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Tribunal Pénal International pour l'ex-Yougoslavie

APPEALS JUDGEMENT SUMMARY

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APPEALS CHAMBER

The Hague, 19 May 2010

Summary of the Appeals Judgement
Prosecutor v. Ljube Boškoski and Johan Tarčulovski

Please find below the summary of the Appeals Judgement read out today by Judge Robinson:

The Appeals Chamber is sitting today to deliver its Judgement in this case.

Following the practice of the Tribunal, I will not read out the text of the judgement except for the disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. This summary is not part of the written judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written judgement will be made available to the parties at the conclusion of this hearing.

Background

This case concerns the events during and subsequent to a police operation conducted on 12 August 2001 in the village of Ljuboten which is situated in the northern part of the Former Yugoslav Republic of Macedonia, also known as the FYROM. At the relevant time, Ljube Boškoski was the Minister of the Interior of the FYROM and Johan Tarčulovski was a police officer.

The Trial Chamber found Johan Tarčulovski guilty of ordering, planning and instigating murder, wanton destruction and cruel treatment, all violations of the laws or customs of war under Article 3 of the Statute. He was sentenced to a single sentence of imprisonment of 12 years. Ljube Boškoski was acquitted on all charges.

Johan Tarčulovski has presented seven grounds of appeal challenging his conviction and sentence. The Prosecution has appealed Ljube Boškoski's acquittal.

Grounds of Appeal

I will first address Johan Tarčulovski's grounds of appeal. I will then turn to the Prosecution's appeal and, at the end of the hearing, read out the disposition.

In his first ground of appeal, Johan Tarčulovski submits that the conflict in the FYROM during the relevant period between FYROM security forces and the National Liberation Army, also known as NLA, did not reach the level of an armed conflict as it did not meet the threshold requirement of intensity.

The Trial Chamber did not err in concluding that the intensity of the conflict in the FYROM and the NLA's features identifying it as an organised armed group were such that an internal armed conflict existed in the FYROM in August 2001. The Appeals Chamber does not see any error in this finding.

Johan Tarčulovski further contends that the Tribunal's exercise of jurisdiction over this case is improper as the Tribunal did not determine whether the government of the FYROM lawfully ordered the operation in self-defence to root out terrorists from amongst

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Media Office/Communications Service
Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands
Tel.: +31-70-512-8752; 512-5343; 512-5356 **Fax**: +31-70-512-5355

the villagers. Furthermore, he argues that the exercise of jurisdiction by the Tribunal is contrary to the actions of the United Nations Security Council.

The Appeals Chamber considers that the fact that a State resorted to force in self-defence in an internal armed conflict against an armed group does not, in and of itself, prevent the qualification of crimes committed therein as serious violations of international humanitarian law. Moreover, the United Nations Security Council did not state that the situation in the FYROM was outside the Tribunal's jurisdiction.

Thus, Johan Tarčulovski's first ground of appeal is dismissed in its entirety.

In his second ground of appeal, Johan Tarčulovski submits that the events in Ljuboten on 12 August 2001 did not violate the laws or customs of war, since they were the result of a sovereign State's legitimate and proportionate response to an internal terrorist attack. He also questions the applicability of the laws or customs of war in determining individual criminal responsibility for a person assigned to carry out a legitimate operation planned by a sovereign State.

The Appeals Chamber finds that the application of rules applicable in armed conflict is not affected by the legitimacy of the use of force by a party to the armed conflict. Therefore, the fact that a State is acting in lawful self-defence against terrorists in an internal armed conflict does not render Common Article 3 inapplicable. Nor is it relevant for a determination of whether a representative of this State has committed a serious violation of international humanitarian law during the exercise of the State's right to self-defence. Accordingly, the Trial Chamber did not err in applying the laws or customs of war in the present case.

Thus, Johan Tarčulovski's second ground of appeal is dismissed in its entirety.

In his fifth ground of appeal, Johan Tarčulovski contends that the Trial Chamber improperly rejected the testimony of entire categories of witnesses, while it later selectively relied upon this testimony.

The Appeals Chamber observes that the Trial Chamber took a careful approach to the evaluation of the evidence provided by these categories of witnesses. Johan Tarčulovski has not demonstrated any error in the Trial Chamber's acceptance of certain parts of their testimony and its rejection of other parts.

Consequently, his fifth ground of appeal is dismissed.

Under parts of his third, fourth and fifth grounds of appeal, Johan Tarčulovski submits that the Trial Chamber erred when it held that to incur criminal liability for acts prohibited under Common Article 3, it must merely be established that the victims for the alleged violation were not taking an active part in the hostilities when the crime was committed. He argues that the Prosecution must also show that the perpetrator was aware or should have been aware of this protected status of the victim.

In light of the principle of individual guilt, the Appeals Chamber is satisfied that it must be proven that the perpetrator of a Common Article 3 crime knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed. Although there are no explicit findings in this regard in the Trial Judgement, when it is read as a whole, it is clear that the Trial Chamber examined whether the direct perpetrators knew or should have been aware of the protected status of the victims in relation to each crime. Johan Tarčulovski's argument in this respect is therefore dismissed.

In his fourth ground of appeal, Johan Tarčulovski contends that the evidence was insufficient to find that murder, wanton destruction and cruel treatment were established beyond reasonable doubt.

The Appeals Chamber is satisfied, however, that the Trial Chamber identified the perpetrators of the three charged murders as men belonging to the police group led by Johan Tarčulovski. The evidence was also sufficient to establish beyond reasonable doubt the circumstances of the killing of each victim and the circumstances of the cruel treatment, as well as the status of the victims and the *mens rea* of the perpetrators thereon. Johan Tarčulovski has failed to show that the Trial Chamber's findings in these respects were erroneous.

Regarding the wanton destruction of twelve houses, Johan Tarčulovski has not shown any error in the Trial Chamber's findings that none of the houses caught fire accidentally or through the shelling by the FYROM army or the NLA; that it was the police who started the fire; and that none of the houses were used for military purposes when they were set on fire.

Thus, Johan Tarčulovski's fourth ground of appeal is dismissed in its entirety.

In his third ground of appeal, Johan Tarčulovski submits that the Trial Chamber erred in its application of the modes of liability of planning, instigating and ordering under Article 7(1) of the Statute.

In relation to planning, Johan Tarčulovski contends that the Trial Chamber erred in concluding that the predominant object of the police operation in Ljuboten on 12 August 2001 was to indiscriminately attack ethnic Albanians and their property. He claims that the evidence shows that the police operation was to eradicate NLA members, who were described as terrorists, from Ljuboten. He also maintains that it could have been the FYROM President or higher officials of the Ministry of Interior who planned it.

The Appeals Chamber finds no error in the Trial Chamber's findings that the predominant object of the operation was to indiscriminately attack Albanian villagers and property; that Johan Tarčulovski had the necessary intent; and that he was involved in the planning of the operation. The possible involvement of other persons in the planning of the operation does not impact on the Trial Chamber's finding that Johan Tarčulovski was criminally responsible for planning the attack.

With regard to instigating and ordering, Johan Tarčulovski contends that the Trial Chamber erred in convicting him under these modes of liability since there was no evidence suggesting that he had prompted or instructed any other person to commit a crime. In respect of ordering, he also maintains that there was no evidence showing that he had *de jure* or *de facto* authority to order killings, burnings or beatings. Furthermore, he submits that the Trial Chamber erred in finding that he had the *mens rea* to order that specific crimes be committed, although it could not determine who ordered the operation.

The Appeals Chamber finds no error in the Trial Chamber's finding that Johan Tarčulovski prompted and instructed police members to commit the crimes at issue and that he had a position of authority to compel them to commit the crimes. The fact that he was ordered to lead the operation does not exonerate him from criminal responsibility if in the execution of the order he in turn instructed other persons to commit a crime.

Thus, Johan Tarčulovski's third ground of appeal is dismissed in its entirety.

Johan Tarčulovski's sixth ground of appeal concerns his statements to a commission established by the Ministry of Interior to investigate what had occurred in Ljuboten. He maintains that the admission of these out-of-court statements was not in conformity with Rule 89 of the Tribunal's Rules of Procedure and Evidence and the general principles of law. He also avers that since the Trial Chamber considered that the statements were reliable in admitting them into evidence, it should have given credence to the statements in his favour.

The Appeals Chamber considers that the Trial Chamber was entitled to admit, pursuant to Rule 89 of the Rules of the Procedure and Evidence, the statements as accurately representing Johan Tarčulovski's evidence before the commission. The general principles of law do not dictate the exclusion of out-of-court statements. The Appeals Chamber also finds that the Trial Chamber properly weighed the statements in light of other evidence.

Accordingly, Johan Tarčulovski's sixth ground of appeal is dismissed.

In his seventh ground of appeal, Johan Tarčulovski asserts that the Trial Chamber erred in sentencing him to twelve years' imprisonment. In particular, he submits that the Trial Chamber failed to consider as a mitigating circumstance the fact that he was carrying out orders of those senior to him. He further maintains that the Trial Chamber failed to consider that the FYROM later granted amnesty to those involved in both sides of the conflict.

The Appeals Chamber considers that the Trial Chamber did take into account that Johan Tarčulovski was carrying out orders of unknown persons, when assessing the gravity of the offences. Furthermore, the relevant legislature of the FYROM contains a provision that those who committed criminal acts falling within the jurisdiction of the Tribunal are excluded from the grant of amnesty. Moreover, the Trial Chamber was not bound by the FYROM sentencing practices.

Thus, Johan Tarčulovski's seventh ground of appeal is dismissed in its entirety.

I will now turn to the Prosecution's appeal against the acquittal of Ljube Boškoski.

The Prosecution submits that the Trial Chamber committed an error of law when it incorrectly required under Article 7(3) of the Statute that a superior need only provide a report to the competent authorities, which was likely to trigger an investigation into the alleged criminal conduct.

The Appeals Chamber is satisfied, however, that the Trial Chamber correctly held that a superior may, under specific circumstances, discharge his obligations to punish an offending subordinate by reporting to the competent authorities, provided that this report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.

In the alternative, the Prosecution submits that the Trial Chamber erred in fact in finding that Ljube Boškoski had taken the necessary and reasonable measures to punish his offending subordinates. The Prosecution in particular submits that reports provided by the Ministry of Interior to the competent judicial authorities were incapable of triggering a criminal investigation into the events in Ljuboten.

The Appeals Chamber observes that the Trial Chamber was aware that the notifications made by the Ministry of Interior to the judicial authorities were not fully adequate. The Trial Chamber also recognized that no normal police investigations were carried out with respect to the relevant events. However, the Trial Chamber held that the notifications ought, in the ordinary course, to have led the judicial authorities to conduct a proper investigation.

In reaching this conclusion, the Trial Chamber particularly noted that the notifications brought the deaths of ethnic Albanians to the attention of the competent authorities and while suggesting one cause, left the cause of death open. Furthermore, the evidence indicates that the notifications were made on 12 and 14 August 2001 and that an investigation team was immediately set up by the competent judicial authorities and attempted to conduct an on-site investigation in Ljuboten. The evidence also shows that Ljube Boškoski was informed of these notifications and the investigation attempt. The Trial

Chamber found that the serious failure to adequately investigate on the basis of the police reports to the judicial authorities was not attributable to Ljube Boškoski, as the judicial authorities were not under his ministerial authority. The Trial Chamber also held that there was no basis for concluding that he tried to impermissibly interfere in the investigations or that he was aware of the failure of the police to perform their normal functions. The Prosecution has not shown that these findings were erroneous.

The Appeals Chamber holds that the Trial Chamber did not err when it found that the notifications ought, in the ordinary course, to have led the judicial authorities to conduct a proper investigation in the events in Ljuboten. Based on this finding, the Trial Chamber held that it was not shown that Ljube Boškoski failed to take the necessary and reasonable measures. In the circumstances of this case, it was open to a reasonable trier of fact to acquit Ljube Boškoski of failure to punish responsibility on the basis of the information given to the judicial authorities. The Trial Chamber did not commit a factual error when arriving at this conclusion.

As a result, the Prosecution's appeal is dismissed in its entirety.

Disposition

I will now read out the disposition of the Appeal Judgement. Mr. Boškoski and Mr. Tarčulovski, will you please rise.

For the foregoing reasons, THE APPEALS CHAMBER,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the Parties and the arguments they presented at the hearing on 29 October 2009;

SITTING in open session;

DISMISSES Johan Tarčulovski's appeal in its entirety;

DISMISSES the Prosecution's appeal in its entirety;

AFFIRMS the acquittal of Ljube Boškoski and the sentence imposed by the Trial Chamber against Johan Tarčulovski, subject to credit being given under Rule 101(C) of the Rules for the period Johan Tarčulovski has already spent in detention; and

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that Johan Tarčulovski is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Judge Liu appends a separate opinion.

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