



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: 14 November 2007
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin
Registrar: Mr. Hans Holthuis
Decision: 14 November 2007

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC

DECISION ON MOTION TO AMEND THE INDICTMENT

The Office of the Prosecutor:

Mr Dan Saxon
Ms Joanne Motoike
Ms Meritxell Regue
Mr Gerard Dobbyn

Counsel for the Accused:

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškosi
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 a “Prosecution Motion for Leave to Amend the Second Amended Indictment with Annexes A and B” (“Motion”), filed on 28 September 2007. In the Motion the Prosecution seeks leave to amend the Second Amended Indictment (“Indictment”), by replacing references to a Macedonian police checkpoint at Buzalak or “Buzalak / Kodra e Zaimit” with references to “a police checkpoint set up in an area between the two locations known as Buzalak and Kodra e Zaimit”. The Prosecution submits that at the time of filing the Indictment it was unaware that those two names related to two different locations. It contends that the proposed amendments would enhance the specificity of the description of the charges. The Prosecution assures that the material facts pleaded remain unchanged and that the amendments would not create confusion, as it is not the case and there is no evidence to suggest that there was a second police checkpoint in the area between Buzalak and Kodra e Zaimit at the time relevant to the Indictment. The Prosecution submits that the proposed amendments would not unfairly prejudice the Accused, as no new evidence would be adduced in support. It contends that the proposed amendments do not introduce a basis for conviction that is distinct from any already present in the Indictment. The Prosecution appends a “Third Amended Indictment”, which reflects the changes it proposes to the Indictment.

2. On 17 October 2007, after having been granted an extension of the time-limit, the Defence for Ljube Boškoski and the Defence for Johan Tarčulovski (“Defence”) filed a “Joint Defence Response to Prosecution Motion for Leave to Amend Second Amended Indictment” (“Response”). The Defence submits that the amendments to the Indictment proposed by the Prosecution constitute a new charge, as they indicate a new location at which crimes are alleged to have been committed. In the Defence’s submission, the Indictment contains reference to the Buzalak police checkpoint, whereas the proposed amendments introduce a new site, Kodra e Zaimit. The Defence contends that the discovery at such a late stage of the proceedings of the error that led to the proposed amendments discloses the lack of due diligence on the part of the Prosecution. The Defence submits that it has not been given adequate notice and that the witnesses who could provide relevant evidence have already testified, which makes it impossible for the Accused to have those witnesses cross-examined on the matter. The Defence submits that the amendments would lead to delays in the proceedings, as they would require the Accused to enter a plea on the new charge. The Defence submits that the matter that led to the filing of the Motion was apparent to the Prosecution in 2004 and no explanation was provided for the Prosecution’s failure to seek such amendments earlier. The Defence also seeks leave to exceed the permissible word limit in its Response.

3. Rule 50 of the Rules of Procedure and Evidence (“Rules”) reads, in so far as relevant:

“(A)(i) The Prosecutor may amend an indictment: ...

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.”

4. Article 19 of the Statute referred to in Rule 50(A)(ii) provides in paragraph 1:

“The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.”

5. Leave to amend the Indictment may be granted before, as well as after the commencement of trial.¹ A Trial Chamber will normally exercise its discretion to permit amendment where the proposed amendment will facilitate the determination of the issues in the case² and will not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole.³ Such unfair prejudice may be caused by depriving him or her of an adequate opportunity to prepare his or her defence,⁴ and by negatively affecting his or her right to be tried without undue delay.⁵ As required by the Rule quoted above, the proposed amendment must be supported by evidence meeting the *prima facie* standard.⁶

6. The amendments proposed by the Prosecution purport to provide a more accurate description of one of the locations at which crimes charged in the Indictment were allegedly committed. The Indictment presently alleges that crimes were committed “at a police checkpoint 3 – 4 kilometres from Ljuboten towards Skopje”,⁷ “on the Ljubotenski Pat road”.⁸ It is alleged that this checkpoint is called “Buzalak”,⁹ whereas in Schedule B, which forms an integral part of the Indictment, the same checkpoint is referred to as “Buzalak/ Kodra e Zaimit checkpoint”. The

¹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006 (“*Popović Decision*”), para 8; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Decision on Prosecution’s Motion Seeking Leave to Amend the Revised Second Amended Indictment, 5 September 2007 (“*Haradinaj Decision*”), para 7.

² *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 (“*Brđanin Decision*”), para 50; *Haradinaj Decision*, para 7; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment, 1 November 2005 (“*Bošković Decision*”), para 7.

³ *Brđanin Decision*, para 50; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“*Halilović Decision*”), para 22; *Haradinaj Decision*, para 7.

⁴ *Popović Decision*, para 9; *Haradinaj Decision*, para 10.

⁵ *Halilović Decision*, para 23; *Popović Decision*, para 10.

⁶ *Bošković Decision*, para 7; *Popović Decision*, para 8.

⁷ Indictment, para 27.

⁸ Indictment, para 29.

⁹ Indictment, paras 29, 34, 35.

proposed amendments purport to make it clear that the alleged conduct occurred at the one checkpoint on the Ljubotenski Pat road. Further, in Schedule B, some victims are alleged to have been mistreated “at the checkpoint”, whereas others “close” or up to 200 metres “before” the checkpoint. In paragraphs 27, 29 and 35, as well as in headings before paragraph 34 of the Indictment and on page 3 of Schedule B, the words “... or near” are proposed to be added after the word “at”, which is placed before references to the police checkpoint in issue. This particular amendment appears to be sought with a view to clarifying that the Prosecution case is that the alleged conduct occurred at or in the vicinity of the one alleged checkpoint.

7. In the present Indictment the one relevant police checkpoint is described as being “3 – 4 kilometres from Ljuboten towards Skopje”, “on the Ljubotenski Pat road”. That provides a more than adequate description of the location of the one police checkpoint. Whether or not this location is also correctly described as Buzalak, or Kodra e Zaimit, or neither of these, is not a legal element of, and is not factually material to, the offences alleged to have occurred at the one checkpoint. As a matter of pleading, whether that location also has a name, and if so what that name might be, is no more than an additional particular to aid the understanding of the Prosecution’s case. An error or a difference of evidence as to the name of the geographic location would not lead to an acquittal, as this particular is not material to the offences alleged to have occurred there. Contrary to the contention of the Defence, the Prosecution does not seek the addition of an extra location where crimes were allegedly committed, but merely to describe with even more, and, in the Chamber’s view, unnecessary, accuracy the one location presently alleged. Whether or not that location is correctly described as “Buzalak”, or “Kodra e Zaimit”, or is between those places, would not provide a materially factually different basis for conviction and would not introduce a new or a distinct charge against the Accused.

8. In the Chamber’s assessment there has been no confusion in fact about the Prosecution case in this respect. The physical location of the one checkpoint has been described by witnesses and identified generally in photographs, maps and sketches. Apart from some difference between some witnesses as to the name by which the locality is known, the general location of the checkpoint has not been the subject of controversy. Whether or not the Indictment were now to be amended as is proposed, there could be no justification for the re-call of any of these witnesses on this issue, and any suggestion that the correct name of the location has been critical to the conduct of the Defence case, or its preparation, is without substance.

9. In so far as the Prosecution also seeks to add “or near” to the allegations of location, as detailed earlier, the Chamber would observe that this is not a case in which there is justification for reading the various allegations of conduct occurring “at” the alleged checkpoint with confined

precision. Rather, as in most contexts, these allegations are properly understood and applied as no more than a general indication of the location of the alleged conduct. Despite the various attempts at greater precision in Schedule B of the Indictment, in the Chamber's view the present Indictment is properly read and applied so that conduct in the vicinity of the one alleged checkpoint is within the natural and ordinary meaning of the allegation that conduct occurred "at" the checkpoint.

10. In the Chamber's view this has not led to any confusion or misunderstanding about the Prosecution case, as the witnesses dealing with these events have described what, in their recollection, occurred and where it occurred. These matters have been explored without difficulty by the limited questioning that has been directed to the location of particular incidents. It is not the case that the conduct of the Defence case, or its preparation, has proceeded on some basis different from what is alleged by the Prosecution, or that some material change is now sought to be introduced by amendment.

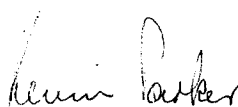
11. In the view of the Chamber, without amendment, it would be open on the present Indictment, should the evidence otherwise justify it, to convict in respect of offences alleged to have occurred at the one alleged police checkpoint, whether or not that checkpoint is located at Buzalak, or at Kodra e Zaimit, or between those geographic locations, and it would also be open to convict in respect of offences occurring in the vicinity of or near that one alleged police checkpoint. For these reasons the Chamber is not persuaded that there is a need to amend the Indictment as proposed by the Prosecution or that the conduct of the trial would be materially assisted if the proposed amendments were made.

12. In view of the foregoing, the Chamber, pursuant to Rule 50 of the Rules,

GRANTS leave to the Defence to exceed the word limit in the Response,

DENIES the Motion.

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



Judge Kevin Parker
Presiding

Dated this fourteenth day of November 2007
At The Hague
The Netherlands

[Seal of the Tribunal]