

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-82-PT
Date: 8 September 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision: 8 September 2006

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

**DECISION ON ASSIGNED *PRO BONO* COUNSEL MOTION
CHALLENGING JURISDICTION**

The Office of the Prosecutor:

Mr. Dan Saxon
Mr. Anees Ahmed

Counsel for the Accused:

Ms. Edina Rešidović for Ljube Boškosi
Mr. Antonio Apostolski for Johan Tarčulovski

I. BACKGROUND

1. Trial Chamber II (“Trial 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 (“Tribunal”) is seised of the “Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction” filed by the Assigned *Pro Bono* Counsel for Boškoski (“Accused”) on 21 June 2006 (“Motion”), in which the Assigned *Pro Bono* Counsel seeks an order from the Trial Chamber whereby it would dismiss all charges against the Accused pursuant to Articles 19 and 21 of the Statute of the Tribunal (“Statute”) and Rules 72(A)(i) and 72(D)(i) and (iv) of the Rules of Procedure and Evidence of the Tribunal (“Rules”). The Prosecution responded in the “Prosecution’s Response to ‘Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction’” (“Response”) which was filed on 4 July 2006. On 11 July 2006 Assigned *Pro Bono* Counsel filed the “Assigned *Pro Bono* Counsel Motion Seeking Leave to Reply to ‘Prosecution’s Response to “Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction’” and Reply to ‘Prosecution’s Response to “Assigned *Pro Bono* Counsel Motion Challenging Jurisdiction’” (“Reply”). In the interests of justice leave to reply to the Response is granted, pursuant to Rule 126 *bis* of the Rules.

2. The original indictment brought against the Accused and Johan Tarčulovski was reviewed and confirmed on 9 March 2005 (“Original Indictment”).¹ On 22 August 2005, in response to a challenge to the form of the Original Indictment by the Accused,² the Trial Chamber issued a Decision (“First Decision”) ordering the Prosecution to amend the Original Indictment so as to provide clarification on certain points.³

3. On 5 September 2005 the Prosecution filed the “Prosecution Motion for Leave to Amend the Original Indictment with Attachments Annex A and B”, whereby the Prosecution sought leave to amend the Original Indictment.⁴ In this motion, the Prosecution proposed both changes in conformity with the First Decision and changes additional to that Decision.⁵ In a Decision of 1

¹ The Original Indictment is dated 22 December 2004.

² Defence Motion of Ljube Boškoski Challenging the Form of the Indictment, 25 May 2005. *See also* Prosecution’s Response to the Defence of Ljube Boškoski’s [Motion] Challenging the Form of the Indictment, 7 June 2005.

³ Decision on Ljube Boškoski’s Motion Challenging the Form of the Indictment, 22 August 2005.

⁴ Prosecution Motion for Leave to Amend the Original Indictment with Attachments Annex A and B, 5 September 2005. On 12 September 2005, the Prosecution filed a Corrigendum to Proposed Amended Indictment.

⁵ *See also* Defence’s Response to Prosecution’s Motion for Leave to Amend the Original Indictment with Attachments Annex A and B, filed by Accused Ljube Boškoski on 29 September 2005, and Defence Response on Behalf of Johan Tarčulovski to the Prosecution’s Motion for Leave to Amend the Original Indictment with Challenges to the Form of the Proposed Amended Indictment, filed on 29 September 2005. The Prosecution subsequently filed the Prosecution’s Reply to the ‘Defence Response for Leave to Amend the Original Indictment’ filed by Accused Ljube Boškoski, and the Prosecution’s Reply to the ‘Defence Response on Behalf of Johan Tarčulovski to the Prosecution’s Motion for

November 2005 (“Second Decision”)⁶ the Trial Chamber granted the request to make the amendments that were in line with its previous decision and certain other proposed amendments. An amended indictment (“Amended Indictment”) was filed on 2 November 2005.⁷

4. Following a Rule 65 *ter* meeting held on 23 March 2006,⁸ the Prosecution filed on 4 April 2006 a confidential “Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment” (“Prosecution’s Motion of 4 April 2006”), in which the Prosecution requested leave to amend the Amended Indictment of 2 November 2005 and requested the Trial Chamber to replace it with an indictment dated 4 April 2006 (“Second Amended Indictment”).

5. On 10 April 2006, Tarčulovski’s Defence filed confidentially its Response to the Prosecution’s Motion of 4 April 2006, in which it was stated that “[t]he Defence takes no position with respect to the Prosecution request to amend the Indictment.”⁹ On 11 April 2006, the Accused filed the “Defence’s Response to Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment”.

6. Following leave granted at a Status Conference held on 11 April 2006,¹⁰ the Prosecution filed its “Reply to the ‘Defence Response to Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment’ Filed by Accused Boškoski on 10 April 2006” on 13 April 2006.

7. In the “Decision on Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment and Submission of Amended Pre-Trial Brief” of 26 May 2006 (“Decision of 26 May 2006”), the Trial Chamber granted the Prosecution’s Motion of 4 April 2006 and ordered that the Amended Indictment of 2 November 2005 be replaced by the Second Amended Indictment dated 4 April 2006.

8. The Motion contains three arguments: (1) that there is no legal basis for responsibility under Article 7(3) of the Statute for acts committed by third parties which subordinates are alleged to have aided and abetted, as pleaded in the amended paragraph 11 of the Second Amended Indictment;¹¹

Leave to Amend the Original Indictment with Challenges to the Form of the Proposed Amended Indictment’, on 6 October 2005.

⁶ 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.

⁷ Prosecution’s Notice of Compliance with the Trial Chamber’s “Decision on Prosecution’s Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Amended Indictment” with Annex A, 2 November 2005, and Amended Indictment, 2 November 2005.

⁸ T. 161–196, 23 March 2006 (closed session).

⁹ Confidential Defence Response to Confidential “Prosecution’s Motion to Amend the Indictment and Submission of Second Amended Indictment” (Tarčulovski), 10 April 2006, para. 2.

¹⁰ T. 145–158, 148, 11 April 2006.

¹¹ Motion, paras 5–23.

(2) that the necessary *mens rea* with regard to armed conflict has not been pleaded;¹² and (3) that the change in the Prosecution case amounts to an abuse of process.¹³ The Response, in addition to rejecting the substance of the three arguments presented in the Motion,¹⁴ submits that the Motion is beyond the scope of Rule 50(C) of the Rules,¹⁵ barred under Rule 72(A) of the Rules,¹⁶ barred by *res judicata*,¹⁷ and is itself a misuse of the process of the Tribunal.¹⁸ In the Reply the Defence contends that the Motion is within the scope of Rule 50(C),¹⁹ that Rule 72 is applicable²⁰ and that the Motion raises matters that have not previously been decided.²¹

9. It should also be recalled that the jurisdiction of the Tribunal has previously been challenged in these proceedings.²² Each of these challenges was dismissed by the Trial Chamber.²³

II. DISCUSSION

1. The authority for filing the Motion

10. The Motion purports to have been filed pursuant to Articles 19 and 21 of the Statute and Rules 72(A)(i) and 72(D)(i) and (iv) of the Rules.²⁴ In the Response the Prosecution contends that the Motion is beyond the scope of Rule 50(C)²⁵ of the Rules, and that the Motion is barred under Rule 72(A) of the Rules.²⁶ Paragraphs 7 to 16 of the Reply imply that the Motion was filed pursuant to Rule 50(C) in conjunction with Rules 72(A)(i) and 72(D)(i) and (iv), although the Motion itself does not in fact mention Rule 50(C).

11. Rule 72(A) requires that preliminary motions which challenge jurisdiction 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)”. As the material and statements referred to in Rule 66(A)(i) were

¹² *Ibid.*, paras 24–27.

¹³ *Ibid.*, paras 28–33.

¹⁴ Response, paras 22–34.

¹⁵ *Ibid.*, para. 3.

¹⁶ *Ibid.*, paras 4–5.

¹⁷ *Ibid.*, paras 6–18.

¹⁸ *Ibid.*, paras 19–21.

¹⁹ Reply, paras 7–13.

²⁰ *Ibid.*, paras 14–16.

²¹ *Ibid.*, paras 17–25.

²² See Preliminary Motion of Johan Tarčulovski, 31 March 2005; Defence Motion of Ljube Boškosi Challenging the Jurisdiction of the Tribunal, 23 May 2005; Motion filed by the Defence of Johan Tarčulovski Challenging the Territorial, Temporal & Subject Matter Jurisdiction of the Tribunal, 27 May 2005.

²³ See Decision on Johan Tarčulovski’s Motion Challenging Jurisdiction, 1 June 2005; Decision on Johan Tarčulovski’s Second Motion Challenging Jurisdiction, 1 June 2005; Decision on Ljube Boškosi’s Motion Challenging Jurisdiction, 14 June 2005.

²⁴ Preamble of the Motion.

²⁵ Response, para. 3.

²⁶ *Ibid.*, paras 4–5.

disclosed to the Defence on 2 May 2005,²⁷ the Motion, which was filed on 21 June 2006, has plainly not been filed within the deadline set out in Rule 72 (A).

12. However, since the Motion concerns an amended indictment, Rule 50 should be considered. Rule 50(C) provides that the accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of new charges.²⁸ This applies where an amendment of the indictment includes new charges. In a Decision in *Prosecutor v. Sefer Halilović*, the Trial Chamber analysed the notion of a “new charge” in the context of Rule 50 and stated that in its opinion the key question is “whether the amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment”.²⁹

13. In its Decision of 26 May 2006, the Trial Chamber already found that the amendment of paragraph 11 of the Second Amended Indictment does not introduce a new basis for conviction but only clarifies the nature and scope of the Accused’s alleged responsibility.³⁰ The Trial Chamber in fact recalls that the effect of the amendment of paragraph 11 is to clarify paragraphs 29, 39 and 40 in the specification of Count 3 so as to exclude the possibility that Boškoski had a superior-subordinate relationship to civilians, prison guards and hospital personnel and for that reason had individual criminal responsibility under Article 7(3) of the Statute for their acts. The Trial Chamber is of the view that the alleged responsibility of the Accused as described in paragraph 11 of the Second Amended Indictment has a more limited reading than the previous text. The Trial Chamber therefore reiterates that the Second Amended Indictment does not introduce a new charge for the purposes of Rule 50(C) of the Rules.

14. Since the amendment of the Indictment does not include a new charge, a preliminary motion challenging jurisdiction cannot be made at this stage under Rule 50(C). However, the Trial Chamber granted the Accused fourteen days from the date of filing of the translation of the Decision of 26 May 2006 to file their challenges to the Second Amended Indictment.³¹ Pursuant to Rule 54 a Trial Chamber may *proprio motu* issue such orders as may be necessary for the

²⁷ Prosecution’s Notice of Compliance with Disclosure Obligations Pursuant to Rule 66 (A) (i) with Confidential Attachment 1, 3 May 2005.

²⁸ Rule 50(C) of the Rules.

²⁹ *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, 17 December 2004 (“*Halilović* Decision”), para. 30. This Trial Chamber endorsed this formulation in a recent Decision in the *Popović et al.* case. See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, paras 26–34.

³⁰ For this reason, the Trial Chamber held that there was no need to provide evidence in support of the amendment in addition to the evidence that it had already provided or to plead further material facts. See Decision of 26 May 2006, para. 48.

³¹ Decision of 26 May 2006, Section VI. Disposition.

preparation or conduct of the trial. It is important at this stage of the proceedings to ensure that “the real issues in the case [are] determined” and to have an indictment that is “as clear and precise [...] as possible”.³² The Accused received the translation of the Decision of 26 May 2006 on 7 June 2006.³³ Thus, the Motion was filed timely on 21 June 2006.

2. The nature and scope of the Accused’s alleged criminal responsibility

15. The first argument in the Motion is that there is no basis, either under the Statute or in customary international law, for holding the Accused responsible under Article 7(3) of the Statute for crimes committed by third parties whom the Accused’s subordinates are alleged to have aided and abetted. In this regard, the Defence contends that the Statute does not provide for individual criminal responsibility pursuant to Article 7(3) where subordinates have allegedly taken part in an underlying crime in a capacity other than that of commission.³⁴

16. Essentially the same argument was given in paragraphs 5 to 9 of the Defence’s “Response to the Prosecution’s Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment”, filed on 11 April 2006. In that submission the Defence contended that the amendment of paragraph 11, which is being challenged in the Motion, fell outside the scope of Article 7(3), on the ground that Article 7(3) does not impose liability for the omissions of alleged subordinates. In the Decision of 26 May 2006, the Trial Chamber considered whether, pursuant to Article 7(3) of the Statute, a superior can be held responsible for the omission of a subordinate and whether a superior can be held responsible where a subordinate has aided and abetted the commission of a crime under the Statute.³⁵ The Trial Chamber found that “acts” and “commits” in Article 7(3) of the Statute are meant broadly and permit the imposition of superior responsibility where subordinates have perpetrated a crime, whether by act or omission, through the modes of liability provided for under the Statute.³⁶ The Trial Chamber therefore dismissed the argument of the Defence.³⁷ The Trial Chamber has therefore already rejected the Motion’s first argument in the present proceedings in

³² See for example, *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 51; *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-PT, Decision on Further Amendments and Challenges to the Indictment, 13 July 2006, para. 37.

³³ Motion, para. 2.

³⁴ *Ibid.*, para. 7.

³⁵ Decision of 26 May 2006, para. 18.

³⁶ It reached this conclusion on the basis of an analysis of the use of the words “acts” and “commits” throughout the Statute; the object and purpose of Article 7(3); the relevant jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda; and the use of the word “commit” in Article 25 of the Statute of the International Criminal Court. See Decision of 26 May 2006, paras 23-45.

³⁷ *Ibid.*, para. 46.

relation to the same amendment of the Indictment. The position taken by the Trial Chamber on this point has been reconfirmed and clarified by the Trial Chamber in the *Orić* Judgement.³⁸

3. Lack of jurisdiction and *mens rea* in relation to armed conflict

17. The second argument given in the Motion is that the charges in the Second Amended Indictment do not satisfy the jurisdictional requirements of Article 3 of the Statute because the Indictment does not plead that the Accused had the necessary *mens rea* in relation to the armed conflict.³⁹ In the Response the Prosecution contends that the argument of the Defence was already rejected in the First Decision,⁴⁰ and that the *mens rea* in relation to the armed conflict is adequately pleaded.⁴¹

18. The Defence cites the *Naletilić and Martinović* Appeal Judgement⁴² in support of its position.⁴³ In paragraph 118 of this Judgement the Appeals Chamber drew attention to the need for a nexus between the act of the accused and the international armed conflict in the case of crimes under Article 2 of the Statute, and stated that it is illogical to say that there is such a nexus unless it is proved that the accused was aware of the factual circumstances concerning the nature of the hostilities. Following a review of relevant jurisprudence and the position adopted by the Preparatory Commission of the International Criminal Court,⁴⁴ the Appeals Chamber concluded that:

[...] the principle of individual guilt requires that the accused's awareness of factual circumstances establishing the armed conflict's international character must be proven by the Prosecution.⁴⁵

In the instant case the Accused is charged under Article 3 of the Statute, which is applicable to acts committed in armed conflict which may be either internal or international.⁴⁶ Therefore the application of the principle from the *Naletilić and Martinović* Appeal Judgement to the instant case would require proof of the Accused's awareness of factual circumstances establishing the armed conflict.

³⁸ *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, paras 296–306.

³⁹ Motion, paras 24–27.

⁴⁰ Response, paras 14–18.

⁴¹ *Ibid.*, paras 28–31.

⁴² *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006 (“*Naletilić and Martinović* Appeal Judgement”), paras 119–121.

⁴³ Motion, paras 24 and 25.

⁴⁴ *Naletilić and Martinović* Appeal Judgement, paras 118–120.

⁴⁵ *Ibid.*, para. 121.

⁴⁶ *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 137.

19. The existence and international character of an armed conflict are jurisdictional prerequisites and substantive elements of crimes pursuant to Article 2 of the Statute.⁴⁷ However, there is no basis under the jurisprudence of the Tribunal for asserting that the *mens rea* in relation to the existence and international character of an armed conflict is also a jurisdictional prerequisite for such crimes. Therefore there is no basis for the claim of the Defence in the second argument of the Motion that the failure to plead in the Indictment the *mens rea* in relation to the armed conflict gives rise to a lack of jurisdiction. Consideration has been given to the question whether the failure to plead the *mens rea* in relation to the armed conflict constitutes a defect in the form of the Indictment, although this is not argued by the Defence. In light of the purpose of indictments under Articles 18(4) and 21(4)(a) and (b) of the Statute, as well as the jurisprudence⁴⁸ and practice⁴⁹ of the Tribunal, the Trial Chamber is of the view that this failure to plead the *mens rea* element does not constitute a defect in the Second Amended Indictment.

4. Abuse of process

20. Finally the Defence argues that the change in the Prosecution case constitutes an abuse of process.⁵⁰ The Defence asserts that the Original Indictment was confirmed on the basis that the Accused could be held responsible for crimes committed by individuals who were not his subordinates,⁵¹ but that the amendment introduced by the Prosecution significantly changes the Prosecution case by alleging that the actual perpetrators are not subordinates but third parties and that a superior may be held responsible for his subordinates aiding and abetting the crimes committed by third parties.⁵²

21. The serious charge of abuse of process cannot be sustained firstly because in the Decision of 26 May 2006 the Trial Chamber found that, because the amendment of paragraph 11 of the Second Amended Indictment clarifies the scope of the Accused's alleged responsibility, it assists the Defence in the preparation of their defence and, as such, enhances the fairness of the trial. As explained above, the Amended Indictment of 2 November 2005 was unclear as to whether the

⁴⁷ *Naletilić and Martinović* Appeal Judgement, para. 116.

⁴⁸ *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić* Appeal Judgement”), para. 88; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-PT, Decision on Defence Application for Bill of Particulars, 2 March 1999, para. 8; *Prosecutor v. Meakić, Grubac, Fuštar, Banović and Knežević*, Case No. IT-02-65-PT, Decision on Predrag Banović's Preliminary Motion on the Form of the Indictment, 4 April 2003, page 2.

⁴⁹ Even though the jurisprudence of the Tribunal clearly requires that the accused of a crime against humanity pursuant to Article 5 of the Statute should know that his act or acts are part of a widespread or systematic attack against a civilian population, this is not routinely pleaded in indictments: *Prosecutor v. Mrkšić, Radić and Šljivčanin*, Case No. IT-95-13/1-PT, Third Consolidated Amended Indictment, 15 November 2004, para. 23; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Revised Second Amended Indictment, 15 May 2006, para. 18; *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić*, Case No. IT-05-87-PT (Redacted) Third Amended Joinder Indictment, 21 June 2006, paras 25–31.

⁵⁰ Motion, paras 28–33.

⁵¹ *Ibid.*, para. 29.

Accused could be held responsible for crimes committed by individuals who were not his subordinates and this lack of clarity was removed in the Second Amended Indictment of 4 April 2006. Such clarification is not an abuse of process. Moreover the Original Indictment of 24 December 2004, which was confirmed on 9 March 2005, does not imply that the Accused could be held responsible for crimes committed by individuals who were not his subordinates. In particular, paragraphs 11 to 17 of the Original Indictment, which concern Article 7(3) of the Statute, in no way imply that the Accused had responsibility for crimes committed by anyone other than his subordinates.

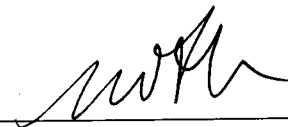
III. DISPOSITION

FOR THE FOREGOING REASONS the Trial Chamber;

DENIES the Motion.

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

Dated this eighth day of September 2006,
At The Hague,
The Netherlands.



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]

⁵² Motion, para. 30.