



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-04-82-PT
Date: 17 November 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 17 November 2006

PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

DECISION ON MOTION FOR CERTIFICATION

The Office of the Prosecutor:

Mr. Dan Saxon
Mr. Anees Ahmed

Counsel for the Accused:

Ms. Edina Rešidović for Ljube Bošković
Mr. Antonio Apostolski for Johan Tarčulovski

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”);

BEING SEIZED OF the “Boškoski Defence Motion for Certification”, filed on 4 October 2006 (“Motion”), in which the Defence of Boškoski (“Defence” and “Accused”, respectively) requests that the Trial Chamber grant certification pursuant to Rule 73 (B) of the Rules of Procedure and Evidence (“Rules”) to appeal the Trial Chamber’s Decision on Boškoski’s Motion challenging the form of the Second Amended Indictment, issued on 27 September 2006 (“Decision of 27 September 2006”);¹

NOTING the description of the procedural history relevant to the Second Amended Indictment filed on 4 April 2006 (“Second Amended Indictment”) in the Decision of 27 September 2006,² on which the Trial Chamber will rely;

NOTING, in particular, that on 26 May 2006 the Trial Chamber issued a decision (“Decision of 26 May 2006”),³ whereby it accepted a number of amendments to the Amended Indictment filed on 2 November 2005 (“Amended Indictment”) proposed by the Prosecution, including an amendment of part of paragraph 11, describing the form of responsibility on the basis of which the Accused is charged in the Indictment;⁴

NOTING that in the Decision of 26 May 2006 the Trial Chamber held that the proposed amendment clarifies the nature and scope of the Accused’s alleged responsibility, and stated that, for this reason, “the Prosecution does not need to provide further evidence in support of [it] [...] or to plead further material facts”, and the proposed amendment “assists the Defence in the preparation of their defence and, as such, enhances the fairness of the trial”,⁵

¹ Decision on Motion Challenging the Form of the Second Amended Indictment and on Motion for Leave to Reply, 27 September 2006, (“Decision of 27 September 2006”).

² Decision of 27 September 2006, paras 1-10. See also, Decision on Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief”, 26 May 2006 (“Decision of 26 May 2006”), paras 1-8.

³ See *supra*, footnote 2.

⁴ Pursuant to paragraph 11 of the Second Amended Indictment, the Accused is charged with responsibility under Article 7(3) of the Statute for the crimes of members of the police force, “both for the commission of crimes by those police, as well as for the acts or omissions of those police, which aided and abetted prison guards, hospital personnel and civilians to commit those crimes [...]”. See also, Confidential Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment”, 4 April 2006, (“Prosecution’s Motion”), para 2 (v). In the Prosecution’s Motion, the Prosecution proposes a number of amendments. It submits that the proposed amendments will “enhance the ability of the Accused to respond to the charges against them and will thereby improve the overall fairness of the trial”, and that the proposed changes should not delay proceedings. See Prosecution’s Motion, para. 4.

⁵ Decision of 26 May 2006, para. 48.

NOTING further that the nature and scope of the Accused's criminal responsibility as it appears in the Second Amended Indictment, had already been clarified by the Prosecution in the Pre-Trial Brief of 7 November 2005,⁶ and further discussed by the parties in the Status Conference of 12 December 2005,⁷ and at the Rule 65*ter* meeting on 23 March 2006;⁸

NOTING that the Defence filed its challenges to the Second Amended Indictment on 21 June 2006 ("Motion of 21 June 2006"), arguing that paragraph 11 of the Second Amended Indictment does not contain the necessary material facts, and, in particular, it submitted a number of claims based on the inadequacy of the Prosecution's pleading with regard to the Accused's form of responsibility;⁹

NOTING that in the Decision of 27 September 2006, the Trial Chamber examined the Defence's claims, while noting that the majority of them were not directed to parts of the Second Amended Indictment that had been amended, and that some had already been subject of previous Trial Chamber's decisions; and that it finally denied the Defence's Motion of 21 June 2006;

NOTING also that on 22 September 2006 the Defence filed a partly confidential interlocutory appeal on jurisdiction, claiming the Tribunal's lack of jurisdiction over the form of superior responsibility that is pleaded in the Second Amended Indictment;¹⁰

NOTING the arguments of the Defence in support of the Motion, that:

- (1) the Decision of 27 September 2006 affects the fair and expeditious conduct of the proceedings insofar as the inadequate nature of the pleadings contained in the indictment falls short of the requirement that (i) the accused should receive timely and adequate notice of the Prosecution's case; (ii) the accused should be tried without undue delay; and (iii) the accused should have adequate time and resources to prepare for trial;¹¹

⁶ "Partly Confidential Prosecution's Submission of Pre-Trial Filings Pursuant to Rule 65 *ter* and Motion for Disclosure with Annexes A to G", Annex A Prosecutions' Pre-Trial Brief, 7 November 2005 ("Pre-Trial Brief of 7 November 2005"). In its Pre-Trial Brief, the Prosecution clarified that the Accused was not the superior of the prison guards, hospital personnel and civilians within the meaning of Article 7(3) of the Statute and that his alleged responsibility arose "as a result of his failure to punish the regular, reserve or special police for their acts or omissions which aided and abetted those prison guards, hospital personnel and other civilians to commit those acts". Pre-Trial Brief of 7 November 2005, para. 83.

⁷ T. 117-144, in particular 117-125.

⁸ T. 161– 196 (closed session).

⁹ Assigned *Pro Bono* Counsel Motion Challenging the Form of the Second Amended Indictment, filed on 21 June 2006 on behalf of Ljube Bošković. See also, Decision of 26 May 2006, Section VI. Disposition, where the Trial Chamber ordered that "the Defence have fourteen (14) days from the date of the filing of the translation of this decision to file their challenges to the Second Amended Indictment."

¹⁰ See Bošković Defence Appeal on Jurisdiction, Partly Confidential, 22 September 2006. It is an interlocutory appeal against the "Decision on Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction", issued on 8 September 2006.

¹¹ Motion, paras 5-8.

(2) the Decision of 27 September 2006 could affect the outcome of the trial should the Defence or the Trial Chamber misunderstand or misinterpret the nature, purport or scope of the Prosecution's case;¹²

(3) an immediate resolution by the Appeals Chamber may materially advance the proceedings insofar as "it would prevent any risk or prejudice to the Defence (should the [Motion] be granted and should the Defence be successful on appeal) and would also ensure that any infringement upon the right of the accused to a fair trial would be properly dealt with and cured immediately so as to limit any prejudicial consequences thereof";¹³

NOTING that the Office of the Prosecutor ("Prosecution") filed its "Response to 'Bošković Defence Motion for Certification'" on 9 October 2006 ("Response"), requesting that the Trial Chamber deny the Motion for the following reasons:

(1) the Motion failed to satisfy any of the requirements set out in Rule 73 (B) of the Rules;¹⁴

(2) even if the Motion has satisfied the requirements for certification, the Motion is untimely, as it raises a number of issues that were previously decided by the Trial Chamber, but never submitted for certification to appeal pursuant to Rule 73 (B);¹⁵ and it concerns language in the Second Amended Indictment that was not recently amended;¹⁶

CONSIDERING that Rule 73 (B) of the Rules provides that a Trial Chamber may certify a decision for interlocutory appeal if two criteria are satisfied, namely that "the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings";

CONSIDERING that Rule 73 (B) precludes certification unless the Trial Chamber finds that both of its requirements are satisfied, and that certification pursuant to Rule 73 (B) is not concerned with whether a decision was correctly reasoned or not;¹⁷

¹² Motion, para. 9.

¹³ Motion, para. 10. The Motion further indicates some of the Defence's potential grounds of appeal "to assist [the Trial Chamber] in determining [the] Motion". *Id.*, para. 13.

¹⁴ Response, paras 5-6.

¹⁵ Response, para. 4.

¹⁶ Response, paras 4-6.

¹⁷ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of a Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, ("*Milošević* Decision"), paras 2 and 4.

CONSIDERING that a request for certification is not a further opportunity for the party filing it to inform the Trial Chamber that it disagrees with a decision it has made;¹⁸ and that certification should not be granted whenever an accused seeks to appeal a decision in which, in his opinion, his claims in respects of defects in the form of the indictment have not been dealt with to his satisfaction,¹⁹

CONSIDERING that the Decision of 27 September 2006 dealt with Defence's claims alleging defects in the form of the Second Amended Indictment, in particular with regard to the Prosecution's pleading of the Accused's alleged criminal responsibility;

CONSIDERING that the Accused's criminal responsibility, as it was already held by the Trial Chamber in its Decision of 26 May 2006 and reiterated in the Decision of 27 September 2006, had not been altered, as the amendment of the wording of paragraph 11 was only a clarification of the nature and scope of the Accused's criminal responsibility, and in general of the Prosecution's case;²⁰

CONSIDERING therefore that the challenges raised by the Defence and decided upon by the Trial Chamber on 27 September 2006 related to matters of the Second Amended Indictment that had not been amended, and to others that had been previously decided upon by the Trial Chamber;

CONSIDERING further that the form of superior responsibility on the basis of which the Accused is charged in the Second Amended Indictment is subject of an appeal on jurisdiction and that the Appeals Chamber is currently examining the issue;

CONSIDERING therefore that the issues raised by the Defence and decided upon in the Decision of 27 September 2006 were not issues that "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial", and "for which an immediate resolution by the Appeals Chamber [...] [would] materially advance the proceedings";

FOR THE FOREGOING REASONS;

PURSUANT TO Rules 54 and 73 (B) of the Rules;

¹⁸ See for example, *Milošević* Decision, para. 3.

¹⁹ See in this respect, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Milivoj Petković's Application for Certification to Appeal Decision on Motions Alleging Defect in Form of Indictment, 19 September 2005, p. 5, discussing Rule 72 (B) (ii). Both Rule 72 (B) (ii) and Rule 73 (B) set out the requirements for certification to be granted by a Trial Chamber.

²⁰ Decision of 26 May 2006, paras 13-14. This was reiterated in the Decision of 27 September 2006, para. 18.

10/6/06

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding Judge

Dated this 17th day of November 2006,
At The Hague
The Netherlands

[Seal of the Tribunal]