Prosecutor v Boškoski
(ICTY, Trial Chamber, Case No IT-04-82-T, 10 July 2008)

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Introduction

On 10 July 2008, Trial Chamber II[1] of the International Criminal Tribunal for the former Yugoslavia ('ICTY') delivered the judgment in the case of *Prosecutor v Ljube Boškoski and Johan Tarčulovski*.[2] The case concerned an alleged attack on the unarmed ethnic Albanian village of Ljuboten, the subsequent murder and cruel treatment of its residents, and the wanton destruction of property by the army and police ('Security Forces') of the former Yugoslav Republic of Macedonia ('FYROM'). The Indictment alleged that these crimes occurred during an armed conflict between the FYROM Security Forces and the ethnic Albanian National Liberation Army ('NLA').[3] This is a significant case because it provides a detailed application of the *Tadić* [4] threshold test to ascertain whether a state of 'internal armed conflict' exists. Also, the Trial Chamber's findings on the principle of superior responsibility demonstrates the difficulties associated with holding a civilian and, more specifically, a politician, criminally responsible for the acts of their subordinates. The decision sends a strong message that the principle of superior responsibility imposes different obligations on military commanders and civilian superiors. In the case of civilian superiors, the Trial Chamber held that it would suffice for them to report crimes to competent authorities to escape international criminal responsibility.

1. The Indictment

The events that formed the basis of the Indictment were alleged to have occurred from 12 August 2001 in Ljuboten, a village in the northern part of FYROM, its surroundings, and thereafter in Skopje. On the morning of 12 August 2001, Ljuboten came under an intense combined attack from police, under the command of Johan Tarčulovski, and from the FYROM army. Possibly as many as 100 police attacked Ljuboten, with the support of a police armoured personnel carrier and mortar and other fire support from the FYROM army. It was alleged that, during this attack, six Albanian civilian residents were shot by police and another civilian was killed by shelling from the army.[5] During this attack, the

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1 Judges Kevin Parker (Presiding), Christine Van Den Wyngaert and Krister Thelin.

2 *Prosecutor v Boškoski* (ICTY, Trial Chamber Case, No IT-04-82-T, 10 July 2008) ('*Boškoski*').

3 *Prosecutor v Boškoski (Amended Indictment)* (ICTY, Case No IT-04-82-PT, 2 November 2005) ('*Boškoski Indictment*'), [52].

4 *Prosecutor v Tadić* (ICTY, Trial Chamber, Case No IT-94-1-T, 7 May 1997) ('*Tadić*').

5 *Boškoski Indictment* [18]–[22].

police destroyed or damaged at least 14 houses in the village by setting them alight and through the use of hand grenades and small arms.[6]

Following the attack on Ljuboten, at least 90 male residents from the village were arrested while fleeing with their families. They were transported and detained at various police stations and the court and hospital in Skopje. From 12–15 August 2001, it was alleged that these detainees were subjected to cruel treatment with repeated beatings, humiliation, harassment and psychological abuse.[7]

The Indictment charged Ljube Boškoski and Johan Tarčulovski ('the Accused') with three counts of violations of the laws and customs of war, namely for murder, cruel treatment and wanton destruction. These violations of the laws and customs of war are punishable under article 3 of the *Statute of the International Tribunal for the Former Yugoslavia* ('*ICTY Statute*').[8]

Johan Tarčulovski was charged with individual criminal responsibility under article 7(1) of the *ICTY Statute* for having planned, instigated, ordered, committed or otherwise aided and abetted the crimes committed at Ljuboten.[9] The use of the term 'committed' in the Indictment did not infer that Tarčulovski physically committed any of the alleged crimes, but rather that he participated in a joint criminal enterprise ('JCE') to commit these crimes. The Prosecution submitted that Tarčulovski participated in a JCE on 10–12 August 2001 for the purpose of engaging in an unlawful attack on civilian objects that was not justified by military necessity.[10] It was alleged that Tarčulovski participated in the JCE with knowledge of its illegal objective and was aware of the possible consequences of the execution of the JCE.[11] It is important to note that Tarčulovski was not charged for the alleged crimes of cruel treatment against civilians outside of Ljuboten.

At the time of the alleged crimes, the police units under the command of Tarčulovski formed part of the Ministry of Interior of FYROM. Between May 2001 and November 2002, Ljube Boškoski was the Minister of Interior of FYROM. On this basis, Boškoski was charged with individual criminal responsibility pursuant to article 7(3) of the *ICTY Statute*. The Prosecution submitted that Boškoski exercised de jure and de facto command and control over the police who participated in the alleged crimes.[12] As a superior of the police, Boškoski was responsible for the actions of his subordinates and, despite knowing or having reason to know that these crimes had been committed by his subordinates, he failed to take necessary and reasonable measures to investigate the allegations and to punish the perpetrators.

Under article 5 of the *ICTY Statute*, the Tribunal will only have the jurisdiction to punish perpetrators of war crimes where the prosecution can establish that an armed conflict, either international or internal in character, existed at the time material to the

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6 Ibid [24].
7 Ibid [26].
8 *Statute 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*, UN Doc S/25704 (1993), Annex, 36.
9 *Boškoski Indictment* [3].
10 Ibid [4].
11 Ibid [6]–[8].
12 Ibid [11].

charged offences. In addition, under article 3 of the *ICTY Statute*, the Tribunal must be satisfied that there is a sufficient link between the alleged acts of an accused and the armed conflict.[13]

The Indictment claimed that an internal armed conflict existed in FYROM from at least January until September 2001 between the FYROM Security Forces and the NLA.[14] The test set out by the Trial Chamber in *Tadić* provides that an internal armed conflict will exist where a minimum level of intensity is reached in the hostilities and the parties to the conflict are considered sufficiently organised, in distinction from lesser forms of violence such as 'terrorist activities'.[15] The existence of an internal armed conflict in FYROM in August 2001 was a highly contested issue in the trial.

2. Submissions of the Accused

Prior to the trial, the Accused unsuccessfully challenged the jurisdiction of the Tribunal on the basis that no armed conflict existed in FYROM in 2001.[16] These motions were dismissed on the basis that the question of whether there was an armed conflict at the time of the alleged crimes was a factual determination for consideration by the Trial Chamber.[17]

At the trial, the Accused argued that the conflict in FYROM did not meet the requisite thresholds necessary under the *Tadić* test. With respect to the intensity of the conflict, it was argued that the circumstances in FYROM were comparable with the 2001 situation in Northern Ireland and the fighting between the Turkish army and the Kurdistan's Workers Party, neither of which were recognised as armed conflicts.[18] On this basis, it was argued that the hostilities were merely acts of a terrorist nature and, therefore, outside the scope of application of international humanitarian law ('IHL'). This proposition was supported by a number of statements from international organisations that had condemned the terrorist attacks perpetrated by the NLA.[19] It was suggested by the Accused that the NLA attacks would have been considered legitimate military activities if these international organisations had characterised the violence in FYROM as an internal armed conflict.

With respect to the required degree of organisation of the parties to the conflict, the Accused submitted that the terrorist nature of the NLA, in addition to allegations of violations of IHL by the NLA, demonstrated that the NLA did not exercise authority to control its own forces. Furthermore, the Accused disputed the fact that the NLA was an organised armed group on the basis that there was a lack of evidence to suggest that it had sufficient organisational, fighting and logistical abilities, or the ability to carry out sustained attacks and to implement humanitarian standards.

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[13] *Tadić* [572]–[573].
[14] *Boškoski Indictment* [52].
[15] *Tadić* [562].
[16] *Prosecutor v Boškoski (Decision on Johan Tarčulovski's Motion Challenging Jurisdiction)* (ICTY, Case No IT-04-82-PT, 1 June 2005); *Prosecutor v Boškoski (Decision on Interlocutory Appeal on Jurisdiction)* (ICTY, Case No IT-04-82-AR 72.1, 22 July 2005).
[17] *Boškoski (Decision on Johan Tarčulovski's Motion Challenging Jurisdiction)* [11]; *Boškoski (Decision on Interlocutory Appeal on Jurisdiction)* [13].
[18] *Boškoski* [179].
[19] Ibid [191].

Further, the Accused argued that Ljuboten was a legitimate military target, that the operation was limited to areas and houses where it was believed that members of the NLA were located and that the attack was justified by military necessity.[20] The Accused submitted that residents from Ljuboten were actively taking part in the hostilities, that there was an NLA presence in Ljuboten and that the village was being used as a logistics base for the NLA. There assertions heavily relied upon Security and Counter-Intelligence Division operative interviews and reports of which the sources were anonymous.[21]

3. Judgment

In handing down its decision, the Trial Chamber was critical of the reliability of the evidence that was given by the residents of Ljuboten and the FYROM Security Forces.[22] Despite these evidentiary issues, the Trial Chamber was satisfied that NLA combatants were present in Ljuboten and that some of its residents were members of the NLA. Based on this objective finding, the Trial Chamber held that the FYROM police reasonably formed the view that suspected terrorists or NLA members were present in Ljuboten and that the police had legitimate reasons for entering the village on 12 August 2001.[23]

Having regard to the evidence before it, the Trial Chamber was persuaded that in August 2001 there was a state of internal armed conflict in FYROM between the FYROM Security Forces and the NLA. In reaching this decision, the Trial Chamber was satisfied that the conflict had reached the required level of intensity and that the NLA possessed sufficient characteristics of an organised armed group.

The Trial Chamber considered a number of indicative factors in determining that the conflict had reached a minimum degree of intensity including:

(i) the seriousness and occurrence of armed clashes had escalated to almost daily violence in FYROM between May and mid-August 2001;[24]

(ii) the conflict covered a large geographical area from Tetovo, to Kumanovo-Lipkovo, around Skopje and in Gostivar;[25]

(iii) the increase in the mobilisation of army, police and additional reserve units of FYROM;[26]

(iv) the United Nations Security Council issued a statement condemning the violence by 'ethnic Albanian armed extremists' and, subsequently, passed Resolution 1345 condemning the hostilities and welcoming international involvement;[27]

(v) the large number of persons that had become refugees or internally displaced as a result of the conflict;[28]

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[20] Ibid [132].
[21] Ibid [134].
[22] Ibid.
[23] Ibid [140].
[24] Ibid [243].
[25] Ibid.
[26] Ibid.
[27] Ibid [213]–[214].
[28] Ibid [248].

(vi) the use of heavy weapons, such as grenade launchers, landmines, helicopters, tanks, Sukhoi SU-25 ground attack fighter planes, mortars and surface-to-air missiles;[29]

(vii) the besieging of towns and villages, such as Tetovo and Aracinovo;[30]

(viii) the significant number of FYROM Security Forces deployed to conflict areas;[31]

(ix) the territory of FYROM that was occupied and controlled by the NLA;[32] and

(x) the towns and villages of FYROM that were occupied by the NLA.[33]

It is interesting to note that, despite the intensity of the conflict and the clear escalation of hostilities leading up to August 2001, the casualties on both sides were relatively low and the material damage to houses and property was 'of a relatively small scale'.[34]

The Trial Chamber dismissed the submission of the Accused that the NLA attacks were terrorist activities. It held that the characterisation of violence as terrorist in nature is immaterial when considering the evidence of armed conflict.[35] Similarly, the Trial Chamber dismissed the submission that the statements of international organisations condemning NLA terrorist attacks constituted evidence that a state of armed conflict did not exist.[36] The Trial Chamber said that it is common practice for states and organisations to characterise acts of non-state actors as terrorist acts notwithstanding the fact that the act might have been committed during an armed conflict and, therefore, dismissed the proposition of the Accused.[37]

With respect to its finding that the NLA possessed sufficient characteristics of an organised group under the *Tadić* test, the Trial Chamber relied on evidence that demonstrated the NLA's:

(i) command structure, with a recognised leader, structure and hierarchy, and internal regulations that outlined the chain of command and established disciplinary measures;[38]

(ii) ability to conduct military operations, such as troop movements and logistics, and the ability to conduct hit and run manoeuvres;[39]

(iii) level of logistics, such as supplying weaponry and equipment, providing military training, the wearing of a uniform and the ability to recruit new members;[40]

(iv) discipline and the obligations to observe the laws of war;[41] and

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[29] Ibid [213]–[214], [217], [229], [232], [243].
[30] Ibid [243].
[31] Ibid [213], [219].
[32] Ibid [242].
[33] Ibid.
[34] Ibid [241], [244]. The highest estimates put the total number of those killed during 2001 at 168.
[35] Ibid [18]–[188].
[36] Ibid [191], also citing *Prosecutor v Boškoski (Decision on Boskoski Defence Motion for Admission of Exhibits from the Bar Table – 'Armed Conflict' and Related Requirements under Article 3 of the Statute)* (ICTY, Case No IT-04-82-T, 27 February 2008), [6].
[37] *Boškoski* [192].
[38] Ibid [268]–[272].
[39] Ibid [277].
[40] Ibid [281], [284]–[286].
[41] Ibid [272].

(v) unity and ability to speak with one voice.[42]

The Trial Chamber dismissed the arguments of the Accused that the NLA did not exercise control over its ground forces. The fact that members of the NLA had violated IHL in the conflict did not, of itself, suggest that the NLA was not organised.[43] Instead, the Trial Chamber indicated that what needed to be considered was how the attacks were planned and carried out, and whether they were conducted as a result of military strategy dictated by a chain of command.[44]

The Trial Chamber was also satisfied that the Prosecution had established the requisite nexus between the conduct of the Accused and the armed conflict. Some factors that the Trial Chamber relied upon to reach this determination included that the FYROM police perpetrated the crimes, and that the attack on Ljuboten was led by a member of FYROM police and supported by artillery fire from the FYROM army.[45]

4. Criminal responsibility

The Trial Chamber acquitted Boškoski of all three charges against him and ordered his release from the United Nations Detention Unit.[46] Critical to this finding was the Prosecution's failure to establish that Boškoski had not taken necessary and reasonable measures to investigate the alleged crimes.

According to the Trial Chamber, article 7(3) of the *ICTY Statute* merely required Boškoski to report the allegations of criminal conduct to the appropriate authorities and, provided that an investigation would likely be triggered by this report, Boškoski would not have been in breach of his obligations under the *ICTY Statute*. Given that Boškoski was notified that the judicial authority and the public prosecutor were investigating the conduct of the FYROM police on 12 August 2001, the Trial Chamber was satisfied that Boškoski had complied with his obligations under article 7(3) of the *ICTY Statute*.[47] The fact that the appropriate authorities did not actually conduct an investigation did not constitute a breach of article 7(3) of the *ICTY Statute* due to the fact that these authorities were outside the Ministry of Interior and, therefore, outside the powers of Boškoski.

On the other hand, Tarčulovski was found guilty on all counts of the Indictment and sentenced to 12 years' imprisonment.[48] The Trial Chamber was satisfied that Tarčulovski played a prominent role in the events of 12 August 2001 in Ljuboten by making logistical

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[42] Ibid [290].
[43] Ibid [205].
[44] Ibid [277]–[291].
[45] Ibid [294].
[46] Ibid [606].
[47] The Prosecution has filed an appeal against this determination of the Trial Chamber: see Prosecution Appeal Brief, filed confidentially on 20 October 2008. A public redacted version of the Prosecution' s Appeal Brief was filed on 4 November 2008: *Prosecutor v Boškoski (Notice of Filing of Corrected Public Redacted Version of Prosecution's Appeal Brief)* (ICTY, Case No IT-04-82-A, 4 November 2008).
[48] Tarčulovski appealed this decision to the Appeals Chamber and the appeal hearing took place, as scheduled, on 29 October 2009: see *Prosecutor v Boškoski (Scheduling Order for Status Conference)* (ICTY, Case No IT-04-82-A, 9 February 2010).

preparations for the operation, coordinating fire support from the army and exercising effective leadership of the police during the attack.[49] This evidence satisfied the Trial Chamber that Tarčulovski was criminally responsible for ordering, planning and instigating the charged crimes.[50] However, the Trial Chamber was not convinced that Tarčulovski participated in a JCE.[51] This determination was based on evidence that the police units under Tarčulovski's command acted on his orders and not as fellow participants in a JCE, and that he was himself merely carrying out the orders of an unidentified superior.[52] It should be noted that on 12 January 2009, Johan Tarčulovski filed an appeal against the decision of the Trial Chamber.[53]

5. Significance of the decision

A. Existence of an internal armed conflict

It is the view of the author that the ICTY was correct in finding that a state of internal armed conflict existed in FYROM in August 2001 based on its application of the *Tadić* test. Should it, therefore, be inferred that *Boškoski* is of limited significance to the ICTY jurisprudence and IHL more broadly?

It could be said that *Boškoski* offers little in terms of providing new legal principles to IHL when compared with cases such as *Tadić* and *Galić* [54], to mention just two. Further *Boškoski* may be described, perhaps over simplistically, as a straightforward application of the *Tadić* test to determine whether a state of armed internal conflict existed. However, it should not be inferred that the *Boškoski* case is of little significance to the development of IHL. Instead of developing or evolving current international legal principles, the decision provides a detailed and thorough application of the *Tadić* test, particularly with respect to the intensity component, which may guide and/or be adopted by future tribunals when assessing whether a state of internal armed conflict exists.

Table 1 below outlines the various indicative factors that have been taken into account by the ICTY when deciding that the minimum intensity threshold has been reached, consequently leading to Tribunal findings that a state of armed internal conflict existed. The seven ICTY decisions that have been included in Table 1 are the *Tadić*, *Čelebići*,[55] *Limaj*,[56] *Kordić*,[57] *Haradinaj*,[58] *Halilović*,[59] and *Boškoski*.

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[49] *Boškoski* [560].
[50] Ibid [577].
[51] Ibid [585].
[52] Ibid.
[53] Tarčulovski's Notice of Appeal (8 August 2008); confidential Appeal Brief (9 January 2009); *Prosecutor v Boškoski (Public – Redacted Brief of Johan Tarculovski)* (ICTY, Case No IT-04-82-A, 12 January 2009) ('*Tarčulovski's Appeal Brief*').
[54] *Prosecutor v Galić* (ICTY, Trial Chamber, Case No IT-98-29-T, 5 December 2003).
[55] *Prosecutor v Delalić* (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Čelebići*').
[56] *Prosecutor v Limaj* (ICTY, Trial Chamber, Case No IT-03-66-T, 30 November 2005) ('*Limaj*').
[57] *Prosecutor v Kordić* (ICTY, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) ('*Kordić*').
[58] *Prosecutor v Haradinaj* (ICTY, Trial Chamber, Case No IT-04-84-T, 3 April 2008) ('*Haradinaj*').
[59] *Prosecutor v Halilović* (ICTY, Trial Chamber, Case No IT-01-48-T, 16 November 2005) ('*Halilović*').

Table 1: Minimum intensity threshold: Factors taken into account by the ICTY

Factors considered	*Tadić*	*Čelebići*	*Limaj*	*Kordić*	*Haradinaj*	*Halilović*	*Boškoski*
1. Seriousness and increase of attacks[60]	✓	✓		✓	✓		✓
2. Spread of attacks over a period of time[61]	✓	✓	✓	✓		✓	✓
3. Increase in mobilisation of forces and weapons[62]		✓					✓
4. Received UN Security Council attention/ resolutions[63]	✓	✓			✓		✓
5. Number of civilians affected[64]	✓		✓	✓	✓		✓
6. Types of weapons used[65]			✓		✓		✓
7. Use of heavy weapons[66]	✓		✓				✓
8. Use of tanks or other heavy vehicles/ military equipment[67]	✓		✓			✓	✓
9. Blocking/ besieging or use of heavy shelling of towns[68]	✓	✓	✓		✓	✓	✓

[60] *Tadić* [565]; *Čelebići* [189]; *Kordić* [340]; *Haradinaj* [91], [99]; *Boškoski* [243].
[61] *Tadić* [566]; *Čelebići* [186]; *Limaj* [168]–[169]; *Kordić* [340]–[341]; *Halilović* [163]–[166]; *Boškoski* [243].
[62] *Čelebići* [188]; *Boškoski*, [243].
[63] *Tadić* [567]; *Čelebići* [190]; *Haradinaj* [49]; *Boškoski* [213], [243].
[64] *Tadić* [565]; *Limaj* [139], [167]; *Kordić* [340]; *Haradinaj* [49], [97]; *Boškoski* [240], [248].
[65] *Limaj* [166]; *Haradinaj* [49]; *Boškoski* [213], [229], [243].
[66] *Tadić* [565]; *Limaj* [136], [138], [156], [158], [163], [166]; *Boškoski* [214], [217].
[67] *Tadić* [143]; *Limaj* [136], [166]; *Halilović* [166]; *Boškoski* [214], [216], [232], [243].
[68] *Tadić* [143]; *Limaj* [153]; *Kordić* [189]; *Haradinaj* [96]; *Halilović* [165]–[168]; *Boškoski* [243].

Factors considered	*Tadić*	*Čelebići*	*Limaj*	*Kordić*	*Haradinaj*	*Halilović*	*Boškoski*
10. Extent of destruction[69]	✓		✓	✓	✓		
11. Number of casualties - fighting and shelling[70]	✓		✓	✓	✓	✓	
12. Quantity of units deployed[71]					✓	✓	✓
13. Existence/ change of front lines[72]						✓	✓
14. Occupation of territory[73]			✓			✓	✓
15. Occupation of towns/villages[74]			✓			✓	✓
16. Deployment of government forces to conflict area[75]			✓				✓
17. Road closures[76]			✓				

Table 1 is illustrative of the number of indicative factors that the ICTY has considered in each particular case before reaching the conclusion that the conflict had satisfied the minimum intensity threshold limb of the *Tadić* test: *Boškoski* (14), *Limaj* (12), *Tadić* (9), *Haradinaj* (8), *Halilović* (8) *Čelebići* (5) and *Kordić* (5). Clearly, the decision of the Trial Chamber in *Boškoski* provides the most expansive list of indicative factors considered by the ICTY in any of its judgments. However, it should not be considered an exhaustive list. In *Čelebići* and *Kordić*, on the other hand, the ICTY was satisfied that the intensity requirement was satisfied after consideration of only five indicative factors.

Table 1 also shows that when finding that the minimum intensity threshold requirement had been satisfied, the ICTY most commonly considered: the seriousness and increase of attacks; the spread of attacks; the number of civilians affected; the degree of attacks against towns; and the number of casualties. However, there is no general rule that

[69] *Tadić* [565]; *Limaj* [142]; *Kordić* [337]–[338]; *Haradinaj* [49].
[70] *Tadić* [565]; *Limaj* [142]; *Kordić* [339]; *Haradinaj* [49]; *Halilović* [164].
[71] *Haradinaj* [49]; *Halilović* [168]; *Boškoski* [219].
[72] *Halilović* [161], [169], [172]; *Boškoski* [212]–[213], 224.
[73] *Limaj* [146], [158]; *Halilović* [163]; *Boškoski* [242].
[74] *Limaj* [143], [163]; *Halilović* [162], [164]; *Boškoski* [242].
[75] *Limaj* [142], [150], [164], [169]; *Boškoski* [213].
[76] *Limaj* [144].

can be derived from these ICTY decisions to the effect that one indicative factor will be given more weight than another or that the presence of one factor will demonstrate that the intensity threshold has been satisfied. This is consistent with a comment made by the ICTY in *Haradinaj* that none of the factors in themselves are essential to satisfying the criterion of intensity.[77] The same was also said with respect to the organisation limb of the *Tadić* test.[78]

Moving forward, the *Boškoski* case has provided future war crimes tribunals with a thorough starting point of indicative factors to consider when called on to determine whether a state of internal armed conflict exists.

B. Superior responsibility

The *Boškoski* decision is also noteworthy with respect to the ICTY's findings on the principle of superior responsibility and the legal standard that should be applied. Article 7(3) of the *ICTY Statute* is the mechanism that is used to hold superiors criminally responsible for the crimes of their subordinates and provides that:

> 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).

Relying on the above emphasised words, the Trial Chamber held that Boškoski satisfied his obligation to punish offending subordinates by providing a 'report to the competent authorities' that was 'likely to trigger an investigation into the alleged criminal conduct'.[79] Given that two reports were made by police of the Ministry of Interior to the investigating judicial authority and to the public prosecutor, and the fact that Boškoski was notified that an investigation was being attempted, the Trial Chamber found that Boškoski was not criminally responsible for the crimes that were committed by his subordinates.[80] It is the author's view that the Trial Chamber was correct in reaching this conclusion and that the finding is supported by a line of ICTY authority.

Nonetheless, the Prosecution's Appeal Brief challenges the correctness of the Trial Chamber's findings with respect to the legal standard applied to superior responsibility.[81] The Prosecution has submitted that the Trial Chamber applied an incorrect test and that the proper legal standard is 'solely whether the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrators thereof'.[82] Further, the Prosecution has submitted that in determining whether the superior has

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[77] *Haradinaj* [49].
[78] Ibid [60].
[79] *Boškoski* [536].
[80] Ibid [536].
[81] *Prosecutor v Boškoski* (*Notice of Filing of Corrected Public Redacted Version of Prosecution's Appeal Brief*) (ICTY, Case No IT-04-82-A, 4 November 2008), [15].
[82] Ibid [17], relying on *Halilović* [64].

discharged his/her duty to punish the perpetrators requires consideration of the measures open to the superior.

Various decisions of the ICTY Trial Chambers have interpreted 'necessary and reasonable measures' for the purposes of article 7(3). In *Aleksovski*,[83] the Trial Chamber commented that:

> It should be stated that the doctrine of superior responsibility was originally intended only for the military authorities. Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to civilian authorities. It cannot be expected that a civilian authority will have the disciplinary power over his subordinate equivalent to that of military authorities in an analogous command position . . . The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.[84]

Similarly, the Trial Chambers in *Kordić*[85] and *Halilović*[86] emphasised that civilian superiors are only required to report the crimes of their subordinates to the competent authorities.

Consistent with these ICTY authorities, the Trial Chamber in *Boškoski* said:

> [I]n the case of a superior who does not have personal power to punish subordinates, such as political leaders, what is required is that there be a report to the competent authorities which is likely to give rise to an investigation or initiation of appropriate proceedings.[87]

This statement, along with comments made by the ICTY in other decisions, indicates that the obligations imposed by article 7(3) on civilian superiors are significantly less stringent than those imposed on military commanders. On the one hand, military commanders are required to actively punish perpetrators, whereas civilian superiors are merely required to report the crimes to a competent authority in order to satisfy the obligation imposed by article 7(3). The rationale for this position is that armies have their own structure of disciplinary mechanisms to deal with breaches of IHL and civilians fall outside this military system. The *Boškoski* Appeals Chamber should, therefore, endorse the earlier decisions of the Trial Chambers.

The ICTY, through *Boškoski* and other earlier decisions, has clearly indicated that civilian superiors will have satisfied their obligations under article 7(3) of the *ICTY Statute* provided that the crimes are reported to the competent authorities and that an investigation will likely follow.

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[83] *Prosecutor v Aleksovski* (ICTY, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999) ('*Aleksovski*').
[84] Ibid [78]. See also *Prosecutor v Brđanin* (ICTY, Trial Chamber, Case No IT-99-36-T, 1 September 2004) ('*Brđanin*'), [281].
[85] *Kordić* [446].
[86] *Halilović* [97], [100].
[87] *Boškoski* [519].

Conclusion

As the indictments against perpetrators of war crimes in FYROM and the operation of the ICTY come to a close, it is important to reflect on the contribution that these cases have made to IHL jurisprudence. *Boškoski* has provided future war crimes tribunals with significant and valuable guidance on what constitutes an 'internal armed conflict' and how to apply the *Tadić* test. In addition, *Boškoski* has sent a message that the principle of superior responsibility does not apply equally to military commanders and civilian authorities alike. The result of this interpretation of article 7(3) of the *ICTY Statute* has made it difficult for prosecutors to establish superior criminal responsibility. If it becomes desirable in the future to hold civilians and politicians to a higher degree of responsibility for the crimes of their subordinates, the provisions of the statute enacting the tribunal will need to reflect the change in position, as it is evident that the wording of article 7(3) of the *ICTY Statute* will not be interpreted in that way.