



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-PT
Date: 27 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 of: 27 September 2006

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

**DECISION ON MOTION CHALLENGING THE FORM OF
THE SECOND AMENDED INDICTMENT AND ON MOTION
FOR LEAVE TO REPLY**

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 “Assigned *Pro Bono* Counsel Motion Challenging the Form of the Second Amended Indictment”, filed on 21 June 2006 (“Motion”) on behalf of Ljube Boškosi (“Accused”).

2. The Prosecution filed a response to the Motion on 4 July 2006 (“Response”).¹ On 11 July 2006, a motion seeking leave to reply, which also included the reply itself was filed on behalf of the Accused (“Motion to Reply”).²

3. In the Response, the Prosecution raises objections relating to the Accused’s self-representation and representation by Counsel.³ The Motion to Reply addresses these issues.⁴ Since Ms. Edina Rešidović is formally representing the Accused as of 20 July 2006,⁵ and thereby can no longer characterize her role as *Pro Bono* Counsel, the Trial Chamber considers that the objections relating to representation raised in the Response no longer require its attention. Thus, the Trial Chamber denies the Motion to Reply.

4. The original indictment brought against the Accused and Johan Tarčulovski was reviewed and confirmed on 9 March 2005 (“Original Indictment”).⁶ On 22 August 2005, in response to a challenge to the form of the Original Indictment by the Accused,⁷ the Trial Chamber issued a Decision (“First Decision”) ordering the Prosecution to amend the Original Indictment so as to provide clarification on certain points.⁸

5. 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.⁹ In this motion, the Prosecution proposed both changes in

¹ Prosecution’s Response to “Assigned *Pro Bono* Counsel Motion Challenging the Form of the Second Amended Indictment” with Annex A, 4 July 2006.

² Assigned *Pro Bono* Counsel Motion Seeking Leave to Reply to “Prosecution’s Response to ‘Assigned *Pro Bono* Counsel Motion Challenging the Form of the Second Amended Indictment’” and Reply to “Prosecution’s Response to ‘Assigned *Pro Bono* Counsel Motion Challenging the Form of the Second Amended Indictment’”.

³ Response, paras 10-12.

⁴ Motion to Reply, para.13.

⁵ See Decision of the Deputy Registrar, filed on 20 July 2006.

⁶ The Original Indictment is dated 22 December 2004.

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

⁸ Decision on Ljube Boškosi’s Motion Challenging the Form of the Indictment, 22 August 2005.

⁹ 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.

conformity with the First Decision and changes additional to that Decision.¹⁰ Due to the necessity to expedite the proceedings at that stage, the Trial Chamber dealt with the amendments as well as the challenges to the Proposed Amended Indictment in its Decision of 1 November 2005 (“Second Decision”),¹¹ in which the Trial Chamber granted several amendments and found that the Proposed Amended Indictment was vague in relation to who the Accused was alleged to have had effective control over and requested the Prosecution to cure this ambiguity in its Pre-Trial Brief. An amended indictment (“Amended Indictment”) was filed on 2 November 2005.¹²

6. On 23 March 2006, a Rule 65ter Conference was held, in which further clarification of the Amended Indictment was discussed including the nature and scope of the Accused’s criminal responsibility.¹³ Following this meeting, 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”).

7. 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.”¹⁴ 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.”

8. Following leave granted at a Status Conference held on 11 April 2006,¹⁵ 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.

¹⁰ 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 Leave to Amend the Original Indictment with Challenges to the Form of the Proposed Amended Indictment’, on 6 October 2005.

¹¹ 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.

¹² 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.

¹³ T. 161– 196 (closed session).

¹⁴ Confidential Defence Response to Confidential “Prosecution’s Motion to Amend the Indictment and Submission of Second Amended Indictment” (Tarčulovski), 10 April 2006, para. 2.

¹⁵ T. 145 – 158, 148, 11 April 2006.

9. 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 2006.¹⁶

10. The Trial Chamber granted the Accused fourteen days from the date of the filing of the translation of the Decision of 26 May 2006 to file their challenges to the Second Amended Indictment.¹⁷ A translation of the Decision of 26 May 2006 was filed on 7 June 2006. Thus, the Motion was filed timely on 21 June 2006.

II. SUBMISSIONS

11. Accused Boškoski submits that the aim of the Motion is to “(1) request that deficiencies in the wording of amended paragraph 11 [...] and other corresponding paragraphs of the Second Amended Indictment, namely paragraphs 34, 39 and 40, be remedied; and (2) request the Trial Chamber to order the Prosecution to respond to the Accused’s questions raised in the Annex”.¹⁸

12. In the Motion, Accused Boškoski argues that paragraph 11 of the Second Amended Indictment does not contain the necessary material facts. In particular, the Accused submits that “the Prosecution failed to plead material facts relating to: (1) particular acts or omissions of policemen, allegedly subordinated to the Accused; (2) which of the alleged crimes constitute ‘commission’ and which constitute ‘omission’ of the alleged subordinates; (3) information on persons who allegedly committed or omitted certain [sic] the alleged crimes and information on particular forces allegedly involved in each incident; (4) particular facts on units the alleged subordinates were members of; (5) relation between the alleged subordinates and perpetrators of the alleged acts[;] (6) the legal basis for the alleged subordinates’ activities; [7] relation between the Accused and persons allegedly aiding and abetting; [8] material facts on the state of mind of the alleged subordinates regarding the criminal activities of civilians and others whom the Prosecution says committed the crimes; [9] particular material facts on the state of mind of the Accused, i.e. the

¹⁶ In the Decision of 26 May 2006 the Trial Chamber also ordered that the Pre-Trial Brief dated 7 November 2005 be replaced by the Amended Pre-Trial Brief, dated 4 April 2006. See Confidential “Prosecution’s Submission of Amended Pre-Trial Brief”, and Confidential “Prosecution’s Corrigendum of Amended Pre-Trial Brief”, filed on 13 April 2006.

¹⁷ Decision of 26 May 2006, Section VI. Disposition. Trial Chambers have recognised the importance at this stage of the proceedings of ensuring that “the real issues in the case [are] determined” and to have an indictment that is “as clear and precise [...] as possible”. See for example, *Prosecutor v. Brđanin 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.

¹⁸ Motion, para. 12.

facts pointing [to] whether the Accused knew or had reason to know that the alleged subordinates aided and abetted to civilians and other persons; [10] particular facts on acts which the Accused allegedly failed to take in order to investigate the acts allegedly ‘committed’ by omission of the alleged subordinates”.¹⁹

13. The Prosecution submits that the amendment to paragraph 11 actually reduces the Accused’s liability rather than increases it,²⁰ and argues that the Motion should be dismissed.²¹

III. DISCUSSION

14. The present Motion is filed in response to the amendments accepted in the Decision of 26 May 2006, which are included in the Second Amended Indictment. Both Accused have previously had the opportunity to challenge earlier versions of the Indictment. It is well established in the jurisprudence of the Tribunal that the right of the Accused to file a motion alleging defects in the form of an amended indictment should be directed to the material added by way of amendments, and not to material present in the original indictment which was not objected to at an earlier stage.²² Furthermore, the Trial Chamber will not revisit issues which it has already decided on.

15. The only substantive amendments in paragraph 11 of the Second Amended Indictment are contained in the second sentence which reads:

LJUBE BOŠKOSKI is charged with superior responsibility for the crimes of regular and reserve police, including special police units, both for the commission of crimes by those police, as well as for the acts or omissions of those police, which aided and abetted prison guards, hospital personnel and civilians to commit those crimes as described in the Second Amended Indictment counts.

The second sentence of paragraph 11 of the Amended Indictment reads:

LJUBE BOŠKOSKI is charged with superior responsibility for the acts of regular and reserve police, including special police units, as well as acts committed by prison guards, hospital personnel and civilians as described in the Amended Indictment counts.

16. The Trial Chamber has previously discussed the scope of the Accused’s superior responsibility and found in its Second Decision that the wording of paragraph 11 of the Amended Indictment was unclear stemming from the fact that the Accused’s criminal responsibility was

¹⁹ Motion, para. 18.

²⁰ Response, para. 13.

²¹ Response, paras 15-16.

²² *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Form of Modified Consolidated Amended Indictment, 20 July 2004, para. 25; and Decision on Form of Second Modified Consolidated Amended Indictment, 29 October 2004, para. 5, both referring to *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, para. 15. See also *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Defence Request to File Preliminary Motion on Revised Second Amended Indictment, 9 June 2006, p. 1.

linked to acts committed by prison guards, hospital personnel, and civilians, which was inconsistent with the allegations according to which the Accused only had superior authority over the police units. This meant that the scope of the Accused's alleged responsibility under Article 7(3) of the Statute could be interpreted in two ways: i) it could be interpreted to mean that the Accused was "alleged to be responsible for failing to investigate and punish the police force, for the crimes they directly committed or for, by way of allowing or encouraging, participating in the crimes committed by the civilians, prison guards and hospital personnel"; or ii) "that Boškoski directly had a superior – subordinate relationship to the civilians, prison guards and hospital personnel and failed to investigate [the] crimes which they allegedly committed."²³ Since it is legally impossible to be held responsible under Article 7(3) of the Statute for acts of persons which one is not charged to have superior authority over and since the Trial Chamber considered that it was two quite different cases to prepare; one in which the Accused was alleged to have had effective control over the police force and was allegedly responsible for the crimes the police force committed and the other, in which the Accused was alleged to have had effective control not only over the police force but also over civilians, prison guards and hospital personnel, the Trial Chamber requested a clarification by the Prosecution. Due to the time constraints in November 2005, further amendments of the Indictment were not possible and the Trial Chamber ordered the Prosecution to submit its clarifications in the Pre-Trial Brief and held that should time allow at a later stage the Prosecution would be ordered to file an adjusted Indictment.²⁴

17. In its Pre-Trial Brief of 7 November 2005, the Prosecution clarified that the Accused was not the superior of the prison guards, hospital personnel and civilians within the meaning of Article 7(3) of the Statute and that his alleged responsibility arose "as a result of his failure to punish the regular, reserve or special police for their acts or omissions which aided and abetted those prison guards, hospital personnel and other civilians to commit those acts" and that it was not its position that the Accused had "superior responsibility, within the scope of Article 7(3), to punish those prison guards, hospital personnel or civilians for their mistreatment of detainees."²⁵

18. Due to changes in the trial scheduling, there was time for the Prosecution to properly amend the Indictment. An amendment of the wording of paragraph 11 of the Amended Indictment was discussed in the Status Conference of 12 December 2005²⁶ and continued at the Rule 65ter Conference on 23 March 2006.²⁷ The Prosecution subsequently requested an amendment to the Amended Indictment, which clarified that the Accused is only charged with responsibility under

²³ Second Decision, para. 40.

²⁴ Second Decision, para. 41.

²⁵ Pre-Trial Brief, 7 November 2005, para. 83.

²⁶ T. 117-144, in particular 117-125.

Article 7(3) of the Statute for the crimes of members of the police force.²⁸ The Trial Chamber accepted the Amendment in its Decision of 26 May 2006.

19. The Trial Chamber agrees with the Prosecution 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 will not revisit an issue it has previously decided on and since the scope of the Accused's responsibility is now more limited it is difficult for the Trial Chamber to see how the amendment could give rise to challenges to the form of the Indictment. It will however consider the arguments raised in the Motion.

20. With regard to the Accused's claims that in the Second Amended Indictment the Prosecution has not pleaded the material facts relating to "(1) particular acts or omissions of policemen, allegedly subordinated to the Accused; (2) which of the alleged crimes constitute 'commission' and which constitute 'omission' of the alleged subordinates", the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard. The Trial Chamber further notes that, in light of the jurisprudence of the Tribunal,²⁹ the Second Amended Indictment, and in particular paragraph 11, read in conjunction with the description of the specific events in paragraphs 18 to 42, adequately pleads the conduct of the subordinates.

21. Concerning the submission that in the Second Amended Indictment the Prosecution has not pleaded the material facts relating to "(3) information on persons who allegedly committed or omitted certain [sic] the alleged crimes and information on particular forces allegedly involved in each incident" and "(4) particular facts on units the alleged subordinates were members of", the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard. The Trial Chamber further notes that this issue had already been decided on in its Second Decision, where the Trial Chamber held that the Indictment in relation to the units allegedly involved is clear and includes sufficient material facts³⁰ and that "the specificity in the identification of the perpetrators for whose acts Boškoski is allegedly responsible is sufficient".³¹

²⁷ T. 161-196, in particular 161-178 (closed session).

²⁸ Confidential Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment, 4 April 2006.

²⁹ See *inter alia*, *Blaškić* Appeal Judgement, where the Appeals Chamber held that in cases where superior responsibility is alleged, the Prosecution needs to plead the material facts related to, *inter alia*, the "conduct" of those persons for whom the accused is allegedly responsible. It further held that "[t]he facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue." *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 218 (footnotes omitted).

³⁰ Second Decision, para. 37.

³¹ Second Decision, para. 42.

22. The Accused claims that in the Second Amended Indictment the Prosecution has not pleaded the material facts relating to the “(5) relation between the alleged subordinates and perpetrators of the alleged acts”. The Trial Chamber notes that, according to paragraph 11 of the Second Amended Indictment, the Accused is charged with superior responsibility for the crimes committed by members of the police force, and “for the acts or omissions of those police, which *aided and abetted* prison guards, hospital personnel and civilians to commit those crimes [...] (emphasis added). The Trial Chamber considers that the conduct of the subordinates in relation to the prison guards, hospital personnel and civilians is further specified in the paragraphs of the Second Amended Indictment describing the specific events in Count 3.³² The Trial Chamber therefore notes that the Prosecution clearly indicates the form of participation of the subordinates in the commission of the alleged crimes and that, according to the jurisprudence of the Tribunal,³³ there is no need to plead any material fact with regard to any further “relation” between the subordinates and the perpetrators of the alleged crimes.

23. Regarding the Accused’s claim that in the Second Amended Indictment the Prosecution has not pleaded the material facts relating to “(6) the legal basis for the alleged subordinates’ activities”, the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard. The Trial Chamber further notes that the Second Amended Indictment clearly indicates that the subordinates’ “activities” are the commission of the crimes described in the Indictment or the acts or omissions which aided and abetted prison guards, hospital personnel and civilians to commit those crimes.

24. Concerning the submission that the Prosecution has not properly pleaded the “[7] relation between the Accused and persons allegedly aiding and abetting”, the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard and that it clearly alleges that the Accused is the superior, within the meaning of Article 7(3) of the Statute, of those members of the police who, with their acts or omissions, aided and abetted others to commit the crimes charged in the Indictment. The Indictment states that the Accused, in his capacity of Minister of Interior of FYROM, “exercised *de jure* and *de facto* command and control over the police forces that participated in the crimes alleged in this Indictment”,³⁴ and “had the authority to appoint, punish, discipline, suspend and dismiss police from duty for crimes they may have committed.”³⁵ The

³² See also Amended Pre-Trial Brief, 4 April 2006, in particular paras 38-46.

³³ See, *inter alia*, *Blaškić* Appeal Judgement, para. 218.

³⁴ Second Amended Indictment, para. 12.

³⁵ Second Amended Indictment, para. 13.

Indictment also alleges that the Minister of Interior was the highest authority in the Ministry of Interior and was officially responsible for public and state security.³⁶

25. Concerning the submission that in the Second Amended Indictment the Prosecution did not adequately plead the “[8] material facts on the state of mind of the alleged subordinates regarding the criminal activities of civilians and others whom the Prosecution says committed the crimes”, the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard. The Trial Chamber further notes that according to the jurisprudence of the Tribunal, in cases where individual responsibility as a superior is alleged, the Prosecution needs to plead the material facts related to, *inter alia*, the “conduct” of those persons for whom the accused is allegedly responsible.³⁷ Thus, while the Prosecution must plead, to the extent possible, the facts relevant to the subordinates’ acts or omissions, there is no such obligation in relation to the subordinates’ *mens rea*.

26. With regard to the Accused’s claim that the Prosecution has not properly pleaded “[9] particular material facts on the state of mind of the Accused, i.e. the facts pointing [to] whether the Accused knew or had reason to know that the alleged subordinates aided and abetted to civilians and other persons”, the Trial Chamber already held in its First Decision that “the jurisprudence of the Tribunal is clear that when the state of mind is pleaded as a material fact, the facts from which the state of mind is established are matters of evidence that need not be pleaded” and therefore found that the *mens rea* was adequately pleaded, and dismissed the argument.³⁸ The Trial Chamber will not revisit an issue it has already decided on.

27. Similarly with regard to the Accused’s claim that the Second Amended Indictment is insufficient with regard to the “[10] particular facts on acts which the Accused allegedly failed to take in order to investigate the acts allegedly ‘committed’ by omission of the alleged subordinates”, the Trial Chamber notes that the Second Amended Indictment has not been amended in this regard. The Trial Chamber further notes that it was satisfied with the material facts pleaded already in its First Decision, where it found that “[t]he Indictment further states that the duties of the Accused included an obligation to investigate the crimes set forth in the Indictment and to impose appropriate punitive measures, and that having knowledge of the perpetrators, he failed to do so.”³⁹ The Trial Chamber has already considered the matter and will not revisit it.

³⁶ Second Amended Indictment, para. 12.

³⁷ See *supra* footnote 33, referring to *Blaškić* Appeal Judgement, para. 218.

³⁸ First Decision, para. 23 (footnotes omitted).

³⁹ First Decision, para. 25 (footnotes omitted).

28. For the above-mentioned reasons the Trial Chamber rejects all the arguments raised in relation to paragraph 11 of the Second Amended Indictment.

29. The Motion also raises arguments relevant to paragraphs 34, 39 and 40 of the Second Amended Indictment. The Trial Chamber notes that these paragraphs have not been altered, and that the Second Amended Indictment has not been amended in this regard. The Trial Chamber dismisses these arguments and is further of the view that the amendments made to the Second Amended Indictment do not have an impact on these paragraphs in such a way that would warrant another possibility for the Defence to challenge it.

30. Regarding the request for an order to the Prosecution to respond to the Accused's questions raised in Annex A, the Trial Chamber notes that the Prosecution has already adequately responded and therefore considers that the matter does not require its intervention.

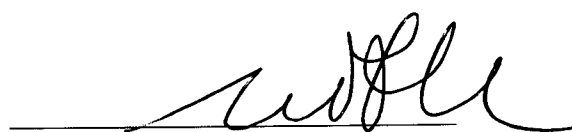
IV. DISPOSITION

DENIES the Motion to Reply;

DENIES the Motion and **FINDS** that the Second Amended Indictment is the operational one.

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

Dated this twenty-seventh day of September 2006,
At The Hague,
The Netherlands.



Carmel Agius

Presiding Judge

[Seal of the Tribunal]