

IT-04-84-T
D19861 - D19858
31 MAY 2007

19861 AT



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

Case No. IT-04-84-T
Date: 31 May 2007
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: Mr Hans Holthuis

Decision of: 31 May 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON IDRIZ BALAJ'S PRELIMINARY MOTION CONCERNING
PARAGRAPH 29 OF THE INDICTMENT**

Office of the Prosecutor

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Mr Paul Troop

1. By motion dated 5 February 2007, Mr Balaj seeks clarification of paragraph 29 of the indictment. Paragraph 29, and the paragraph before it, read:

28. By virtue of his participation in the JCE, each Accused is individually responsible for the acts and omissions of his two co-Accused and for the acts and omissions of other members of the JCE that were in furtherance of the common criminal purpose, and that were either within the object of the JCE or that were the natural and foreseeable consequences of its execution.

29. Each Accused is also individually responsible for the acts and omissions of other persons, who were not members of the JCE, but who were used by the members of the JCE to carry out crimes committed in furtherance of the common criminal purpose that were either within the scope of the JCE or that were the natural and foreseeable consequences of its execution.

2. Both paragraphs allude in part to the third form of the joint criminal enterprise doctrine of individual liability (JCE III).

3. Mr Balaj submits that, where JCE III is alleged, “responsibility for a crime which was not agreed upon by the accused is incurred only if it was foreseeable to the accused that such a crime might be committed by one or more members of the JCE, and the accused willingly took the risk that such a crime would be committed.”¹ The essence of Mr Balaj’s complaint is that paragraph 29 impermissibly expands the reach of JCE III, or that it relies on a liability doctrine (described by Mr Balaj as “indirect co-perpetration”) that has no basis in the Tribunal’s Statute or in customary international law.

4. The Prosecution responded on 19 February 2007, opposing the motion.²

5. Tribunal jurisprudence at the time of Mr Balaj’s motion was indeed not consistent on this point. In particular, a question remained about responsibility for the actions of JCE non-members (a question that was not exclusive to JCE III). However, since the filing of the motion, the Appeals Chamber has settled the question, by holding that:

When the accused, or any other member of the JCE, in order to further the common criminal purpose, uses persons who, in addition to (or instead of) carrying out the actus reus of the

¹ Motion, para. 10. Mr Balaj’s request for permission to exceed in this instance the word limit for motions – a request found at the end of his motion – is hereby granted, because the additional words were necessary to address a matter as complex as that raised by Mr Balaj. On 12 February 2007, Mr Balaj filed an addendum to his motion, clarifying that the original motion was pursuant to Rule 72 (A) (ii) of the Tribunal’s Rules of Procedure and Evidence (in other words, that it was a preliminary motion arguing defects in the form of the indictment).

² Like Mr Balaj’s submission, the Prosecution’s response exceeded the word limit. The Chamber grants permission for the excess words, for the same reasons given above. On 12 April 2007, the Prosecution also filed a “Reference to Supplementary Authority in Relation to Balaj’s Motion and Addendum Seeking Clarification of Paragraph 29 of the Indictment”.

crimes forming part of the common purpose, commit crimes going beyond that purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the JCE) in order to carry out the actus reus of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk – that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.³

6. Therefore, provided that the above elements are proven, a Trial Chamber may find an accused responsible for statutory crimes in accordance with the doctrine outlined in paragraph 29 of the indictment. This supplies the clarification sought by Mr Balaj.

7. Mr Balaj's motion raises the additional complaint that paragraph 29 is unacceptably vague, because it does not name the non-members of the JCE who allegedly were used by JCE members to commit crimes, nor does it specify the crimes the non-members allegedly committed.⁴ The Prosecution responds that the notice given in the indictment is sufficient when the indictment is read as a whole, and that the notice given there is further enhanced by the Prosecution's pre-trial brief.⁵

8. It is true that, whereas the indictment names some alleged JCE members (paragraph 27), it does not name any non-members allegedly used by JCE members to achieve the objectives of the enterprise. Persons in the latter category are, however, named in the Prosecution's pre-trial brief,⁶ filed in a timely manner more than a month before the case went to trial.⁷ Just as it is not always possible (or required) for the Prosecution to list every member of an alleged JCE,⁸ the class of non-members of the JCE pressed into service by JCE members might not be known down to the last person (and need not be specified in full). The pre-trial brief rectified a shortcoming in the indictment.

9. The Chamber finds that the indictment, when read together with the pre-trial brief, gives sufficient notice of the scope of application of paragraph 29 of the indictment. Therefore, Mr Balaj has not identified any continuing lack of clarity or uncured defect with the indictment.

³ *Prosecutor v. Radoslav Brđanin*, Judgement on Appeal, 3 April 2007, para. 411.

⁴ Motion, paras 30-4.

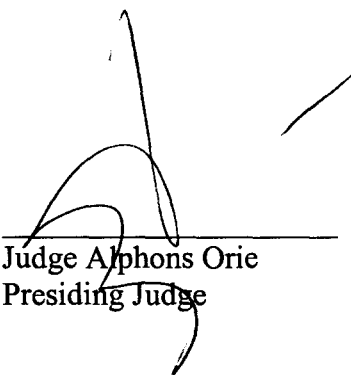
⁵ Response, paras 14, 17-22.

⁶ Prosecution's Pre-trial Brief, 29 January 2007, paras 34-5.

⁷ An indictment giving insufficient notice may be repaired by a pre-trial brief: *Prosecutor v. Zoran Kupreškić et al.*, Judgement on Appeal, 23 October 2001, paras 116-124.

⁸ See, for example, *Prosecutor v. Momčilo Krajišnik*, Judgement, 27 September 2006, para. 1086.

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



Judge Alphons Orié
Presiding Judge

Dated this 31st day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]