



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-T  
Date: 10 May 2007  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr. Hans Holthuis

**Decision:** 10 May 2007

**PROSECUTOR**  
v.  
**LJUBE BOŠKOSKI**  
**JOHAN TARČULOVSKI**

**REASONS FOR ORAL DECISION DENYING BOŠKOSKI  
DEFENCE MOTION TO STOP PROSECUTION'S CONTINUED  
INVESTIGATION AND CONTINUED DISCLOSURE**

**The Office of the Prosecutor:**

Mr Dan Saxon  
Ms Joanne Motoike  
Mr Matthias Neuner

**Counsel for the Accused:**

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškosi  
Mr Antonio Apostolski and Ms Jasmina Zivković for Johan Tarčulovski

1. On 2 April 2007 Counsel for Ljube Boškoski (“Defence”) filed the “Motion to Stop Prosecution Continued Investigation and Continued Disclosure to Enable Defence to Prepare and to Ensure Compliance with Fundamental Human Rights of Defendant” (“Motion”). By this Motion the Defence seeks (i) an order to the Office of the Prosecutor (“Prosecution”) to stop any further investigation of its case; (ii) an order to the Prosecution to sign an undertaking that it has now disclosed all Rule 66 and Rule 68 material presently in its possession; and (iii) an order to the Prosecution to seek leave from the Chamber for any further Rule 66 or Rule 68 disclosure, to establish good cause for any delay in this matter and to immediately notify the Defence of any Rule 68 material and provide the Defence with a copy of it. The Prosecution responded on 10 April 2007 opposing the Motion. Counsel for Johan Tarčulovski made no submissions on the Motion. On 12 April 2007 the Chamber made an oral order denying the Motion.<sup>1</sup> The Chamber delivers below the reasons for its oral order of 12 April 2007.

2. The Defence essentially submits that the effect of the Tribunal’s Rules of Procedure and Evidence (“Rules”) is that by the time of confirmation of an indictment the Prosecution should in principle have finished its investigation. It is submitted that further investigation should be limited to exceptional circumstances, where the Prosecution has been unable to investigate before and that the Prosecution’s continued investigation in this case creates a burden for the Defence and prevents it from being able to prepare adequately for trial. Further, it is submitted that the combined effect of a Prosecution case which remains in large parts obscure and the continued disclosure of new material may interfere with the Accused’s right to know the Prosecution’s case so as to be able to meet it. In particular, reference is made to the fact that between 12 December 2006 and 2 April 2007 the Defence has received 22 batches with Rule 66 and Rule 68 material, and to the fact that a large amount of motions and other submissions have been made by the Prosecution in this period.

3. The Prosecution responds that the practice of the Tribunal allows for the Prosecution to continue its investigation after an indictment has been confirmed. It disputes the factual basis of the Motion and submits that between 12 December 2006 and 2 April 2007 it has disclosed only five items under Rule 66(A)(ii) and that the overwhelming majority of the material disclosed under Rule 66 was disclosed pursuant to Rule 66(B). It submits further that approximately two thirds of the material disclosed to the Defence between December 2006 and April 2007 were translations of previously provided material, and that of the approximately 594 documents disclosed to the

Defence since December 2006 only 103 documents resulted from recent investigations. It is submitted further that some of these 103 documents have been disclosed pursuant to Rule 68.

4. It is the practice of most jurisdictions and the practice of this Tribunal that investigations should be conducted primarily before an indictment is issued or submitted for confirmation. Under the Rules of the Tribunal, if in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime, the Prosecutor shall prepare an indictment which is then submitted for confirmation by a Judge.<sup>2</sup> The Rules and the Statute of the Tribunal (“Statute”) do not explicitly restrict investigations to the time of confirmation of an indictment. The nature and scope of the indictments tried in this Tribunal would make such a restriction unreasonable. In fact the Rules implicitly allow for the possibility that investigation may be conducted after the confirmation of an indictment. For example, pursuant to Rule 50, after an indictment has been confirmed the Prosecutor may seek leave to amend this indictment so as to include new allegations, provided that these allegations are supported by sufficient evidence. Pursuant to Rule 50(A)(ii), the Judge or the Trial Chamber before whom such a motion is brought shall not grant leave to amend the indictment unless satisfied that sufficient evidence is presented to support the proposed amendment. The evidence submitted in support of the proposed amendment should meet the *prima facie* standard for confirmation of a “fresh” indictment established by Article 19 of the Statute. As this evidence was not available at the time of confirmation, the effect of this Rule is to suggest that investigations may continue after the confirmation of an indictment. Further, Rule 73*bis* allows for the Prosecutor to seek leave to vary the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that it intends to call, after the commencement of the trial. This further supports the proposition that investigation is not strictly limited to the stage preceding confirmation as the need to vary the crime sites or incidents or the number of witnesses often may stem from investigation conducted at a later stage.

5. The accused has the right to be informed promptly of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. Investigations conducted after an indictment has been confirmed may have the practical effect of the Prosecution seeking to add new allegations to the indictment or seeking to present further evidence at trial. In the former case the rules governing leave to amend an indictment apply. The basic principle governing a decision to grant leave to amend an indictment is whether the

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<sup>1</sup> Hearing of 12 April 2007, T 266.

<sup>2</sup> Rule 47(B).

proposed amendments result in unfair prejudice to the accused.<sup>3</sup> The touchstone is fairness; there will be no injustice to the accused if he is provided with an adequate opportunity to prepare an effective defence to the amended indictment.<sup>4</sup> Two factors, in particular, are relevant in determining whether amendment of an indictment would cause unfair prejudice: (1) notice, *i.e.* whether the accused has been given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendments will result in undue delay.<sup>5</sup> In the Chamber's view, these principles may be applied by analogy to the issue whether continuing disclosure (whether resulting from ongoing investigation or not) infringes upon the fundamental rights of the accused. In determining whether ongoing disclosure by the Prosecution may cause unfair prejudice to an accused, the Chamber, therefore, will consider whether the accused has been given an adequate opportunity to prepare an effective defence and whether allowing the additional disclosure will result in undue delay.

6. In the present circumstances, a large amount of documents have been disclosed to the Defence in the months preceding the commencement of the trial. It is the Prosecution's submission, that two thirds of these documents constitute translations of documents previously disclosed to the Defence. The Chamber accepts that a large amount of the documents disclosed in the months preceding the start of the trial, are translations. By their disclosure, no new information has been provided to the Defence. Further, the Prosecution submits that from December 2006 until April 2007 it has disclosed five documents pursuant to Rule 66(A)(ii). These documents do not concern any of the early Prosecution witnesses.<sup>6</sup> While a large amount of Rule 66(B) and Rule 68 material have been disclosed to the Defence from December 2006 to April 2007, the postponement of the commencement of evidence granted by the Chamber, should have allowed sufficient time for the Defence to analyse these documents. On the basis of the material currently before it the Chamber is unable to conclude that the disclosure by the Prosecution from December 2006 to April 2007, whether resulting from ongoing investigation or not, has caused prejudice to the Defence.

For the foregoing reasons the Chamber **DENIES** the Motion.

<sup>3</sup> *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin and Talić* Decision"), para 50; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004 ("*Halilović* Decision"), para 22; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 ("*Beara* Decision"), p 2; *Prosecutor v Ante Gotovina*, Case No: IT-01-45-PT and *Prosecutor v Ivan Čermak and Mladen Markač*, Case No: IT-03-73-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 ("*Gotovina Joinder* Decision") para 10.

<sup>4</sup> *Brđanin and Talić* Decision, para 50; *Prosecutor v Ivan Čermak and Mladen Markač*, Case No:IT-03-73-PT, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, 19 October 2005 ("*Čermak and Markač* Second Indictment Decision"), para 35. *Gotovina Joinder* Decision, para 10.

<sup>5</sup> *Beara* Decision, p 2; *Halilović* Decision, para 23; *Čermak and Markač* Second Decision, para 35; *Gotovina Joinder* Decision, para 10.

<sup>6</sup> With respect to the fifth document, *see* Chamber's oral decision of 7 May 2007, T 382.

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

Dated this tenth day of May 2007  
At The Hague  
The Netherlands



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Judge Kevin Parker  
Presiding Judge

**[Seal of the Tribunal]**