IT-04-82-PT
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UNITED NATIONS

	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:	1 November 2005
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Hans Henrik Brydensholt
Judge Albin Eser, Pre-Trial Judge

Registrar: **Mr. Hans Holthuis**

Decision of: **1 November 2005**

PROSECUTOR

v.

Ljube BOŠKOSKI
Johan TARČULOVSKI

DECISION ON PROSECUTION MOTION FOR LEAVE TO AMEND THE ORIGINAL INDICTMENT AND DEFENCE MOTIONS CHALLENGING THE FORM OF THE PROPOSED AMENDED INDICTMENT

The Office of the Prosecutor:

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Counsel for the Accused:

Mr. Dragan Godžo for Ljube Boškoski
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 "Prosecution Motion for Leave to Amend the Original Indictment with Attachments Annex A and B" ("Motion"), filed by the Prosecution on 5 September 2005, whereby the Prosecution seeks, pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), leave to amend the indictment against the accused Ljube Boškoski ("Boškoski") and the accused Johan Tarčulovski ("Tarčulovski) (together "Accused"). The Motion was filed with an appended proposed Amended Indictment ("Proposed Amended Indictment").

2. The initial indictment against Boškoski and Tarčulovski was reviewed and confirmed by Judge Robinson on 9 March 2005 ("Original Indictment").[1] On 25 May 2005, Boškoski filed "Defence Motion of Ljube Boškoski Challenging the Form of the Indictment" ("Motion Challenging the Form of Indictment"), pursuant to Rule 72(A)(ii) of the Rules, alleging defects in the form of the Original Indictment. The Prosecution responded in "Prosecution's Response to the Defence of Ljube Boškoski's Motion Challenging the Form of the Indictment" filed on 7 June 2005. In its decision on 22 August 2005, the Trial Chamber ordered the Prosecution to amend the Original Indictment providing clarification on certain points, and dismissed the remainder of his allegations.[2]

3. The Prosecution's Motion on 5 September 2005 was filed in response to the above-mentioned Decision by the Trial Chamber. However, in the Motion, the Prosecution further seeks to introduce additional amendments not particularly requested by the Trial Chamber. As a consequence, the Prosecution's Proposed Amended Indictment attached to the Motion comprises two different types of modifications, namely, changes proposed in conformity with the Decision by the Trial Chamber and amendments newly suggested by the Prosecution.

4. In view of the necessity to expedite the proceedings, the Trial Chamber ordered that in their responses to the Prosecution's Motion, the Accused raise objections as to Prosecution's Motion for leave to amend the Original Indictment within the scope of Rule 50(A)(i)(c) of the Rules and challenges to the form of the Proposed Amended Indictment pursuant to Rule 72(A)(ii) of the Rules, should those modifications be granted.[3] On 29 September 2005, Boškoski accordingly filed "Defence's Response to Prosecution's Motion for Leave to Amend the Original Indictment with

[1] The Original Indictment is dated 22 December 2004.
[2] Decision on Ljube Boškoski's Motion Challenging the Form of the Indictment, 22 August 2005 ("Decision").
[3] Scheduling Order, 15 September 2005 ("Scheduling Order").

Attachments Annex A and B" ("Boškoski's Response"), and Tarčulovski filed "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" ("Tarčulovski's Response"). The Prosecution subsequently filed "Prosecution's Reply to the 'Defence Response for Leave to Amend the Original Indictment' Filed by Accused Ljube Boškoski" ("Reply to Boškoski") and "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'" ("Reply to Tarčulovski") on 6 October 2005.

5. In the present decision, the Trial Chamber addresses both the Prosecution's Motion for amendment of the Original Indictment (Part II) and the Accused's challenges to the form of the Proposed Amended Indictment (Part III).

6. In the relevant indictments (both the Original Indictment and the Proposed Amended Indictment), Boškoski and Tarčulovski are jointly charged for offences allegedly committed in the village of Ljuboten in the Former Yugoslav Republic of Macedonia ("FYROM") in August 2001. The indictments allege that Boškoski is individually criminally responsible pursuant to Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute")[4] in his capacity as Minister of Interior of the FYROM for crimes under Article 3 of the Statute, specifically Murder,[5] Wanton Destruction of Cities, Towns or Villages,[6] and Cruel Treatment.[7] As to Tarčulovski, the indictments allege that he is individually criminal responsible pursuant to Article 7(1) of the Statute for crimes under Article 3 of the Statute, specifically Murder,[8] Wanton Destruction of Cities, Towns or Villages,[9] and Cruel Treatment[10], which he allegedly committed, ordered, planned, instigated or aided and abetted.[11] The term "committed", in relation to Tarčulovski, includes participation in a joint criminal enterprise ("JCE") and does not include any physical commission of the alleged crimes.[12] The indictments further set out General Legal Allegations regarding an alleged state of armed conflict in the FYROM,[13] and Additional Facts regarding the history of the FYROM and the conflict therein.[14]

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[4] Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993 by Resolution 827.
[5] Original Indictment & Proposed Amended Indictment, Count 1, paras. 18-23.
[6] *Ibid.*, Count 2, paras. 24-25.
[7] *Ibid.*, Count 3, paras. 26-42.
[8] Original Indictment & Proposed Amended Indictment, Count 1, paras. 18-23.
[9] *Ibid.*, Count 2, paras. 24-25.
[10] *Ibid.*, Count 3, paras. 26-42.
[11] Original Indictment & Proposed Amended Indictment, *Ibid.*, para. 3.
[12] *Ibid.*, para. 3.
[13] *Ibid.*, paras. 43-44.
[14] *Ibid.*, paras. 45-70.

II. PROPOSED AMENDEMENTS TO THE ORIGINAL INDICTMENT

A. THE LAW

7. Rule 50 of the Rules governs the amendment of an indictment and provides, in relevant part, as follows:

> (A) (i) The Prosecutor may amend an indictment:
>
> ...
>
> (c) after the assignment of a 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.

As prescribed in Rule 50(A)(ii) of the Rules, leave to amend is not granted if the material provided by the Prosecution does not meet the *prima facie* standard, as set forth in Article 19(1) of the Statute, to support proposed amendments.[15] Whereas, apart from this *prima facie* standard, Rule 50 of the Rules does not provide specific guidelines to a Trial Chamber for determining whether or not to allow the amendment of an indictment when leave to amend is sought,[16] the basic principle that has guided the Trial Chamber in its exercise of judicial discretion in relation to a motion to amend an indictment is whether the amendments result in unfair prejudice to the accused.[17] Where an amendment to an indictment is sought to ensure that the real issues in the case will be determined, a Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment will not prejudice the accused unfairly.[18] While regard must be given to the circumstances of the case as a whole,[19] two factors, in particular, are considered: (1) whether the

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[15] *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005 ("*Beara* Decision"), p. 2.

[16] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment, 2 June 2005 (dated 27 May 2005) ("*Šešelj* Decision on Amendment of Indictment"), para. 5; *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; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on Motion for Leave to Amend the Indictment, 2 August 2002 ("*Ljubičić* Decision"), p. 3.

[17] *Beara* Decision, p. 2; *Halilović* Decision, para. 22; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Decision on the Consolidated Indictment, 21 November 2002 ("*Mejakić et al.* Decision"), p. 3; *Ljubičić* Decision, p. 3; *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 ("Second *Brđanin* and *Talić* Decision"), para. 50; *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, ("*Naletilić* and *Martinović* Decision") 14 February 2001, pp. 4-7.

[18] *Šešelj* Decision on Amendment of Indictment, para. 5; Second *Brđanin* and *Talić* Decision, para. 50; *Naletilić* and *Martinović* Decision, p. 7.

[19] *Beara* Decision, p. 2; *Halilović* Decision, para. 22; *Mejakić et al.* Decision, p.3; *Naletilić* and *Martinović* Decision, p. 5.

Accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendment will result in undue delay.[20]

B. CONSIDERATION

1. Amendment Relating to the Duration of the Armed Conflict

(a) Arguments of Parties

8. In Boškoski's Response, Boškoski asserts that the Prosecution is obliged to provide evidence from which it can be inferred that armed conflict existed in FYROM during the modified period, "from January until at least late September 2001",[21] as the Prosecution previously asserted in the Original Indictment that a state of armed conflict had existed in FYROM "[a]t all times relevant to [the] indictment".[22]

9. The Prosecution responds that the alteration referred to by Boškoski is not a substantive change made by the Prosecution in the Original Indictment,[23] and that it is the result of the Prosecution's attempt to "clarif[y] the duration of the time that the armed conflict continued", by "harmonis[ing] the two unclear pleadings" which Judge Agius once pointed out, namely, one pleading that a state of armed conflict existed at all times relevant to the indictment and the other pleading that the conflict formally ended on 13 August 2001 with the signing of the Ohrid peace agreement.[24]

(b) Discussion

10. Whereas the Prosecution's allegation in the Original Indictment was that the armed conflict had existed throughout the time relevant to the indictment,[25] it also asserted that the conflict had begun in January 2001 and continued "until August 2001".[26] In addition, there was an allegation in the Original Indictment that the conflict had formally ended on 13 August 2001 with the signing of the Ohrid peace agreement.[27] In the Proposed Amended Indictment, the Prosecution now alleges that the armed conflict began in January 2001 and continued "until at least September 2001",[28]

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[20] *Šešelj* Decision on Amendment of Indictment, para. 5; *Beara* Decision, p. 2; *Halilović* Decision, para. 23.
[21] Boškoski's Response, paras. 25-26.
[22] Original Indictment, paras. 43.
[23] Reply to Boškoski, para. 22.
[24] Reply to Boškoski, para. 23.
[25] Original Indictment, para. 43.
[26] Original Indictment, para. 52.
[27] Original Indictment, para. 52.
[28] Proposed Amended Indictment, paras. 43 and 52.
The relevant part of paragraph 43 now reads: "A state of armed conflict existed in FYROM from January 2001 until at least late September 2001".

instead of its previous assertion that it continued "until August 2001". The Trial Chamber is of the view that even if the Prosecution did not mean from the outset that the armed conflict had ended exactly at the conclusion of the Ohrid peace agreement on 13 August 2001 as once doubted by Judge Agius,[29] the modified period "from January until at least late September 2001" differs from its previous contention on the period of the armed conflict, adding at least the month of September to it. This results in an expansion of the duration of the armed conflict rather than a mere clarification of the duration, and requires supporting material that satisfies the *prima facie* standard as provided in Rule 50(A)(ii) of the Rules.

11. Following the order by the Pre-Trial Judge to direct the Trial Chamber to the supporting material already filed or to file new supporting material if the already submitted files do not contain such material,[30] the Prosecution filed a notice[31] consisting of a news summary of 13 August 2001 (Annex A) and a table of numerous excerpts of daily news summaries for the period of 13 August 2001 to 28 December 2001 (Annex B), produced by the Allied Press Information Centre of the Allied Forces in Southern Europe (NATO) in Skopje. Considering that Annex B does not contain the evidence itself but mere summaries of the evidence, the Pre-Trial Judge further issued an order instructing the Prosecution to submit copies of the evidence.[32] Following this order, the Prosecution filed on 25 October 2005, a Second Notice with the actual material attached.[33]

12. Having considered the material submitted by the Prosecution in the Second Notice, the Trial Chamber finds that it establishes a *prima facie* case of the relevant amendments. The extension of the period of the armed conflict until late September 2001 would not cause an undue burden on the defence, particularly since the Proposed Amended Indictment concerns offences allegedly committed in the events that took place in August 2001. Admitting these amendments will neither deny the Accused an adequate opportunity to prepare his defence nor cause undue delay. In addition, the Trial Chamber finds no indication that the Prosecution has sought an improper tactical advantage. The Trial Chamber holds that the amendments do not prejudice the Accused unfairly and are therefore granted.[34]

The relevant part of paragraph 52 now reads: "The armed conflict began in January 2001 and continued until at least late September 2001. ... On 13 August 2001 the Ohrid peace agreement was signed between the two parties".

[29] *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, IT-04-82-PT, Transcript, 21 March 2005, p. 6.

[30] Order Concerning Supporting Material, 14 October 2005.

[31] Prosecution's Notice of Compliance with the Trial Chamber's Order Concerning Supporting Material Dated 14 October 2005 with Annex A & B, 18 October 2005 ("Notice").

[32] Second Order Concerning Supporting Material, 20 October 2005.

[33] Prosecution Second Notice of Compliance with the Trial Chamber's Second Order Concerning Supporting Material Dated 20 October 2005 with Annex A, 25 October 2005.

[34] Proposed Amended Indictment, paras. 43 and 52.

13. The Trial Chamber, however, disagrees with the Prosecution's view that [p]roviding copies of all of the relevant daily news summaries would entail an enormous burden on the Conference and Language Support Services Section of the Registry of the Tribunal to translate the material into the language understood by the Accused prior to the commencement of the trial.[35] The supporting material submitted, which the Prosecution intends to rely on, should be translated into the language of the Accused, and the translation should be provided to the Accused by 15 November 2005.

2. Amendment Relating to *Mens Rea* of Superior Responsibility

(a) Arguments of Parties

14. Boškoski also submits that the amended formulation of the *mens rea* requirement of the superior responsibility doctrine in paragraph 11 of the Proposed Amended Indictment is not proper,[36] while he does not provide any ground for this assertion. The Prosecution does not respond to this assertion; neither does it particularly argue in its Motion why it ought to be changed in the proposed way. The Prosecution merely states, in generally referring to all of the newly suggested amendments, that "the purpose of the further amendments is to render the indictment against both Accused more legally and factually accurate and precise".[37]

(b) Discussion

15. The relevant part in paragraph 6 of the Proposed Amended Indictment reads as follows:

> A superior is responsible for the criminal acts of his subordinates *when* he knew or had reason to know that his subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators (Emphasis added).

The word "when" is inserted in place of the word "if" in the Original Indictment. The Trial Chamber notes that Article 7(3) of the Statute stipulates the superior responsibility in the similar wording but uses the term "if" in the equivalent context.[38] Elements of the superior responsibility have been developed in the jurisprudence of the Tribunal based on this wording of the Statute.[39]

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[35] Notice, para. 8.
[36] Boškoski's Response, para. 10(c).
[37] Motion, para. 2.
[38] Article 7(3) of the Statute:
> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility *if* he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof (Emphasis added).

[39] *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić and Esad Landžo also known as "Zenga"* ("Čelebići Case"), Case No. IT-96-21-T, Judgement, 16 November 1998, para. 346, applied and affirmed in deciding appeal, *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")* ("Čelebići Case"), Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"),

The Trial Chamber is thus of the view that the Prosecution's previous formulation using "if" was in line with Article 7(3) of the Statute and the jurisprudence of the Tribunal, and it does not see any reason for altering it. Furthermore, the Trial Chamber notes that it has not been presented with any arguments as to why the change would render matters more accurate and precise, if it was the Prosecution's intention. Accordingly, the Trial Chamber rejects this amendment, and orders that the original word "if" remain.

3. Amendment Relating to the Timeframe of JCE

(a) Arguments of Parties

16. Among a number of arguments against the Proposed Amended Indictment submitted in Tarčulovski's Response, Tarčulovski asserts that while the Proposed Amended Indictment alleges that the JCE came into force on or about 10 August 2001, it "states that Johan Tarčulovski participated in the JCE, with knowledge of its illegal objective from July to August 2001, through personally selecting individual to form his regular and reserve police unit and coordinated [sic] the members",[40] and that the Proposed Amended Indictment "should be clear whether the JCE is referring to this period as well".[41]

17. The Prosecution contends that Tarčulovski seeks to challenge the form of the Original Indictment and not the defects in the proposed amendments sought therein because none of his assertion is directed against the proposed amendments but against the Prosecution's allegations already contained in the Original Indictment.[42]

(b) Discussion

18. The Trial Chamber is of the view that the Accused's argument regarding the timeframe of the JCE relates to one of the newly suggested amendments in the Proposed Amended Indictment

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paras. 192-198, 225-226, 238-239, 256, 266-267; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999, para. 69; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 294; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 401; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23 & IT-96-23/1-T, Judgement, 22 February 2001, para. 395, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 604; *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, para. 314.; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 457; *Prosecutor v. Stanislav Galić*, Judgement and Opinion, Case No. IT-98-29-T, 5 December 2003, para. 173; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004. para. 275; *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, 17 January 2005, para. 790.

[40] Tarčulovski's Response, para. 11.

[41] Tarčulovski's Response, para. 11.

[42] Reply to Tarčulovski, paras. 18-19.

which was not included in the Original Indictment.[43] Therefore the Trial Chamber will consider this argument.

19. The relevant part states that the JCE, in which Tarčulovski allegedly participated, came into existence "on or about Friday 10 August 2001",[44] instead of the previous assertion that it came into existence "no earlier than Friday 10 August 2001".[45] The Trial Chamber finds that this amendment results in obscuring the time of the commencement of the JCE rather than clarifying it, in particular, when it is read in connection with the amendment in paragraph 6 of the Proposed Amended Indictment, which now states:

> **Johan TARČULOVSKI** participated in the JCE, with knowledge of its illegal objective, throughout its existence in one or more of the following ways:
>
> (a) From July to August 2001 he personally selected individuals to form his regular and reserve police unit that took part in the attack.
>
> (b) From July to August 2001 he co-ordinated the arming of the members of his regular and reserve police unit that took part in the attack.[46]
>
> ...

It is not clear from these paragraphs whether the JCE came into existence in July or on a date closer to 10 August 2001. Reading the Prosecution's allegation that the JCE came into existence "on or about Friday 10 August 2001" together with its pleading that Tarčulovski participated in the JCE by personally selecting individuals to form his police unit "from July to August 2001" and by co-ordinating the arming of this unit "from July to August 2001", makes the Prosecution's suggested amendment more unclear and ambiguous than the previous pleading, which clearly stated that the JCE came into existence "no earlier than" 10 August 2001. The possibility to interpret the Prosecution's current pleading as alleging that the JCE existed from July does not clarify matters but rather makes the timeframe of the JCE unclear, which affects the preparations of a defence. Since the previous timeframe was clear, the Trial Chamber rejects this amendment and orders that it remain as in the Original Indictment.

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[43] For discussion on Tarčulovski's other arguments see paras. 45-47 of this decision.
[44] Proposed Amended Indictment, para. 4.
[45] Original Indictment, para. 4
[46] Paragraph 6 of the Original Indictment was as follows:
Johan TARČULOVSKI participated throughout its existence of the JCE in one or more of the following ways:
(a) From July to August 2001 he personally selected individuals to from his regular and reserve police unit that took part in the attack.
(b) From July to August 2001 he co-ordinated the arming of the members of his regular and reserve police unit that took part in the attack.
...

20. Should the Prosecution wish to make an amendment to include an allegation that the JCE came into existence prior to 10 August 2001, it could submit a motion requesting leave to amend, including arguments supporting the amendment sought.

4. The Remainder

21. The Trial Chamber is of the view that the rest are either changes within the purview of the direction given by the Trial Chamber or newly proposed amendments that are not substantial in scope. The Trial Chamber is satisfied that these changes and amendments satisfy the *prima facie* standard. The Trial Chamber also notes that neither Accused raise any objections to those changes and amendments themselves within the scope of Rule 50(A)(i)(c) of the Rules. The Trial Chamber further considers that admitting these changes and amendments will not deny the Accused their rights to be tried without undue delay. Given the facts upon which the proposed changes and amendments are based were in the Original Indictment or included in the supporting material already submitted, no need arises for the accused to conduct any new inquiries, approach new witnesses, or expend any additional resources. Furthermore, there is no suggestion that the Prosecution has sought an improper tactical advantage. Accordingly, the Trial Chamber holds that those changes and amendments do not result in unfair prejudice. The changes and the amendments are granted.[47]

III. CHALLENGES TO THE FORM OF THE PROPOSED AMENDED INDICTMENT

22. The Trial Chamber will now turn to the Accused's challenges to the form of the Proposed Amended Indictment pursuant to Rule 72(A)(ii) of the Rules.

A. THE LAW

23. Article 18(4) of the Statute and Rule 47(C) of the Rules provide that an indictment shall contain a concise statement of the facts and the crimes with which the accused is charged. These provisions should be interpreted in conjunction with Article 21(2) and Article 21(4)(a) and (b) of the Statute, which provide for the right of an accused to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.[48]

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[47] Proposed Amended Indictment, the heading "AMENDED INDICTMENT", paras. 1, 2, 5, 6, 10, 11 (Except for the change of the word "if" to "when"), 12, 15, 16, 18, 20, 21, 22, 24, 26, 28, 29, 30, 32, 33, 34, 35, the heading "KISELA VODA (PROLEĆE) POLICE STATION, paras. 36, 38, 39, 40, 42, 45, 48, 51, 53, 54, 56, 57, 59, 61, 62, 64, 65, 66, 69 and 70.

[48] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić* Appeals Judgement"), para. 88.

The Prosecution is required to plead the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[49]

24. The materiality of a particular fact depends on the nature of the Prosecution case.[50] A decisive factor in this respect is the nature of the alleged criminal conduct charged against the accused,[51] and in particular, the proximity of the accused to the events alleged in the indictment.[52] The materiality of facts such as the identity of the victims, the place and date of the events and the description of the events themselves necessarily depend on the alleged proximity of the accused to those events.[53]

25. Where an indictment is based on individual responsibility as the superior of the actual perpetrators under Article 7(3) of the Statute, the accused needs to know not only his alleged conduct forming the basis of his responsibility, but also what is alleged to have been the conduct of those persons for whom he is allegedly responsible, subject to the Prosecution's ability to provide those particulars.[54]

26. In cases where individual responsibility as superior responsibility is alleged, the following material facts should be pleaded:[55]

a. (i) that the accused is the superior of (ii) subordinates sufficiently identified,[56] (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;

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[49] *Kupreškić* Appeals Judgement, para. 88; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeals Judgement"), para. 209; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on the Form of the Indictment, 19 June 2003, ("*Mrkšić* Decision"), para. 7.

[50] *Kupreškić* Appeals Judgement, para. 89; *Blaškić* Appeals Judgment, para. 210; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 (dated 26 May 2004) ("*Šešelj* Decision on Jurisdiction and Form of Indictment"), para. 23.

[51] *Kupreškić* Appeals Judgement, para. 89.

[52] *Ibid*, paras. 89-90.

[53] *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, "Decision on objection by Momir Talić to the form of the amended indictment" 20 February 2001, ("First *Brđanin* and *Talić* Decision"), para. 18; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, ("Second *Krnojelac* Decision") para. 18; *Prosecutor v. Krajisnik*, Case No. IT-00-39-PT, Decision concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, ("*Krajisnik* Decision"), para. 9.

[54] Second *Krnojelac* Decision, para. 18; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25, PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("First *Krnojelac* Decision"), para. 40; *Blaškić* Appeals Judgment, para. 216.

[55] *Blaškic* Appeals Judgement, para. 218 (footnotes omitted).

[56] Although this could be interpreted as requiring the identification of the perpetrator(s) by name, the Appeals Chamber in *Blaškić* appears satisfied with the Trial Chamber in *Krnojelac* stating that "the identification of subordinates who allegedly committed the criminal acts by their 'category' or 'group' was sufficient if the Prosecution was unable to identify those directly participating in the alleged crimes by name," *Blaškić* Appeals Judgement, para 216, with reference to First *Krnojelac* Decision, para. 46.

b. the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The 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; and

c. the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.

27. A reference in an indictment to the accused as a "commander" of a camp may be sufficient to ground the charges of command responsibility, where the alleged crimes were committed in that camp.[57] Further, a reference to the accused's specific military duties has been found to be sufficient to identify the basis of his alleged command responsibility.[58]

28. In an Article 7(1) case the Prosecution may be required, depending on the circumstances of the case, to "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged," in other words, to indicate the particular head or heads of liability.[59] This may be necessary in order to avoid ambiguity with respect to the exact nature and cause of the charges against the accused[60] and to enable the accused to effectively and efficiently prepare his defence. The material facts to be pleaded in an indictment may vary depending on the particular head of Article 7(1) responsibility.[61]

29. When an accused is charged with "commission" of a crime under Article 7(1), the indictment must specify whether such "commission" is a physical commission by the accused or participation by the accused in a JCE.[62]

30. The following four elements must also be present in an indictment charging an accused with JCE:

(a) the nature or purpose of the JCE;

(b) the time at which or the period over which the enterprise is said to have existed;

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[57] First *Krnojelac* Decision, para. 19; *Blaškić* Appeals Judgment, para. 217.
[58] *Blaškić* Appeals Judgement, para. 217, Second *Brđanin* and *Talić* Decision, para. 19.
[59] *Čelebići* Appeals Judgement, para. 350. *See also Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-PT, Decision on Form of the Indictment, 25 October 2002 ("*Deronjić* Decision"), para. 31.
[60] See *Čelebići* Appeals Judgement, para. 351; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeals Judgement), para. 171, fn. 319 (with reference to Second *Krnojelac* Decision, paras. 59-60).
[61] For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, must be pleaded in detail (*Kupreškić* Appeals Judgement, para. 89), whereas, in a JCE case, different material facts would have to be pleaded (*See also* Second *Brđanin* and *Talić* Decision, paras. 21-22).
[62] *See Aleksovski* Appeals Judgement, fn. 319 (citing and upholding Second *Krnojelac* Decision, paras. 59-60).

(c) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group;

(d) the nature of the participation by the accused in that enterprise.[63]

31. Where the state of mind with which the accused carried out his alleged acts is relevant, the Prosecution must either (i) plead the relevant state of mind itself as a material fact, in which case the facts by which that material fact is to be established are ordinary matters of evidence, and need not to be pleaded; or (ii) plead the evidentiary facts from where the relevant state of mind is to be inferred.[64] The Prosecution may not simply presume that the legal pre-requisites are met.[65] In general each of these facts should be pleaded expressly, though, under certain circumstances, they can be sufficiently pleaded by necessary implication.[66]

B. CONSIDERATION

1. Effective control and identification of subordinates

(a) Arguments of Parties

32. The Trial Chamber, in its Decision, found that while the Original Indictment patently stated that Boškoski had been the superior of the regular and reserve police within FYROM, it was not clear over which other specific groups he was alleged to have exercised effective control.[67] Accordingly the Trial Chamber ordered the Prosecution to clarify whether Boškoski is charged with superior responsibility for the acts of regular and reserve police only or whether he is also charged for the acts of the following groups: (a) "some civilians";[68] (b) "special police";[69] (c) "prison guards and some civilians";[70] and (d) "hospital personnel".[71] [72] Furthermore, it ordered the Prosecution to,

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[63] *The Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ("Third *Krnojelac* Decision"), para. 16. See *Prosecutor v. Milutinović, Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 ("*Milutinović* Decision"), p. 4, for a similar presentation as to pleading requirements for a JCE.

[64] Second *Brđanin* and *Talić* Decision, para. 33; *Mrkšić* Decision, para. 11; *See* also *Blaškić* Appeals Judgment, para. 219, solely addressing the issue of pleading responsibility under Article 7(3); *Šešelj* Decision on Jurisdiction and Form of Indictment, para. 29.

[65] First *Brđanin* and *Talić* Decision, para. 48; *Hadžihasanović* Decision, para. 10, both not specifically referring to the material facts concerning *mens rea*; *Blaškić* Appeals Judgment, para. 219; *Šešelj* Decision on Jurisdiction and Form of Indictment, para. 30.

[66] First *Brđanin* and *Talić* Decision, para. 48; *Hadžihasanović* Decision, para. 10; *Blaškić* Appeals Judgement, para. 219; *Šešelj* Decision on Jurisdiction and Form of Indictment, para. 30.

[67] Decision, para. 17.

[68] Original Indictment, para. 34.

[69] *Ibid.*, para. 38.

[70] *Ibid.*, para. 39.

[71] *Ibid.*, para. 40.

[72] Decision, p. 12.

if possible, name or identify with more specificity the subordinates who participated in the alleged crimes.[73]

33. In response to the Trial Chamber's order, The Prosecution submitted in its Motion to amend the Original Indictment that Boškoski is also charged for the acts of the groups about which the Trial Chamber requested clarification,[74] by inserting the following phrase in paragraph 11 of the Proposed Amended Indictment:

> **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 Indictment counts.

In the attempt to further explain this assertion, the Prosecution also adds in paragraphs 29, 39 and 40 of the Proposed Amended Indictment that civilians, prison guards and hospital personnel, who allegedly committed the concerned crimes, were "allowed, encouraged and[/or] assisted by the police"[75] to commit those crimes. As regards the specification of the subordinates who participated in the alleged crimes, the Prosecution submits that at this time, it is unable to name or identify them with more specificity.[76]

34. Boškoski contends that despite the changes and clarifications suggested by the Prosecution, it still fails to plead his effective control over special police, prison guards, hospital personnel and civilians, for whose acts the Prosecution charges him with criminal responsibility under Article 7(3) of the Statute, since the Proposed Amended Indictment lacks material facts underpinning these charges with sufficient detail.[77] Boškoski also asserts that the source of Boškoski's authority over those groups and grounds for the allegation of his authority are lacking.[78] In relation to the specification of the subordinates, he argues that the Prosecution fails to name or identify with more specificity the subordinates who participated in the alleged crimes, "relying only on generalization terms."[79] He also asserts that the phrase in paragraph 29 of the Proposed Amended Indictment, "...the beatings were committed by police officers, reservists, *or* civilians who were allowed,

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[73] Decision, p. 12.
[74] Motion, para. 3.
[75] The Prosecution is inconsistent in pleading that "civilians", as the alleged perpetrators, "were allowed, encouraged *or* assisted by the police (Emphasis added)" in paragraph 29 of the Proposed Amended Indictment, and in pleading "some civilians" and "hospital personnel", as the alleged perpetrators, "were allowed, encouraged *and* assisted by the police (Emphasis added)" in paragraphs 39 and 40 of the Proposed Amended Indictment.
[76] Motion, para. 4.
[77] Boškoski's Reponse, paras. 14-17.
[78] Boškoski's Reponse, paras. 10(d), 11, 12 and 17.
[79] Boškoski's Response, para. 10 (b).

encouraged or assisted by the police...(Emphasis added)," lacks specificity as to who carried out the alleged beatings.[80]

35. The Prosecution provides its counterarguments, submitting that regarding Boškoski's effective control, it incorporated the changes as directed by the Trial Chamber,[81] and that the forces under control of Boškoski are identified in paragraphs 11-13 of the Proposed Amended Indictment.[82] It also submits that Boškoski, "being the Minister of the Interior of Macedonia, clearly had superior responsibility for the acts of the police and those who acted at the encouragement and assistance of the police", and that the changes in paragraphs 29, 39 and 40 of the Proposed Amended Indictment represent this allegation.[83] As to the specification of the subordinates, the Prosecution is of the view that through the relevant amendments, necessary material facts underpinning such charges are pleaded in the Proposed Amended Indictment, which are separable from the evidence based on which such charges are to be proven by the Prosecution at trial.[84] It further argues that if the Prosecution is unable to identify those directly participating in the alleged criminal acts by name, it will be sufficient for it to identify them at least by reference to their "category" (or their official position) as a group, and that the present case is "*in pari materia* to these cases".[85]

36. The Trial Chamber will hereby briefly address the issue raised by the Prosecution, whether the Proposed Amended Indictment includes new charges that allow Boškoski to file a preliminary motion pursuant to Rule 72 alleging the abovementioned defects in the form of the Proposed Amended Indictment. The Trial Chamber notes that the jurisprudence of this Tribunal has given a wide interpretation to the term "new charge". 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".[86] If an allegation in an amendment could become the sole basis that justifies imposition of criminal responsibility, the amendment is regarded as alleging a "new charge". In other words, if the accused could be convicted on the basis of the new allegation even when the Prosecution fails to prove the other allegations already raised in the initial indictment, the new allegation is a "new charge" for the purposes of Rules 50(B) and (C). In the present case, it was not clear in the Original Indictment whether Boškoski was charged for the acts of regular and reserve police only, or whether he was also charged for the acts of the other groups of perpetrators. The amendments made it clear that Boškoski's alleged criminal responsibility as a superior also arises

[80] Boškoski's Response, paras. 12-13.
[81] Reply to Boškoski, para. 17.
[82] Reply to Boškoski, para. 18.
[83] Reply to Boškoski, para. 16.
[84] Reply to Boškoski, para. 13.
[85] Reply to Boškoski, para. 14.

from the acts of the other groups. As the acts of the other groups and the other required elements in relation to these groups could provide the sole, distinct bases for convictions of Boškoski, the amendments lead to inclusion of "new charges" into the Proposed Amended Indictment, as opposed to the Prosecution's assertion that it "has *not* added any new charges (Emphasis original)."[87] Accordingly, Boškoski is entitled to challenge the form of the Proposed Amended Indictment in relation to these new charges pursuant to Rule 50(C) and Rule 72(A)(ii) of the Rules.

(b) Discussion

37. With respect to the form of pleading superior responsibility for the alleged acts of civilians, special police, prison guards, and hospital personnel within the FYROM, the Trial Chamber held in its Decision as follows:[88]

> [F]or pleading superior responsibility with regard to [these groups of perpetrators], it is not sufficient to allege that "public and state security" within the FYROM was part of [Boškoski's] official responsibilities [as the Minister of FYROM Ministry of Interior]. If the Prosecution intends to charge the Accused with criminal responsibility for the acts of these other groups, it must plead the material facts underpinning these charges with sufficient detail so that the Accused may prepare his defence.[89] In this case, this requires stating with particularity that the Accused had the authority to exercise control over these groups, including but not limited to the authority to appoint, punish, discipline, suspend, and dismiss them from their duties for crimes they may have committed.

The Trial Chamber reaffirms this holding. In light of the Decision, the Prosecution now indicates that the "regular and reserve police" include "special police units".[90] It is therefore clear that when the Prosecution alleges that "Ljube BOŠKOSKI exercised command and control of all FYROM police forces" with "the authority to appoint, punish, discipline, suspend and dismiss police from duty for crimes they may have committed",[91] the reference to "all FYROM police forces" encompasses "special police". The Prosecution further describes that "Ljube BOŠKOSKI in his capacity as Minister of Interior exercised *de jure* and *de facto* command and control over the police force [... and] had the overall authority and responsibility for the functioning of the police forces, both regular and reserve, including all special police units, within FYROM".[92] The Trial Chamber considers that the Proposed Amended Indictment in relation to "special police" and the police force in general is clear and includes sufficient material facts.

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[86] *Halilović* Decision, para. 31; *Beara* Decision, p.2.
[87] Reply to Boškoski, para. 8
[88] Decision, para. 19.
[89] Cf. *Kupreškić* Appeals Judgement, para. 88.
[90] Proposed Amended Indictment, paras. 11-12.
[91] Proposed Amended Indictment, para. 13.
[92] Proposed Amended Indictment, para. 12.

38. The Prosecution also charges Boškoski with superior responsibility under Article 7(3) of the Statute for "acts committed by prison guards, hospital personnel and civilians".[93] It appears that the Prosecution alleges that Boškoski had effective command and control over these groups thereby being responsible for their acts. The Prosecution pleads, however, only in general terms, that these groups of perpetrators were allowed, encouraged and[/or] assisted by the police to commit the alleged crimes.[94] The Trial Chamber finds these general pleadings to be ambiguous. Language indicating that these groups were "encouraged and[/or] assisted by the police to commit the alleged crimes" does not provide material facts about a superior-subordinate relationship between these groups and Boškoski.

39. First, the language does not state *with particularity* how Boškoski had the authority to *exercise control* over the prison guards, hospital personnel and civilians, as a function of his command and control over the police forces. It is not sufficiently pleaded in what manner Boškoski is alleged to have exercised authority over these groups such that he had a *de jure* or *de facto* superior relationship to these groups and thereby could appoint, punish, discipline, suspend or dismiss member of these groups for crimes allegedly committed in the course of their duties. For the groups of the regular and reserve police, including special police units, this was shown in the Proposed Amended Indictment, by stating that Boškoski as Minister of Interior exercised *de jure* and *de facto* command and control over all FYROM police forces, and that thereby he had the authority to appoint, punish, discipline, suspend and dismiss police from duty for crimes they allegedly committed.[95] The Trial Chamber reiterates its finding in the Decision that alleging that "public and state security" within the FYROM was part of his official responsibilities is not sufficient to plead his superior responsibility with respect to the acts committed by the civilians, prison guards and hospital personnel.[96] The mere insertion of the allegation that Boškoski "failed to fulfil his duty as a superior to investigate and punish the perpetrators" of the alleged crimes,[97] explains neither how he was a superior to the civilians, prison guards and hospital personnel nor how he had effective control in the sense of a material ability to prevent or punish their criminal conduct, generated by such a superior relationship.

40. The pleadings are unclear to the Trial Chamber since at least two different allegations can be envisaged from the current Proposed Amended Indictment, which both require changes. The first possible interpretation is based on, *inter alia,* the wording of paragraphs 29, 39, and 40 of the Proposed Amended Indictment that alleges that the FYROM police force, allowed and encouraged

[93] Proposed Amended Indictment, para. 11.
[94] Proposed Amended Indictment, paras. 29, 39 and 40; *Also see*, footnote 75 of this decision.
[95] Proposed Amended Indictment, para. 12 and 13.
[96] Decision, para. 19.

the civilians, prison guards and hospital personnel to commit the charged crimes , in addition to the allegations that FYROM police forces directly participated in the crimes and that Boškoski "failed to fulfil his duty as a superior to investigate and punish the perpetrators of the crimes". Since the Proposed Amended Indictment only describes Boškoski as a superior of the FYROM police forces, a logical conclusion is that Boškoski is 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. The second possible interpretation, stemming from paragraph 11 of the Proposed Amended Indictment, is that Boškoski directly had a superior – subordinate relationship to the civilians, prison guards and hospital personnel and failed to investigate and crimes which they allegedly committed. Should this interpretation be the Prosecution's case it is required to add information as to how Boškoski as Minister of Interior was a superior to and failed to investigate and punish the civilians, prison guards and hospital personnel, in which case the allegation would be that Boškoski had effective control over the police force, civilians, prison guards and hospital personnel. The Trial Chamber considers this a crucial point and finds that the Proposed Amended Indictment in its current form is defective.

41. Due to the limited time remaining until the filing of the Pre-Trial Briefs, further amendments of the indictment in conformity with this holding are not practically possible. Therefore, the Trial Chamber orders the Prosecution to submit clarifications in its Pre-Trial Brief to be filed on 7 November 2005 in order to cure the defect. Should the Trial Chamber not be satisfied with the clarifications in the Pre-Trial Brief, the Trial Chamber will return to the issue later. Further, should time allow at a later stage to file a properly adjusted indictment, the Prosecution will be ordered to do so.

42. As to the specification of alleged subordinate perpetrators, the Trial Chamber notes its holding in the Decision that "the Prosecution should include in the Indictment names and further details identifying the alleged perpetrators for whom [Boškoski] is alleged to have superior responsibility, *should such information be in its possession* (Emphasis added)."[98] The Prosecution responds that it is unable to provide such information at this time.[99] As the Trial Chamber earlier referred in footnote 24 of the Decision, the precedents of this Tribunal on this issue stated that the identification of subordinates who had allegedly committed the criminal acts by their "category" or "as a group" was sufficient if the Prosecution was unable to identify those directly participating in

[97] Proposed Amended Indictment, para. 11.
[98] Decision, para. 19.
[99] Motion, para. 4.

the alleged crimes by name.[100] The Trial Chamber finds that the specificity in the identification of the perpetrators for whose acts Boškoski is allegedly responsible is sufficient. This applies not only to "regular and reserve police, including special police units", but also to "prison guards, hospital personnel and civilians", especially given that they are referred to as perpetrators of crimes committed in specific instances that are described with a reasonable degree of particularity with respect to time and places in the Proposed Amended Indictment.[101] The phrase in paragraph 29 of the Proposed Amended Indictment, "the beatings were committed by police officers, reservists *or* civilians (Emphasis added)", should also be read in conjunction with the following description of specific events with sufficient details.[102] This phrase summarises a number of incidents explained thereafter. The subsequent paragraphs clearly explained which category of perpetrators carried out the alleged beatings in such incidents.

2. The Other Allegations Relating to the Form of the Proposed Amended Indictment

(a) Allegations of Boškoski

43. The rest of the Boškoski's arguments against the form of the Proposed Amended Indictment includes:

i) contradictory allegations in the Proposed Amended Indictment regarding superior's duty to prevent criminal acts or to punish the perpetrators thereof;[103]

ii) use of vague language throughout the Proposed Amended Indictment;[104]

iii) lack of a nexus between the alleged crimes and the armed conflict;[105] and

iv) inaccuracy in the sections of "General Legal Allegations" and "Additional Facts".[106]

44. The Trial Chamber considers that these four arguments are neither directed against the amendments nor a continuation of matters requested by the Trial Chamber to be changed, but are directed against allegations already included in the Original Indictment. The part relevant to Boškoski's alleged criminal responsibility in the Original Indictment was examined by the Trial Chamber in its entirety in the Decision, where the Trial Chamber held that the Original Indictment

[100] *Blaškić* Appeals Judgment, para. 217 with reference to First *Krnojelac* Decision, para. 4; *Prosecutor v. Miroslav Kvočka et al.*, Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-PT, 12 April 1999, para. 22, also with reference to First *Krnojelac* Decision, para. 46.
[101] First *Krnojelac* Decision, paras. 44-48.
[102] Proposed Amended Indictment, paras. 31-40.
[103] Boškoski's Response, paras. 18-21.
[104] Boškoski's Response, paras 22-24.
[105] Boškoski's Response, para. 26.
[106] Boškoski's Response, paras. 27-29.

"satisfies Rules 47(B) and 47(C) of the Rules, with the exception of certain necessary clarifications" regarding over whom Boškoski had effective control, and regarding identification of his subordinates if possible.[107] Consequently, these issues relating to Prosecution's pleadings already contained in the Original Indictment are *res judicata*. In this respect, the Trial Chamber agrees with the Prosecution's submissions.[108] The abovementioned four arguments are rejected.

(b) Allegations of Tarčulovski

45. Except for the assertion concerning the timeframe of the JCE, which in view of the Trial Chamber, amounts to an objection to amendments introduced in the Proposed Amended Indictment, Tarčulovski's Response consists of challenges to the form of the Proposed Amended Indictment. The alleged defects include:

i) the Prosecution's failure to identify the other participants in the JCE;[109]

ii) its failure to define the common purpose of the JCE;[110]

iii) its failure to state matters related to *mens rea* in more detail;[111]

iv) its failure concerning the ways of alleging modes of liability ("JCE", "ordering, planning and instigating," or "aiding and abetting");[112]

v) contradiction in the Prosecution's assertion on military necessity;[113]

vi) its failure to state matters required in pleading the existence of an armed conflict, including the definition of NLA and the internal or international nature of the armed conflict;[114]

vii) inaccuracy in relation to the Ohrid Peace Agreement.[115]

46. Regarding these arguments, the Trial Chamber agrees with the Prosecution's contention that they are "not in fact directed against the proposed amendment to the Original Indictment but indeed against the Original Indictment itself".[116] None of these arguments concern the amended parts in

[107] Decision, para. 32.
[108] Reply to Boškoski, paras. 9, 20, 21 and 25.
[109] Tarčulovski's Response, paras. 6 and 16.
[110] Tarčulovski's Response, paras. 7, 8 and 16.
[111] Tarčulovski's Response, para. 9.
[112] Tarčulovski's Response, paras. 10 and 16.
[113] Tarčulovski's Response, para. 12.
[114] Tarčulovski's Response, paras. 13 and 16.
[115] Tarčulovski's Response, para. 14.
[116] Reply to Tarčulovski, para. 19.

the Proposed Amended Indictment. Rather, they are directed against the Prosecution's allegations that have already existed in the Original Indictment. Tarčulovski did not challenge the form of the Original Indictment by filing a preliminary motion within the statutory period as stipulated in Rule 72 of the Rules. Tarčulovski may no longer challenge the form of the Prosecution's pleadings contained in the Original Indictment. Accordingly, the abovementioned assertions by Tarčulovski that in effect relate to the Original Indictment are dismissed.

47. The Trial Chamber, however, considers *proprio motu* that the Prosecution should include in their Pre-Trial Brief a detailed description of who, if possible by name, it considers to have participated in the JCE together with the Accused Tarčulovski. The Trial Chamber is further expecting an extensive description relating to the other forms of liability charged.

V. DISPOSITION

With respect to amendments to the Original Indictment, for the foregoing reasons and pursuant to Rule 50 of the Rules, the Trial Chamber

REJECTS the amendment relating to *mens rea* of Superior Responsibility using the term "when" instead of "if";[117]

REJECTS the amendment relating to the timeframe of the JCE;[118]

GRANTS the amendment extending the duration of the armed conflict until late September 2001;[119]

GRANTS the rest of the changes within the purview of the previous direction by the Trial Chamber and the newly proposed amendments;[120]

With respect to the Accused's challenges to the form of the Proposed Amended Indictment, for the foregoing reasons and pursuant to Rule 72 of the Rules, the Trial Chamber

ORDERS the Prosecution to cure the ambiguity in the Proposed Amended Indictment relating to Boškoski's effective control over civilians, prison guards and hospital personnel in its Pre-trial Brief;[121]

DISMISSES the remainder of the challenges by Boškoski and the challenges by Tarčulovski.[122]

The Trial Chamber further

ORDERS the Prosecution to provide the Accused with the translation of the relevant parts of the newly submitted supporting material in the language of the Accused by 15 November 2005 and a full translation no later than a week before the commencement of the trial;[123] and

ORDERS the Prosecution to file an updated indictment by 7 November 2005, incorporating this decision apart from the ambiguity relating to Boškoski's effective control over civilians, prison guards and hospital personnel which the Prosecution is ordered to address in its Pre-Trial Brief.

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[117] Proposed Amended Indictment, para. 11; *cf.* paras. 14-15 of this Decision.
[118] Proposed Amended Indictment, para. 4; *cf.* paras. 16-20 of this Decision.
[119] Proposed Amended Indictment, paras. 43 and 52; *cf.* paras. 8-13 of this Decision.
[120] See above footnote 47; *cf.* para. 21 of this Decision.
[121] Proposed Amended Indictment, paras. 11, 29, 39 and 40 (*cf.* paras. 12 and 13); *cf.* para. 32-42 of this Decision.
[122] *Cf.* paras. 43-47 of this Decision.
[123] *Cf.* para. 13 of this Decision.

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

Dated this first day of November 2005,
At The Hague,
The Netherlands.

Carmel Agius

Presiding Judge

[Seal of the Tribunal]