



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 January 2007
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: 17 January 2007

PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

**DECISION ON NASER ORIĆ'S REQUEST FOR
CERTIFICATION**

The Office of the Prosecutor:

Mr. Dan Saxon
Mr. Anees Ahmen

Counsel for the Accused:

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

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

1. This decision of Trial Chamber II (“Trial Chamber”) is in respect of Naser Orić’s “Request for Certification” for an interlocutory appeal from the Trial Chamber’s “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,” filed on 18 December 2006 (“Request”).
2. On 28 September 2006 Counsel for Naser Orić (“Orić Defence”) filed its “Motion for Access to the Relevant Portions of the Transcript of the Rule 65*ter* Conference of 23 March 2006 in *Prosecutor v. Ljube Bošković and Johan Tarčulovski*” requesting the disclosure of the part of the transcript of what, strictly was a Rule 65*ter* meeting, in which the issue of amending the indictment to include an allegation that Bošković’s subordinates aided and abetted others to commit crimes was discussed. On 11 December 2006 the Trial Chamber denied this motion (“Decision of 11 December 2006”).
3. On 18 December 2006 the Orić Defence filed its Request for Certification. The Office of the Prosecutor (“Prosecution”) responded on 22 December 2006 (“Response”) opposing the Request. Counsel for Ljube Bošković and Counsel for Johan Tarčulovski have not filed submissions in the deadline prescribed by the Rules.
4. Decisions on motions, other than preliminary motions, are without interlocutory appeal save with certification by the Trial Chamber. Pursuant to Rule 73(B) of Rules of Procedure and Evidence (“Rules”) a Chamber may grant such certification “if 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 of the Appeals Chamber may materially advance the proceedings.” The effect of Rule 73(B) is to preclude certification unless both of its cumulative conditions are satisfied,¹ but in a case where they are satisfied, certification remains in the discretion of the Trial Chamber.²
5. The Orić Defence submits that Rule 73(B) is imperfectly adapted for situations where a party to proceedings before the Appeals Chamber seeks relief from a Trial Chamber and that in such circumstances the Chamber may choose to grant certification so that the entire matter can be brought before the Appeals Chamber dealing with the final appeal in this case.³ Alternatively, it is submitted, if the Chamber decides that Rule 73(B) is construed so that proceedings before the Appeals Chamber fall within its scope, it should grant the Request as the requirements for

¹ See for example *Prosecutor v. Milošević*, Case No.: IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005 (“*Milošević* Decision”), para 2; *Prosecutor v. Popović et al*, Case No.: IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005, para 6.

² *Prosecutor v. Strugar*, Case No.: IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para 2.

³ Request, paras 3-7.

certification prescribed by the Rules have been met. In particular, it is submitted that as one of Orić's grounds of appeal against the trial judgement alleges that the Chamber erred in law by applying a theory of command responsibility of which the Defence had no notice in the Indictment and as the portion of the transcript in *Prosecutor v. Ljube Bošković and Johan Tarčulovski* to which access is sought contains a decision relevant to this issue, granting certification will enable the Appeals Chamber to have access to this transcript and will ensure that the Appeals Chamber is as well placed as possible to resolve these issues. It is submitted that this would significantly affect the fair and expeditious conduct of, and materially advance, the *Orić* appeal proceedings and the outcome of the appeal.⁴ The Orić Defence further submits that in its Decision of 11 December 2006 the Chamber erred: (i) in finding that overlapping legal issues are *per se* incapable of amounting to a relevant *nexus* grounding a request for access to materials in another case;⁵ (ii) in considering that, as a matter of principle, transcripts from Rule 65ter conferences are never disclosed to the defence in other cases;⁶ (iii) by failing to consider the inequality of arms created by the fact that the Prosecution in the *Orić* case would have full access to all relevant Rule 65ter transcripts (the Office of the Prosecution being one, indivisible unit) whereas the Orić Defence would not;⁷ and (iv) by considering that the Orić Defence's lack of access to the relevant Rule 65ter transcript is compensated by access to other materials, as some of these materials are not publicly available on the Tribunal's website. It is submitted that unless the decisions identified in the Chamber's Decision of 11 December 2006 set out everything that has been discussed at the Rule 65ter conference, the Orić Defence would still be handicapped by not having access to this transcript.⁸

6. The Prosecution responds that the Orić Defence has satisfied neither of the conditions for certification under Rule 73(B). It is submitted that the denial of access to legal discussions in a Rule 65ter context does not implicate the fairness of Orić's appeal as such discussions do not supply relevant jurisprudence and the public record provides all potentially relevant information.⁹ It is submitted that the transcript forms part of the record on appeal of the decision of 26 March 2006 (pending at the time of the Response) and is therefore available to the Appeals Chamber.¹⁰ It is submitted further that granting certification would delay, rather than materially advance the

⁴ *Ibid*, paras 9-13.

⁵ *Ibid*, paras 14-19.

⁶ *Ibid*, paras 20-23.

⁷ *Ibid*, paras 24-26.

⁸ *Ibid*, paras 27-30.

⁹ Response, paras 3-4.

¹⁰ *Ibid*, para 5.

appeal, as the Orić Defence has been able to brief the underlying legal issues regarding the scope of Article 7(3) without reference to the Rule 65ter discussion in the *Boškoski* case.¹¹

7. Rule 73(B) gives discretion to a Trial Chamber to grant a request for certification if a decision on a motion involves an issue that “would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” and if an immediate resolution by the Appeals Chamber “may materially advance the proceedings.” Rule 73(B) does not specifically refer to motions in pre-trial, trial, or appellate proceedings, but generally to “all motions.” While it contains a reference to “the outcome of the trial,” this is only one of two alternatives, the other being the “conduct of the proceedings.” There are two references to “proceedings” in Rule 73(B). In each case the reference appears capable of being applied to proceedings before the Appeals Chamber, or a Trial Chamber, whichever is the case. Decisions by Trial Chambers on motions filed by parties to appellate proceedings, therefore, fall within the scope of Rule 73(B).

8. In the view of the Chamber, the Decision of 11 December 2006 does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings before the Appeals Chamber or the outcome of the appeal. The grounds of appeal in the *Orić* case may raise issues whether the pleading of command responsibility in the Indictment was adequate in law, and whether in the circumstances of that case it gave the Defence adequate notice of the Prosecution’s case about command responsibility or perhaps of the possibility of conviction on the view of command responsibility said to have been applied by the Trial Chamber in reaching its decision. To the extent that this may involve questions of law, it is said that the same issues were discussed in the course of the Rule 65ter meeting in this case. It is not apparent how any views expressed during a meeting of this nature can be of any real assistance to the Orić Defence or to the Appeals Chamber in the *Orić* appeal. No views expressed in such a meeting are of any binding force or authority. A brief reference to the issues discussed in private at this Rule 65ter meeting was made at a subsequent public status conference. This was followed by a public decision of the Trial Chamber which provided information on the substance of the discussions at the Rule 65ter meeting and disclosed the Trial Chamber’s position on the relevant legal issues. The position of the Trial Chamber, therefore, has been made sufficiently clear to the public to enable others, including the Orić Defence, to advance arguments on this basis. It has not been demonstrated that the transcript of the Rule 65ter meeting between parties in another case could have a significant effect on the fair and expeditious conduct of the proceedings in the *Orić* appeal. In this case that is especially so as the Trial Chamber’s position in the matter is the subject of a public decision.

¹¹ *Ibid*, para 6.

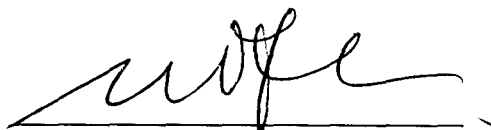
9. Further, the Chamber is not satisfied that, in the present circumstances, an immediate resolution by the Appeals Chamber may materially advance the proceedings on appeal. As indicated in the Request, the position of the Trial Chamber in this case has been already addressed in Orić's *Defence Appeals Brief*, in the *Prosecution's Brief in Response* and in the *Defence Brief in Reply* filed in the appellate proceedings. The essence of the relevant discussion in the Rule 65ter meeting in question has already been brought to the attention of the Appeals Chamber. In the view of this Chamber, the proceedings before the Appeals Chamber in the *Orić* appeal will not be materially advanced by the disclosure of the transcript of the Rule 65ter meeting in this case.

10. The Orić Defence identifies four errors in the Chamber's Decision of 11 December 2006. It is a settled jurisprudence of the Tribunal that a request for certification is not concerned with whether a decision was correctly reasoned or not¹² but whether the standard of Rule 73(B) has been established. The Chamber, therefore, does not find it necessary to address these arguments in its consideration pursuant to Rule 73(B).

The Trial Chamber therefore **DENIES** the Request.

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

Dated this seventeenth day of January 2007
At The Hague
The Netherlands



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]

¹² *Milošević* Decision, para 4. See also *Prosecutor v Ivan Čermak and Mladen Markač*, Case No: IT-03-73-PT, "Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder," 14 July 2006; *Prosecutor v. Milutinović et al*, Case No: IT-05-87-T, "Decision Denying Prosecution's Request for Certification of Ruling on Proposed Exhibits P438 and P473" 17 October 2006.