UNITED
NATIONS

Case No.: MICT-15-96-PT

Mechanism for International Criminal Tribunals

Date: 27 October 2016

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IN THE TRIAL CHAMBER

Before: Judge Burton Hall, Presiding
Judge Seon Ki Park
Judge Solomy Balungi Bossa

Registrar: Mr. John Hocking

Date: 27 October 2016

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC WITH PUBLIC ANNEX A AND CONFIDENTIAL ANNEX B

STANIŠIĆ DEFENCE REQUEST TO STAY THE PROCEEDINGS UNTIL THE PROSECUTION RESPECTS THE PRINCIPLE OF FINALITY AND THE APPEAL CHAMBER'S ORDER FOR RETRIAL

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I. Introduction

1. On 1 May 2003, Mr. Stanišić was indicted by the International Criminal Tribunal for the former Yugoslavia ('ICTY').[1] On 31 May 2013, his trial ended in a full acquittal.[2] On 25 September 2013, the Prosecution submitted its Appeal Brief, appealing selected parts of the acquittal.[3]

2. On 9 December 2015, the Appeals Chamber granted, Judge Afanđe dissenting, the Prosecution's sub-ground of appeal 1(A),[4] and granted, Judge Agius and Judge Afanđe dissenting, sub-ground of appeal 2(A)[5] and ordered a "retrial on all counts in the Indictment".[6] Stanišić made his initial appearance before the Mechanism for International Criminal Tribunals ('MICT') on 18 December 2015, where he pleaded not guilty to the retrial Indictment. On 5 September 2016, the Prosecution filed its Pre-Trial Brief and other pre-trial materials.[7]

3. For the reasons detailed below, the Defence submits that the Prosecution's approach to the retrial amounts to such an egregious violation of the Accused's rights that it is detrimental to the Court's integrity, contravenes any sense of justice, and makes a fair trial impossible. The Trial Chamber should stay the proceedings until the Prosecution fully respects the *res judicata* and *non bis in idem* principles and the order of the Appeals Chamber for a retrial on the previous Indictment without addition or expansion of the counts or charges.

II. Applicable Law

A. The Prosecutor's Duty to Act as Ministers of Justice

4. Prosecutors have a responsibility to act as ministers of justice as they do not represent a single individual, but are assistants of the court in its pursuit of truth and its administration

[1] *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69, Indictment, 1 May 2003.
[2] *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-T, Judgement, 30 May 2013.
[3] *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-A, Prosecution Appeal Brief, 11 September 2013 ('Prosecution Appeal Brief').
[4] *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-A, Appeal Judgement, 9 December 2015 ('Appeal Judgement'), paras 90, 131.
[5] *Ibid*, paras 108, 131.
[6] *Ibid*, paras 129, 131.
[7] *Prosecutor v. Stanišić & Simatović,* Case No. MICT-15-96-PT, Corrigendum to Prosecution Pre-Trial Brief, 30 September 2016 (confidential with confidential annex A and confidential and ex parte annex B), Confidential Annex A ('Prosecution Pre-Trial Brief); *Prosecutor v. Stanišić & Simatović,* Case No. MICT-15-96-PT, Prosecution Notice of Rule 70(E) Filings, 5 September 2016 (public with confidential annexes A, B and E and confidential and *ex parte* annexes C, D and F) ('Prosecution Notice of Rule 70(E) Filings').

of justice.[8] Throughout the proceedings – investigation, pre-trial, trial, appeal and review – it is expected that the prosecution shall "respect the fundamental rights of…[the] accused".[9]

B. Abuse of Process

5. The concept of abuse of process is well established in international criminal law.[10] It was recognised by the Appeals Chamber in *Barayagwiza* as a "process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the Accused's rights would prove detrimental to the court's integrity".[11]

6. In *Karadžić,* the Appeals Chamber found that two situations may qualify as constituting such a serious and egregious violation of the Accused's rights, namely: (i) where a fair trial for the Accused is impossible, usually for reasons of delay; and (ii) where the trial of the Accused is marred by procedures which contravene the court's sense of justice.[12]

C. Finality Principles

i. Res Judicata

7. The principle of *res judicata* is well established in the jurisprudence of the ICTY,[13] the International Criminal Tribunal for Rwanda ('ICTR')[14] and the MICT.[15] In *Delalić et al.*, the Trial Chamber found that "[t]he principle of *res judicata* only applies *inter partes* in a

[8] *See Prosecutor v. Blaškić,* Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32, fn. 23; *Prosecutor v. Kordić & Čerkez,* Case No. IT-95-14/2-A, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 14, fn. 25.

[9] MICT Standards of Professional Conduct of Prosecution Counsel, MICT/12, 29 November 2013, para. 2(a).

[10] *See e.g. Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, Decision, 3 Nov. 1999 ('*Barayagwiza* Appeal Decision'), paras 74-77; *Prosecutor v. Šešelj,* Case No. IT-03-67-T, Decision on Oral Request of the Accused for Abuse of Process, 10 February 2010 ('*Šešelj* Decision'), para. 19; *Prosecutor v. Karadžić,* Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009 ('*Karadžić* Appeal Decision'), para. 47.

[11] *Barayagwiza* Appeal Decision, para. 74; *Karadžić* Appeal Decision*,* para. 45.

[12] *Karadžić* Appeal Decision*,* para. 45; *Šešelj* Decision, para. 21; *Barayagwiza* Appeal Decision, paras 74, 77.

[13] *See e.g. Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, Partially Dissenting Opinion of Judge Robinson, 31 May 2011 ('*Haradinaj* Dissent of Judge Robinson'), para. 3, fn. 3; *Prosecutor v. 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 2001, para. 5; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 ('*Delalić et al.* Trial Judgement'), para. 228.

[14] *See e.g. Prosecutor v. 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, fn.7.

[15] *Prosecutor v. Karadžić,* Case No. MICT-13-55-R90.3, Decision to Invite the ICTY Trial Chamber in the Karadžić Case to Determine whether there is "Reason to Believe" that Contempt has been Committed by Members of the Office of the Prosecutor, 21 July 2014, para. 9, where it provided that the MICT is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTY and ICTR.

case where a matter has already been judicially determined within that case itself".[16] The Chamber continued that, in criminal cases, *res judicata* relates to whether, "when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated".[17]

8. A finding or decision ought to be considered *final* - i.e. *res judicata* or fully litigated – when there are no available appellate procedures remaining relating to the subject matter. This arises in two principal situations. First, a decision is *res judicata* when an Appeals Chamber dismisses or otherwise rejects a ground of appeal. Second, a finding is *res judicata* when the time to activate available appellate procedures expires, or when – in exercising those procedures - the parties exclude specific findings of an impugned Judgement from the review requested to the higher Court. In other words, when the matter is waived.[18]

ii. Non Bis in Idem

9. The principle of *non bis in idem,* or double jeopardy, is well established in both international criminal law[19] and international human rights law.[20]

10. It is the underlying *acts*, and not the *offence*, which is determinative of whether there is a violation of the *non bis in idem* principle.[21] The *ad hoc* tribunals have repeatedly held that the risk of facing a conviction for *acts* already finally considered would constitute a violation of the *non bis in idem* principle,[22] and hence an infringement of the fundamental rights of the Accused. The MICT has defined "same acts" as acts that do not differ

[16] *Delalić et al.* Trial Judgement, para. 228; *see also Haradinaj* Dissent of Judge Robinson, para. 3.
[17] *Delalić et al.* Trial Judgement, para. 228.
[18] *Infra*, paras 11-12.
[19] Statute of the MICT, UN Doc. S/Res/1966, 22 December 2010 ('MICT Statute'), Article 7(1). *See also* Rome Statute of the International Criminal Court (as amended), 2187 UNTS 90, adopted 17 July 1998, entered into force 1 July 2002 ('Rome Statute'), Article 20; Statute of the ICTR (as amended), UN Doc. S/Res/955, 8 November 1994 ('ICTR Statute'), Article 9(1); Statute of the ICTY (as amended), UN Doc. S/Res/827, 25 May 1993 ('ICTY Statute'), Article 10(1).
[20] *See* International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966, Article 14(7); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 117, 23 August 2007, Article 4(1). International human rights law generally follows an *idem factum* approach, which focus on the "same conduct" on the applicant's part irrespective of the legal classification. *See e.g. Sergey Zolotukhin v. Russia*, Application No. 14939/03, 10 February 2009, para. 83.
[21] *See* MICT Statute, Article 7(1); ICTY Statute, Article 10(1); ICTR Statute, Article 9(1).
[22] *See e.g. Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, para. 74; *Prosecutor v. Orić,* Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016 ('*Orić* Appeal Decision'), para. 13.

fundamentally with respect to the alleged victims and the nature, time, and location of the alleged criminal conduct.[23]

iii. Waiver

11. As mentioned,[24] a matter becomes *res judicata* when it is dismissed on appeal at the highest level within a judicial system, or when the matter is *waived* by the affected party. Waiver occurs when a party has the opportunity to exercise its rights to address, object or appeal a particular matter, but chooses not to do so.

12. The principle of waiver is manifested in a variety of contexts in the jurisprudence of the *ad hoc* tribunals. For example, in the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could reasonably have done so in the first instance.[25]

D. Finality Principles in Criminal Proceedings during Retrials

13. While the ICTY has routinely applied the principles of *res judicata* and *non bis in idem* in their proceedings,[26] it has not applied them in relation to a retrial of the nature proposed by the Prosecution. The closest jurisprudential cognate arose in the *Haradinaj* retrial.[27] In this case, in addition to the general principles identified above in relation to what makes a matter *res judicata* and *non bis in idem*, the Appeals Chamber established, *inter alia*, the following principles:

- The Trial Chamber during retrial cannot make findings on counts or charges with respect to an Accused's individual criminal responsibility beyond that successfully appealed by the Prosecution, as doing so would be *res judicata* and violate the *non bis in idem* principle;[28]

- Admitting new or previously excluded evidence in support of specific charges that were the basis of the Prosecution's appeal and reversed by the Appeals Chamber

[23] *Orić* Appeal Decision, para. 11.
[24] *Supra*, para. 8.
[25] *See e.g. Prosecutor v. Naletilić & Martinović,* Case No. IT-98-34-A, Judgement, 3 May 2006*,* para. 21; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 222, *citing Prosecutor v. Tadić,* Case No. IT-94-1-A, Judgement, 15 July 1999 ('*Tadić* Appeal Judgement'), para. 55.
[26] *See infra,* paras 7-10.
[27] *Prosecutor v. Haradinaj et al.,* Case No. IT-04-84*bis*-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011 ('*Haradinaj* Appeal Decision').
[28] *Haradinaj* Appeal Decision, para. 32.

during the retrial of an acquitted Accused does not *per se* violate the *res judicata* principle; and

- Contextual evidence in support of successfully appealed charges may be presented during a retrial, but findings cannot be made beyond the grounds that were successfully granted on appeal.[29]

14. Moreover, *Haradinaj* further established that "[a]ny potential for undue prejudice to a defendant in a retrial following an acquittal [and in light of the principles outlined] should be addressed through […] the Trial Chamber's continuing *duty to apply fair trial principles*".[30]

III. Submissions

A. The Prosecution's Violation of Core Finality Principles and its Addition to, or Expansion of, the Charges in the Indictment is an Abuse of Process

15. According to the applicable law, the Prosecution's approach to the retrial gravely undermines the Accused's rights through: (i) systemic violations of the *res judicata* and *non bis in idem* principles; and (ii) violation of the Appeals Chamber's order for retrial through the impermissible addition to, or expansion of, the charges.

16. Due to these violations, the Trial Chamber should decline to exercise its jurisdiction and stay the proceedings against Mr. Stanišić until the Prosecution proceeds in full respect for the Accused's human rights.

i. Abuse that Contravenes the Court's Integrity

a. Exculpatory Findings Not Appealed or Not Found in Error by the Appeals Chamber are *Res Judicata* and *Non Bis In Idem*

17. On 9 December 2015, a Majority of the Appeals Chamber found reversible legal errors in the Trial Judgement and consequently granted the Prosecution's sub-grounds of appeal 1(A) and 2(A). The Appeals Chamber dismissed sub-grounds 1(B), 1(C), 2(B) and 3, and ordered a retrial on "all counts of the Indictment" on the basis of 1(A) and 2(A).[31]

[29] *Ibid*, para. 32.
[30] *Ibid*, para. 26 (emphasis added).
[31] Appeal Judgement, para. 131.

i) Sub-ground 1(A): Findings Subject to Finality

18. Under sub-ground 1(A), the Appeals Chamber found an error of law by finding it was not established that Stanišić shared the intent to further the common criminal purpose without adjudicating or providing a reasoned opinion on the existence of, and Stanišić's participation in, the common criminal purpose of the JCE.[32]

19. As summarised by the Appeals Chamber, the Prosecution argued that the predicate determinates to decide on Stanišić's intent were absent from the Trial Chamber's ruling.[33] The Trial Chamber's error was limited to a failure to conduct an analysis of: (i) whether there was a common purpose; (ii) the content of the common purpose; (iii) when the common purpose came into existence; (iv) who shared the common purpose; (v) which crimes formed part of the common purpose; and (vi) how JCE members contributed to the common purpose.[34]

20. As the Appeals Chamber also noted, the Prosecution accepted that the Trial Chamber made legitimate findings concerning whether Stanišić's actions contributed to certain crimes but had failed to assess those actions as contributions to the common criminal purpose.[35] As such, the Prosecution submitted that the Appeals Chamber would not need to undergo extensive fact finding, but to the contrary, given the Trial Chamber had accepted the "vast majority" of its case, this was a "compelling argument" for the Appeals Chamber to agree with the majority of these findings, to enter additional findings if necessary, and to convict the Accused accordingly.[36]

21. The Appeals Chamber thus found that the error of law was the *lack* of findings and a *lack* of an analysis as to what evidence or findings would be indicative of or would establish the existence and scope of a common criminal purpose shared by a plurality of persons, as well as on the Accused's contribution to it.[37] In sum, there was no complaint or error found in relation to the facts that were found, only that more findings were needed to enable the correct analysis. The former are *res judicata* and *non bis in idem*, the latter are the subject of the retrial.

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[32] *Ibid*, para. 62.
[33] *Ibid*, para. 63; Prosecution Appeal Brief, paras 21, 22.
[34] Appeal Judgement, para. 63; Prosecution Appeal Brief, para. 21.
[35] Appeal Judgment, para. 64; *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-A, Appeal Hearing, 15 July 2015 ('Appeal Hearing'), pp. 11-12, 15-16, 22.
[36] Appeal Judgement, para. 112; Prosecution Appeal Brief, para. 44; Appeal Hearing, pp. 34-35.
[37] Appeal Judgement, paras 87, 89.

ii) Sub-ground 2(A): Findings Subject to Finality

22. Under sub-ground 2(A), the Prosecution argued that the Trial Chamber erred in law by requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime and that, had the Trial Chamber not erred, it would have found that Stanišić aided and abetted the crimes committed in Bosanski Šamac, Doboj, and SAO Krajina.[38]

23. In sum, according to the Prosecution, and as found by the Appeals Chamber, what was required was an application of the correct law to the existing factual findings concerning Stanišić's contributions to the crimes. There was nothing wrong with the factual findings concerning Stanišić's contributions. According to the Prosecution, the findings and the evidence on the record show that Stanišić possessed the requisite *mens rea* for aiding and abetting these crimes.[39] The Trial Chamber's factual findings relevant to Stanišić's contributions are *res judicata* and *non bis in idem.*

iii) Modes of liability: Findings Subject to Finality

24. The Prosecution's appeal focused on JCE and aiding and abetting liability. Nonetheless, in the retrial the Prosecution alleges planning and ordering as additional modes of liability in relation to all crimes charged in the Indictment.[40] The Trial Chamber found that it was not proven beyond reasonable doubt that the Accused planned or ordered the crimes charged in the Indictment.[41] These findings were not appealed, nor did the Appeals Chamber reverse these findings. Therefore, the Trial Chamber's findings on these modes of liability are *res judicata* and *non bis in idem.*

25. Furthermore, as concerns aiding and abetting liability, the Prosecution alleges it as an additional mode of liability for all crimes charged in the Indictment.[42] Nevertheless, in sub-ground of appeal 2(A), the Prosecution submitted that the Trial Chamber erred in law in requiring specific direction, and had the Chamber not so erred, it would have concluded, based on its findings alone, that the *actus reus* of aiding and abetting is met with regard to the crimes in Bosanski Šamac, Doboj and SAO Krajina.[43] The Prosecution did not appeal the Trial Chamber's findings in regard to other areas, and the Appeals Chamber, in finding that

[38] Prosecution Appeal Brief, para. 129; Appeal Judgement, para. 93, fn. 341.
[39] Appeal Judgement, para. 113; Prosecution Appeal Brief, paras 129, 153.
[40] Indictment, paras 10, 16-17, 25, 63, 66.
[41] Trial Judgement, para. 2355.
[42] Indictment, paras 10, 16-17, 25, 63, 66.
[43] Prosecution Appeal, paras 129, 131; Appeal Judgement, para. 93, fn. 341.

the Trial Chamber did so err, granted sub-ground of appeal 2(A).[44] Therefore, the findings relating to Stanišić's responsibility for aiding and abetting crimes outside of these three areas are *res judicata* and *non bis in idem.*[45]

iv) Conclusion

26. With regards to sub-grounds 1(A) and 2(A), and the additional modes of liability, certain findings from the previous trial were not the subject of the Prosecution's appeal and were not reversed by the Appeals Chamber. Accordingly, they were waived or have otherwise been finally determined, making them *res judicata* and *non bis in idem*. Annex A to this Motion contains the positive factual findings relevant to sub-grounds 1(A) and 2(A) that are final.

27. As Annex A further shows, the Prosecution's Rule 70(E) filings attempt to ride roughshod over these finality principles through a wholesale inclusion of an extensive range of counts and charges in full knowledge that they have either not been challenged on appeal or have otherwise attained finality.

28. As discussed, the Prosecution's Appeal did not take issue with a majority of the Trial Chamber's findings.[46] Instead, it urged the Appeals Chamber to agree with the findings, enter additional findings as necessary, and to convict Stanišić and Simatović accordingly.[47]

29. This preference explains why the Prosecution did not request a retrial during the appeal proceedings, where it stated:

> […] a retrial is not the most appropriate remedy in this case. Here the problem is not with the existing evidentiary record. The problem is one of failure to properly adjudicate the evidence already on that record. The **interests of justice militate away from a time and resource-intensive retrial and towards a remedy that will correct the problem at issue**.[48]

30. However, having failed to persuade the Appeals Chamber that it ought to enter convictions against Stanišić on all counts of the Indictment on the basis of the Trial Chamber's factual findings and the trial record,[49] the Prosecution now wishes to abandon that purportedly principled approach and relitigate all the charges and counts.

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[44] Appeal Judgement, para. 108.
[45] *See* Trial Judgement, paras 2356-2361.
[46] *See e.g.* Prosecution Appeal Brief, paras 11, 18, 44, 101, 105, 108, 129, 173, 215, 250, 275; Prosecution Reply Brief, para. 15.
[47] Appeal Judgement, para. 112; Prosecution Appeal Brief, para. 44; Appeal Hearing, pp. 34-35.
[48] Appeals Hearing, p. 37 (emphasis added).
[49] Appeal Judgement, para. 111.

31. To accept and place reliance on findings as representing final findings of truth significant enough to urge conviction on appeal, only to seek to disregard those findings when expedient during retrial, is a serious and egregious violation of due process that contravenes the Tribunal's sense of justice and is seriously detrimental to the Tribunal's integrity. The Trial Chamber ought to stand against this manipulation of the process and issue a stay of the proceedings until the current Prosecution respects the *res judicata* and *non bis in idem* principles.

b. The Prosecution Has Violated the Order of the Appeals Chamber through the Impermissible Expansion or Addition of Counts/Charges

32. Nothing in the Appeals Judgement permits the Prosecution to add or otherwise expand the counts or charges beyond its original case. On the contrary, the Appeals Chamber expressly limited the retrial and ordered that Stanišić "be retried on all counts of the Indictment".[50] This can only be understood to mean the Prosecution's original Indictment, or case, against Stanišić. The Appeals Chamber's order did not provide the Prosecution with discretion to increase or otherwise expand the counts or charges in the Indictment.

33. The Appeals Chamber reasoned that there were three choices available to ensure justice was done in light of the errors found. None of them permitted the Prosecution's current approach to the retrial. Firstly, it noted that it could conduct an appellate review of "the relevant factual findings of the Trial Chamber" using the existing "trial record";[51] "remitting limited issues to be determined by either the original or a newly composed trial chamber" on the "basis of the original trial record";[52] or a retrial on all counts of the Indictment.[53] The Appeals Chamber ordered a retrial because the first two options were not possible due to the unavailability of two Judges of the original Trial Chamber and the impracticality and unfairness that would arise from an analysis of "the entire trial record without the benefit of having directly heard the witnesses in order to determine whether it is itself satisfied with respect to the requirements of JCE liability and, depending on the result of such an analysis, with respect to the requirements of aiding and abetting liability".[54]

34. Despite this restriction of the Prosecution's appellate case to the original case against the Accused, the Prosecution have sought to not only expand the evidentiary basis for the

[50] *Ibid*, para. 131.
[51] Appeal Judgment, para. 123.
[52] Appeal Judgment, para. 125.
[53] *Ibid*, para. 125.
[54] *Ibid*, para. 124.

retrial related to the contents of sub-grounds 1(A) and 2(A), but also to seek convictions on counts/charges that were not part of the first case against the Accused. As Annex B shows, the Prosecution have in fact sought a massive addition to, or expansion of, the charges against Stanišić in this case. It has proposed the addition of 70 material facts that amount to new charges or an expansion of the existing charges.

35. Undoubtedly, the Prosecution will attempt to explain their approach through a claim that the Indictment in the first trial is the same as the operative Indictment in this retrial.[55] However, as the volume of additional or expanded charges contained in Annex B shows, it is legally immaterial that the Indictment contains the same words.

36. As the ICTY and ICTR have made clear on many occasions when Prosecutions have attempted to use these misconceived arguments to covertly expand their cases against other Accused, this conflates the distinction between counts or charges and the material facts that underpin that charge or count.[56]

37. According to the jurisprudence, substantive changes which seek to add fresh allegations amounting either to separate charges or to a new allegation in respect of an existing charge ought to be the subject of an amendment to the Indictment. The key focus when considering whether the Prosecution is seeking to reply upon "a new charge" is whether there exists a basis for conviction "that is factually and/or legally distinct from any already alleged in the Indictment".[57]

38. Therefore, plainly, the presence or absence of new counts in the Indictment does not determine whether the Prosecution has sought to add new counts or charges. The Prosecution is not permitted to amend the counts of the Indictment under the cover of pleading new material facts that can "readily be characterised as new charges".[58] Whilst it is true that the

[55] *Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-PT, Prosecution Notice of Filing of Third Amended Indictment, 10 July 2008.
[56] *Prosecutor v. Muvunyi,* Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision on 23 February 2005, 12 May 2005 ('*Muvunyi* Appeal Decision'), para. 19.
[57] *Prosecutor v. Halilović,* Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, para. 30. *See also Prosecutor v. Prlić et al.,* Case No. 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 which provides that "[i]f a new charge does not expose an accused to an additional risk of conviction, then it cannot be considered as a new charge."
[58] *Muvunyi* Appeal Decision, para. 20.

plain terms of the Indictment have not changed, this is only because of the pleading style adopted by the Prosecution.[59] Indeed:

> […] it is at least arguable that there has been an insertion of entirely new factual allegations in support of existing counts, either in substitution for or in addition to the factual situations, which had been placed in the original indictment. Even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges.[60]

39. In sum, any argument that seeks to conceal the insertion of entirely new factual allegations either in substitution for or in addition to the factual situations that had been placed in the original Indictment, must be rejected as wholly self-serving and undermining of fundamental fair trial rights. The expansion of counts/charges in the Stanišić retrial violates the Appeal Chamber's ruling. Further, it also runs contrary to the Appeals Chamber's finding in *Haradinaj* that permits new evidence (subject to an assessment of its impact on fair trial rights) in support of successfully appealed counts or charges but no new counts or charges.[61] It amounts to a manipulation of the Court process, contravenes the Court's sense of justice in these proceedings and amounts to an abuse of process.

ii. Abuse: A Fair Trial is Impossible

40. As noted, it is submitted that the Prosecution's approach to the retrial is characterised by serious and egregious violations of fundamental rights and fair trial processes that if allowed to continue would prove detrimental to the court's integrity and sense of justice.[62] Moreover, when viewed singularly or in combination, they have such an effect that if permitted they would make a fair trial impossible.

41. Aside from the violation of the prohibition on new counts or charges,[63] the Prosecution's targeted selection of new counts or charges is designed to optimise its prospects for conviction on the successfully appealed counts or charges (that are properly the subject of the retrial), and the charges or counts that are final (and not properly the subject of the retrial).

42. In sum, the Prosecution's violation of finality principles and the addition or expansion of counts/charges (and not merely evidence) is a calculated strategy that fundamentally

[59] *Prosecutor v. Krnojelac*, Case No. IT-27-95-PT, Decision on Prosecutor's Response to Decision of 24 February 1999, 20 May 1999 ('*Krnojelac* Decision') para. 19.
[60] *Ibid*, para. 20.
[61] *Haradinaj* Appeal Decision, para. 32.
[62] *Barayagwiza* Appeal Decision, para. 74; *Karadžić* Appeal Decision, para. 45.
[63] *Haradinaj* Appeal Decision, para. 32.

violates the presumption of innocence, including through a reversal of the burden of proof. As will be discussed below, seeking to deprive the Accused of a multitude of positive and final findings whilst concurrently adding or expanding specifically selected charges in the circumstances of a retrial, provides the Prosecution with such an overwhelming advantage that a fair trial is not possible.

a. The Presumption of Innocence

43. To have meaning consistent with the principle of legality and personal culpability, the presumption of innocence requires that a Trial Chamber must ensure the procedural balance between the parties is maintained concretely and with exactitude—ensuring that the burden and standard of proof remains firmly upon those bringing the allegations.

44. As noted by the Appeals Chamber in *Orić*, in the context of equality of arms, the burden of proof presupposes that the Prosecution's task is more onerous than that of the Defence:

> The Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond a reasonable doubt. Defence strategy, by contrast, often focuses on poking specifically targeted holes in the Prosecution's case, an endeavour which may require less time and fewer witnesses.[64]

45. As a core component of the burden of proof, the Trial Chamber shall ensure that a trial is 'fair and expeditious' and there is 'equality of arms', which means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage *vis-à-vis* his opponent".[65] An Accused is entitled to "a reasonable and adequate opportunity to present his case".[66]

46. At the ICTY, these principles have been recognised, *inter alia*, as requiring that the Prosecution, but not the Accused, fulfill a wide range of disclosure obligations, including informing the Accused promptly and in detail of the nature and cause of the charges against them through a variety of instruments,[67] including the Indictment;[68] supporting material and all prior statements obtained from the Accused;[69] an enhanced Prosecutor's pre-trial brief

[64] *Prosecutor v. Orić,* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 7.
[65] *Tadić* Appeal Judgement, paras 43, 44, 48, 52.
[66] *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision in Relation to Severance, Extension of Time and Rest, 12 December 2005, para. 25.
[67] *See* MICT Statute, Article 19(4)(a); ICCPR, Article, 14(3)(a); European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), ETS No. 5, 4 November 1950, Article 6(3)(a).
[68] MICT Rules of Procedure and Evidence, MICT/1/Rev.2, 26 September 2016 ('MICT Rules'), Rule 48(C).
[69] *Ibid*, Rule 71(A)(i).

(with, *inter alia,* "a summary of the evidence");[70] the filing of a list of witnesses it intends to call (including a summary of facts);[71] its list of exhibits;[72] and copies of witness statements, transcripts and written statements.[73] The Prosecution must also notify the Defence of the witnesses it intends to call in rebuttal of any defence plea,[74] and disclose to the Defence any exculpatory evidence.[75]

47. As is plain, there is little by way of corresponding obligations upon the Accused, who is only required to disclose in general terms the nature of his/her defence.[76] Efforts by a series of Prosecutors to up-turn this balance have been consistently resisted by the ICTY.[77]

48. However, in a retrial, the Prosecution has advanced notice of the strengths and weakness of their own case and overly expansive details of the Defence case. They do not begin from a position of having to establish the theory of their case or a coherent narrative. Therefore, the mere fact of a retrial undermines the delicate operation of this procedural framework and risks tipping the balance in favour of the Prosecution to a degree that places the Accused at a serious forensic and tactical disadvantage so that the presumption of innocence is violated.

49. This is not to argue that a retrial must always be unfair or amount to an impermissible lowering of the burden of proof. However, in the context of lengthy and complex international trials, a retrial provides the Prosecution with a considerable advantage and an opportunity to design a more effective but unfair prosecution. This explains the *Haradinaj* Appeals Chamber's approach – allowing the addition of new evidence, but not charges or expanded allegations – but only following a strict application of fair trial principles and an assessment of resulting potential for prejudice.[78] The Appeals Chamber understood that a Prosecutor could misuse the inherent advantages of a retrial and shift the burden of proof onto the Accused through the selective bombardment of new charges and evidence.

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[70] *Ibid*, Rule 70(E)(i).
[71] *Ibid*, Rule 70(E)(ii).
[72] *Ibid*, Rule 70(E)(iii).
[73] *Ibid*, Rule 71(A)(ii).
[74] *Ibid*, Rule 72(B)(ii).
[75] *Ibid*, Rule 73.
[76] *Ibid*, Rules 70(F), 70(M), 72(B)(i)-(ii).
[77] *See e.g. Prosecutor v. Stanišić & Simatović,* Case No. IT-03-69-T, Decision on Urgent Prosecution Motion for Disclosure of Witness Details and for Modification of the Scheduling Order of 1 April 2011, 27 May 2011, paras 11-12. *See also Prosecutor v Blakšić*, Case No. IT-95-14-T, Decision on the Prosecution Motion for Seven Days Advance Disclosure of Defence Witnesses and Defence Witness Statements, 3 September 1998; *Prosecutor v. Krajišnik & Plavšić,* Case Nos. IT-00-39-PT & IT-00-40-PT, Decision on Prosecution Motion for Clarification in Respect of Application of Rules *65ter,* 66(b) and 67(C), 1 August 2007, para. 9.
[78] *Haradinaj* Appeal Decision, paras 32, 39.

50. Notwithstanding, the Prosecution seeks not only to disregard the *Haradinaj* admonishments in regard to finality principles and the prohibition on new charges and counts, but also the cautionary warnings concerning new evidence. In sum, aside from the systematic violation of the prohibition on new counts or charges,[79] the Prosecution's targeted selection of additional or expanded counts and charges (as well as evidence in support) is designed to optimise its prospects for conviction on the successfully appealed counts or charges (that are properly the subject of the retrial), and the material allegations, charges or counts that are final (and not properly the subject of the retrial).

51. In taking this approach, the Prosecution abandons its obligation to respect the fundamental rights of suspects and Accused in favour of pursuing convictions at all costs. By pursuing a strategy that seeks to maximise the efficiency and effectiveness of the Prosecution case (through the selective targeting of a mass of new or expanded charges and a volume of new evidence designed to fill the gaps identified in the first trial) whilst simultaneously seeking to deprive the Accused of the benefit of the reasonable doubt established in relation to findings already made final, the Prosecution seeks to lift the burden from its own shoulder, exhaust the resources of the Defence and shift the burden of proof onto the Accused.

52. This is not the legitimate business of a retrial. Indeed, as Annexes A and B show, to call it a retrial stretches the bounds of language and incredulity to breaking point. As Annex A demonstrates, the Prosecution failed to prove most of their case against Stanišić in the first trial. Despite alleging that Stanišić was the right hand man of Milošević, one of the architects of the crimes and the prime facilitator of the alleged five-year JCE, he was consistently found to be pursuing *legitimate* military activity and *remote* from criminal activity. Having failed to establish the foundation of their Indictment, as Annex B shows, they now seek to construct anew in significantly more favourable procedural conditions and in violation of fundamental rights. It is a new trial, not in pursuit of the truth, but in pursuit of a conviction at all costs.

53. In sum, alongside the violation of the finality principles, the addition of targeted new and expanded charges fatally undermines the presumption of innocence and violates the object and purpose of the retrial. As such, until the additional or expanded charges are dismissed, the proceedings should be stayed as an abuse of process.

[79] *Ibid*, para. 32.

IV. Remedy

54. For the reasons outlined above, the Defence submits that Prosecution's approach to the retrial is an abuse of process that contravenes the court's sense of justice and renders a fair trial impossible.

55. The Defence respectfully requests the Chamber stay the proceedings against Mr. Stanišić until the Prosecution's case is amended to ensure respect for the principles of *res judicata, non bis in idem* and the order of the Appeals Chamber for a retrial.

Respectfully submitted,

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