

UNITED
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11 December 2006

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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: 11 December 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker, Pre-Trial Judge
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Decision of: 11 December 2006

PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

**DECISION ON MOTION FILED BY DEFENCE FOR
NASER ORIĆ FOR ACCESS TO RELEVANT PORTION
OF TRANSCRIPT OF RULE 65 TER CONFERENCE
OF 23 MARCH 2006**

The Office of the Prosecutor:

Mr. Dan Saxon
Mr. Anees Ahmed

Counsel for the Accused:

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

Counsel for Naser Orić:

Ms Vasvija Vidović and Mr. John Jones for Naser Orić



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 SEISED OF the “Motion for Access to the Relevant Portion of the Transcript of the Rule 65 *ter* Conference of 23 March 2006 in *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*” (“*Boškoski and Tarčulovski* case”), filed on 28 September 2006 (“Motion”) by the Defence of Naser Orić (“Orić Defence”), requesting the disclosure of the part of the above-mentioned transcript in which the issue of amending the indictment to include the allegation that the Accused’s subordinates aided and abetted others to commit crimes is discussed;¹

NOTING the order regarding the composition of the Trial Chamber and designating a Pre-Trial Judge, issued on 23 November 2006;²

NOTING that in support of its request, the Orić Defence argues that the material sought will assist in properly formulating its submissions relating to one of the grounds of appeal directed against the Judgement rendered on 30 June 2006,³ namely that the indictment was not so worded as to provide the Accused notice that he might be convicted under Article 7(3) on the basis of a finding that his subordinates aided and abetted third parties to commit crimes;⁴

NOTING that the Orić Defence submits that the same issue of “perpendicular command responsibility” has arisen in the *Boškoski and Tarčulovski* case,⁵ and that it therefore has a legitimate forensic purpose for seeking access to the said transcript;⁶

NOTING that according to the Orić Defence, it appears from the Trial Chamber Decision of 26 May 2006 in the *Boškoski and Tarčulovski* case,⁷ as well as from the partly confidential *Boškoski* Defence Appeal on Jurisdiction, filed on 22 September 2006,⁸ that the necessity of pleading “perpendicular command responsibility” in the indictment was discussed in the *Boškoski and*

¹ Motion, para. 8.

² Order Regarding Composition of Trial Chamber and Designation of Pre-Trial Judge, 23 November 2006. With this order, the Presiding Judge of Trial Chamber II ordered that the Trial Chamber in the case of *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* shall be composed, for the purposes of pre-trial proceedings, as follows: Judge Carmel Agius (Presiding) Judge Kevin Parker Judge Kimberly Prost; and designated Judge Kevin Parker as Pre-Trial Judge for this case.

³ Motion, paras 7-8. See also, *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Notice of Appeal on Behalf of Naser Orić Pursuant to Rule 108, 31 July 2006 (“Orić Defence’s Notice of Appeal”); *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006.

⁴ Motion, para. 3.

⁵ Motion, para. 4.

⁶ *Id.*, paras 8 and 10.

⁷ 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 4-5.

⁸ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR72.2 *Boškoski* Defence Appeal on Jurisdiction, Partly Confidential, 22 September 2006, paras 10-13.

Tarčulovski case at the conference which took place pursuant to Rule 65 *ter* of the Rules of Procedure and Evidence (“Rules”), on 23 March 2006 (“Rule 65*ter* meeting”);⁹

NOTING the submission made by the Orić Defence that “it is a reasonable inference [...] that the Chamber recognised that, in order to plead ‘perpendicular *command responsibility*’ [...] the Indictment has to explicitly set out that form of command responsibility, mentioning explicitly the allegation that the Accused’s subordinates aided and abetted third parties to commit crimes”;¹⁰

NOTING the Orić Defence’s claim that the same Chamber, which convicted Naser Orić on the basis of this theory of command responsibility when the Indictment did not expressly make any allegation that the Accused’s subordinates aided and abetted others to commit murder and cruel treatment, “was aware that this [was] not fair to the Accused”;¹¹

NOTING that the Orić Defence submits that the transcript sought is “extremely important material” to refer to, in support of its submissions under the above-mentioned ground of appeal and its allegations of a denial of the right to a fair trial;¹²

NOTING that the Office of the Prosecutor (“Prosecution”), on 9 October 2006, filed the “Response to the Orić Defence Motion of 28 September 2006 for Access to Confidential Material in the Boškoski Case” (“Response”), requesting that the Motion be dismissed on the basis that: (1) there is no geographical, temporal or otherwise material overlap between the *Boškoski and Tarčulovski* case and the proceedings against Naser Orić;¹³ (2) the Orić Defence has failed to demonstrate a legitimate forensic purpose for the access;¹⁴ and (3) granting the Orić Defence access to the record of discussions which took place during the Rule 65 *ter* meeting would defeat the intent of Rule 65*ter* and would impede free and frank exchange in the future which is so vital for the efficient conduct of the pre-trial process;¹⁵

NOTING that the Defence of Boškoski and the Defence of Tarčulovski did not file a response to the Motion;

NOTING that the necessity to bring clarity to the nature and scope of the Boškoski’s criminal responsibility as alleged in paragraph 11 of the Indictment was first raised by the Trial Chamber in

⁹ Motion, paras 4-5.

¹⁰ *Id.*, para. 6.

¹¹ *Id.*, para. 7.

¹² *Ibid.*

¹³ Response, paras 5-8.

¹⁴ *Id.*, paras 9-11.

¹⁵ *Id.*, paras 12-13.

the Decision of 1 November 2005¹⁶—which led the Prosecution to file an amended indictment on 2 November 2005 (“Amended Indictment”)¹⁷—and further discussed during the Status Conference of 12 December 2005,¹⁸ the Rule 65 *ter* meeting held on 23 March 2006,¹⁹ and briefly during the Status Conference of 11 April 2006;²⁰

NOTING that following the Rule 65 *ter* meeting, on 4 April 2006, the Prosecution requested leave to amend the Amended Indictment in order to clarify that the Accused is charged with responsibility under Article 7(3) of the Statute for the crimes of members of the police force, who were his subordinates, “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 [...]”;²¹ and that the Prosecution requested the Trial Chamber to replace the Amended Indictment with an indictment dated 4 April 2006 (“Second Amended Indictment”);²²

NOTING that the Trial Chamber accepted the amendment in its Decision of 26 May 2006, finding that, as the proposed amendment “clarifies the scope of Bošković’s alleged responsibility, it assists the Defence in the preparation of their defence and, as such, enhances the fairness of the trial”;²³

CONSIDERING that, according to the jurisprudence of the Tribunal, a party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case, if the material sought has been identified or described by its general nature, and if a legitimate forensic purpose for access to such material has been shown;²⁴

¹⁶ Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, 1 November 2005.

¹⁷ Prosecution’s Notice of Compliance with the Trial Chamber’s “Decision on Prosecution’s Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment” with Annex A, 2 November 2005, and Amended Indictment, 2 November 2005.

¹⁸ T. 117-144, in particular 117-125.

¹⁹ T. 161-196, in particular 161-178 (closed session).

²⁰ T. 145-158, in particular 146-148.

²¹ Confidential Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment, 4 April 2006 (“Prosecution’s Motion of 4 April 2006”), para. 2 (v). In the Motion, the Prosecution proposes a number of amendments to the Amended Indictment and to the Pre-Trial Brief. 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. *Id.*, para. 4.

²² Prosecution’s Motion of 4 April 2006, p. 5.

²³ Decision of 26 May 2006, para. 48.

²⁴ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellant’s Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002, (“*Blaškić* Decision”), para. 14, referring to *Prosecutor v. Hadžihasanović et al.*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001 (“*Hadžihasanović et al.* Decision”), para. 10; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case, 23 January 2003, (“*Kordić and Čerkez* Decision of 23 January 2003”), p. 3.

CONSIDERING that to demonstrate the existence of a legitimate forensic purpose, the party seeking access to confidential material must show that “the material sought is likely to assist the applicant’s case materially, or at least, there is a good chance that it would”;²⁵

CONSIDERING that this standard can be met by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, for example if there exists a geographical, temporal or otherwise material overlap between the cases;²⁶

CONSIDERING that the Orić Defence has sufficiently identified the confidential material to which it seeks access;

CONSIDERING that between the *Boškovski and Tarčulovski* case and the *Orić* case there is no geographical or temporal overlap, and the events and crimes charged are clearly different; and that the similarity of the form of criminal responsibility charged in the two cases—the only “nexus” identified by the Orić Defence—does not amount to any material overlap, or otherwise show the existence of any nexus, between the two cases;

CONSIDERING, further and alternatively, that even if the Orić Defence had been able to show the existence of a nexus, which is not the case, before assessing whether the access sought would in any way be of material assistance to the Orić Defence’s case, it is first relevant to have regard to the purpose of Rule 65 *ter* meetings and the rationale for keeping the transcript of such meetings confidential;

CONSIDERING that pursuant to Rule 65 *ter*, parties meet “to discuss issues related to the preparation of the case” so that they can meet their obligations under the Rules, and that such meetings “are held *inter partes* or, at his or her request, with the Senior Legal Officer, and one or more of the parties”;²⁷ and that the Senior Legal Officer “may require a transcript to be made”;²⁸

CONSIDERING that Rule 65 *ter* meetings are generally held in the presence of a Senior Legal Officer and the transcripts of these meetings are kept confidential, in order to promote free and

²⁵ See, *inter alia*, *Prosecutor v. Brdanin and Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 7; *Hadžihasanović et al.* Decision, para. 11; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić seeking access to Confidential Material in the Blagojević and Jokić Case, 18 January 2006, para. 4, referring to *Blaškić* Decision, para. 15; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002, p. 3.

²⁶ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Order on Paško Ljubičić’s Motion for Access to Confidential Supporting Material, transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p. 4; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Order on Motion of General Miletić for Access to Confidential Information in the *Milošević* Case, 22 February 2006, p. 2, referring to *Kordić and Čerkez* Decision of 23 January 2003, p. 4; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić seeking access to Confidential Material in the Blagojević and Jokić Case, 18 January 2006, para. 4; *Blaškić* Decision, para. 15.

²⁷ Rule 65 *ter* (D) (iv) and (v).

frank discussions between the parties, which are important for Rule 65 *ter* meetings to be successful, and ultimately for the efficient and expeditious conduct of pre-trial proceedings;

CONSIDERING that generally Rule 65 *ter* meetings are followed by a status conference, where the relevant issues amongst those discussed in the Rule 65 *ter* meetings are raised and discussed in open session in front of the Pre-Trial Judge;²⁹

CONSIDERING that at the Rule 65 *ter* meeting of 23 March 2006 the Pre-Trial Judge was present;

CONSIDERING that during the Rule 65 *ter* meeting the parties engaged in discussions on, *inter alia*, the nature and scope of the Accused's criminal responsibility, following which the Prosecution filed a motion to amend the Amended Indictment, without a status conference being held in the meantime;

CONSIDERING that a brief reference to the issues discussed during the Rule 65 *ter* meeting may be found in the public record of the status conference held on 11 April 2006;

CONSIDERING that the Decision of 26 May 2006 provides information on the substance of the discussions at the Rule 65 *ter* meeting which eventually led to the Prosecution's proposal of the relevant amendment to the Amended Indictment;³⁰ and that the Trial Chamber's position on the relevant legal issues is clear from the terms of the same decision;

CONSIDERING further that the issue whether it was necessary or desirable in this case to plead the Accused's criminal responsibility as it appears in the Second Amended Indictment was also discussed in the Decision of 1 November 2005, as well as in the status conferences held on 12 December 2005 and 11 April 2006 in open session;

CONSIDERING that the Trial Chamber is satisfied that it has not been shown by the Orić Defence that the requested portion of the transcript of the Rule 65 *ter* meeting contains any additional information that could assist the Orić Defence in its case before the Appeals Chamber, let alone do so materially, nor that there is a good chance that it would give such assistance;

CONSIDERING therefore that the Trial Chamber is not satisfied that the Orić Defence has demonstrated a legitimate forensic purpose for the access to the relevant portion of the transcript of the Rule 65 *ter* meeting;

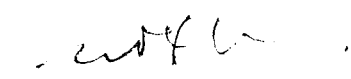
²⁸ Rule 65 *ter* (D) (vii).

FOR THE FOREGOING REASONS;

PURSUANT TO Rule 54 of the Rules,

HEREBY DENIES the Motion.

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



Carmel Agius
Presiding Judge

Dated this eleventh day of December 2006,

At The Hague

The Netherlands

[Seal of the Tribunal]

²⁹ Pursuant to Rule 65 *bis* status conferences are convened “to organize exchange between the parties so as to ensure expeditious preparation for trial” and “to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto [...]”.

³⁰ Decision of 26 May 2006, paras 8 and 15.

