



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-T  
Date: 9 May 2007  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr. Hans Holthuis

**Decision:** 9 May 2007

**PROSECUTOR**  
v.  
**LJUBE BOŠKOSKI**  
**JOHAN TARČULOVSKI**

**DECISION ON BOŠKOSKI DEFENCE MOTION FOR AN  
ORDER TO DISCLOSE**

**The Office of the Prosecutor:**

Mr Dan Saxon  
Ms Joanne Motoike  
Mr Matthias Neuner

**Counsel for the Accused:**

Ms Edina Rešidović and Mr Guénaél Mettraux for Ljube Boškoski  
Mr Antonio Apostolski and Ms Jasmina Zivković for Johan Tarčulovski

1. This Trial Chamber (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seized of the “Motion for Leave to Add to Defence Submissions Regarding Rule 92bis Application and Motion for an Order to Disclose” filed confidentially by Counsel for Ljube Boškoski (“Defence”) on 16 March 2007 (“Motion”). In this Motion the Defence seeks (i) leave to supplement its submission pursuant to Rule 92bis of the Rules of Procedure and Evidence (“Rules”) with regard to the written statement of Henry Bolton, proposed for admission in the Prosecution’s Third Revised Motion pursuant to Rule 92bis; (ii) an order to the Prosecution to immediately disclose to the Defence any statement taken from any of its proposed witness, in whatever form, whether in the form of investigator’s notes or otherwise, as well as any and all investigator’s notes or other types of records of interview prepared by Mr Howard Tucker or Mr Thomas Kuehnel; and (iii) an order to the Prosecution not to proof Mr Bolton or otherwise discuss his evidence with him prior to him giving evidence before the Chamber. The Prosecution responded on 30 March 2007 opposing the Motion. Counsel for Johan Tarčulovski did not make submissions on the matter.

2. On 8 June 2006 the Prosecution filed its Third Revised Motion for Admission of Written Statements pursuant to Rule 92bis seeking, *inter alia*, the admission into evidence of the written statement of Henry Bolton. On 12 March 2007, in response to a request from the Defence the Prosecution informed the Defence that Howard Tucker, investigator for the Office of the Prosecutor, had interviewed Henry Bolton on 25 April 2002 and following this interview had made notes (“investigator’s notes”). The Prosecution indicated in its letter to the Defence that the notes summarised the information provided by Henry Bolton, that they were typed out by Mr Tucker for internal purposes, and that Mr Bolton did not sign or acknowledge in any way their accuracy. The Prosecution further indicated that Mr Bolton gave his first written witness statement to the Prosecution on 14 August 2003. This statement has been disclosed to the Defence. In its letter to the Defence of 12 March 2007 the Prosecution did not accept that the investigator’s notes prepared by Howard Tucker are a statement for the purposes of Rule 66(A)(ii) of the Rules but nevertheless provided the Defence with a copy.

3. The Defence submits that at the time of responding to the Prosecution’s Third Revised Motion pursuant to Rule 92bis it was not aware of the investigator’s notes in question and seeks leave to supplement its submission. This request has been considered by the Chamber in its Decision on the Prosecution’s Third Revised Motion pursuant to Rule 92bis and will not be discussed further here. The Chamber will discuss below the Defence request for an order to the Prosecution to disclose investigator’s notes pertaining to any of the witnesses the Prosecution intends to call, to disclose all investigator’s notes produced by Mr Tucker and Mr Kuehnel,

investigators for the Office of the Prosecutor and intended Prosecution witnesses, and for an order to prevent the Prosecution from proofing Mr Henry Bolton.

4. The Defence submits that the Prosecution's failure to disclose Mr Bolton's statement of 25 April 2002 constitutes a violation of its obligation under Rule 66. It is submitted that the Prosecution is under an obligation to disclose any witness statement of its witnesses regardless of the form in which the statement has been taken and that by failing to do so it has failed to act with the necessary diligence. It is submitted that the need to protect the integrity of Mr Bolton's evidence justified the Prosecution being denied the opportunity to proof or to prepare in other way this witness prior to trial. The Defence submits further that the Prosecution failure to disclose Mr Bolton's statement of 25 April 2002 is a violation of its disclosure obligations pursuant to Rule 68 as the statement, in its submission, falls within the scope of Rule 68. It is also submitted that Mr Tucker seeks to undermine or limit the significance of Mr Bolton's evidence in several personal comments which he made throughout the statement, which, in the Defence submission, could be relevant to assessing Mr Tucker's credibility.

5. The Prosecution initially responded that the investigators' notes fall within the scope of Rule 70(A) of the Rules and, therefore, are excluded from the scope of Rule 66(A)(ii). It submits that it has disclosed the investigator's notes pertaining to Mr Bolton in a timely manner, that the investigator's notes are largely repetitive to Mr Bolton's witness statement, and that it has satisfied its obligations pursuant to Rule 68. It is further submitted, in effect, that a number of investigator's notes pertaining to other witnesses have been disclosed to the Defence pursuant to Rule 66(B) and that with the exception of three investigator's notes, which were of information provided on a confidential basis and therefore within the scope of Rule 70(B), it intends to disclose the investigator's notes pertaining to all remaining witnesses on the Prosecution's witness list including these to which it had asserted Rule 70(A) applies. Finally, the Prosecution submits that there is nothing to suggest that the standards of professional conduct which apply to Prosecution counsel when proofing witnesses will not be observed when proofing Mr Bolton, or that there is such a risk that they may not, so as to warrant intervention by the Chamber.

6. On 30 April 2007 the Prosecution informed the Defence and the Chamber that it had disclosed all investigator's notes that were "not protected by the confidentiality restrictions of Rule 70." When read together with the Prosecution's response to the Motion, the Chamber accepts that this refers only to the confidentiality restrictions of Rule 70(B).

7. The Prosecution's notice of 30 April 2007 changes materially the issue before the Chamber. It now appears that all investigator's notes that could have been the subject of an order for disclosure have now been disclosed to the Defence. In the present circumstances there is no need

for the Chamber to discuss further whether and in what circumstances investigator's notes and other similar material may constitute material discloseable pursuant to Rule 66(A)(ii) or to set out disclosure guidelines for this purpose. While it may be the case that the disclosure of one or more sets of notes was delayed, the Defence has suffered no prejudice from the late disclosure. This part of the Motion is, therefore, moot.

8. The Defence submits that the investigator's notes of 25 April 2002 reveal that Mr Tucker (the investigator who produced the notes) sought to undermine or limit the significance of Mr Bolton's evidence in several personal comments, which, it is submitted he makes throughout the statement. In the Chamber's assessment there are no comments of this nature in the notes in question. There is a comment on the absence of evidentiary support for an opinion expressed, which is entirely appropriate in an internal document to assist in the preparation of the Prosecution case. Nothing demonstrates that the interviewer was seeking to undermine Mr Bolton's evidence. The comment made adds emphasis to the question whether the notes were in truth intended as an internal Prosecution document within the meaning of Rule 70(A) and, therefore, not discloseable under Rule 66(A)(ii).

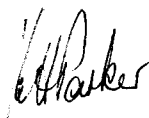
9. The Defence further seeks an order for the Prosecution to disclose all investigator's notes of interviews taken by Howard Tucker and Thomas Kuehnel. Notes taken of interviews with persons who are not to be called as Prosecution witnesses need not be disclosed under Rule 66(A)(ii), but if they are material to the preparation of the defence, or contain exculpatory information, Rules 66(B) or Rule 68, respectively, will apply. There is no present reason to conclude that there has been a failure to observe these Rules.

10. Finally, the Defence seeks an order to prevent the Prosecution from proofing Mr Henry Bolton when he comes to give evidence before the Chamber. It is submitted that this is necessary because of the Prosecution's conduct in this matter and because of the need to protect the integrity of Mr Bolton's evidence. The material before the Chamber does not support a conclusion that such an order is necessary. Proofing of a witness is not objectionable in itself; it is a normal and useful procedure in most cases. The Defence has not established any impropriety in the way the investigator's notes or the witness statement of Mr Bolton were made or recorded. The circumstances do not indicate to the Chamber that there is any justification for such an order.

For the foregoing reasons and pursuant to Rules 66, 68 and 70 of the Rules the Chamber **DENIES** the Motion.

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

Dated this ninth day of May 2007  
At The Hague  
The Netherlands



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Judge Kevin Parker  
Presiding Judge

**[Seal of the Tribunal]**