



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-A
Date: 16 April 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision of: 16 April 2009

PROSECUTOR
v.
LJUBE BOŠKOSKI
JOHAN TARČULOVSKI
PUBLIC

**DECISION ON BOŠKOSKI DEFENCE CORRIGENDUM TO
RESPONDENT BRIEF**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Ljube Boškosi:

Ms. Edina Rešidović
Mr. Guénaél Mettraux

Counsel for Johan Tarčulovski:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

The **APPEALS 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 (“Appeals Chamber” and “Tribunal”, respectively);

NOTING the Judgement rendered by Trial Chamber II in the present case on 10 July 2008¹ where the Trial Chamber acquitted Ljube Boškosi (“Boškosi”)² on all counts;

NOTING the “Prosecution’s Appeal Brief” (“Appeal Brief”), filed confidentially on 20 October 2008,³ the “Boškosi Defence Respondent Brief” (“Respondent Brief”), filed publicly by Boškosi on 1 December 2008, and the “Prosecution’s Reply Brief” (“Reply Brief”), filed confidentially on 16 December 2008;⁴

BEING SEIZED of the “Boškosi Defence Corrigendum to Respondent Brief” (“Corrigendum”), filed publicly by Boškosi on 20 January 2009;

NOTING that in the Corrigendum, Boškosi submits that his Respondent Brief should be corrected in the following manner:⁵

- 1) References to Exhibit 1D147 in footnotes 87 and 88 of the Respondent Brief should be replaced with references to Exhibit 1D47 (Proposed Corrigendum I).⁶
- 2) Instead of the original reference to the *Halilović* Trial Judgement in footnote 438 of the Respondent Brief, this footnote should refer to eight other authorities, including jurisprudence of post-World War II Tribunals in Germany and Japan, the International Committee of the Red Cross (“ICRC”) Commentary on the Additional Protocols to the Geneva Conventions, and jurisprudence of the International Criminal Tribunal for Rwanda (Proposed Corrigendum II).⁷

NOTING that should the Appeals Chamber be of “the view that the above go beyond permissible ‘corrections’, [Boškosi] seeks leave to add those references as and in place of

¹ *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008 (“Trial Judgement”).

² Trial Judgement, para. 606.

³ A public redacted version of the Appeal Brief was filed on 3 November 2008, and its corrected public redacted version was filed on 4 November 2008.

⁴ A public redacted version of the Reply Brief was filed on 24 December 2008 (signed on 23 December 2008).

⁵ Corrigendum, para. 17.

⁶ Corrigendum, para. 10.

⁷ Corrigendum, para. 14.

‘Book of Authorities’⁸ pursuant to the Practice Direction on Formal Requirements for Appeals from Judgement (“Practice Direction”),⁹ or in the alternative, to amend his Respondent Brief to add those references;¹⁰

NOTING further Boškosi’s submission that “[i]n light of the fact that the Prosecution will have an opportunity to review those references and to address any of them during oral submissions, no prejudice accrues in this matter”;¹¹

NOTING the “Prosecution Response to ‘Boškosi Defence Corrigendum to Respondent Brief’” (“Response to Corrigendum”), filed publicly on 29 January 2009, in which the Prosecution contends that while it does not object to Proposed Corrigendum I, it does object to the Proposed Corrigendum II on the grounds that it effectively constitutes a sur-reply to the Reply Brief, containing additional submissions rather than simple corrections;¹² that “Boškosi has not shown good cause to amend or supplement his Respondent’s Brief;” and that he fails to show how Proposed Corrigendum II is “of ‘sufficiently compelling importance’ to justify the admission of a supplemental brief at this late stage, after briefing has been completed;”¹³

NOTING further that in its Response to Corrigendum, the Prosecution requests leave to file a supplemental reply not exceeding 600 words, should the Appeals Chamber grant Boškosi leave to amend his Respondent Brief by supplementing the new references as set out in Proposed Corrigendum II;¹⁴

NOTING that paragraph 7 of the Practice Direction provides that “[a] Book of Authorities must be attached to the Appellant’s Brief and the Respondent’s Brief, in accordance with the Rules, containing a separate compilation setting out clearly all authorities relied upon”;

CONSIDERING that the requirement that a Book of Authorities be attached to the brief in question implies that it should be filed simultaneously with said brief;

FINDING accordingly that Boškosi may not file a Book of Authorities in support of his Respondent Brief at this stage in briefing in order to introduce new references not contained in said Brief;

⁸ Corrigendum, para. 15.

⁹ Practice Direction, IT/201, paras 7 *et seq.*

¹⁰ Corrigendum, paras 15, 17.

¹¹ Corrigendum, para. 16.

¹² Response to Corrigendum, paras 1-2.

¹³ Response to Corrigendum, para. 3 (footnote omitted).

¹⁴ Response to Corrigendum, para. 5.

CONSIDERING that “a party may, without requesting leave from the Appeals Chamber, file a corrigendum to their previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification;”¹⁵

CONSIDERING, however, that if a party requires a substantive amendment to supplement their brief, they may, pursuant to Rule 127(A)(ii) and (B) of the Rules of Procedure and Evidence (“Rules”), file the said supplement with sufficient reasons constituting good cause for the Appeals Chamber to recognise it as validly filed;¹⁶

CONSIDERING that the “good cause” requirement is assessed on a case by case basis, and that the concept of “good cause” encompasses both good reason for amending a brief by supplementing new information and good reason showing why such new information was not included in the original brief;¹⁷

CONSIDERING further that the “good cause” requirement is to be interpreted more restrictively at later stages in the appeal proceedings when an amendment to a brief may substantially affect the efficient administration of justice – for instance, where the briefing on appeal is completed and such an amendment would require further filings of a supplemental or revised response or reply;¹⁸

CONSIDERING that whereas a party is not provided with a right to file a sur-reply since “a respondent, in his response to a motion, must give his full answer to the issues raised in that

¹⁵ *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Order Concerning Milan Martić’s Submission of a Corrected Version of his Appellant’s Brief, 11 February 2008, p. 2; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Prosecution’s Motion for Variance Concerning Order and Numbering of the Arguments on Appeal and on the Prosecution’s Corrigendum to Appeal Brief, 3 May 2007, p. 2; *Prosecutor v. Željko Međaković et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion for Enlargement of Time to File Appellant’s Brief, 30 August 2005 (“*Međaković Decision*”), p. 3.

¹⁶ See *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo’s Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning *Ex Parte* Portion of the Trial Record, 9 January 2007 (“*Bralo Decision*”), para. 9; *Međaković Decision*, p. 3. Although the jurisprudence cited in this footnote and the subsequent two footnotes concerns an amendment of an Appellant’s Brief or a Notice of Appeal, the principle provided in this jurisprudence applies *mutatis mutandis* to an amendment of a Respondent’s Brief.

¹⁷ See *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Leave to Present Appellate Arguments in Order Different From That Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 (“*Bošković and Tarčulovski Decision*”), para. 17; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006, para. 7; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 5.

¹⁸ See *Bošković and Tarčulovski Decision*, para. 18; *Bralo Decision*, paras 9, 11.

motion,” leave to file a sur-reply may be granted “where the reply raises a new issue to which the respondent has not already had the opportunity to respond;”¹⁹

CONSIDERING that whereas Proposed Corrigendum I is a mere correction of a clerical error, Proposed Corrigendum II seeks to replace an original reference with new references to authorities other than those originally referred to in the Respondent Brief, in response to the Prosecution’s assertion in its Reply Brief that the original reference does not support Boškoski’s submission in the relevant part of his Respondent Brief;²⁰

FINDING that the new references contained in Proposed Corrigendum II are tantamount to supplementing Boškoski’s Respondent Brief with new substantial information, thus amounting to a sur-reply, and cannot be deemed as corrections of a minor or clerical nature;

CONSIDERING that the only reason set forward by Boškoski for the introduction of the new references at this late stage is the fact that the Prosecution noted in its Reply Brief that the jurisprudence relied upon by Boškoski in his Respondent Brief did not support his submissions;²¹

FINDING that this does not constitute good cause for amending the Respondent Brief as indicated in Proposed Corrigendum II;

CONSIDERING further that allowing Proposed Corrigendum II to be considered as a validly filed sur-reply would require the Appeals Chamber to further permit the Prosecution to file a supplemental reply, which would affect the efficiency of the proceedings;

¹⁹ *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlado Radić, 9 May 2006, p. 3.

²⁰ Corrigendum, paras 11-13, referring to para. 266 and footnote 438 of the Respondent Brief.

²¹ The Appeals Chamber notes that footnote 438 of the Respondent Brief refers not only to the *Halilović* Trial Judgement, para. 71 - which Boškoski seeks to replace - but also to the *Bagilishema* Appeal Judgement, paras 35-36. Thus, the relevant argument in the Respondent Brief remains supported by the latter reference.

FOR THE FOREGOING REASONS

HEREBY ACCEPTS Proposed Corrigendum I and **DENIES** Boškoski's request for leave to amend his Respondent Brief by supplementing new references as set out in Proposed Corrigendum II.

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

Dated this sixteenth day of April 2009,
At The Hague
The Netherlands



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]