

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

Case No. IT-04-84bis-AR73.2

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Dagon
Judge Andresia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Date Filed: 3 March 2011

THE PROSECUTOR

v.

**Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ**

PUBLIC

**APPEAL BRIEF ON BEHALF OF IDRIZ BALAJ ON
CLARIFICATION OF THE OPERATIVE INDICTMENT**

The Office of the Prosecutor:
Mr. Paul Rogers

Counsel for Ramush Haradinaj:
Mr. Ben Emmerson QC
Mr. Rodney Dixon

Counsel for Idriz Balaj:
Mr. Gregor Guy-Smith
Ms. Colleen Rohan

Counsel for Lahi Brahimaj:
Mr. Richard Harvey
Mr. Paul Troop

I. Introduction

1. The issue certified for appeal on behalf of Mr. Balaj raises the question of whether, at the partial retrial ordered on the six counts alleging offenses at Jablanica/Jabllanice, the prosecution is legally barred from re-alleging as part of its JCE theory, criminal conduct for which the Accused have all been acquitted pursuant to final judgements after appeal.
2. The current version of the operative shortened indictment, filed on 21 January 2011, alleges in 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 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 KLA's headquarters at Jablanica/Jabllanice and Glodane/Gllodjan, and at the Black Eagles headquarters at Rznici/Irznici.¹

3. Mr. Balaj submits that all allegations in this paragraph alleging that the common criminal purpose of the JCE involved the commission of crimes against humanity and/or included offenses alleged to have taken place anywhere other than at Jablanica/Jabllanice must be removed.
4. Mr. Balaj and his co-accused have all been finally acquitted of crimes against humanity and all other crimes which were the subject of the original trial, except for the six Jablanica/Jabllanice counts.² The partial re-trial has been ordered only as to the counts alleging criminal conduct at Jablanica/Jabllanice. Whatever the common criminal

¹ *Prosecutor v Haradinaj et al*, IT-04-84bis-PT, Submission of Revised Fourth Amended Indictment, 21 January 2011, paragraph 24 [hereinafter the "operative shortened indictment"]. For clarity all other versions of the indictment in this case are referred to by the date on which they were filed.

² The only exception is Lahi Brahimaj who was convicted after the original trial for counts 28 and 32. Those convictions are now final.

purpose of the JCE is alleged to have been, all allegations that it involved or included crimes against humanity and crimes committed anywhere other than Jablanica/Jabllanice must be stricken in light of these acquittals.

5. The allegations at issue are reflected in the language set forth below in bold:

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 KLA's headquarters at Jablanica/Jabllanice **and Glodane/Gllodjan, and at the Black Eagles headquarters at Rznice/Irznice.**

6. Mr. Balaj respectfully requests a ruling from this Appeals Chamber ordering the prosecution to amend the indictment to exclude these allegations.

II. Procedural background

7. The October 2007 indictment, which was the operative indictment at the original trial, contained the following allegations regarding the common plan or purpose of the JCE alleged in this case:

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 KLA's

headquarters at Jablanica/Jabllanice and Glodane/Gllodjan, and at the Black Eagles headquarters at Rznic/Irznik.³

8. The New Version of the Revised Fourth Amended Indictment, filed on 9 November 2010 after the completion of appellate proceedings in this case and in anticipation of the partial re-trial, significantly changed the allegations regarding the substantive common plan or purpose of the JCE, from that alleged at the original trial.⁴
9. Paragraph 24 of the 9 November indictment read as follows:

The common criminal purpose of the JCE was to mistreat Serb civilians and Kosovar Albanian and Kosovar Roma/Egyptian civilians, and other civilians, who were, or were perceived to have been, collaborators with the Serbian Forces or otherwise not supporting the KLA. The common criminal purpose involved violations of the laws or customs of war under Article 3, including murder, cruel treatment, and torture. The JCE included the establishment and operation of and the mistreatment of detained persons at the KLA's headquarters at Jablanice/Jabllanice.⁵

10. On 23 November 2010 Mr. Balaj filed a Motion challenging the 9 November indictment. Mr. Balaj argued, based on various grounds, that the joint criminal enterprise allegations contained in the first sentence of paragraph 24 of the 9 November indictment had to be amended to reflect the same substantive common plan or purpose as alleged at the original trial.⁶
11. On 14 January 2011 the Trial Chamber granted that motion, finding, *inter alia*, that 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

³ *Prosecutor v Haradinaj et al*, IT-04-84-T, Fourth Amended Indictment, 16 October 2007, para 26 [emphasis added]; hereinafter "October 2007 indictment".

⁴ Submission of New Version of the Revised Fourth Amended Indictment, 9 November 2010, para 24 [hereinafter "9 November indictment"].

⁵ 9 November indictment, para 24.

⁶ Idriz Balaj's Motion Challenging the New Version of the Revised Fourth Amended Indictment, 23 November 2010.

the Appeals Chamber did not order amendments to the common purpose or to the crimes within its scope.”⁷

12. The Trial Chamber ordered that “paragraph 24 [of the 9 November 2010 indictment] shall be replaced by paragraph 26 of the Fourth Amended [October 2007] Indictment.”⁸
13. On 21 January 2011 the prosecution filed its “Submission of Revised Fourth Amended Indictment” [the operative shortened indictment].
14. Paragraph 24 of the operative shortened indictment alleged the same common criminal purpose for the alleged JCE for the re-trial as that alleged at the original trial.⁹ However, it re-alleged, as delineated in bold in paragraph 5 *supra*, allegations from paragraph 26 of the October 2007 indictment related to criminal conduct for which all the Accused have been finally acquitted.¹⁰
15. On 26 January 2011 Mr. Balaj filed a Request for Clarification of the Trial Chamber’s 14 January 2011 Decision. Mr. Balaj did not take issue with the Trial Chamber’s finding that the allegations regarding the substantive common criminal purpose of the JCE must be the same at the re-trial as they were at the original trial.¹¹
16. He submitted, however, that the substantive JCE alleged at the retrial could not include the allegations that the JCE involved the commission of crimes against humanity and could not include offenses alleged to have taken place “at KLA headquarters” other than at Jablanice, since all Accused had been acquitted of conduct alleged to have occurred at Glodane/Gllodjan and Rznice/Irznik pursuant to final judgements after appeal.¹² He

⁷ Decision on Shortened Form of the Fourth Amended Indictment, 14 January 2011, para 30 [hereinafter “Decision”; emphasis in original].

⁸ Decision, para 42(2)(b).

⁹ This paragraph is quoted in full at paragraph 2, *supra*.

¹⁰ These allegations had been properly excluded from the 9 November indictment. [See 9 November indictment, para 24 and para 5 *supra* [quoting paragraph 24 in full].

¹¹ Idriz Balaj’s Request for Clarification of the Decision of 14 January 2011 Regarding Paragraph 24 of the Shortened Indictment, para 14; and see Decision on Shortened Form of the Fourth Amended Indictment, 14 January 2011, para 28 [noting that this Chamber ordered a retrial only in relation to the six Jablanica/Jablanice counts and did not hold that “the common purpose of the JCE should be in any way altered.”]

¹² Idriz Balaj’s Request for Clarification of the Decision of 14 January 2011 Regarding Paragraph 24 of the Shortened Indictment, para 8-9; 13-14.

requested the operative shortened indictment be appropriately amended to reflect that fact.

17. The prosecution did not file an opposition to Mr. Balaj's Request.¹³
18. The Trial Chamber denied the Request for Clarification on 8 February 2011.¹⁴ It did so based on its finding that paragraph 24 of the operative shortened indictment "describes the common criminal purpose of the Joint Criminal Enterprise for the purpose of the partial retrial and does not contain any charges against the Accused, nor re-allege allegations which may not be made, as is submitted in the Motion."¹⁵
19. It also opined that Mr. Balaj's objection to the inclusion, in paragraph 24 of the operative shortened indictment, of allegations that the JCE involved crimes against humanity and included crimes alleged to have occurred other than at Jablanica/Jablanice was inconsistent with his submission (in his motion challenging the 9 November indictment¹⁶) that the substantive common criminal purpose of the JCE alleged at the re-trial (as described in the first sentence of paragraph 24) must be the same as that alleged at the original trial.¹⁷
20. On 15 February 2011 Mr. Balaj applied for certification to appeal the Decision denying his request for clarification of the indictment.¹⁸
21. On the same day he filed a request with the Appeals Chamber seeking standing and/or joinder in issues now pending before this Chamber as part of Ramush Haradinaj's

¹³ The prosecution informed the Trial Chamber by email, on 28 January 2011, that it did not intend to file a response to Mr. Balaj's Request.

¹⁴ Decision on Idriz Balaj's Request for Clarification of the Decision Regarding Paragraph 24 of the Revised Shortened Indictment, 8 February 2011, p.3.

¹⁵ *Ibid* pgs. 2-3.

¹⁶ Idriz Balaj's Motion Challenging the New Version of the Revised Fourth Amended Indictment, 23 November 2010.

¹⁷ *Ibid*, pgs 2-3.

¹⁸ Idriz Balaj's Application Pursuant to Rule 73(B) of the Rules for Certification to Appeal the Trial Chamber's Decision of 8 February 2011, 15 February 2011.

interlocutory appeal.¹⁹ The specifics of the relief Mr. Balaj is seeking regarding arguments raised by Mr. Haradinaj on appeal, are set forth in that request.

22. The Trial Chamber granted Mr. Balaj's certification to appeal the Decision denying his request for clarification of the operative shortened indictment on 24 February 2011. It certified for appeal the "question of whether to make the revisions sought by Balaj" to paragraph 24 of the operative shortened indictment and concluded that the resolution of this question will significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial.²⁰
23. The Trial Chamber also found that "the validity of Balaj's request for a revision of paragraph 24 of the Revised Shortened Indictment is an issue for which an immediate resolution by the Appeals Chamber may materially advance the proceedings."²¹
24. The Trial Chamber observed in *dicta* that while Mr. Balaj's Motion for Clarification and Mr. Haradinaj's Motion for Certification to appeal "seek the same content for the second and third sentences of paragraph 24 of the Revised Shortened Indictment, they differ in regard to the first sentence, which purports to delineate the common criminal purpose [of the JCE]. The denial of [Mr. Balaj's] Motion would prevent Balaj from making submissions to the effect that the JCE should have a fundamentally different ambit from that sought by Haradinaj."²²
25. In light of this *dicta* Mr. Balaj believes it prudent to iterate the nature of the relief he sought in the Trial Chamber and to maintain the distinction between issues raised by Mr. Haradinaj and issues raised by Mr. Balaj.

¹⁹ *Prosecutor v Haradinaj et al*, IT-04-84b-s-AR73.1, Idriz Balaj's Request for Standing Before the Appeals Chamber and/or Joinder in Issues Pending on Appeal Which Are Central to the Limited Partial Retrial Ordered in His Case, 15 February 2011.

²⁰ Decision on Idriz Balaj's Application Pursuant to Rule 73(B) for Certification to Appeal the Trial Chamber's Decision of 8 February 2011, 24 February 2011, para 14.

²¹ *Ibid*, para 15.

²² *Ibid*, para

26. Mr. Balaj did not move to clarify the first sentence of paragraph 24 of the operative shortened indictment. As mentioned earlier he did not take issue with the Trial Chamber's findings in that regard. He also did not seek certification from the denial of his motion to clarify on the basis that he should be provided with the opportunity to make submissions such as those suggested in the Trial Chamber's decision granting certification.
27. The issue raised by Mr. Balaj and certified by the Trial Chamber for appeal is Mr. Balaj's contention that the prosecution is legally barred from including, in paragraph 24 of the operative shortened indictment, allegations related to crimes for which Mr. Balaj and his co-accused have been finally acquitted.
28. As to Mr. Haradinaj's appeal, Mr. Balaj has, as noted earlier, asked this Appeals Chamber for standing to make submissions and/or joinder in Mr. Haradinaj's pending interlocutory appeal, including standing to reply to the prosecution's response to that appeal, as specified in his request for standing and/or joinder.

III. Standard of review on appeal

29. Review of a Trial Chamber's decision on interlocutory appeal is not subject to *de novo* review when the decision at issue involves the exercise of the Trial Chamber's discretion.²³
30. Trial Chamber decisions involve the exercise of discretion when they resolve matters related to the fair and expeditious management of trial, including, for example, in relation to the admissibility of evidence,²⁴ when imposing sentence,²⁵ in determining whether

²³ *Prosecutor v Gotovina et al*, IT-06-90-AR73.2, Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber's Decision on conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic, 29 June 2007, para 11.

²⁴ *Prosecutor v Milutinovic et al*, IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to Its 65th Witness List, 20 April 2007, para 7 [hereinafter "Milutinovic Appeal"].

²⁵ *Prosecutor v Tadic*, IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2001, para 22.

provisional release should be granted,²⁶ in evaluating evidence,²⁷ and, more frequently, in deciding points of practice or procedure.²⁸

31. In reviewing discretionary decisions by the Trial Chamber, the Appeals Chamber accords deference to the Trial Chamber in recognition of the Trial Chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case."²⁹
32. Mr. Balaj asserts that in this case the Trial Chamber's holding denying his request for clarification of the indictment for the reasons stated by the Trial Chamber does not fall within the category of a discretionary decision, but rather constituted an error of law which is subject to *de novo* review by this Chamber.
33. Even if the Trial Chamber's ruling is viewed as an exercise of its discretion, however, Mr. Balaj submits the Trial Chamber engaged in a discernible error.³⁰
34. When an appeal is brought from a discretionary decision of the Trial Chamber the issue is not whether the decision is correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. When an error in the exercise of the discretion has been demonstrated the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber.³¹
35. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a

²⁶ *Prosecutor v Brdanin and Talic*, IT-99-16-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 26 July 2000, para 22; *Prosecutor v Krajisnik and Plavsic*, IT-00-39 & 40-AR73.2 Decision on Interlocutory appeal by Momcilo Krajisnik, 26 February 2002, paras 16, 22.

²⁷ *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para 64.

²⁸ *Prosecutor v Slobodan Milosevic*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 April 2002, para 3 [joinder of indictments; hereinafter "Milosevic Appeal"]; *Prosecutor v Galic*, IT-98-29-AR72, Decision on Application by Defence for leave to appeal, 30 November 2001, para 17 [granting leave to amend an indictment]; *Prosecutor v Galic*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para 7 [determining the limits to be imposed upon the length of time available to prosecution for presenting evidence].

²⁹ *Prosecutor v Milan Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babic, 14 September 2006, paras 6, 8 [hereinafter "Martić Appeal"]; Milutinovic Appeal, para 8.

³⁰ Milosevic Appeal, para 5. [A party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a "discernible error."]

³¹ Milosevic Appeal, para 4.

patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."³²

36. It is also incumbent upon a Trial Chamber "to provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision."³³
37. Mr. Balaj submits that whether the Trial Chamber's decision is viewed as involving only an issue of law or as an exercise of its discretion it cannot be sustained.

IV. The inclusion in paragraph 24 of allegations that the charged JCE involved the commission of crimes against humanity under Article 5 and offenses at KLA headquarters at Glodane/Glogjan and Rznic/Irznik is barred by principles of *res judicata*

38. In his Motion seeking clarification of the operative shortened indictment, Mr. Balaj submitted that paragraph 24 of that indictment impermissibly contained and re-alleged allegations from the original trial indictment which could no longer be alleged as "the Accused have been acquitted of all crimes against humanity and all offences alleged to have taken place anywhere other than Jablanice."³⁴
39. The Trial Chamber denied Mr. Balaj's motion on the basis that paragraph 24 "describes the common criminal purpose of the Joint Criminal Enterprise for the purpose of the partial retrial and does not contain any charges against the Accused, nor re-allege allegations which may not be made, as is submitted in the Motion."³⁵
40. Mr. Balaj submits this finding is patently incorrect as a matter of law and/or reflects a discernible error on the part of the Trial Chamber.

³² Milutinovic Appeal, para 10; Martić Appeal, para 7, fns 11, 12.

³³ *Prosecutor v Prlić et al*, IT-04-74-AR73.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005, para 11 [hereinafter "Prlić Appeal"]; *Prosecutor v Milutinović et al*, IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para 22.

³⁴ Idriz Balaj's Request for Clarification of the Decision of 14 January 2011 Regarding Paragraph 24 of the Shortened Indictment, para 8.

³⁵ Decision on Idriz Balaj's Request for Clarification of the Decision Regarding Paragraph 24 of the Revised Shortened Indictment, pgs. 2-3.

41. Paragraphs 23 through 27 of the operative shortened indictment allege that the three Accused are charged with a joint criminal enterprise.³⁶ The paragraphs, which must be read in conjunction with each other and in reference to each other, set forth the nature and specifics of the alleged JCE and the nature and specifics of the accused's alleged participation in the alleged JCE.
42. Paragraph 24 of the operative shortened indictment describes the common criminal purpose of the charged JCE. It contains the allegation that the JCE involved the commission of crimes at Jablanica/Jablanice but adds to that (unlike the 9 November indictment) the additional allegation that the JCE involved commission of crimes against humanity under Article 5 and offenses at KLA headquarters at Glodane/Gllogjan and Rznic/Irznik.
43. In international criminal law the concept of JCE is commonly used to refer to an inherently criminal enterprise under the statutes of the international tribunals.³⁷
44. This Tribunal has also recognized that when considering whether a proposed amendment to an indictment includes a "new charge," it is appropriate to focus on the imposition of criminal liability on a basis that was not previously reflected in the indictment. The key question is whether the amendment introduces a basis for conviction that is factually or legally distinct from any already alleged in the indictment. A new allegation, even without additional factual allegations, which could be the sole legal basis for an accused's conviction is a "new charge." If a new allegation does not expose an accused to an additional risk of conviction, then it cannot be considered as a new charge.³⁸
45. Under these standards Paragraph 24 clearly, and contrary to the Trial Chamber's finding, contains charges against the Accused; indeed, charges not previously alleged in the 9

³⁶ Operative shortened indictment, paras 23-27.

³⁷ See, e.g. *Prosecutor v Krajisnik*, IT-00-39-T, Trial Judgement, 27 September 2006, para 883, citing *Prosecutor v Tadic*, IT-94-1-A, Appeal Judgement, 15 July 1999, para 227.

³⁸ *Prosecutor v Prlic et al*, IT-04-74-PT, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, 18 October 2005, para 13; *Prosecutor v Halilovic*, IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para 35.

November indictment. The paragraph's contents are also an integral part of the allegation that the accused participated in a joint criminal enterprise.

46. The Trial Chamber engaged in an error of law or, at minimum a discernible error, when it found that paragraph 24 does not contain any "charges" against Mr. Balaj.
47. Similarly the Trial Chamber engaged in an error of law or, at minimum a discernible error, when it found that paragraph 24 did not re-allege allegations which may not be made.
48. The partial retrial ordered in this case as to the six Jablanica/Jabllanice counts was ordered not because the Appeals Chamber overturned a conviction at the request of the Accused, but because the Appeals Chamber overturned acquittals at the request of the prosecution.
49. That reversal was based on narrow legal grounds; specifically, that the original Trial Chamber erred, as a matter of trial management, when it did not provide the prosecution with additional time in which to obtain and present the testimony of Mr. Kabashi and the other witness.
50. The prosecution represented and argued on appeal that Mr. Kabashi's proposed testimony and the other witness's proposed testimony were crucial to proof of the six Jablanica/Jabllanice counts;³⁹ the only counts for which the prosecution sought a retrial.⁴⁰ Retrial was ordered only as to the six counts involving allegations of illegal conduct at Jablanica/Jabllanice.⁴¹
51. Given this procedural posture the parties and the re-trial Chamber are now bound by principles of *res judicata* regarding all factual and/or legal issues which could have been challenged by the prosecution on appeal, but were not challenged on appeal.

³⁹ *Prosecutor v Haradinaj et al*, IT-04-84-A, Prosecution Appeal Brief, 16 July 2008, paras 3-16; 21; 231 42-43.

⁴⁰ *Ibid*, at paras 42-43 ["The only remedy is to remit the matter to a trial chamber for a re-trial on the relevant counts only. A re-trial would permit a reasonable possibility for the crucial evidence of Shefqet Kabashi and [the other witness] to be heard."]

⁴¹ *Prosecutor v Haradinaj et al*, IT-04-84-A, Appeal Judgement, 21 July 2010, para 50.

52. Specifically the prosecution did not appeal the original Trial Chamber's verdict acquitting all of the accused of all crimes against humanity under Article 5. Those acquittals are now final judgements.
53. The prosecution appealed the acquittal of Mr. Balaj on three counts of the indictment.⁴² Those acquittals were upheld on appeal and are now final judgements.⁴³
54. None of the other acquittals related to Mr. Balaj or his co-accused were challenged by the prosecution on appeal. Those acquittals, which included acquittals for all offenses alleged to have taken place in venues other than Jablanica/Jabllanice are now final judgements.
55. It is a fundamental principle in the jurisprudence of this Tribunal that when a party does not challenge a Trial Chamber's legal or factual findings on appeal, the Trial Judgement is final under the doctrine of *res judicata*.⁴⁴
56. The principle is recognized by this Tribunal as applicable to prosecutions involving international crimes and is part of international customary law.⁴⁵
57. Under principles of *res judicata* the prosecution is legally barred from re-alleging in the operative shortened indictment for the re-trial, allegations related to criminal conduct which is now the subject of final judgements of acquittal; to wit, crimes against humanity under Article 5 and/or any offenses alleged to have occurred anywhere other than at Jablanica/Jabllanice.
58. The Trial Chamber erred as a matter of law in finding otherwise.

⁴² Prosecution Appeal Brief, IT-04-84-A, paras 71, 89, 96.

⁴³ *Prosecutor v Haradinaj et al*, IT-04-84-A, Appeal Judgement, 21 July 2010, paras 62, 74, 103, 377.

⁴⁴ *Prosecutor v Delalic et al*, IT-96-21-T, Judgement, 16 November 1998, para 228; *Prosecutor v Simic et al*, IT-95-9-PT, Decision on Application by Todorovic to Re-Open the Decision of 27 July 1999 etc, 28 February 2000, paras 9-10; and see *Prosecutor v Blagojevic and Jokic*, IT-02-60-A, Decision on Prosecution's Request for leave to Amend Notice of Appeal in Relation to Vicoje Balgojevic, 20 July 2005; Partial Dissenting Opinion of Judge Pocar, para 2 [regarding the Prosecution's untimely attempt to amend its notice of appeal to expand its scope].

⁴⁵ See, e.g. *Prosecutor v Karadzic*, 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, *Prosecutor v Delalic et al*, IT-96-21-T, Trial Judgement, 16 November 1998, para 228.

59. If viewed as a discretionary decision, the Trial Chamber's finding that paragraph 24 did not re-allege allegations which may not be made, is plainly based on an incorrect interpretation of governing law and constitutes a discernible error.
60. As just discussed, because all the Accused have been finally acquitted of all crimes against humanity under Article 5 as well as all offences alleged to have taken place other than in Jablanica/Jablanice, the allegations that the JCE included the commission of such crimes is barred under principles of *res judicata*.
61. Mr. Balaj's Motion emphasised that the allegations at issue could not be properly pled because the Accused had been acquitted for all crimes against humanity and all offenses alleged to have taken place anywhere other than at Jablanice.⁴⁶ The Trial Chamber's denial of his Motion does not address this contention at all. It states, without legal or other explanation, that paragraph 24 does not "re-allege allegations which may not be made..."⁴⁷
62. As noted earlier, it is incumbent upon a Trial Chamber to provide a reasoned opinion that, among other things, indicates its view on all those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision."⁴⁸
63. A reasonable Trial Chamber would have taken the applicability of the doctrine of *res judicata* into account and ruled upon its merits given the arguments raised in Mr. Balaj's Motion for Clarification and the procedural posture of this case.
64. Mr. Balaj asserts the Trial Chamber erred as a matter of law or, at minimum, engaged in a discernible error, when it found that allegations regarding conduct for which the Accused have been finally acquitted could be properly re-alleged at the re-trial in the paragraph of the operative shortened indictment which delineates and defines the JCE charged against all the Accused.

⁴⁶ Request for Clarification, paras 8-9; 13-15.

⁴⁷ Decision, pg. 3.

⁴⁸ Prlic Appeal, para 22.

65. The error is also prejudicial. The principle of *non bis in idem* applies to cases, such as the one at hand, where an accused has already been tried.⁴⁹ The principle has been recognized on the national level as well as among almost all common law countries including at least fifty constitutions in countries such as Canada, New Zealand, the United States, India and South Africa.⁵⁰ It has been adopted in the Rome Statute of the International Criminal Court.⁵¹ It is included in Article 14(7) of the International Covenant of Civil and Political Rights,⁵² the European Convention on Human Rights,⁵³ and the Charter of Fundamental Rights of the European Union.⁵⁴
66. The rationale underlying this principle recognizes the need to protect individuals from repeated prosecutions for the same conduct and/or crimes and to prevent the prosecuting authorities from attempts to retry facts underlying an acquittal.⁵⁵
67. The prosecution has the ability to appeal a factual acquittal under ICTY Rules, however that does not give it *carte blanche* to overlook or ignore fundamental principles of human rights, such as the principle of *non bis in idem* at a subsequent, partial retrial.
68. Mr. Balaj has been ordered to stand trial, for a second time and despite previous acquittals, on counts 24, 26, 28, 30, 32 and 34. Although a partial retrial has been permitted as to those counts, due to a finding of trial management error at the original trial, principles of *non bis in idem* preclude the prosecution from re-alleging in the

⁴⁹ See *Prosecutor v Karadzic*, IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, 16 November 2009, para 13 (citing: *Prosecutor v Tadic*, IT-94-1-T, Decision on the Defence motion on the Principle of *Non-Bis-In-Idem*, 15 November 1995, paras 9, 20; *Prosecutor v Oric*, IT-03-68-A, Decision on Oric's Motion Regarding Breach of *Non-Bis-Id-Idem*, 7 April 2005, p. 5; *Prosecutor v Nzabirinda*, ICTR 2001-77-T, Sentencing Judgement, 23 February 2007, para 46 (citing: *Prosecutor v Semanza*, ICTR 97-20-A, Decision, 31 May 2000, para 74).)

⁵⁰ See Daniels, Reynaud N., "Non Bis in Idem and the International Criminal Court," *bePress Legal Series* (2006) p. 2.

⁵¹ Article 20(1) of the Rome Statute provides: "Except as provided for in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." And see Reynaud, p. 24 [opining that Article 20(1) protects against repeated prosecutions at the ICC].

⁵² ICCPR Article 14(7): "No one shall be liable to be retried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

⁵³ ECHR Article 4(1), Additional Protocol 7: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

⁵⁴ Charter of Fundamental Rights of the European Union (2010), Article 50.

⁵⁵ See, e.g. *Brown v Ohio*, 432 US 161 (1977).

indictment and/or producing evidence at the partial retrial, regarding any of the other counts alleged at the original trial for which Mr. Balaj has now been finally acquitted.

69. The prejudice arising from permitting allegations regarding the commission of crimes against humanity under Article 5 and/or any offenses committed anywhere other than at Jablanica/Jablanice to remain in the indictment for the partial retrial is clear. Mr. Balaj submits such allegations must be stricken.

V. If the Appeals Chamber finds that paragraph 24 “does not contain any charges against the Accused” then the allegations in the paragraph related to crimes against humanity under Article 5 and offenses at Glodane/Gllogjan and Rznic/Irznik should be stricken as surplusage

70. The Trial Chamber found that paragraph 24 “describes the common criminal purpose of the Joint Criminal Enterprise for the purpose of the partial retrial and does not contain any charges against the Accused...”⁵⁶

71. As argued *supra*, Mr. Balaj asserts that finding is legally incorrect.

72. If, however, the Appeals Chamber determines that the Trial Chamber was correct in finding that paragraph 24 merely describes the charged JCE and does not contain any charges against the Accused, then the language describing the JCE as including the commission of crimes for which Mr. Balaj has been finally acquitted should be stricken as surplusage.

73. The language is misleading and confusing, in light of the final acquittals, regarding the description of the nature and parameters of the JCE which is actually charged. As such it serves no legitimate legal purpose.

74. When the prosecution relies on a theory of joint criminal enterprise it must clearly plead the purpose of the enterprise, the identity of the participants, and the nature of the accused participation in the enterprise.⁵⁷

⁵⁶ Decision, pgs 2-3.

75. In order for an Accused charged with joint criminal enterprise to fully understand which acts he is allegedly responsible for, the indictment must also indicate which form of joint criminal enterprise is being alleged.⁵⁸
76. Clarity in the pleading of an indictment is also required to ensure a fair trial;⁵⁹ in this context, by providing the Accused with fair and clear notice of the actual charges he will face at trial. Assuring clarity in the indictment will, in turn, facilitate clarity at trial as to what evidence is relevant and admissible and what is not.
77. Here the language stating that the charged JCE includes the commission of crimes against humanity under Article 5 and/or crimes alleged to have occurred Jablanica/Jablanice, if it is not meant to allege any crimes, serves the sole purpose of obfuscating the nature of the JCE actually alleged and the nature of the acts Mr. Balaj is alleged to be responsible for under that JCE theory.

⁵⁷ See e.g. *Prosecutor v Stanasic*, IT-03-69-PT, Decision on Defence Preliminary Motions, 14 November 2003, p. 5; *Prosecutor v Krarjisk and Plavsic*, IT-00-39 & 40-PT, Decision on Prosecution's Motion for Leave to Amend the Consolidated Indictment, 4 March 2002, para 13.


⁵⁸ *Prosecutor v Krnojelac*, IT-97-25-A, Appeal Judgement, 17 September 2003, para 138 [noting it is preferable for an indictment, charging a joint criminal enterprise, to refer to the particular form of JCE which is envisaged].

⁵⁹ *Prosecutor v Krnojelac*, Appeal Judgement, para 138.

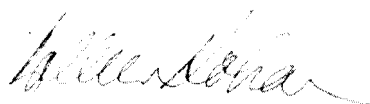
VI. Relief requested

78. Mr. Balaj respectfully requests the Appeals Chamber to grant his appeal regarding the issues certified for appeal and raised herein.
79. He requests that the prosecution be ordered to amend Paragraph 24 of the operative shortened indictment by deleting all language related to the alleged commission of crimes against humanity under Article 5 as well as all language related to the alleged commission of offenses other than at Jablanica/Jabllanice.

Respectfully submitted this 3rd day of March 2011,



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