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	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:	26 May 2006
		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: **26 May 2006**

PROSECUTOR

v.

Ljube BOŠKOSKI
Johan TARČULOVSKI

DECISION ON PROSECUTION'S MOTION TO AMEND THE INDICTMENT AND SUBMISSION OF PROPOSED SECOND AMENDED INDICTMENT AND SUBMISSION OF AMENDED PRE-TRIAL BRIEF

The Office of the Prosecutor:

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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 confidential "Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment" filed on 4 April 2006 ("Motion"), in which the Prosecution requests leave to amend the Amended Indictment, dated 2 November 2005 ("Amended Indictment"), and requests the Trial Chamber to replace it with the Second Amended Indictment dated 4 April 2006 ("Second Amended Indictment"), attached as Annex A to the Motion. The Trial Chamber is also seised of the confidential "Prosecution's Submission of Amended Pre-Trial Brief" filed on 4 April 2006 ("Submission"), in which the Prosecution requests the Trial Chamber to accept the appended Amended Pre-Trial Brief, dated 4 April 2006 ("Amended Pre-Trial Brief"), and replace the Pre-Trial Brief, dated 7 November 2005, with the Amended Pre-Trial Brief.[1]

2. The original indictment setting out the charges brought against Ljube Boškoski and Johan Tarčulovski ("Accused") was reviewed and confirmed on 9 March 2005 ("Original Indictment").[2] On 22 August 2005, in response to a challenge to the Original Indictment by Boškoski,[3] the Trial Chamber ordered the Prosecution to amend the Original Indictment so as to provide clarification on certain points.[4]

3. The Prosecution then 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.[5] In this motion, the Prosecution proposed both changes in conformity with the Trial Chamber's abovementioned decision of 22 August 2005 and changes additional to that decision.[6] The Trial Chamber granted the request to make the amendments that were in line with its previous decision and a proposed amendment extending the duration of the armed conflict until late

[1] In the "Confidential Prosecution's Corrigendum of Amended Pre-Trial Brief", filed on 13 April 2006, the Prosecution corrects the date noted in the last sentence of paragraph 15 of the Amended Pre-Trial Brief. "During 10 – 13 August 2001" has been corrected to read "[d]uring 10 – 12 August 2001".
[2] The Original Indictment is dated 22 December 2004.
[3] 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.
[4] Decision on Ljube Boškoski's Motion Challenging the Form of the Indictment, 22 August 2005.
[5] 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.
[6] See also Defence responses: "Defence's Response to Prosecution's Motion for Leave to Amend the Original Indictment with Attachments Annex A and B" (Boškoski), 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", 29 September 2005. The Prosecution subsequently filed "Prosecution's Reply to the 'Defence Response for Leave to Amend the Original Indictment' Filed by Accused Ljube 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'", 6 October 2005.

September 2001.[7] It also noted that if certain defects in the Pre-Trial Brief were not clarified to the Trial Chamber's satisfaction, it would return to the issue later.[8] The Amended Indictment was filed on 2 November 2005.[9]

4. A Rule 65*ter* meeting was held on 23 March 2006 ("Rule 65*ter* meeting"), in which, for the purpose of protecting the interests of the Accused, the further clarification of certain points in the Indictment was discussed,[10] namely: the nature and scope of Boškoski's criminal responsibility; the scope of Tarčulovski's criminal responsibility; participation in the Joint Criminal Enterprise ("JCE"); the presence of the Albanian National Liberation Army ("NLA") in Ljuboten; the use of "attack" and corresponding terms; and, the dates on which alleged events took place.

5. The Motion follows the Rule 65*ter* meeting. In the Motion, the Prosecution proposes a number of amendments to the Amended Indictment and to the Pre-Trial Brief. It submits that the proposed amendments will "enhance the ability of the Accused to respond to the charges against them and will thereby improve the overall fairness of the trial", and that the proposed changes should not delay proceedings.[11] It also submits that the proposed amendments will either clarify or reduce the scope of the allegations against the Accused[12] or correct grammatical errors,[13] and, consequently, that the proposed amendments will protect the fair trial rights of the Accused.[14]

6. On 10 April 2006, Tarčulovski filed his response to the Motion, in which it was stated that, "[t]he Defence takes no position with respect to the Prosecution request to amend the Indictment."[15]

7. On 11 April 2006, Boškoski filed the "Defence's Response to Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment" ("Boškoski Response"). In the Boškoski Response, a number of submissions were made regarding the

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[7] It also rejected a number of proposed amendments relating to the *mens rea* of superior responsibility and the timeframe of the JCE. See Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment, 1 November 2005.
[8] Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment, 1 November 2005, para. 41.
[9] Prosecution's Notice of Compliance with the Trial Chamber's "Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Proposed Indictment" and Annex A, 2 November 2005, and Amended Indictment, 2 November 2005.
[10] T. 161 – 196, 23 March 2006.
[11] Motion, para. 4.
[12] The Prosecution refers to its proposed changes to paragraph 6 (concerning Tarčulovski) and paragraph 11 (concerning Boškoski).
[13] See Motion, para. 2(i), (ii), (vi) – (xvi).
[14] Motion, paras. 5 – 6.
[15] Confidential Defence Response to Confidential "Prosecution's Motion to Amend the Indictment and Submission of Second Amended Indictment" (Tarčulovski), 10 April 2006, para. 2.

Prosecution's proposed amendment to paragraph 11 of the Amended Indictment.[16] In addition, it was submitted that the Prosecution has failed to identify known alleged subordinates of Boškoski.[17]

8. At the Status Conference held on 11 April 2006, Judge Eser granted leave to the Prosecution to file a reply to the Boškoski Response.[18] The Prosecution filed its "Reply to the Defence's Response to Prosecution's Motion to Amend the Indictment and Submission of Proposed Second Amended Indictment Filed by the Accused Boškoski on 10 April 2006" on 13 April 2006 ("Reply"). In the Reply, the Prosecution submits that Boškoski has only objected to the proposed amendment to the second sentence of paragraph 11 of the Amended Indictment and that this proposed amendment is "essentially in line with the 'proposal' made by the Pre-Trial Judge at the Rule 65 *ter* Conference... so as to bring 'clarity' in the Indictment and Pre-Trial Brief".[19] The Prosecution also addresses the other submissions made in the Boškoski Response.

II. THE LAW RELATING TO AMENDMENT OF INDICTMENT

9. Rule 50 of the Tribunal's Rules of Procedure and Evidence ("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.
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> (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.

10. Pursuant to Rule 50(A)(i)(c) of the Rules, the Trial Chamber has discretion to allow an amendment to an indictment. 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, provided for in Article 19(1) of the Tribunal's Statute ("Statute"), to support proposed amendments.[20] While Rule 50 of the Rules does not provide specific guidelines to a Trial Chamber for determining whether to allow the amendment of an indictment when leave to amend is sought,[21]

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[16] Boškoski Response, paras. 5 – 15.
[17] Boškoski Response, paras. 16 – 20.
[18] T. 145 – 158, 148, 11 April 2006.
[19] Reply, para. 7.
[20] *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005, p. 2 ("*Beara* Decision").
[21] *Prosecutor v. 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"), para. 5; *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. 22;

the Rule must be construed in light of the Statute as a whole and, in the exercise its discretion, the Trial Chamber must have regard to the right of an accused to a fair trial.[22] 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.[23] While regard must be given to the circumstances of the case as a whole,[24] two factors, in particular, are considered: (1) whether the accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendment will result in undue delay.[25]

11. It has been previously noted that the issue of notice is relevant to the assessment of whether the accused has been given an adequate opportunity to prepare an effective defence.[26] The fairness of the trial may be enhanced by amendments to the indictment if they clarify the Prosecution's case and provide further notice to the accused of the charges against them.[27]

12. In relation to determining whether granting an amendment will result in undue delay, it has been found that, in addition to considering the course of proceedings to date, the likelihood of delay in the proceedings should be weighed against the advantages to the accused and the Trial Chamber of an improved indictment.[28] The Appeals Chamber has taken the view that amending an indictment can simplify proceedings, improve the accused's and the Tribunal's understanding of the Prosecution's case, and avert possible challenges to the indictment or evidence presented at trial.[29]

III. DISCUSSION OF PROPOSED AMENDMENTS TO AMENDED INDICTMENT

13. The Trial Chamber finds that the proposed amendments will clarify the scope of the allegations contained in the Amended Indictment. As such, the Trial Chamber considers that the proposed amendments will assist in enhancing the fair trial rights of the Accused.

Prosecutor v. Ljubičić, Case No. IT-00-41-PT, Decision on Motion for Leave to Amend the Indictment, 2 August 2002, ("*Ljubičić* Decision"), p. 3.

[22] *Beara* Decision, p. 2; *Halilović* Decision, para. 22; *Prosecutor v. Meakić et al.*, Case No. IT-02-65-PT, Decision on the Consolidated Indictment, 21 November 2002 ("*Meakić et al.* Decision"), p. 3; *Ljubičić* Decision, p. 3; *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 ("*Brđanin and Talić* Decision"), para. 50; *Prosecutor v. Naletilić and Martinović*, 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, 14 February 2001 ("*Naletilić and Martinović* Decision"), pp. 4 - 7.

[23] *Šešelj* Decision, para. 5; *Brđanin and Talić* Decision, para. 50; *Naletilić and Martinović* Decision, p. 7.

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

[25] *Šešelj* Decision, para. 5; *Beara* Decision, p. 2; *Halilović* Decision, para. 23.

[26] *Halilović* Decision, para. 23.

[27] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 ("*Karemera et al.* Decision"), para. 27. See also, para. 13.

14. Moreover, the Trial Chamber considers that a clear and understandable indictment is likely to have a beneficial impact on future proceedings, particularly as it may reduce or prevent possible future challenges to the operative indictment. In this regard, the Trial Chamber reiterates that it is established practice that a Trial Chamber will usually exercise its discretion to permit an amendment to an indictment where that is sought to ensure that the real issues in the case will be determined and the amendment will not prejudice the accused unfairly.

1. Nature and scope of Boškoski's alleged criminal responsibility

15. At the Rule 65*ter* meeting, Judge Eser stated that it was unclear from the Amended Indictment whether the Prosecution intended to charge Boškoski pursuant to Article 7(3) of the Statute in relation to acts directly committed by police forces or whether the Prosecution also wished to indict Boškoski in relation to the participation of subordinates in crimes committed by non-subordinates.[30] To clarify the Prosecution's position, it was considered that an amendment to paragraph 11 of the Amended Indictment would be necessary.

16. In the Motion, the Prosecution proposes the following amendment to paragraph 11 of the Amended Indictment to address the issue of Boškoski's responsibility under Article 7(3): "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" ("first proposed amendment").[31]

17. The objections raised in the Boškoski Response can be summarised as follows: (a) the Prosecution's first proposed amendment falls outside the scope of Article 7(3) of the Statute because Article 7(3) does not impose liability for the omissions of alleged subordinates;[32] (b) the Prosecution's first proposed amendment is a "new proposal" and the Prosecution has not included new evidence to support it;[33] (c) the Prosecution has not pleaded the material facts relating to the Prosecution's first proposed amendment;[34] and, (d) the "umbrella-like" charge in the Prosecution's

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[28] *Halilović* Decision, para. 23, citing the *Karemera et al.* Decision, para. 13.
[29] *Karemera et al.* Decision, para. 15.
[30] T. 161 – 196, 163, 23 March 2006.
[31] Note that as a consequence of the amendment of paragraph 11 of the Amended Indictment, paragraph 83 of the Pre-Trial Brief would also require modification. See also para. 82 of the Amended Pre-Trial Brief. Italics indicates proposed amendments. Note that the paragraph numbering in the Pre-Trial Brief and the Amended Pre-Trial Brief differs because the Prosecution have merged paragraphs 67 and 68 in the Amended Pre-Trial Brief.
[32] Boškoski Response, paras. 5 – 9.
[33] Boškoski Response, paras. 10 – 12.
[34] Boškoski Response, paras. 13 – 14.

first proposed amendment means that the Accused is not able to successfully prepare an effective defence and it "puts a fair trial into question".[35]

(a) Scope of Article 7(3)

18. Boškoski's first objection to the first proposed amendment argues for a literal, narrow interpretation of "acts" and "commit" in Article 7(3) of the Statute with the effect that the terms are read as referring solely to the "commission" mode of liability as provided for in Article 7(1). As such, Boškoski's first objection raises the issues of whether, pursuant to Article 7(3) of the Statute, a superior can be held responsible for an 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.[36]

19. The Trial Chamber is of the view that these two issues cannot be dealt with in isolation of the wider issue, which is whether superior responsibility can be attributed under Article 7(3) of the Statute for crimes committed by a subordinate, by act or omission, through any of the modes of liability provided for under Article 7(1) of the Statute.

20. In its Reply, the Prosecution submits, *inter alia*, that "nothing in Article 7(3) of the Statute suggests that liability under that article applies only where a subordinate engages in criminal conduct through the "commission" mode of liability"[37] and that to find otherwise would "lead to illogical results in the parallel obligation to prevent crimes".[38] The Prosecution also argues that a restrictive interpretation of Article 7(3) would "be at odds with the object and purposes of Article 7(3)", which aims to ensure that a superior can be held responsible for his subordinate's unlawful behaviour.[39] Furthermore, the Prosecution submits that the *Krstić* Trial Judgement supports the position that all forms of participation of subordinates fall within Article 7(3), including aiding and abetting.[40]

21. Article 7 of the Statute is concerned with the modes of individual responsibility. In relevant part, it reads:

> 1. A person who planned, instigated, ordered, *committed* or otherwise aided and abetted in the planning,

[35] Boškoski Response, para. 15.
[36] Note that it is not immediately clear from the Boškoski Response whether Boškoski is also objecting to the first proposed amendment on the ground that responsibility cannot be attributed pursuant to Article 7(3) of the Statute for the conduct of subordinates that aided and abetted the perpetration of a crime. However, the Boškoski Response, para. 10, states, "[t]he Prosecution makes the further argument that the police were aiding and abetting prison guards, hospital personnel and civilians". The Trial Chamber considers it prudent to deal with this statement as an objection and has addressed it in this decision.
[37] Reply, para. 10. The Prosecution also refers to the use of "committing" in Articles 2 and 29 of the Statute.
[38] Reply, para. 10.
[39] Reply, paras. 11 – 12.
[40] Reply, para. 13.

preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

[...]

3. 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]

22. It is apparent that in Article 7(1) "committed" was intended to denote a particular mode of individual liability for the crimes set out in Articles 2 to 5 of the Statute. The Trial Chamber is of the view that, by contrast, "acts" and "commit" in Article 7(3) of the Statute should be interpreted in a broad manner. Thus, "acts" refers to the conduct of the subordinate, including both acts and omissions of the subordinate and "commit" refers to any criminal conduct by a subordinate perpetrated through any of the modes of liability that are provided for under the Statute. This interpretation of "commit" is in line with its ordinary meaning, which is defined broadly as "to perpetrate (a crime)"[41] or "to perpetrate or carry out".[42] The Trial Chamber considers that the broad interpretation is the only plausible interpretation in light of the Statute as a whole and the object and purpose of Article 7(3).

23. Three examples of "acts" in other Articles of the Statute can be usefully cited: Article 2 of the Statute lists "acts against persons and property" as grave breaches of the Geneva Conventions; Article 4 of the Statute refers to "any other acts enumerated in paragraph 3" and includes conspiracy to commit genocide, attempt to commit genocide and complicity in genocide; Article 5, in providing for crimes against humanity, includes "other inhumane acts". The Trial Chamber is of the view that, as these crimes can be perpetrated by both act and omission, "acts" in Articles 2, 4 and 5 cannot be read in a narrow sense so to exclude the possibility of the perpetration of a crime through omission.

24. The Trial Chamber considers that "commit" is also used in the broad sense throughout the Statute to refer to all modes of liability. The Preamble and Articles 1, 9 and 16 refer to "...serious violations of international humanitarian law committed in the territory of the former Yugoslavia..." Article 29 refers to "the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". The Trial Chamber considers that "committed" is used in these Articles to encompass all the modes of liability under the Statute; to interpret "committed" here to mean only one particular mode of liability would have absurd results; for example, the Tribunal's mandate would be limited in a manner that would prevent the judicial

[41] Black's Law Dictionary, 7th ed.
[42] Concise Oxford English Dictionary, 10th ed.

determination of many of the cases that have been decided to date and the Prosecutor would have no authority to investigate and prosecute any cases where the mode of liability was anything other than "commission" in person. In addition, a narrow reading of "committed" in these Articles would render the other modes of liability in Article 7(1) of the Statute irrelevant since the Tribunal would not have jurisdiction over individuals that were responsible for the perpetration of crimes in ways other than by the "commission" mode of liability.

25. The same may be said of Articles 2, 4 and 5 of the Statute, where, the Trial Chamber considers, that "committed" refers to broadly to criminal conduct constituting grave breaches of the Geneva Conventions, crimes of genocide and crimes against humanity.

26. Furthermore, the Trial Chamber is convinced that the drafters of the Statute would not have intended the use of "commit" in Article 7(3) to be read in a way that would have the effect of undermining its very object and purpose. The mode of liability of superior responsibility is the method by which responsible command can be enforced and a commander can be held responsible for the conduct of his subordinates.[43] It imposes a duty on a commander to ensure that those under his command do not commit violations of international humanitarian law and is, therefore, central to the enforcement of international humanitarian law itself. To view "commit" in Article 7(3) narrowly as referring to the "commission" mode of liability would drastically reduce the types of situations in which superior responsibility could be found to the extent that the form of liability would have minimal impact on the enforcement of either responsible command or international humanitarian law. For example, if a superior observes that his subordinate is about to beat a prisoner, he is obliged to prevent the beating from taking place. If instead, the superior observes his subordinate handing a non-subordinate a baseball bat, with which that non-subordinate is going to beat a prisoner, it is inconceivable that the superior should not also be obliged to prevent his subordinate from giving the non-subordinate the baseball bat.

27. In similar terms, the Trial Chamber considers that the Secretary-General's statement in his 1993 Report to the Security Council demonstrates that Article 7(3) of the Statute was not intended to be interpreted so as to unduly limit the application of superior responsibility but rather so that a superior could be held responsible for any behaviour of a subordinate that resulted in the perpetration of crimes under the Statute. The Secretary-General stated:

> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the *unlawful behaviour* of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to *commit or had committed crimes* and yet failed to take the necessary and

[43] See, for example, *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005, para. 39.

reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[44]

28. The Secretary-General makes clear that responsibility is attributable, *inter alia*, for the "unlawful behaviour" of a superior's subordinates. "Unlawful behaviour" encompasses all forms of unlawful conduct, namely, acts and omissions that fall within all modes of liability under the Statute. Moreover, the Trial Chamber notes that consequently "commit or had committed" must be intended in the broad sense to encompass all types of unlawful behaviour under the Statute. It is noteworthy that to find otherwise would mean that the Secretary-General had stated what the application of the doctrine of superior responsibility should be and then immediately and significantly limited its application in the Statute without further explanation.

29. The Trial Chamber further considers that under the Statute a crime can be perpetrated by omission and that individual responsibility for that omission can be attributed pursuant to both Articles 7(1) and 7(3) of the Statute. This is in accordance with the proposition, to which the Trial Chamber subscribes, that a superior should not be able to refute his responsibility under Article 7(3) if a crime is perpetrated by a subordinate through an omission when, if his subordinate had committed the crime through an act, the superior could be found responsible.

30. In *Krnojelac* Judgement, the Trial Chamber expressly found that a superior could be held responsible for the omissions of his subordinates. The Trial Chamber stated that it was "satisfied that the Accused incurred criminal responsibility in his position as a warden of the KP Dom for the acts and omissions of his subordinates, pursuant to Article 7(3) of the Tribunal's Statute. The Trial Chamber [was] satisfied that the Accused was aware of the participation of his subordinates in the creation of living conditions at the KP Dom which constituted inhumane acts and cruel treatment, that he omitted to take any action to prevent his subordinates from maintaining these living conditions and that he failed to punish his subordinates for the implementation of these living conditions".[45]

31. Insofar as the Trial Chamber is aware, there have been no other cases before the Tribunal which have directly addressed the issue of superior responsibility for the omissions of subordinates. However, the jurisprudence of the Tribunal confirms that liability can be incurred pursuant to Article 7(1) of the Statute for both acts and omissions that result in the perpetration of a crime.

32. The Appeals Chamber in *Tadić* held that, "[t]his provision [Article 7(1)] covers first and foremost the physical perpetration of a crime by the offender himself, *or the culpable omission* of

[44] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 56. Emphasis added.

an act that was mandated by a rule of criminal law".[46] The Trial Chamber in *Galić* found that under all forms of participation included in Article 7(1) of the Statute "a crime may be performed through positive acts or through culpable omissions".[47] In the *Kvočka et al.* Appeal Judgement, the Appeals Chamber held that, "the accused's participation in carrying out the joint criminal enterprise is likely to engage his criminal responsibility as a co-perpetrator, without it being necessary in general to prove the substantial or significant nature of his contribution: it is sufficient for the accused to have committed an act *or an omission* which contributes to the common criminal purpose".[48]

33. More specifically, in relation to the "commission" mode of liability, the Trial Chamber in *Natelilić and Martinović* held that it "means physically and personally perpetrating a crime or engendering a culpable omission in violation of a rule of criminal law".[49] In *Krstić*, the Trial Chamber noted that the "essential findings" of the Tribunal and the ICTR in relation to the "commission" mode of liability were that it "covers physically perpetrating a crime *or engendering a culpable omission* in violation of criminal law".[50] The Trial Chamber in *Kvočka et al.* similarly found that aiding and abetting "may consist of an act or omission of a crime perpetrated by another... To aid or abet by omission, the failure to act must have had a significant effect on the commission of a crime".[51] In addition, the Trial Chamber notes that, as submitted by the Prosecution, the case law provides that "assistance" may be provided by either act or omission.[52]

34. The jurisprudence from the ICTR also demonstrates that the commission of a crime can occur through omission. In the *Ntagerura et al.* Judgement it was held that an accused could be found guilty for failing to act where certain conditions were established, although the accused, Bagambiki, was acquitted on the facts.[53] Moreover, in the *Rutaganira* Sentencing Judgement, the

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[45] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, ("*Krnojelac* Trial Judgement") para. 172. See also, para. 318. Note, this finding regarding Article 7(3) of the Statute was not appealed. See *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeals Judgement").
[46] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 188. Emphasis added.
[47] *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Judgement"), para. 168. Emphasis added.
[48] *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeals Judgement"), para. 187. Emphasis added.
[49] *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić and Martinović* Judgement"), para. 62. See also *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 376; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, para. 251; and *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 439.
[50] *Prosecutor v. Krstić*, Case No. IT-98-33, Judgement, 2 August 2001 ("*Krstić* Judgement"), para. 601. See also, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Judgement"), para. 694.
[51] *Kvočka et al.* Appeal Chamber Judgement, para. 256. See also *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Judgement, 17 October 2003 ("*Simić et al.* Judgement"), paras. 162 – 163.
[52] Reply, para. 16. See, for example, *Krnojelac* Trial Judgement, paras. 88 and 90 and *Simić et al.* Judgement, paras. 162 – 163.
[53] *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgement and Sentence, para. 659.

Trial Chamber found the Accused guilty of a crime against humanity (extermination) for having aided and abetted the commission of the crime by omission.[54]

35. In addition, a number of crimes under the Statute can be committed by act or omission. For example, the Trial Chamber in *Brđanin* held that the *actus reus* for the crimes of wilful killing and extermination consists of acts, omissions or a combination thereof.[55] Similarly, "murder"[56], "cruel treatment"[57] and "other inhumane acts"[58] can be perpetrated by both acts and omissions. The Appeals Chamber has found that crimes of persecution[59] and torture[60] may consist of acts and omissions.

36. The Trial Chamber similarly considers that it would run counter to the concept and purpose of superior responsibility if a subordinate could commit crimes under the Statute through the range of modes of liability provided for in Article 7(1) and yet a superior could not be held responsible for any of those crimes, with the exception of those "committed" (through the "commission" mode of liability) by his subordinates.[61] In several Tribunal judgments, accused have been held responsible under Article 7(3) for acts of subordinates that cannot be categorised as falling under the "commission" mode of liability.

37. Of particular pertinence to the present case, this Trial Chamber notes that in the *Krnojelac* Judgement, the Trial Chamber found the accused responsible pursuant to Article 7(3) for "the actions of the KP Dom guards (a) who permitted individuals from outside the KP Dom to enter the KP Dom in order to participate in the mistreatment of detainees, thereby (at least) aiding and abetting them in that mistreatment, and (b) who participated with those outsiders in that mistreatment".[62] As such, the Trial Chamber clearly considered that responsibility can be attributed pursuant to Article 7(3) for crimes perpetrated by subordinates through forms of liability other than "commission".

38. The Prosecution directed the Trial Chamber to the *Krstić* Trial Judgement, in which Krstić was found guilty of, *inter alia*, genocide pursuant to Articles 4(2)(a) and 7(1) of the Statute.[63] The

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[54] *Prosecutor v. Rutaganira*, Case No. ICTR-95-1C-T, Sentencing Judgement, 14 March 2005, para. 68.
[55] *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Judgement"), paras. 382 and 389.
[56] *Kvočka et al.* Appeals Judgement, para. 260; *Krnojelac* Trial Judgement, paras. 324 and 329; *Galić* Judgement, para. 150; *Brđanin* Judgement, para. 381; *Krstić* Judgement, para. 485.
[57] *Krstić* Judgement, para. 516.
[58] *Blagojević and Jokić* Judgement, para. 626.
[59] *Krnojelac* Appeals Judgement, para. 185.
[60] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, paras. 142 – 144.
[61] See also para. 26 above.
[62] *Krnojelac* Trial Judgement, para. 319. Note that Krnojelac's superior responsibility pursuant to Article 7(3) was confirmed on appeal, but for the crime of torture rather than cruel treatment. See *Krnojelac* Appeals Judgement, paras. 146 – 147, 171 – 172.
[63] See *Krstić* Judgement, para. 605, and paras. 607 – 646.

Trial Chamber held that Krstić knowingly participated in the "genocidal joint criminal enterprise" by fulfilling a "key co-ordinating role in the implementation of the killing campaign" in Srebrenica.[64] In making this finding, the Trial Chamber noted that the Drina Corps, and particularly the Zvornik and Bratunac Brigades, over which he had effective control at the relevant time,[65] had participated in the executions in a number of ways, including, scouting for sites at Orahovac presumably to be used for detention and execution, use of Zvornik Brigade military equipment in tasks relating to the burial of victims from Orahovac, transportation of prisoners from a detention site to an execution site, and assistance with executions at certain sites.[66] In light of its finding of guilt under Article 7(1), the Trial Chamber did not attribute responsibility to Krstić pursuant to Article 7(3).[67] However, it did find that the evidence satisfied "the three-pronged test...for General Krstić to incur command responsibility for the participation of Drina Corps personnel in the killing campaign".[68]

39. In the *Natelilić and Martinović* Trial Judgement, the two accused were held responsible, *inter alia*, for plunder pursuant to Articles 3(e) and 7(3) of the Statute.[69] The Trial Chamber found that, in addition to other instances of plunder carried out directly by Natelilić's and Martinović's subordinates, prisoners had been forced by their subordinates to loot apartments in areas of Mostar.[70] In making the finding of responsibility under Article 7(3), the Trial Chamber did not distinguish between the looting carried out directly by Natelilić's and Martinović's subordinates and that carried out by the prisoners being forced to loot by Natelilić's and Martinović's subordinates; it held Natelilić and Martinović responsible for both. As such, the Judgement indicates an acceptance of the view that superior responsibility could be attributed to commanders where their subordinates had aided and abetted the crime in question.[71]

40. In the *Hadzihasanović* case, the Trial Chamber limited the application of Article 7(3) responsibility to instances where the crimes within the jurisdiction of the Tribunal had been perpetrated, finding that criminal liability cannot attach where subordinates were about to plan or

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[64] *Krstić* Judgement, para. 644. Note that the Trial Chamber found General Krstić was a co-perpetrator. The Appeals Chamber found that, in fact, General Krstić had aided and abetted the genocide: *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004.
[65] *Krstić* Judgement, para. 631.
[66] *Krstić* Judgement, para. 623. Consequently, the Trial Chamber held that, "the Drina Corps rendered tangible and substantial assistance and technical support to the detention, killing and burial" of the Muslim men at several sites between 14 and 16 July 1995, see para. 624.
[67] See *Krstić* Judgement, paras. 605 and 652.
[68] *Krstić* Judgement, paras. 647 – 648.
[69] See *Naletilić and Martinović* Judgement, paras. 628 and 631.
[70] *Naletilić and Martinović* Judgement, paras. 619 – 631.
[71] Note that this was not an issue on appeal. In relation to his conviction for plunder, Natelilić argued that the Trial Chamber had made too much of one witness's testimony regarding his presence at instances of plunder and that his presence at one instance of plunder is not enough to support a conviction under Article 7(3). The Appeals Chamber found that even if the Trial Chamber had erred by finding that Natelilić was present at "some instances of plunder"

prepare the crimes.[72] However, it also held that evidence of acts of planning or preparation may be relevant for the finding whether a superior "knew or should have known" that a subordinate "was about to commit such acts" and "failed to prevent" them.[73]

41. This Trial Chamber does not consider that Article 7(3) of the Statute necessarily excludes these forms of liability, since it considers that if a subordinate's acts can be categorised as criminal under any of the modes of liability set out in Article 7(1) of the Statute then responsibility under Article 7(3) for failure to prevent and punish these acts may arise.

42. The Trial Chamber also notes, as did the Prosecution,[74] that the *Blagojević and Jokić* Trial Judgement found that the subordinates of the Accused Blagojević "participated in the burial of the victims of the Kravica Warehouse massacre on 14 July at Glagova"[75] and participated in the transport of Bosnian Muslim men from Bratunac to the Grbavic school in Orahovac, in the Zvornik municipality, in the early afternoon of 14 July."[76] With regard to Article 7(3) responsibility, the Trial Chamber held that:

> in relation to the participation of the units [of the Bratunac Brigade] in the murder operation, the Trial Chamber is convinced that they rendered practical assistance that furthered the crimes of murder and extermination. However, the Trial Chamber is unable to determine that they "committed" any of the crimes charged under the counts of murder or extermination.[77]

43. The *Blagojević and Jokić* Trial Chamber found that Blagojović's subordinates did not commit the murders as such, but that they participated by giving practical assistance in the burial and transportation of victims, which furthered the crimes of murder and extermination. This Trial Chamber notes that the indictment in *Blagojević and Jokić* does not limit Blagojević's superior responsibility to only crimes "committed" by his subordinates. Rather it refers to his subordinates' participation in the commission, planning, instigation, ordering and aiding and abetting of the crimes.[78] The *Blagojević and Jokić* Trial Chamber could have attributed superior responsibility to Blagojević for the participation of his subordinates in the crimes. The Trial Chamber did not do so,

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instead of one instance, the Defence had not shown that this resulted in a miscarriage of justice, see *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, paras. 386 – 388.

[72] *Prosecutor v. Hadzihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002 ("*Hadzihasanović et al.* Decision"), para. 209. The Trial Chamber held that it "does not find that through the words "planning" and "preparation" the Prosecution is seeking to attach any liability for *attempted* crimes by subordinates". Note that the accused appealed the Trial Chamber's decision but the grounds of appeal did not relate to the liability of superiors for failure to prevent or punish "planning" or "preparation" of offences. See *Prosecutor v. Hadzihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

[73] *Hadzihasanović et al.* Decision, para. 210

[74] Reply, fn. 13.

[75] *Blagojević and Jokić* Judgement, para. 367.

[76] *Blagojević and Jokić* Judgement, para. 368.

[77] *Blagojević and Jokić* Judgement, para. 794. Note that the Trial Chamber did not examine Article 7(3) responsibility in light of the facts of the case, finding instead that Blagojević's criminal responsibility was best reflected in the modes of liability provided for Article 7(1).

[78] See para. 31 of the Amended Joinder Indictment, 26 May 2003.

and the above quoted paragraph of the *Blagojević and Jokić* Judgement may be read as supporting a narrow interpretation of Article 7(3) of the Statute. It is not clear whether the *Blagojević and Jokić* Trial Chamber intended such a limited application. However, insofar such interpretation was intended, this Trial Chamber is not in a position to support it. The Trial Chamber notes that the scope of Article 7(3) of the Statute is one of the issues on appeal.[79]

44. In addition, the use of "commit" in Article 25 of the Rome Statute of the International Criminal Court ("ICC Statute")[80] reinforces the view of the Trial Chamber that "commit" has both narrow and broad readings and that "commits" in Article 7(3) should be read broadly to encompass all modes of liability under the Statute. Articles 25(2) and 25(3) of the ICC Statute set down the basic principle of individual criminal responsibility and establish the modes of liability under the ICC Statute:

> 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
>
> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that person is criminally responsible;
> (b) Orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) In any other way contributes to its commission or attempted commission of such a crime by a group of persons acting with a common purpose...;
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions...

45. It is apparent that "commits" in Article 25(2) and 25(3)(b) – (f) is meant in the broad sense to refer to the perpetration of a crime. Thus, in Article 25(2), "commits" encompasses all the modes of liability which are elaborated upon in Article 25(3). In Article 25(3)(b) – (f), "commission" means the perpetration of a crime by the specific mode of liability in the particular sub-paragraph. By contrast, "commits" in Article 25(3)(a) refers, narrowly, to the "commission" mode of liability, as does "committed" in Article 7(1) of the Tribunal's Statute.

46. On the basis of the reasons provided above, the Trial Chamber finds that "acts" and "commit" 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. Therefore, the Trial Chamber dismisses Boškoski's first objection to the first proposed amendment, namely, that the Prosecution's first proposed amendment falls outside the scope of Article 7(3) of the Statute because Article 7(3) does

[79] *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Prosecution's Brief on Appeal, para. 4.9.
[80] The ICC Statute is not binding on the Tribunal. However, there are 100 States Parties to ICC Statute and it be may be regarded as an authoritative expression of many aspects of international criminal law.

not impose liability for either the omissions of subordinates or crimes perpetrated by subordinates by means of modes of liability other than "committing".

(b) Other objections to the first proposed amendment

47. In addition to the objections relating to the scope of Article 7(3) of the Statute, it was further submitted in the Boškoski Response that the Prosecution had not provided evidence to support, or pleaded the material facts relating to, the first proposed amendment and that the nature of the first proposed amendment raised fair trial issues. The Prosecution submits, in the Reply, that new evidence "cannot be provided in support of the [first proposed amendment] inasmuch as the proposal actually reduces the Accused's liability rather than increasing it".[81] The Prosecution also notes that it has the obligation to state the material facts underpinning the charges but not the evidence by which those facts are to be proven.[82]

48. The case-law of the Tribunal sets out that the Prosecution needs to provide additional evidence in support of its amendment when "the amendment introduces a basis for conviction that is factually and/or legally distinct from any already alleged in the indictment".[83] In examining the proposed amendments, the Trial Chamber has come to the view that the first proposed amendment does not introduce a new basis for conviction but that it clarifies the nature and scope of Boškoski's alleged responsibility. Therefore, the Prosecution does not need to provide evidence in support of the first proposed amendment in addition to the evidence it has already provided or to plead further material facts. Furthermore, the Trial Chamber disagrees with Boškoski's assertion that the first proposed amendment will prevent Boškoski from successfully preparing an effective defence and that it will undermine his fair trial rights. Instead, the Trial Chamber considers that because the first proposed amendment clarifies the scope of Boškoski's alleged responsibility, it assists the Defence in the preparation of their defence and, as such, enhances the fairness of the trial.

2. Scope of Tarčulovski's alleged criminal responsibility

49. In the Rule 65*ter* meeting, Judge Eser pointed out that paragraph 7 of the Amended Indictment alleges that Tarčulovski participated in the crimes charged as a co-perpetrator and questioned whether, by the use of "co-perpetrator", the Prosecution was intending to focus on co-

[81] Reply, para. 17.
[82] Reply, para. 17.
[83] *Halilović* Decision, para. 30; *Beara* Decision, p. 2; 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 ("Decision on Leave to Amend Original Indictment"), para. 36.

perpetration or whether it was also intending to include the other modes of liability associated with "participation".[84]

50. The Prosecution requests the replacement of "as co-perpetrator" with "*together with others known and unknown*" in paragraph 7 of the Amended Indictment and that a footnote is added that makes clear that the use of "co-perpetrator" should not be interpreted to exclude other modes of individual criminal responsibility as described in Article 7(1) of the Statute ("second proposed amendment").[85]

51. The second proposed amendment clarifies that the Prosecution does not intend to limit the possible forms of participation by Tarčulovski in the crimes charged in the Amended Indictment. In this regard, the Trial Chamber notes that the other modes of participation, namely, ordering, planning and instigating and aiding and abetting are already included in both the Amended Indictment and Pre-Trial Brief.[86] Furthermore, the Trial Chamber considers that the second proposed amendment will assist the preparation of an effective defence and that it will not lead to any delay in proceedings. Therefore, the Trial Chamber grants the second proposed amendment.

3. Use of "attack" and other corresponding terms

52. The Amended Indictment and the Pre-Trial Brief state that the alleged objective of the JCE was "the unlawful attack on civilians and civilian objects". However, as pointed out by Judge Eser in the Rule 65*ter* meeting, the Amended Indictment and the Pre-Trial Brief also refer to other attacks, described as "attack", "ground attack", "police ground attack", "major attack", "combined attack", "police security operation" and "operation", that took place during the relevant time in Ljuboten and with seemingly different participants. Judge Eser noted that it would be helpful if a phrase could be found that would clearly indicate when the Prosecution was referring to the unlawful attack as charged in the Amended Indictment.[87] The Prosecution stated that different terminology had been used to distinguish other types of actions from the unlawful attack.[88]

53. In the Motion, the Prosecution proposes substituting "ground attack" for "major attack" in paragraph 56 of the Amended Indictment ("third proposed amendment"). No objections to this proposed amendment were made by Tarčulovski or Boškoski. The Trial Chamber considers that the third proposed amendment constitutes a point of clarification and that, as such, it will assist the Defence in the preparation of their defence. The conduct of the proceedings will not be affected. Therefore, the Trial Chamber grants the third proposed amendment.

[84] T. 161 – 196, 192 - 193, 23 March 2006.
[85] See Amended Indictment, 4 April 2006, para. 7, and Amended Pre-Trial Brief, para. 87 and fn. 9. [Emphasis added].
[86] Indictment, 2 November 2005, paras. 3, 9 – 10 and Pre-Trial Brief, paras. 60, 62 – 65.

4. Dates on which alleged events took place

54. At the Rule 65*ter* meeting, Judge Eser raised the matter of the timeframe of the alleged JCE.[89] Currently, paragraph 6 of the Amended Indictment states that Tarčulovski participated in the JCE in the ways enumerated in sub-paragraphs (a) – (i). However, sub-paragraphs (a) – (d) concern activities that allegedly took place from July to August 2001 and, thus, fall outside the timeframe of the alleged JCE. Judge Eser also noted that the date on which it is submitted a particular event occurred is not always clear from the Amended Indictment.[90]

55. In the Motion, the Prosecution proposes the removal of the references to dates in paragraph 6(a) – (d) of the Amended Indictment and the addition of "[*b*]*etween Friday 10 August 2001, up to and including Sunday, 12 August 2001*" to the chapeau of paragraph 6 ("fourth proposed amendment").

56. The Trial Chamber notes that Tarčulovski and Boškoski did not object to this proposed amendment. The fourth proposed amendment clearly limits the timeframe of the JCE and resolves the uncertainty that currently exists as to the time period over which the Prosecution asserts that the JCE took place. Thus, the Trial Chamber is of the view that the fourth proposed amendment will assist the Defence and that it will not have any negative repercussions for the conduct of proceedings. The Trial Chamber grants the fourth proposed amendment.

5. Other proposed amendments to the Amended Indictment

57. The Motion also provides for the correction of a number of punctuation and grammatical errors in Amended Indictment, and the replacement of "mine" with "explosion" in one heading and the addition of "village" in another heading.[91] The Trial Chamber considers that these proposed amendments are small, and while they contribute to the greater overall clarity of the Amended Indictment, they do not alter the Amended Indictment in any substantive manner. The Trial Chamber has no objection to them being implemented.

IV. DISCUSSION OF PROPOSED AMENDMENTS TO PRE-TRIAL BRIEF

58. In addition to the proposed amendments to the Amended Indictment, the Prosecution makes a number of amendments to the Pre-Trial Brief, which deal with: (a) Boškoski's subordinates; (b)

[87] T. 161 – 196, 180, 23 March 2006.
[88] T. 161 – 196, 181, 23 March 2006.
[89] T. 161 – 196, 178 - 180, 23 March 2006.
[90] T. 161 – 196, 181 - 182, 23 March 2006.
[91] Motion, para. 2(i), (ii), (vi) – (xvi).

the scope of Tarčulovski's responsibility; (c) participation in the JCE; (d) presence of the NLA in Ljuboten at the relevant time; (e) the use of the term "attack"; and, (f) the dates on which the alleged events took place. The Trial Chamber considers that the proposed amendments to the Pre-Trial Brief, which are set out below, deal with concerns that were raised in the Rule 65*ter* meeting.

1. Boškoski's subordinates

59. In the Rule 65*ter* meeting, Judge Eser noted that paragraph 86 of the Pre-Trial Brief raises the question of whether the Prosecution is alleging that Boškoski exercised control over police forces only or police and other types of forces.[92] Judge Eser also referred to paragraph 70(b) of the Pre-Trial Brief, where it is alleged that Boškoski had meetings with Tarčulovski, Zoran Jovanovski and "other participants", and stated that "it would be in the interests of the Defence to get some clarification who might have been these participants".[93]

60. The Prosecution proposes replacing "the forces" in paragraph 86 of the Pre-Trial Brief with "*active and reserve police forces*" in paragraph 85 of the Amended Pre-Trial Brief and adding Zoran Jovanovski's alias to paragraph 70(b) of the Amended Pre-Trial Brief.

61. The Trial Chamber notes that it is submitted in the Boškoski Response that the Prosecution has failed to identify the perpetrators of the alleged crimes and Boškoski's known alleged subordinates.[94] In its Reply, the Prosecution argues that it has previously addressed the issue of the perpetrators and Boškoski's alleged subordinates and that it is sufficient for the Prosecution to identify the individuals by reference to their category or official position as a group.[95] The Trial Chamber agrees with the submission of the Prosecution and notes that it has already found that the reference that was included in the Amended Indictment to "the police force in general is clear and includes sufficient material facts".[96] The Trial Chamber also reiterates that the first proposed amendment clarifies that the Prosecution is not alleging that the prison guards, hospital personnel and civilians are, in addition to the regular and reserve police, subordinates of Boškoski. As such, the fact that the Prosecution provides greater specificity regarding Boškoski's subordinates is in the interests of justice. However, the pleading in the Amended Indictment and the relevant proposed amendments thereto, which are reflected in the Pre-Trial Brief, provide sufficient information.

[92] T. 161 - 196, 192, 23 March 2006.
[93] T. 161 - 196, 192, 23 March 2006.
[94] Boškoski Response, paras. 16 – 20.
[95] Reply, para. 18.
[96] Decision on Leave to Amend the Original Indictment, para. 37.

2. Scope of Tarčulovski's alleged criminal responsibility

62. Judge Eser noted at the Rule 65*ter* meeting that the Pre-Trial Brief referred to Tarčulovski's conduct, "including his failure to prevent crimes committed by other policemen participating in the attack on Ljuboten."[97] In addition, Judge Eser referred to the lack of reference to "aiding and abetting" as a mode of liability in paragraph 62 of the Pre-Trial Brief.[98]

63. In respect of Tarčulovski's alleged duty to prevent, the Prosecution suggests two amendments to the Pre-Trial Brief. The first, included in paragraph 64 of the Amended Pre-Trial Brief, reads: "*Given his position as the commander of the policemen who carried out the unlawful attack on Ljuboten, Johan Tarčulovski had the duty to prevent such crimes by the policemen in his unit, or to punish those policemen in his unit who committed such crimes.* Johan Tarčulovski's conduct, including his failure to prevent *and punish* the crimes committed by the other policemen participating in the unlawful attack on Ljuboten..."[99] The second, included in paragraph 65 of the Amended Pre-Trial Brief, provides for Tarčulovski's "failure to *exercise his duty by stoppin*[*g*] any of the crimes from being committed, *or by punishing any of the policemen who committed the crimes...*".[100] The Prosecution also proposes adding "aiding and abetting" to paragraph 62 of the Amended Pre-Trial Brief.

3. Participation in the JCE

64. At the Rule 65*ter* meeting, the lack of certainty surrounding whether the Prosecution was alleging that members of the Macedonian Armed Forces were members of the JCE was raised. The Prosecution made it clear that that the Amended Indictment should not suggest that members of the Macedonian Army were also members of the JCE.[101] In addition, Judge Eser asked for further clarification about who else was involved in the JCE.[102]

65. In response, the Prosecution suggests two new sentences, which are added to paragraph 1 of the Amended Pre-Trial Brief, stating, "[t]*he unlawful attack occurred between Friday, 10 August 2001 and up to and including Sunday, 12 August 2001. While units of both Macedonian Police and the Macedonian Army were involved in the unlawful attack, the Second Amended Indictment... charges only members of the Macedonian Police with individual criminal responsibility for the crimes alleged*".

[97] T. 161 - 196, 191, 23 March 2006.
[98] T. 161 - 196, 190 - 191, 23 March 2006.
[99] Emphasis added.
[100] Emphasis added.
[101] T. 161 - 196, 184 - 185, 23 March 2006.
[102] T. 161 - 196, 188, 23 March 2006.

66. In relation to the further clarification of who was involved in the JCE, the Prosecution proposes the addition of the names of four persons to paragraph 61 of the Amended Pre-Trial Brief, which refers to members of the JCE that formed part of the police unit allegedly lead by Tarčulovski.

4. Presence of the NLA in Ljuboten

67. In the Rule 65*ter* meeting the Prosecution's attention was drawn to the apparent inconsistency regarding the presence of members of the NLA in the Amended Indictment. As a result of the references to "armed persons" and "armed Albanian combatants" in addition to "NLA", "NLA military elements" and "NLA combatants" it is not clear from the Amended Indictment and Pre-Trial Brief who "armed persons" and "armed Albanian combatants" are and whether they are members of NLA. The Prosecution stated in the Rule 65*ter* meeting that it used "armed persons" and "armed Albanian combatants" to clearly distinguish these persons for members of the NLA.[103]

68. The Prosecution suggests the addition of the following clause to the Amended Pre-Trial Brief: "During 10 – 12 August 2001, *the period of the unlawful attack alleged in the Indictment, while there were NLA sympathizers present in Ljuboten*, there was no armed NLA presence in the village of Ljuboten".[104]

5. The use of the term "attack"

69. The Prosecution proposes adding "unlawful" in front of every use of "attack" in the Amended Pre-Trial Brief.[105]

6. Dates on which alleged events took place

70. The Prosecution proposes the addition of the sentence, "[*t*]*he unlawful attack occurred between Friday 10 August 2001, up to and including Sunday, 12 August 2001*", to paragraph 1 of the Amended Pre-Trial Brief and references to dates in a number of other different paragraphs.[106]

[103] T. 161 - 196, 187, 23 March 2006.
[104] See paragraph 15 of the Amended Pre-Trial Brief. Note that the "Confidential Prosecution's Corrigendum of Amended Pre-Trial Brief", filed on April 2006, corrects the date in the last sentence of paragraph 15 of the Amended Pre-Trial Brief from "10 – 13 August 2001" to "10 – 12 August 2001".
[105] Note that in paragraph 59 of the Amended Pre-Trial Brief "unlawful attack" has been modified to read "unlawful ground attack"
[106] References to "Sunday, 12 August 2001" have been included in paras. 28, 29, 30, 32, 35, 36, 57 and 69 of the Amended Pre-Trial Brief.

V. CONCLUSION

71. In light of all the abovementioned considerations, the Trial Chamber grants the Prosecution's request to amend the Amended Indictment and the Pre-Trial Brief. The Trial Chamber also accepts the Amended Pre-Trial Brief.

VI. DISPOSITION

FOR THE FOREGOING REASONS and pursuant to Rule 50 of the Rules, the Trial Chamber;

GRANTS the Motion;

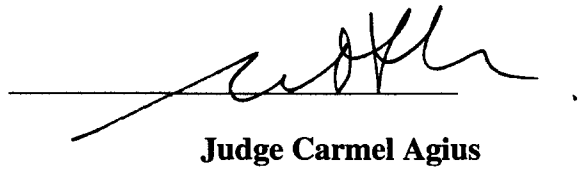
ORDERS that the Amended Indictment dated 2 November 2005 is replaced by the Second Amended Indictment, dated 4 April 2006 and attached in Annex A to the Motion;

ORDERS that the Pre-Trial Brief dated 7 November 2005 is replaced by the Amended Pre-Trial Brief, dated 4 April 2006, attached in Annex A to the Submission, and including the "Confidential Prosecution's Corrigendum of Amended Pre-Trial Brief" filed on 13 April 2006; and

ORDERS that the Defence have fourteen (14) days from the date of the filing of the translation of this decision to file their challenges to the Second Amended Indictment.

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

Dated this twenty-sixth of May 2006,
At The Hague,
The Netherlands.



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]