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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

Case No. IT-04-82-T
Date: 17 July 2007
Original: English

IN THE TRIAL CHAMBER II

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

Registrar: **Mr Hans Holthuis**

Decision of: **17 July 2007**

PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

PUBLIC

**DECISION ON THE PROSECUTION'S SUBMISSION OF
THIRD EXPERT REPORT BY DR SIMON EICHNER WITH
ANNEX A**

The Office of the Prosecutor:

Mr Dan Saxon
Ms Joanne Motoike
Mr Matthias Neuner
Ms Meritxell Regue

Counsel for the Accused:

Ms Edina Rešidović and Mr Guénaël Mettraux for Ljube Boškoski
Mr Antonio Apostolski and Ms Jasmina Zivković for Johan Tarčulovski

1. This Trial Chamber (“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”) is seized of the “Prosecution’s Submission of Third Expert Report by Dr Simon Eichner with Annex A” filed on 7 May 2007 (“Motion”). In this Motion the Prosecution asks that the Chamber permit the Prosecution to present the Third Expert Report by Dr Simon Eichner (“Report”) pursuant to Rule 94bis of the Rules of Procedure and Evidence (“Rules”). Counsel for Ljube Boškoski (“Boškoski Defence”) filed a “Response to Prosecution Motion for Leave to Add Third Expert Report of Dr Simon Eichner” (“Response”) on 18 May 2007. Counsel for Johan Tarčulovski (“Tarčulovski Defence”) did not file a response.

2. The Prosecution submits that although it has filed this Report after the trial has formally commenced, it has acted with due diligence and has shown good cause pursuant to Rule 127. In particular, it is submitted that in the course of its ongoing Rule 68 review and studying of Dr Eichner’s Second Expert Report, the Prosecution has realised that it would be desirable and necessary to conduct another test to determine whether the material found on or near the bodies exhumed in Ljuboten had been fired from the firearms allegedly seized by the police. It is submitted further that a notice about the submission of the Report had been given to the Defence on 20 March 2007. The Prosecution further submits that the report is relevant to allegations in paragraph 68 of the Indictment and in particular whether there was resistance to the police troops in Ljuboten on 12 August 2001 and to the allegation in paragraph four of the Indictment that a joint criminal enterprise existed.

3. In the Response, the Boškoski Defence opposes the Motion on two separate grounds. First, it is submitted that the Prosecution has not acted with due diligence and has not shown good cause for the late submission of the report pursuant to Rule 127. The Boškoski Defence further submits that the Report is not relevant to issues pertaining to resistance of Ljuboten residents, neither to the alleged joint criminal enterprise, nor to any other fact or issue that is material to the Prosecution case.

4. The Report which the Prosecution now seeks to present contains the results of tests conducted on ballistic material, bullets or fragments of bullets, which had been found in the clothes, in or next to the bodies of several alleged victims of the crimes alleged in the Indictment. The tests were conducted to determine if any of the bullets were fired from any of the three firearms allegedly seized by the Macedonian police on 12 August 2001 in Ljuboten. The Prosecution was ordered by the Pre-Trial Judge to disclose any expert reports it intended to present in court to the Defence no later than 31 March 2006. The Report of Dr Eichner was disclosed to the Defence over one year

after this deadline and after the commencement of the trial. In determining whether there has been an unreasonable delay the Chambers notes that the Prosecution was not in possession of the firearms necessary for this analysis until February 2006. The firearms were only transferred for initial ballistic analysis in May 2006. The results of this analysis were made available to the Prosecution on 15 January 2007 and were disclosed to the Defence on 30 January 2007. The present Report was commissioned on 9 February 2007. In the view of the Chamber, therefore, there was no unreasonable delay in the late disclosure of the Report. Turning next to whether the late submission of the Report may prejudice the Accused, the Chamber notes that the author of the Report, Dr Eichner, is not among the witnesses to be called by the Prosecution in the coming weeks. The Defence will have ample time to study his Report and to prepare for cross-examination.

5. Pursuant to Rule 89(C) of the Rules the Chamber may admit any relevant evidence which it deems to have probative value. The Report is prepared by an expert from the Bavarian State Institute of Criminology. It provides evidence as to whether bullets found in the clothes, in or next to the bodies of several of the alleged victims of the crimes charged in the Indictment may have been fired from the firearms seized in Ljuboten and, therefore, is of some relevance in particular to the issue of military necessity. The existence of military necessity is relevant to both the alleged purpose of the joint criminal enterprise and to other factual allegations in the Indictment. The Report is, therefore, both relevant and has probative value. Its content is such that fairness requires that the Defence have an opportunity to cross-examine Dr Eichner.

6. For the foregoing reasons and pursuant to Rule 89(C) of the Rules, the Chamber

-GRANTS the Motion and permits the Prosecution to present the Report,

-ORDERS that Dr Eichner shall appear for cross-examination.

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

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



Judge Kevin Parker
 Presiding Judge

[Seal of the Tribunal]