional circumstances.[26] He has also requested an extension of the 3000 word limit of the Reply to 3500 words in order to address all the arguments raised by the Prosecution in its Response.[27]

10. The Appeals Chamber considers that the questions raised in this appeal are important issues not previously considered by the Appeals Chamber and which are crucial to determining the scope of the partial retrial that is to take place in due course. While the significance of the issues generally does not in and of itself prevent an appellant from presenting sound submissions on those issues in compliance with the set word limit,[28] the Appeals Chamber finds that the particular circumstances of the present case justify the extension of the word limits, and therefore grants the requested extensions.[29]

IV. DISCUSSION

11. In the Appeal, Haradinaj submits that the Trial Chamber erred in: (1) rejecting Haradinaj's submission that the evidence at the retrial should be limited to the testimony of Kabashi and the other witness, and that no new evidence may be relied upon by the Prosecution;[30] (2) concluding that the Operative Indictment must include the same JCE as was alleged during Haradinaj's trial;[31]

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[25] *Gotovina* Decision, para. 14; *Karadžić* Decision, para. 5.
[26] Appeal, para. 13. *See* Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005 ("Practice Direction on the Length of Briefs and Motions"), para. I(C)(2)(1).
[27] Reply, fn. 2. *See* Practice Direction on the Length of Briefs and Motions, para. I(C)(2)(3).
[28] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Motion of Radevoje Miletić for Permission to Further Exceed Word Limitation, 18 January 2011, p. 2; *In The Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009, para. 24, *citing Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Defence Motion for Extension of Word Limit for Defence Appellant's Brief, 6 October 2006, which stated at p. 3 that "[...] although this appeal raises important legal and factual issues, the Defence is required to demonstrate exceptional circumstances which distinguish this case and necessitate an extension of prescribed word limits"; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nikola Šainović's and Dragoljub Ojdanić's Joint Motion for Extension of Word Limit, 11 September 2009, pp. 3-4.
[29] The Appeals Chamber is also mindful that Haradinaj's further request for an oral hearing was denied. *See* Reply, paras 6-7; Decision on Request for Oral Argument, 16 March 2011, p. 2.
[30] Appeal, paras 19-24, 41-55.
[31] *Ibid.*, paras 25-26, 56-65.

and (3) denying Haradinaj's request to delete from the Operative Indictment all allegations that concern incidents unrelated to the six counts that are the subject of the retrial.[32]

12. Haradinaj accordingly requests the Appeals Chamber to issue an order: (1) limiting the scope of the retrial to the calling of two witnesses, Kabashi and the other witness;[33] (2) limiting the alleged JCE for the retrial to a JCE to commit the crimes charged in the six counts that are subject to the retrial;[34] and (3) deleting from the Operative Indictment all allegations that concern criminal conduct unrelated to the six counts that are subject to the retrial and for which Haradinaj has been acquitted.[35]

A. First Ground of Appeal: Whether the Trial Chamber should only hear Kabashi and the other witness whom the Prosecution was not allowed to call at trial

1. Submissions of the Parties

13. Haradinaj submits that the reopening of a case following a final decision is an extraordinary remedy.[36] "Since a retrial is a departure from the principles of finality", he contends that "it should provide a tailored remedy capable of rectifying a clearly identified error in the [trial] proceedings, and no more."[37] The identified error in the instant case, Haradinaj submits, was a failure on the part of Trial Chamber I to afford the Prosecution a fair opportunity to call two witnesses, Kabashi and the other witness, and therefore the appropriate remedy for that error is an order for a partial retrial limited to enabling those witnesses to be called.[38] Haradinaj argues that the evidence of those two witnesses should be considered by the Trial Chamber against the record of the trial to see whether the evidence of those two witnesses would have made any difference to the verdict of Trial Chamber I.[39] He submits that allowing the Prosecution to present evidence beyond the testimony of the two witnesses would constitute an unjustified benefit to the Prosecution, infringe the principles of *non bis in idem*, *res judicata* and finality, and be barred by collateral estoppel or the doctrine of abuse of process in criminal proceedings.[40] Haradinaj contends that the *Muvunyi* Decision is distinguishable from the present case since it addressed the issue of the scope of evidence to be

[32] *Ibid.*, paras 27, 66-76.
[33] *Ibid.*, paras 24, 28(a).
[34] *Ibid.*, para. 28(b).
[35] *Ibid.*, para. 28(c).
[36] *Ibid.*, para. 2, fn. 1.
[37] *Ibid.*, para. 3.
[38] *Ibid.*, paras 4-11, 41-45.
[39] *Ibid.*, paras 4, 23-24.
[40] *Ibid.*, paras 10, 22, 29, 32-33, 35-39, 54; *see also* Reply, para. 4.

heard in a retrial following an appeal by an accused against a conviction.[41] He argues that the "principles applicable to an appeal against acquittal were not in issue in that case."[42] In particular, he submits that "[t]here was no issue of the [a]ccused'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."[43]

14. Haradinaj also submits that the Prosecution cannot be allowed to re-litigate issues at retrial which could have been raised during the course of the appeal in which the retrial was ordered.[44] Haradinaj argues that it "would be contrary to fundamental principles of criminal law and procedure for the Prosecution [...] to be permitted to attempt to re-litigate its case [...] by identifying completely new witnesses and seeking to make good inadequacies in the [...] trial with additional evidence".[45] Specifically, Haradinaj submits that the Prosecution should not be allowed to call the six prospective witnesses disclosed by the Prosecution in its Pre-Trial Brief of 6 December 2010.[46] It is Haradinaj's submission that the statements of the six witnesses cover incidents that allegedly occurred outside of Jablanica/Jabllanicë and do not concern the six counts that are subject to retrial.[47] He also claims that the admission of the evidence of these six new witnesses would be prejudicial and an abuse of process since the Prosecution only disclosed them to him in December 2010, more than two years after the rendering of the Trial Judgement, while the Prosecution's investigations date back to before 2004.[48] This, he argues, is wholly different from the situation in *Muvunyi*, where the proposed new witnesses had been disclosed to the accused since the time of the trial.[49] Haradinaj submits that the Prosecution should not be allowed to call an expert witness who, although disclosed to Haradinaj at trial, was not called to testify by the Prosecution. He also objects to the admission of evidence from witnesses who were heard in the first trial and from whom the Prosecution has since taken new statements.[50]

15. Haradinaj further submits that the Prosecution should not be able to present evidence that was ruled inadmissible at trial.[51] It is his contention that since those rulings were not appealed by the Prosecution during trial or appellate proceedings those rulings must stand as final, barring the

[41] Appeal, para. 40; Reply, para. 13, *referring to The 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 ("*Muvunyi* Decision").
[42] Appeal, para. 40.
[43] *Ibid*; Reply, para. 13.
[44] Appeal, paras 11, 22, 46, 48, 53.
[45] *Ibid.*, para. 49.
[46] *Ibid.*, paras 20, 49.
[47] *Ibid.*
[48] *Ibid.*, paras 22, 49-50, 67.
[49] *Ibid.*, para. 40.
[50] *Ibid.*, para. 20.
[51] *Ibid.*, paras 20, 22, 54; Reply, para. 16.

Prosecution from attempting to have a second opportunity to use this evidence against him.[52] Finally, he argues that allowing the Prosecution to present new evidence at the retrial would effectively allow it to circumvent Rule 115 of the Rules, which it could have sought to rely on at the appellate stage in order to admit this "fresh evidence".[53]

16. The Prosecution responds that retrial is a broad remedy, that restrictions on the evidence to be presented during a retrial must be explicit in the retrial order, and that there are no such limitations in the Order for the Partial Retrial.[54] According to the Prosecution, a "retrial is a *de novo* hearing which proceeds as though there had never been a first trial."[55] It submits that "[t]he purpose of the partial retrial is to establish the responsibility of the [a]ccused for the retrial counts and inherently includes the possibility of hearing new evidence."[56] The Prosecution argues that domestic law supports a retrial which includes the possibility of hearing evidence that was not heard during the initial proceedings, citing a number of examples of national practice.[57] Moreover, it contends that the Appeals Chamber has already tailored the retrial to the reversible error that gave rise to it by limiting it to the Jablanica/Jabllanicë counts.[58] The Prosecution submits that the admissibility of evidence is a matter for the Trial Chamber to resolve, and that it would be premature for the Appeals Chamber to intervene in such matters before they have been litigated before the Trial Chamber.[59] In the Prosecution's view, a "blanket restriction" on additional evidence would deprive the Trial Chamber of "crucial evidence", thus compounding the error identified by the Appeals Chamber when it ordered the retrial to provide the Prosecution with the opportunity to present "further crucial evidence".[60]

17. The Prosecution further submits that in the absence of a final conviction or acquittal on the retrial counts, evidence which satisfies the rules on admissibility in relation to those counts may be admitted and relied upon by the Trial Chamber hearing the retrial, notwithstanding its being deemed inadmissible in the first trial.[61] It also responds that the remedy sought in the Prosecution's appeal of the Trial Judgement was not simply the hearing of the two witnesses; the focus on these witnesses in the Prosecution's appeal was used to demonstrate how Trial Chamber I's errors invalidated the Judgement or resulted in a miscarriage of justice.[62] The appropriate remedy, it

[52] Appeal, paras 22, 46, 53-54.
[53] *Ibid.*, para. 53.
[54] Response, paras 2, 6-7, 14, 20.
[55] *Ibid.*, para. 5.
[56] *Ibid.*, para. 15.
[57] *Ibid.*, para. 10, fn. 29.
[58] *Ibid.*, para. 12.
[59] *Ibid.*, paras 3, 7, 15, 17-20, 23-24.
[60] *Ibid.*, para. 19.
[61] *Ibid.*, paras 27-29.
[62] *Ibid.*, paras 14, 16.

argues, was the reversal of the Accused's acquittals on the Jablanica/Jabllanicë counts and a retrial on those counts.[63] Furthermore, the Prosecution argues that Haradinaj provides no valid reason to depart from the precedent set by the *Muvunyi* Decision.[64] In its view, the "mere fact" that the *Muvunyi* Decision concerned an accused's appeal against a conviction does not suffice to distinguish it from the present case.[65]

18. On the principle of *non bis in idem*, the Prosecution submits that "[t]he use of evidence relating to the charges for which Haradinaj was acquitted does not violate the principle of double jeopardy because the Prosecution does not seek to convict Haradinaj of these charges"; it only intends to use the evidence to prove his liability in relation to the counts concerning Jablanica/Jabllanicë.[66] The Prosecution asserts that fairness to the accused is "but one" factor to be considered by a court in determining whether evidence adduced in a prior trial resulting in an acquittal can be admitted in a subsequent proceeding.[67]

19. Haradinaj replies that the three issues certified for appeal do not concern the admissibility of evidence at the retrial pursuant to the rules on the admission of evidence, but rather relate to the "nature and scope" of the partial retrial.[68] He rejects the Prosecution's contention that retrial is a "broad remedy", arguing that this view is not supported by international or domestic case law and cannot be read into Rule 117(C) of the Rules.[69] In particular, he argues that the scope of a retrial following an acquittal must be clearly defined and narrowly construed, since "there is a fundamental difference between a convicted person who on his own appeal against his conviction secures a retrial [...] and that of an acquitted person who on an appeal by the Prosecution is to [be] retried again on the same charges of which he was found not guilty."[70] He argues that the cases and legislation cited by the Prosecution concern retrials following conviction and "thus have no direct bearing on the facts of the present case."[71] Haradinaj contends that the fact that the Prosecution would be given a second chance to convict him "with knowledge of the weaknesses in its case and the case of the defence" in a retrial following acquittal means that the Appeals Chamber should limit the scope of the retrial to correcting the error made by Trial Chamber I.[72]

[63] *Ibid.*, para. 16.
[64] *Ibid.*, para. 8.
[65] *Ibid.*, para. 11.
[66] *Ibid.*, para. 27.
[67] *Ibid.*, para. 29.
[68] Reply, para. 2.
[69] *Ibid.*, paras 3, 11.
[70] *Ibid.*, para. 12. *See also ibid.*, para. 8.
[71] *Ibid.*, para. 3. *See also ibid.*, para. 17.
[72] *Ibid.*, para. 12.

20. Haradinaj further argues that the Appeal Judgement did limit the scope of the retrial since the six counts to be retried relate directly to the evidence that could be provided by the two witnesses.[73] In his contention, the limitation in the scope of the retrial to hearing the evidence of these two witnesses is "manifest" from the Appeal Judgement, which centred on Trial Chamber I's failure to hear the evidence of these two "crucial" witnesses.[74]

2. Analysis

21. Rule 117(C) of the Rules provides that "[i]n appropriate circumstances the Appeals Chamber may order that the accused be retried according to law." Neither the Statute of the Tribunal ("Statute") nor the Rules address the scope of evidence to be adduced in a retrial.

22. The Appeals Chamber had occasion to consider the question of bringing new evidence in the partial retrial of Tharcisse Muvunyi.[75] It found that, under Rule 118(C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (the equivalent to Rule 117(C) of the Rules), evidence not presented at the initial proceedings may be admitted at a retrial.[76] It further held that any restrictions on the scope of a retrial must be made "explicit" by the Appeals Chamber.[77]

23. The Appeals Chamber notes that the *Muvunyi* Decision addressed a retrial following conviction, whereas Haradinaj's retrial follows his acquittal. However neither the text of Rule 117(C) of the Rules nor the *Muvunyi* Decision suggests that this distinction automatically affects the parameters of a retrial. Instead, the *Muvunyi* Decision emphasized that in any retrial, the new Trial Chamber is vested with the discretion to determine the scope of evidence admitted, subject to the Tribunal's Rules and jurisprudence concerning admission of evidence, as well as any additional restrictions imposed by the Appeals Chamber.[78]

24. Haradinaj is mistaken in his contention that the Impugned Decision's finding that the Prosecution may seek the admission of evidence beyond that of the two witnesses who were the focus of the Appeal Judgement undermines principles of law geared to "securing certainty and finality in criminal litigation".[79] The *Muvunyi* Decision held that "a retrial [...] inherently includes the possibility of hearing evidence that was not presented during the initial proceedings" and

[73] *Ibid.*, paras 8-9.
[74] *Ibid.*, paras 9-10.
[75] *Muvunyi* Decision; *see also Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-A, Judgement, 29 August 2008, paras 148, 171.
[76] *Muvunyi* Decision, para. 13.
[77] *Ibid.*
[78] *See ibid.* No distinction was made between retrials following acquittals or convictions.

underscored that the scope of a retrial is determined "by the Appeals Chamber in a particular instance."[80] Thus the Appeals Chamber is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case, including whether the retrial follows conviction or acquittal, as well as relevant principles of law. In the Impugned Decision, the Trial Chamber correctly found that the Order for Partial Retrial imposed no limitations on the evidence adduced to prove the charges against Haradinaj,[81] beyond those applicable to any trial before the Tribunal.[82]

25. The Appeals Chamber is unconvinced by Haradinaj's contention that decisions regarding the admission of evidence made in the course of his first trial should be binding on the Trial Chamber conducting his retrial.[83] The different contexts in which the two trials are held mean that evidentiary decisions proper in one case may not be proper in the other. In this situation, the prospect of inconsistency on an evidentiary point between a trial and a retrial is not unfair and does not risk jeopardizing public confidence in the administration of justice by the Tribunal. With respect to Haradinaj's argument regarding Rule 115 of the Rules, the Appeals Chamber also recalls that different standards of admissibility apply in appellate proceedings and in a retrial; thus, any failure to apply for admission of evidence under Rule 115 of the Rules during an appeal does not exclude the admission of that evidence in a subsequent retrial.

26. The Appeals Chamber underscores that whether a retrial follows acquittal or conviction is not necessarily insignificant. However the context of each retrial is unique, and the impact of a previous conviction or acquittal can only be addressed by taking into account this individual context. Any potential for undue prejudice to a defendant in a retrial following an acquittal should be addressed through both the Appeals Chamber's careful delineation of a retrial's parameters and the Trial Chamber's continuing duty to apply fair trial principles.[84] In this context, the Appeals Chamber directs the Trial Chamber, when determining the admissibility of evidence in the retrial, to be particularly mindful of any potential prejudice that the admission of new evidence may cause to the fair trial rights of the Accused. Where the Prosecution seeks to introduce evidence that was excluded in prior proceedings, the Trial Chamber should explicitly consider whether re-litigation of

[79] Appeal, para. 2. *See also ibid.*, paras 22, 24, 28-29, 51, 54. These legal principles include *res judicata*, *non bis in idem*, and issue estoppel (collateral estoppel).
[80] *Muvunyi* Decision, paras 12-13.
[81] *See* Impugned Decision, para. 41; Appeal Judgement, paras 50, 377.
[82] The Appeals Chamber notes that by definition, Haradinaj does not risk conviction on charges of which he was finally acquitted, given the limited scope of the retrial.
[83] *See* Appeal, paras 20, 22, 54.
[84] *See Muvunyi* Decision, para. 18, which states: "[a]ll fair trial principles governing trial also apply to the retrial proceedings."

this same issue in the retrial would be unduly prejudicial. If such is the case, the evidence must be excluded.

27. The Appeals Chamber therefore dismisses this ground of Appeal.

B. Second Ground of Appeal: Whether the Operative Indictment should include the same JCE alleged at trial

1. Submissions of the Parties

28. Haradinaj submits that the Operative Indictment should limit the JCE to a common purpose to commit the crimes at Jablanica/Jabllanicë alleged in the six counts which are the subject of retrial. Haradinaj contends that since Trial Chamber I acquitted him of all the other allegations encompassed within the JCE pleaded in paragraph 24 of the Operative Indictment and these findings were not appealed, they have acquired the quality of *res judicata* and may not be re-litigated.[85]

29. While the Prosecution agrees with Haradinaj that the Operative Indictment should limit the JCE to a common purpose to commit the crimes alleged in the six counts which are the subject of retrial, it responds that it is unnecessary to amend the common purpose in paragraph 24 of the Operative Indictment as it includes the common purpose to commit the crimes at Jablanica/Jabllanicë.[86] The Prosecution argues that because the Trial Chamber can convict the Accused on part of the common purpose, it is not necessary for the Prosecution to prove a common purpose beyond the commission of crimes in Jablanica/Jabllanicë.[87]

30. Haradinaj replies that the Prosecution is obliged to prove all of the allegations relied upon in the Operative Indictment, since the Prosecution cannot be given the "benefit" of having a very broad JCE in the Operative Indictment so as to allow it to present evidence going well beyond the crimes charged in Jablanica/Jabllanicë, while not being required to prove the broad JCE alleged.[88]

2. Analysis

31. In the Impugned Decision, the Trial Chamber determined that, in the Order for Partial Retrial, the Appeals Chamber did not intend to alter the common purpose of the JCE in any way.[89] The Trial Chamber found that what was envisioned by the Appeals Chamber was not a narrower

[85] Appeal, paras 26, 57, 64.
[86] Response, para. 4.
[87] *Ibid.*, para. 33.
[88] Reply, paras 5, 19-20.
[89] Impugned Decision, para. 28.

JCE, but "a narrower *participation* by the Accused" in the JCE, which remains as originally alleged.[90]

32. The Appeals Chamber finds, Judge Robinson dissenting, that the Trial Chamber committed no discernible error in so finding.[91] The Appeals Chamber did not intend to alter the scope of the JCE when it held that Haradinaj would be retried only for "participation in a JCE to commit crimes at the KLA headquarters and the prison in Jablanica/Jabllanicë".[92] Rather, it stated clearly which crimes would be retried. This limiting of the charges to be retried does not alter the broader scope of the alleged JCE. Since the Trial Chamber may not make findings with respect to Haradinaj's responsibility beyond those in the six counts alleged, the Appeals Chamber finds, Judge Robinson dissenting, that consideration of the broader JCE in the context of the partial retrial does not place him in potential double jeopardy or otherwise affect his fundamental rights and interests.

33. The Appeals Chamber also notes Haradinaj's arguments regarding the scope of facts the Prosecution must prove in order to establish the JCE.[93] In this regard, the Appeals Chamber underscores that the assessment of evidence submitted by parties to the retrial is a matter of Trial Chamber discretion.

34. The Appeals Chamber therefore dismisses this ground of appeal.

C. Third Ground of Appeal: Whether allegations unrelated to the six counts that are subject to the retrial should be deleted from the Operative Indictment

1. Submissions of the Parties

35. Haradinaj requests that certain paragraphs relating to his alleged participation in the JCE and appearing in the "Statement of Facts" of the Operative Indictment be deleted, as they include allegations of unlawful conduct for which Haradinaj has been acquitted without appeal from the Prosecution and which are unrelated to the six counts being retried.[94] He contends that the inclusion of such allegations in the Operative Indictment would violate the principle of *res judicata* and amount to an abuse of process.[95] While Haradinaj recognises that the Prosecution is not seeking to

[90] *Ibid.*, para. 30 (emphasis in original).
[91] *Ibid.*
[92] Appeal Judgement, paras 50, 377.
[93] Reply, paras 5, 19.
[94] Appeal, paras 27, 66.
[95] *Ibid.*, para. 67.

convict him for crimes of which he has been finally acquitted, he submits that the introduction of evidence relating to such crimes is a violation of the principle of finality.[96]

36. Specifically, Haradinaj argues that paragraphs 28(a)-(f) of the Operative Indictment contain no reference to Jablanica/Jabllanicë, which would permit the Prosecution to lead evidence of alleged unlawful conduct for which Haradinaj has been finally acquitted.[97] He also objects to the inclusion of paragraphs 28(j)-(m) of the Operative Indictment, which contain allegations that mention or refer to Jablanica/Jabllanicë as an example of a place where unlawful acts were committed as part of the broader common purpose.[98] Haradinaj further contends that the "Statement of Facts" in the Operative Indictment contains allegations not confined to the six Jablanica/Jabllanicë counts, but concerning crimes for which he has been finally acquitted.[99] In his view, only paragraphs 39-41 of the Operative Indictment, which concern the crimes alleged at Jablanica/Jabllanicë, should be retained.[100]

37. Haradinaj further submits that the allegation in paragraph 28(c) of the Operative Indictment that he excluded all rivals to KLA forces, such as the Armed Forces of the Republic of Kosovo (FARK), from the Dukagjin Operational Zone, so as to allow his soldiers to dominate the area and to persecute civilians, goes far beyond the allegation of crimes committed in Jablanica/Jabllanicë and has no relevance to those alleged crimes.[101] He argues that while this allegation was relevant to the broad JCE alleged in the original trial, which concerned the consolidation of military control over the Dukagjin area, he was acquitted of participation in this JCE, and allowing the evidence to be adduced in the retrial would re-open factual issues determined finally in the Trial Judgement, and not subsequently appealed.[102] Haradinaj also submits that the Prosecution intends to lead evidence from members of the Stojanović family regarding Haradinaj's alleged involvement in beatings for which he was acquitted. Not only would such evidence be barred by the principle of finality, he argues, but it is also irrelevant to the six Jablanica/Jabllanicë counts, as well as having allegedly occurred on a date prior to the commencement of the armed conflict, as established by Trial Chamber I.[103]

38. The Prosecution responds that although the common purpose is limited to the commission of crimes at Jablanica/Jabllanicë, it does not follow that the Prosecution must rely solely on

[96] Reply, para. 17.
[97] Appeal, para. 68.
[98] *Ibid.*
[99] *Ibid.*, para. 73.
[100] *Ibid.*, para. 74.
[101] *Ibid.*, paras 69-71.
[102] *Ibid.*, para. 72.
[103] *Ibid.*, para. 76.

evidence relating to events in Jablanica/Jabllanicë in order to show that Haradinaj acted together with other JCE members to pursue the common purpose.[104] It argues that evidence not strictly concerned with events at Jablanica/Jabllanicë is still relevant since it "demonstrates that the alleged crimes in Jablanica/Jabllanicë did not occur in isolation, but took place in a context of violence against perceived KLA opponents."[105] In particular, it argues that evidence of certain incidents is relevant to and probative of Haradinaj's criminal propensity.[106] It contends that it is for the Trial Chamber to determine whether the proffered evidence satisfies the criteria for admission.[107]

2. Analysis

39. Since the Trial Chamber cannot make findings with respect to Haradinaj's criminal responsibility beyond that alleged in the six counts which are the subject of the retrial, the Appeals Chamber considers, Judge Robinson dissenting, that the inclusion of the above-mentioned general allegations in the "Statement of Facts" of the Operative Indictment does not expose Haradinaj to any additional charges or render the retrial unfair *per se*.[108]

40. It will be for the Trial Chamber, applying the normal rules of admissibility of evidence, to assess the relevance and probative value of evidence proffered by the Prosecution in relation to such general allegations, and to decide if consideration of such evidence would unduly prejudice Haradinaj in the context of retrial following acquittal.

41. Accordingly, this ground of appeal is rejected.

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[104] Response, para. 25.
[105] *Ibid.*, para. 26.
[106] *Ibid.*
[107] *Ibid.*, para. 25.
[108] The Appeals Chamber notes that in the *Muvunyi* retrial, the Indictment from the original trial remained the operative indictment for the retrial without any amendment, despite the fact that at trial Muvunyi had been acquitted of one charge and another charge had been dismissed. *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-I, Indictment, 23 December 2003; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgement and Sentence, signed on 12 September 2006 and filed on 18 September 2006, para. 531; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T, Judgement, 11 February 2010, para. 2, fn. 3.

V. DISPOSITION

42. For the foregoing reasons, the Appeals Chamber, Judge Robinson partially dissenting, **DISMISSES** the Appeal in its entirety.

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

Judge Patrick Robinson
Presiding

The partially dissenting opinion of Judge Robinson is appended hereto.

Dated this thirty-first day of May 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE ROBINSON

1. The Appeals Chamber in this Decision is faced with a number of legal issues which, because this is the first retrial before the Tribunal, it has not previously considered. The Majority bases its reasoning on the three grounds of appeal principally and almost exclusively upon the *Muvunyi* Decision of the ICTR Appeals Chamber, the only case of the two *ad hoc* international criminal tribunals to have addressed the issue of the scope of evidence to be brought in a retrial to date. While I agree that the *Muvunyi* Decision provides a relevant starting point for the discussion of the issues, and certainly answers some of the questions raised by them, I disagree with the Majority's view that the *Muvunyi* Decision – a decision dealing with a person retried following conviction – answers all the questions raised in this Decision, which concerns a person acquitted of all charges in the first trial. In particular, I believe that the Appeals Chamber could, and should, have given further consideration to other relevant legal principles and their scope of application in the context of retrial following acquittal, which may have also assisted the Trial Chamber in its determination of admissibility challenges that will inevitably arise in the course of the retrial.

2. I agree with the outcome of the Decision on Ground 1 of the Appeal, although I have some reservations as to whether the reasoning enunciated by the Majority fully addresses all the submissions advanced by the parties or identifies all the relevant legal principles at stake. This partially dissenting opinion concerns Grounds 2 and 3 of the Appeal.

A. Ground 2: Whether the Operative Indictment should include the same JCE alleged at trial

3. I disagree with the Majority's decision on the second ground of appeal. In my view, pursuant to the principle of *non bis in idem*, a person who has been tried at the Tribunal must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of being treated as guilty in any sense.[1] In this respect, *non bis in idem* acts as a procedural bar, precluding the Prosecution from re-alleging the guilt of an accused when that question has previously been

[1] The principle of *non bis in idem* is enshrined in Art. 10 of the Statute of the Tribunal to the extent that it protects a person who has been tried by this Tribunal from further prosecution before a national court for the same "acts constituting serious violations of international humanitarian law" and vice versa except where the act was characterized as an ordinary crime or where the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. *See Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995, para. 9; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Orić's Motion Regarding a Breach of *Non-Bis-In-Idem*, 7 April 2009, p. 5. This fundamental principle is also applicable within the exclusive jurisdiction of the Tribunal. This has been recognized at the ICTR: *see The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel, 16 July 2008, para. 4.

determined against it.[2] This preclusion applies *a priori* to the Indictment. Furthermore, the doctrine of *res judicata* entails that matters decided having passed into judgement must be accepted as true in the sense of the judgement, and can not be relitigated by the same parties in a subsequent proceeding.[3]

4. In addition, I note that the whole purpose of an Indictment is to include the charges against an accused and the material facts supporting those charges pleaded with sufficient precision so as to provide notice to an accused.[4] An Indictment should thus be precise as to the charges, allegations, and modes of responsibility.[5]

5. The purpose and scope of the partial retrial is limited to retrying Haradinaj on those counts of the Operative Indictment for which he has not been finally convicted or acquitted, namely those six counts in relation to crimes alleged to have taken place at Jablanica/Jabllanicë. His acquittals in relation to all other crimes alleged in the Operative Indictment are final, and any re-alleging of Haradinaj's responsibility on those counts are barred by the principles of *non bis in idem* and *res judicata*.

6. In the Trial Judgement, Trial Chamber I was not satisfied beyond a reasonable doubt of the existence of the JCE as charged in the Fourth Amended Indictment in which the three Accused participated and, by consequence of this, it concluded that all three Accused should be acquitted of Counts 6, 14, 20, 22, 30, 36, and 37, that Haradinaj and Balaj should be acquitted on Counts 28 and 32, and that Brahimaj would not be held responsible under Counts 28 and 32 as a participant in a JCE.[6] This finding, central to the cause of action in the case, was not appealed by the Prosecution, except to the extent that the Prosecution sought a retrial on Counts 24, 26, 28, 30, 32 and 34 of the Fourth Amended Indictment, based solely on the Trial Chamber's alleged failure to counter the

[2] *See, e.g., R v Storey* [1978] HCA 39; (1978) 140 CLR 364, at 373.
[3] *See Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 228; *Prosecutor Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, paras 9-10; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel, 31 March 2010, para. 5. *See also Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, 29 May 2007, para. 6.
[4] *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 292.
[5] Thus, the Appeals Chamber has found that the Prosecution should only plead those modes of responsibility which it intends to rely on (*Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 41). *See also Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006, para. 21, citing, *inter alia*, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 215; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 171, fn. 319; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Objections by Momir Talić to the form of the Amended Indictment, 20 February 2001, para. 10; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 60.
[6] Trial Judgement, para. 478. All three Accused were acquitted of the remaining Counts in the Fourth Amended Indictment on other grounds.

witness intimidation that permeated the trial, and, in particular, to allow for the possibility of hearing the evidence of Kabashi and another witness. The finding of Trial Chamber I acquitting the Accused of the broader JCE was undisturbed by the Appeal Judgement, save in the limited sense of the six counts the subject of the retrial. Neither were any of the other verdicts of acquittal of crimes alleged to be part of the common purpose appealed or disturbed by the Appeal Judgement.

7. In light of these facts and the applicable law noted above, I am not able to concur with the Majority's finding. I agree with Haradinaj that the JCE as currently pleaded in the Operative Indictment requires the Prosecution to prove allegations for which Haradinaj has been finally acquitted and that are outside the scope of the crimes to be tried in the retrial.

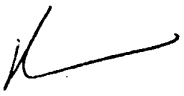
B. Ground 3: Whether allegations unrelated to the six counts that are subject to the retrial should be deleted from the Indictment

8. I further disagree with the Majority's finding on the third ground of appeal. In my view, the Prosecution is barred by the principles of *non bis in idem* and *res judicata* from re-alleging crimes for which Haradinaj has been finally acquitted. While some of the paragraphs in the Statement of Facts contain simply general allegations with no specific reference to any crimes for which Haradinaj has been acquitted, other paragraphs do, in my opinion, concern crimes for which he has been acquitted. These are paragraphs 34-38, 42-46 of the Operative Indictment. Their inclusion in the Operative Indictment, as currently drafted, in my opinion violates the principles of *non bis in idem* or *res judicata* or would amount to an abuse of process.

9. The remaining paragraphs of the Operative Indictment, namely paragraphs 28(a)-(f), (j)-(m), 32-33, are broad factual allegations that do not directly impact upon Haradinaj's final acquittals. It is not clear what evidence the Prosecution intends to lead in support of such allegations. Relevant legal principles suggest that the Prosecution would be estopped from leading evidence that, if accepted, would tend to overturn the acquittals.[7]

[7] *See, e.g. Sambavisum v. Public Prosecutor, Federation of Malaya*, [1950] A.C. at 458; *Director of Public Prosecutions v. Humphrys* (1977) AC, at 43 (per Salmon L.); *Garrett v. The Queen* (1977) 139 CLR 437, 445 (per Barwick CJ).

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



Judge Patrick Robinson

Dated this thirty-first day of May 2011
At The Hague
The Netherlands

[Seal of the Tribunal]