



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-AR72.1

Date: 22 July 2005

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Order of: 22 July 2005

THE PROSECUTOR

v.

Ljube BOŠKOSKI and Johan TARČULOVSKI

DECISION ON INTERLOCUTORY APPEAL ON JURISDICTION

Defense Counsel

Dragan Godzo (for Ljube Boškosi)

Antonio Apostolski (for Johan Tarčulovski)

Office of the Prosecutor

Kenneth Scott

1. 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) is seised of an interlocutory appeal in the case of *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, which is currently pending in Trial Chamber II of the Tribunal. The Trial Chamber dismissed the motion of Johan Tarčulovski (“Appellant”) challenging the jurisdiction of this Tribunal pursuant to Rule 70(B)(i), (C) of the Rules of Procedure and Evidence (“Rules”).¹ The Appellant filed an interlocutory appeal against the decision on 15 June 2005.² On 24 June, the Prosecution filed its response.³ No reply to that Response was filed by the Appellant.

2. In his Appeal, the Appellant identifies two errors made by the Trial Chamber in the Impugned Decision. He argues, first, that the Trial Chamber erred by finding in the Impugned Decision that the Tribunal had jurisdiction over events that occurred in the Republic of Macedonia, after its peaceful dissolution from the former Yugoslavia and after ten years of independence,⁴ and, second, that the Trial Chamber erred in holding that it had jurisdiction as the situation in Macedonia at the relevant time was not a situation of armed conflict.⁵

3. In its Response, the Prosecution makes a preliminary objection to the Appeal. It says that the Appellant fails to state the specific grounds on which the appeal is based and merely repeats arguments put before the Trial Chamber “without citing the error on the question of law committed by the Trial Chamber invalidating its decision or an error of fact that has occasioned a miscarriage of justice”.⁶ It argues that the Appellant’s failure to identify the specific ground on which the appeal is made has forced it to make assumptions as to the basis of the appeal.⁷ It says that the Appeals Chamber should dismiss the appeal *in limine* on this basis.⁸

4. The Appeals Chamber notes that in making these arguments, the Appellant does not identify any actual error of legal reasoning in the Impugned Decision. The Appellant is merely reasserting arguments that were apparently put before the Trial Chamber and rejected by it. The Appeals Chamber reiterates that this is not the purpose of an appeal. An appeal is not a hearing *de novo* of

¹ Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction, 1 June 2005 (“Impugned Decision”).

² Interlocutory Appeal Against the Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction Dated 1st of June 2005, 15 June 2005; (“Appeal”).

³ Prosecution’s Response to the Interlocutory Appeal Against the Trial Chamber’s Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction Dated 1 June 2005, 24 June 2005 (“Response”).

⁴ Appeal, paras. 2 -3.

⁵ *Ibid*, paras. 4-5.

⁶ Response, par 6.

⁷ *Ibid*.

arguments considered and rejected by a Trial Chamber.⁹ In filing an appeal the Appellant is expected to identify precisely the error in the reasoning of the Trial Chamber.¹⁰

5. The Appeals Chamber could well dismiss the Appeal on this basis alone. However, as an appeal on jurisdiction is an appeal as a right under Rule 72 of the Rules, and as a matter of utmost fairness to the Appellant, it has determined not to do so in this instance. Rather, the Appeals Chamber will address the objections made by the Appellant in light of the reasoning of the Trial Chamber in the Impugned Decision.

a) The Trial Chamber erred in finding that the Tribunal had temporal and geographical jurisdiction over Macedonia

6. The Appellant argues that the decision of the Security Council establishing the Tribunal was prompted by reports about serious violations of international criminal law on the territory of the Socialist Republic of Yugoslavia (“SFRY”) and was determined after several General Assembly Resolutions failed to have any effect to end those violations.¹¹ The Appellant argues that the events in the Republic of Macedonia, which are the subject of the indictment, occurred “after its peaceful disassociation from the former Yugoslavia and after ten years of independent and peaceful democratic growth and development”, and that to place such events under the jurisdiction of the Tribunal is unsound.¹²

7. In Response, the Prosecution says it assumes that the argument put by the Appellant is that the Tribunal is without jurisdiction to hear the crimes charged in the indictment on the ground that the indictment does not relate to the territory nor the time period indicated in Articles 1, 8 and 9 of the Statute.¹³ It says that the Trial Chamber made no error in the Impugned Decision in finding that Articles 1 and 8 of the Statute expressly state that the jurisdiction of the Tribunal extends to the territory of the former SFRY and that the jurisprudence of the Tribunal has consistently recognised that the territory of the Former Yugoslav Republic of Macedonia was included in the territory of the

⁸ *Ibid.*

⁹ *Prosecutor v. Tihomir Blaskić*, Judgement, Case No. IT-95-14-A, 23 October 2001, para. 417, citing *Prosecutor v. Krnojelac* Appeal Judgement, Case No. IT-97-25-A, 17 Sep. 2003, para. 10.

¹⁰ *Prosecutor v. Vasiljevic*, Judgement, Case No. IT-98-32-A, 25 February 2004, para. 5. *See also, Prosecutor v. Krnojelac*, Appeal Judgement, para. 10; *Prosecutor v. Furundžija*, Appeal Judgement, Case No. IT-95-17/1-A, 21 July 2000, para. 35; Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal” IT/155 Rev.1, 7 March 2002, Part II, 1(e).

¹¹ Appeal, para. 3.

¹² *Ibid.*, para. 2.

¹³ Response, para. 7.

SFRY. It argues that the Trial Chamber's reasoning reveals no legal or factual error and that it correctly found that it had territorial jurisdiction in this case.¹⁴

8. With respect to the temporal jurisdiction of the Tribunal, the Prosecution says that in the Impugned Decision the Trial Chamber noted further that while Article 8 of the Statute identifies the temporal jurisdiction of the Tribunal as beginning from 1 January 1991, it does not stipulate a date on which jurisdiction ends. The Trial Chamber held therefore that if the jurisdiction of the Tribunal was to be limited, the Security Council would have expressly identified an end date. The Trial Chamber noted further than "the jurisdiction of the Tribunal as an enforcement measure under Chapter 7 of the United Nations Charter, is linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia supporting the conclusion that the Tribunal has continuing jurisdiction from 1991 onwards".¹⁵

9. The Prosecution argues that the reasoning of the Trial Chamber is fully consistent with that of the Appeals Chamber in an interlocutory decision in the *Šešelj* case.¹⁶ Further, it says that conflicts that have broken out in the territory of the former Yugoslavia many years after the Tribunal's creation in 1993 are the subject of several other cases before the Tribunal, and that the UN Secretary General confirmed the open-ended temporal jurisdiction of the Tribunal in his report to the Security Council on 21 February 2001.¹⁷ In conclusion, it says that the Appellant's arguments are contrary to the Statute of the Tribunal and without support in the jurisprudence of the Tribunal.¹⁸

Analysis

10. The Appeals Chamber cannot identify any evidence of error on the part of the Trial Chamber in its reasoning. The Statute of the Tribunal extends the Tribunal's jurisdiction to those entities that were a part of the former Yugoslavia prior to its dissolution. This includes Macedonia, which was part of the former Yugoslavia prior to its succession. Further, the Statute of the Tribunal confers jurisdiction on the Tribunal over persons responsible for serious violations of international humanitarian law since 1991. The UN Security Council has decided in Resolution 827 (1993) that the temporal jurisdiction of the Tribunal covers the period "between 1 January 1991 and a date to

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, para. 9.

¹⁶ *Ibid.*, para. 10, referring to *Prosecutor v. Šešelj*, Decision on Interlocutory Appeal Concerning Jurisdiction, IT-03-67-AR72.1, 31 August 2004.

¹⁷ *Ibid.*, paras. 12-13.

¹⁸ *Ibid.*, para. 14.

be determined by the Security Council upon restoration of peace.”¹⁹ At present, no such end date has been determined; therefore, the Tribunal’s temporal jurisdiction is open-ended and does extend to allegations of serious violations of international humanitarian law occurring after 2001.

b) The Trial Chamber erred in holding that it had jurisdiction as there was no armed conflict in Macedonia

11. The Appellant argues that the position of the Trial Chamber with respect to the application of international humanitarian law to the Republic of Macedonia is unacceptable as there was no armed conflict in Macedonia. He argues that there was no armed violence or protracted violence in Macedonia in 2001. He argues that terrorists from Kosovo, Albania, Afghanistan and other countries arrived and committed sporadic acts of violence. Following the commission of such acts the alleged terrorists fled and hid in the villages and mountains. Macedonia security forces responded with a one-day or two-day action in order to locate them and stop them from further action. They did so only after “these criminal elements had committed a brutal massacre and mutilation of 16 soldiers”.²⁰ The Appellant argues that these facts cannot be characterised as a situation of protracted armed violence. He argues that the Macedonian police were legitimately fighting against terrorism and that such a fight “is universally accepted as a peace-making activity for maintaining the global peace”.²¹

12. In Response, the Prosecution says that it can only assume that the argument being put forward by the Appellant is that the Tribunal does not have subject matter jurisdiction to hear the crimes charged in the Indictment as they do not relate to any of the violations contained in Articles 2,3,4,5 and 7 of the Tribunal’s Statute as there was no armed conflict in Macedonia. The Prosecution submits that in the Impugned Decision the Trial Chamber addressed this argument and held that the solution of issues, such as the nature of the conflict, “do not raise jurisdiction questions, but depend first and foremost on factual determination”, and that such determinations can only be made by a Trial Chamber after having examined the evidence presented at trial.²²

Analysis

13. The Appeals Chamber agrees with the Trial Chamber’s holding that the characterization of the conflict in Macedonia is an issue whose resolution depends on factual determinations and may

¹⁹ S/RES/827 (1993), 25 May 1993.

²⁰ Appeal, para. 5.

²¹ *Ibid.*

²² Response, paras. 15-16.

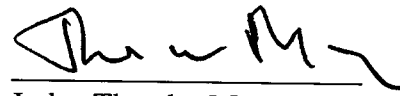
not be addressed at this stage in the proceedings. Such factual determinations are to be made by the Trial Chamber upon hearing and reviewing evidence admitted at trial. The Trial Chamber held that the Appellant's argument involved a question of fact that should be determined based on the evidence. The Appeals Chamber finds that the Trial Chamber was within its discretion to decide that it would be premature to decide the issue now, rather than waiting until it had received factual submissions. The Appeals Chamber is satisfied that the reasoning of the Trial Chamber evidences no error.

Disposition

On the basis of the foregoing the Appellant's interlocutory appeal on jurisdiction is **DISMISSED**.

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

Dated this 22nd day of July 2005,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]