



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: IT-04-82-AR72.2

Date: 9 January 2007

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Order of: 9 January 2007

THE PROSECUTOR

v.

Ljube BOŠKOSKI and Johan TARČULOVSKI

DECISION ON LJUBE BOŠKOSKI'S APPEAL ON JURISDICTION

Defence Counsel

**Ms. Edina Rešidović and Mr. Guénaél Mettraux for Ljube Boškosi
Mr. Antonio Apostolski for Johan Tarčulovski**

Office of the Prosecutor

**Mr. Dan Saxon
Mr. Anees Ahmed**

1. The Appeals Chamber of the International Criminal 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 “International Tribunal”, respectively), is seized of an appeal filed by the accused Ljube Boškoski (“Boškoski”) on 22 September 2006, against a decision of the Trial Chamber dated 8 September 2006 (“Impugned Decision”) dismissing his challenge to the International Tribunal’s jurisdiction over him pursuant to Article 7(3) of the International Tribunal’s Statute and for offences charged under Article 3 of the International Tribunal’s Statute.¹ Boškoski further challenges the Trial Chamber’s failure to dismiss the charges against him as an abuse of process.² The Prosecution filed its Response on 2 October 2006³ and Boškoski filed his Reply on 6 October 2006.⁴

2. Boškoski is charged in the Second Amended Indictment with Article 7(3) command responsibility for murder (Count 1); wanton destruction of cities, towns or villages (Count 2); and cruel treatment (Count 3). Each Count is charged as a violation of the laws or customs of war pursuant to Article 3 of the Statute of the International Tribunal.⁵

3. The Appeals Chamber does not consider that Boškoski’s Appeal is admissible as there is no basis upon which he could have properly filed his jurisdictional challenge before the Trial Chamber. The Appeals Chamber recalls that Rule 72(A)(i) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) requires that challenges to jurisdiction must be “brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i)”. Since disclosure for this case was completed in 2005, this Rule did not apply in this instance. Similarly, Rule 50(C) of the Rules, which accords the accused “a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of new charges” did not apply since the amended indictment did not add new charges. Accordingly, Boškoski cannot be considered as now having the right to file an appeal under Rule 72(B)(i) of the Rules. Furthermore, the Appeals Chamber questions the Trial Chamber’s decision to recognize this motion under Rule 54 of the Rules, which effectually allowed for the circumvention of the clear provisions of Rule 72 and the time limits therein. Seeing, however, that the Impugned Decision was

¹ Boškoski Defence Appeal on Jurisdiction, filed partly confidentially on 22 September 2006 (“Appeal”).

² Appeal, para. 64.

³ Prosecution’s Response to the Boškoski Defence Appeal on Jurisdiction dated 22 September 2006, 2 October 2006 (“Response”).

⁴ Boškoski Defence Reply to “Prosecution’s Response to the Boškoski Appeal on Jurisdiction dated 22 September 2006”, 6 October 2006 (“Reply”).

⁵ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Second Amended Indictment, 5 September 2005 (“Second Amended Indictment”).

considered on the basis of Rule 54, only Rule 73 of the Rules would have been applicable, necessitating certification.


4. Moreover, in the context of Boškoski's Article 7(3) claims, the issues in question have been litigated previously. Indeed, the Trial Chamber dealt with exactly the same questions in its decision of 26 May 2006 confirming the Second Amended Indictment.⁶ Boškoski did not choose to file for certification to appeal this decision, and thus waived his right to file an interlocutory appeal on the very same issue that he brings now a second time before the Appeals Chamber. Accordingly, the 26 May 2006 Decision has to be seen as a decision barring Boškoski from bringing an interlocutory appeal only now.

5. In addition to the applicability of the above reasoning *mutatis mutandis* to Boškoski's Article 3 and abuse of process challenges to the International Tribunal's jurisdiction, the Appeals Chamber equally finds that they are not properly presented as issues of jurisdiction. Under Rule 72(D) of the Rules, motions challenging jurisdiction are restricted to challenges to the indictment on the ground that it does not relate to: (i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute; (ii) the territories indicated in Articles 1, 8 and 9 of the Statute; (iii) the period indicated in Articles 1, 8 and 9 of the Statute; or (iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute. Boškoski's objections as a result of the Prosecution's failure to plead that he "knew or had reason to know of the existence of an armed conflict and nature thereof" and as a result of the Trial Chamber's failure to dismiss the charges against him as an abuse of process do not fall within this narrow purview.

6. On the basis of the foregoing, the Appeals Chamber, Judge Pocar dissenting in part, considers that it would be acting *ultra vires* if it were to address Boškoski's Appeal on the merits. Accordingly, the Appeal is hereby **DISMISSED**.

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

Dated this 9th day of January 2007,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

Judge Pocar appends a partially dissenting opinion to this decision.

[Seal of the International Tribunal]

⁶ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, 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 ("26 May 2006 Decision").

PARTIALLY DISSENTING OPINION OF JUDGE POČAR

1. I agree with the majority of the Appeals Chamber's overall disposition of the present Appeal, however, I am not persuaded that Boškoski's challenge to the International Tribunal's jurisdiction pursuant to Article 7(3) of the Statute should have been rejected as inadmissible on procedural grounds and without consideration of the merits. I do concur, however, that Boškoski's challenges under Article 3 and abuse of process are not appropriately challenges to jurisdiction as set out in Article 72 of the Rules.

2. While the majority of the Appeals Chamber correctly notes that Boškoski's motion was not filed before the Trial Chamber under Rule 72, as under that Rule it would have been out of time, I am of the view that it was within the Trial Chamber's discretion to allow its admission under Rule 54. However, while relying upon Rule 54, the Trial Chamber was in fact considering, as a matter of substance, a challenge to jurisdiction. In my opinion, as a challenge to jurisdiction under Rule 72(B) gives rise to an appeal as of right, when such a challenge arises under any other Rule from a Trial Chamber, it should also be treated as allowing a right of appeal. Any other interpretation would create the possibility of an accused standing trial on charges that are not properly brought before this Tribunal. As was stated by the Appeals Chamber in *Prosecutor v. Tadić*, in its decision on jurisdiction, "[s]uch a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial".⁷ While that statement was made in relation to whether the International Tribunal had any jurisdiction at all, it is equally applicable to whether the Tribunal's jurisdiction pursuant to Article 7(3) extends to all types of criminal activity of subordinates.


3. Further, with respect to the Appeals Chamber finding that Boškoski waived his right to file an appeal on this issue of Article 7(3) because he failed to seek certification of the Trial Chamber's 26 May 2006 Decision, in which he raised the issue as a defect in the form of the indictment, I do not consider that the accused's challenge to the issue as constituting a defect in the form of the indictment should preclude his challenge of the same issue as one of jurisdiction.

4. Accordingly, in my opinion, the interests of resolving matters concerning the Tribunal's jurisdiction at the pre-trial stage and fairness to the accused dictate in favour of determining Boškoski's Appeal, with regard to the issue of Article 7(3) jurisdiction, on its merits.

⁷ *Prosecutor v Duško Tadić*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

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

Dated this 9th day of January 2007,
At The Hague,
The Netherlands.



Judge Fausto Pocar