



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-02-55-MISC.6

Date: 4 October 2002

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BEFORE THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphonsus Orié

Registrar: Mr. Hans Holthuis

Order of: 4 October 2002

IN RE: THE REPUBLIC OF MACEDONIA

**DECISION ON THE PROSECUTOR'S REQUEST FOR DEFERRAL
AND MOTION FOR ORDER TO THE
FORMER YUGOSLAV REPUBLIC OF MACEDONIA**

The Office of the Prosecutor:

Ms. Carla del Ponte

The Government of the Republic of Macedonia

Mr. Stavre Djikov

I. Procedural History

1. On 5 September 2002, the Prosecutor filed a “Motion to President to Assign Trial Chamber to Prosecutor’s Deferral Request”. By “Order of the President Assigning a Case to a Trial Chamber”, dated 6 September 2002, the case was assigned to Trial Chamber I (“the Chamber”). The Chamber received the “Prosecutor’s Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia”, dated 5 September 2002 (“the Prosecutor’s Request”).

2. On 10 September 2002, the Chamber I held an informal hearing of the Office of the Prosecutor on the Motion on the part of the Prosecutor’s Request that applied for the issuance of an interim order from the Chamber to stop the commencement of criminal proceedings against two individual accused on the next day in the Republic of Macedonia.

3. The Chamber rendered their “Decision on the Application of the Prosecutor for an Interim Order and Scheduling Order” on the same day, rejecting the application for an interim order and scheduling a formal hearing on the Prosecutor’s Request to take place on 25 September 2002. An authorised Representative of the Republic of Macedonia was invited by the Chamber to participate in the hearing and to submit to the Chamber the position of the Government of the Republic of Macedonia with regard to the Deferral issues in question. On 13 September 2002, the Chamber received a letter from the Republic of Macedonia, Public Prosecution Office, confirming that the Public Prosecutor of the Republic of Macedonia intended to participate in the hearing.

4. The hearing on the Prosecutor’s Request took place on 25 September 2002. The Office of the Prosecutor was represented by Ms. Carla del Ponte (“the Prosecutor”), the Government of the Republic of Macedonia was represented by Public Prosecutor General Stavre Djikov (“the Public Prosecutor General”). The Chamber heard presentations and arguments of both parties and availed itself of the opportunity to put additional questions to the Prosecutor and the Public Prosecutor General. The Chamber invited the Public Prosecutor General to submit his presentation in writing to the Chamber after the hearing.¹ The Public Prosecutor General announced that he would communicate the statement of the Macedonian authorities including a documentation to the court.²

¹ *Transcript*, p. 16

² *Transcript*, p. 16

5. On September 26, 2002, the Trial Chamber received a filing from the Public Prosecutor's Office of the Republic of Macedonia ("the Macedonian Filing"). In addition, several exhibits were submitted.³

II. The Prosecutor's Request for Deferral

6. The Prosecutor requests the Chamber to issue a formal request pursuant to Rules 9 (iii) and 10 (A) of the Rules of Procedure and Evidence of the Tribunal ("the Rules") to the Republic of Macedonia to defer to the competence of the Tribunal investigations and prosecutions of alleged crimes committed by the National Liberation Army (NLA) and the Macedonian forces in Macedonia during the year 2001.⁴ The Prosecutor's Request concerns the deferral of the following five specific cases and investigations:⁵

- the "Lipkovo Water Reserve" case, involving allegations that members of the NLA interfered with the supply of water to Lipkovo in June 2001;
- the "NLA Leadership" case, involving allegations of various crimes committed by senior NLA members during 2001;
- the "Mavrovo Road Workers" case, involving allegations that NLA members detained and abused five Macedonian road workers in August 2001;
- the "Neprošteno" investigations, concerning activities of the NLA with regard to alleged crimes committed against Macedonian civilians, including a number of mass graves discovered in Neprošteno;
- the "Ljuboten" investigations, concerning activities of the Macedonian forces against Macedonian Albanian civilians in Macedonia during 2001, including alleged crimes committed in Ljuboten.

7. In addition, the Prosecutor seeks a formal request from the Trial Chamber that the competent authorities of the Republic of Macedonia defer to the competence of the Tribunal all current and future investigations and prosecutions of alleged crimes committed by

³ The following exhibits were submitted: A publication by the Ministry of Internal Affairs of the Republic of Macedonia (ed.), called "White Book-Terrorism of the So-Called NLA", published in Skopje in 2001 (Exhibit M1); a CD-Rom of the afore-mentioned book (Exhibit M2); A Document with the title "The reaction of some Statements and Officials of the International Community and reactions of academy scientists", source and date unknown (Exhibit M3); A Binder with the title "Proposal's for Criminal Prosecution submitted by Public Prosecution of the Republic of Macedonia to the International Criminal Tribunal in February 2002" (Exhibit M4); Computer disc of the Public Prosecution Office of the Republic of Macedonia (Exhibit M5); Article "The Calm Before the Storm: The Influence of Cross-Border Networks, Corruption, and Contraband on Macedonian Stability and Regional Security", written by Robert Hislope, New York 2001 (Exhibit M6).

⁴ *Prosecutor's Motion to President to Assign Trial Chamber to Prosecutor's Deferral Request*, p. 1

⁵ *The Prosecutor's Request*, p. 2

members of the NLA during 2001 as well as all current and future investigations and prosecutions of allegations concerning the activities of the Macedonian forces against Macedonian Albanian civilians in Macedonia in 2001.⁶

8. The Prosecutor submits the following procedural background for their application: In October 2001, she received a letter by the President of Macedonia seeking an investigation by the International Criminal Tribunal (“the Tribunal”) into the killing of twelve Macedonian civilians purportedly buried in a mass grave near the village of Neprošteno. On 9 November 2001, the Prosecutor commenced an investigation into allegations concerning the activities of the NLA in Macedonia during the year 2001, including investigations with regard to the villages Neprošteno and Ljuboten. Subsequently, the Prosecutor received information from the Macedonian authorities that national investigations were conducted with regard to the “Lipkovo Water Reserve” case, the “NLA Leadership” case and the “Mavrovo Road Workers” case.⁷

9. With regard to the “Mavrovo Road Workers” case, the Prosecutor submits that the Macedonian authorities have already charged and detained two individuals. The Prosecutor reviewed the available evidence against them and came to the conclusion that there was insufficient evidence to establish a *prima facie* case against them. By letter, dated 26 June 2002, the Prosecutor informed the Macedonian authorities that she would not proceed with the prosecution of the two detained individuals.⁸ The Prosecutor later learned that the trial of the two individuals was scheduled to commence before a domestic court on 11 September 2002.⁹

10. In May 2002, the Prosecutor had informed the Macedonian authorities about her decision to assume primacy over the afore-mentioned three cases and the two investigations. By a letter, dated 14 August 2002, the Public Prosecutor General informed the Prosecutor that the Macedonian authorities were not provided with information as to whether the Prosecutor acted under Rule 9 of the Rules of Procedure and whether a formal request for deferral had been issued by a Chamber. The Public Prosecutor General informed the Prosecutor that the authorities in Macedonia had not yet received any such formal request.¹⁰ In her response letter, dated 29 August 2002, the Prosecutor expressed her view that a formal deferral proceeding under Rules 9 and 10 of the Rules may be substituted by an

⁶ *The Prosecutor’s Request*, pp.1,6

⁷ *The Prosecutor’s Request*, p. 2

⁸ *The Prosecutor’s Request*, p. 4, see also Annex D

⁹ *The Prosecutor’s Request*, p. 5

agreement by the two prosecuting parties. Due to the co-operation of the Prosecutor and the authorities of the Republic of Macedonia, the deferral of the cases in question would therefore not call for a Chamber's decision.¹¹ The Public Prosecutor General responded by letter dated 2 September 2002. He underlined that the competent authorities of the Republic of Macedonia were conducting formal criminal proceedings against known perpetrators in national courts and that, therefore, these cases should be formally deferred. He also informed the Prosecutor that in the absence of a formal request for deferral the Public Prosecutor General's Office and the Macedonian courts are legally obliged to continue with the investigations and proceedings before the competent domestic courts and that, therefore, it is essential to follow the formal procedures for deferral of cases as enshrined in the Rules of the Tribunal.¹²

11. In support of her application, the Prosecutor submitted the following arguments to the Chamber: The ongoing domestic investigations and prosecutions in Macedonia into crimes allegedly committed by NLA members in 2001 and the investigations and prosecutions concerning the activities of the Macedonian forces against Macedonian civilians in Macedonia in 2001 are "closely related" to the Prosecutor's investigations of the same acts in the meaning of Rule 9 (iii) of the Rules. The Prosecutor has already commenced investigations into the specific five cases concerned and has designated additional resources for investigations to be conducted during the next 18 months.

12. The Prosecutor expressed her concern that parallel investigations of the same acts by the Prosecutor and the Macedonian authorities at the same time, however, may have serious negative implications and may ultimately jeopardise the success of the Prosecutor's investigations. In particular, the Prosecutor fears that multiple interviews of witnesses by different investigating parties create the risk that conflicting statements may arise and that witnesses be antagonised. Further, the seizure and analysis of physical and forensic evidence by the domestic authorities may compromise the Prosecutor's ability to analyse the same evidence. Due to the potentially different investigative procedures of the two investigating parties, the acts of the Macedonian authorities could also compromise or taint subsequent investigative efforts by the Prosecutor.

13. During the hearing on 25 September 2002, the Prosecutor submitted that all legal elements required for a deferral of a case under Rules 9 and 10 of the Rules are met. She

¹⁰ *The Prosecutor's Request*, Annex F, pp. 4, 5

¹¹ *The Prosecutor's Request*, Annex G, p. 1

further submitted an additional argument in support of her request for deferral to the Chamber.¹³ She underlined that the Macedonian national law does not provide for the protection of witnesses. For the purpose of the investigations and proceedings in question, however, such witness protection measures are indispensable. Since the Tribunal has witness protection mechanisms in place, it would, in the view of the Prosecutor, also be more appropriate to conduct the investigations and proceedings exclusively pursuant to the Rules and Procedure of the Tribunal.¹⁴

14. The Prosecutor suggests that only at the end of her investigations, she will be in the position to determine which cases are appropriate for indictment by the Tribunal and which investigations or proceedings could be referred back to the Macedonian authorities.¹⁵

III. The presentation by the Republic of Macedonia

15. In the hearing, the Public Prosecutor General submitted an overview on the alleged crimes committed during the year 2001 in the Republic of Macedonia to the Chamber.¹⁶ According to the Public Prosecutor General, in the period between January 2001, when the conflict started, and 26 September 2001, 82 members of the Macedonian Security Forces and 16 civilians, two of whom were OSCE staff members, have been killed. About 300 policemen obtained bodily injuries as did members of the army and civilians. More than 86.000 people were displaced from their homes and 80.000 citizens temporarily abandoned the Republic of Macedonia and went abroad.¹⁷ 92 persons were kidnapped. 20 persons are accounted missing, six of whom are ethnic Albanians, 13 are ethnic Macedonians and one is a citizen of Bulgaria.¹⁸ More than 40 religious buildings were damaged, including mosques and churches of outstanding historical and cultural value. The overall damaged caused to the citizens and the economy is estimated to amount to 1 billion Euro.¹⁹

16. The Public Prosecutor General submitted that 75 criminal complaints against 245 suspects with regard to crimes committed against the state and crimes against humanity pursuant to chapter 28 and 34 of the Criminal Code of the Republic of Macedonia have been

¹² *The Prosecutor's Request*, Annex H, p. 2

¹³ *Transcript*, p. 5

¹⁴ *Transcript*, p. 6

¹⁵ *Transcript*, pp. 6, 7

¹⁶ *Transcript*, pp. 8-11

¹⁷ *Transcript*, p. 12

¹⁸ *Transcript*, p. 12

¹⁹ *Transcript*, p. 12

lodged.²⁰ However, on March 8, 2002, a law on amnesty was adopted by the parliament of the Republic of Macedonia according to which all the reported persons, except for 56 people, are excluded from prosecution. These 56 persons are alleged perpetrators of serious violations of International Humanitarian Law. With regard to those alleged perpetrators, proceedings are instigated before the domestic courts.²¹ These 56 individuals relate to three cases, the “NLA Leadership” case, the “Mavrovo Road Workers” case and the “Lipkovo Water Reserve” case.²² For these three cases, the alleged perpetrators are known.²³

17. The Public Prosecutor General submitted that in 1999, during the events in Kosovo, an office of the Tribunal was opened in Skopje. He underlined that, ever since, intensive co-operation of the State organs, the police, domestic courts and Prosecutor’s Offices and the Tribunal was conducted.²⁴

18. With regard to the Prosecutor’s Request, he proposed that three cases, namely the “NLA leadership” case, the “Mavrovo Road Workers” case and the “Lipkovo Water Reserve” case be deferred to the competence of the Tribunal.²⁵ Upon question by the Chamber, the Public Prosecutor General also confirmed that the Republic of Macedonia would not oppose to the deferral of the two investigations in questions, namely, the “Neprošteno” and the “Ljuboten” investigations.²⁶ With regard to these investigations, the alleged perpetrators are not yet known.²⁷ In support of his proposal, he argued that there is still well-founded fear that the security situation in the Republic of Macedonia and the fragile peace that was recently established could be disrupted if these cases would be tried by domestic courts.²⁸ He also confirmed the Prosecutor’s argument that, in the domestic legal system, there are currently no legal mechanisms for victim and witness protection in place and that, therefore, it would be preferable to try these cases under the jurisdiction of the Tribunal. He submitted that such a deferral should be conducted pursuant to Rule 10 of the Rules of the Tribunal, whereupon the Chamber would submit to the competent Macedonian authorities an official request for deferral.²⁹

²⁰ *Transcript*, p. 13

²¹ *Transcript*, p. 13

²² *Transcript*, p. 33

²³ *Transcript*, p. 34

²⁴ *Transcript*, pp. 11, 47

²⁵ *Transcript*, p. 16

²⁶ *Transcript*, p. 35

²⁷ *Transcript*, p. 35

²⁸ *Transcript*, p. 17

²⁹ *Transcript*, p. 19

19. As to the domestic trial against two individuals in the “Mavrovo Road Workers” case, the Public Prosecutor General informed the Chamber that the commencement of the proceedings which was originally scheduled for 11 September 2002, had been postponed until 5 October 2002 after the Macedonian authorities were informed of the scheduled deferral hearing.³⁰ In contrast to the Prosecutor’s opinion, the Public Prosecutor General has no doubts that there may exist a prima facie case against the two individuals since the decision to indict them was based on the identification of the alleged perpetrators by the victims before a judge and before a prosecutor in a domestic court.³¹

20. Regarding the Prosecutor’s Request for deferral of all current and future investigations and proceedings, the Public Prosecutor General suggested to the Chamber to deny this application.³² He argued that the constitution of the Republic of Macedonia, the law on public prosecution and the law on criminal procedure oblige the competent law enforcement authorities and bodies to undertake identification and prosecution of perpetrators of severe violations of International Humanitarian Law. Regarding all future cases, the authorities of the Republic of Macedonia will however continue to inform the Prosecutor of the Tribunal, as enshrined in Article 18 of the Statute and Rule 8 of the Rules.³³

IV. The Applicable Law

21. Article 9 of the Amended Statute of the Tribunal (“the Statute”) enshrines the principle of concurrent jurisdiction and primacy of the Tribunal over national courts:

1. *The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.*
2. *The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the Tribunal.*

22. Article 9 paragraph 2 of the Statute refers to the Rules of Procedure and Evidence of the Tribunal with regard to the details of the deferral procedure. Rule 9 and Rule 10 of the Rules set out the procedure.

³⁰ *Transcript*, pp. 36, 48

³¹ *Transcript*, p. 48

³² *Transcript*, p. 18

³³ *Transcript*, p. 19

23. Rule 9 of the Rules defines the various scenarios in which the Prosecutor may propose to the Trial Chamber that a formal request for a deferral to the competence of the Tribunal be made:

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

- (i) *the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;*
- (ii) *there is lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or*
- (iii) *what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,*

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

24. Rule 10 of the Rules sets out the criteria to be satisfied for the Trial Chamber to accept an application of the Prosecutor under Rule 9 of the Rules and the action to be taken in such case:

- (A) *If it appears to the Trial Chamber seized of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.*
- (B) *A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgment, if already delivered, be forwarded to the Tribunal.*
- (C) *Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before another Trial Chamber.*

25. Article 10 of the Statute refers to the principle of *non bis in idem*:

1. *No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.*
2. *A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:*
 - (a) *the act for which he or she was tried was characterized as an ordinary crime; or*
 - (b) *the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.*
3. *In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.*

V. Discussion

26. Since the Prosecutor's Request as a matter of fact contains various requests for individual deferrals, these will be dealt with separately in the following.

1. The Deferral of the "NLA Leadership" case

27. The "NLA Leadership" case concerns 10 known individuals who are suspected to belong to the NLA leadership and to have participated in serious crimes committed by NLA members.³⁴ In January 2002, the Public Prosecutor of the Republic of Macedonia submitted to the Tribunal a proposal for the prosecution of these 10 individuals pursuant to Articles 2, 3 and 5, Article 7 of the Statute of the Tribunal.³⁵ The Public Prosecutor General, in the hearing on 25 September 2002, repeated this proposal for a deferral of the NLA leadership case to the competence of the Tribunal.³⁶

28. The Chamber is satisfied that the conditions set by Rules 9 (iii) and 10 (A) of the Rules are met. It has been established, and both parties also agree, that the domestic prosecution of the "NLA Leadership" case in the Republic of Macedonia is closely related, if not even identical, with the investigation and future prosecution of this case by the Prosecutor. It can not be excluded that parallel investigations and prosecutions might have serious implications for the investigations and prosecutions before the Tribunal. Furthermore, the Chamber is satisfied that, due to the agreement of the parties on the deferral of this case, it is appropriate in the meaning of Rule 10 (A) of the Rules to issue a formal request that the courts of the Republic of Macedonia defer to the competence of the Tribunal the investigation and prosecution of the 10 individuals named in the Macedonian filing, also called the "NLA Leadership" case.

2. The Deferral of the "Lipkovo Water Reserve" case

29. The "Lipkovo Water Reserve" case concerns an individual who is suspected to have ordered twice to stop the water supply on the Lipkovo Lake, as a consequence of which 100.000 people were left without fresh water for a period of several weeks in the summer of

³⁴ *Proposals for Criminal Prosecution Submitted by Public Prosecution of the Republic of Macedonia to the International Criminal Tribunal in February 2002*, (Proposal for Criminal Prosecution – Case "NLA Leadership", Exhibit M 4

³⁵ *The Macedonian Filing*, p. 3

³⁶ *Transcript*, p. 17

2001 in the town of Kumanovo.³⁷ In January 2002, the Public Prosecutor of the Republic of Macedonia submitted a proposal for the prosecution against the alleged perpetrator pursuant to Articles 5 and 7 of the Statute of the Tribunal.³⁸ In the hearing on 25 September 2002, the Public Prosecutor General orally renewed the proposal that this case be deferred to the competence of the Tribunal.³⁹

30. The Chamber is satisfied that, for the same reasons elaborated above under heading 1., a formal request for deferral to the competence of the Tribunal is appropriate with regard to the “Lipkovo Water Reserve” case.

3. The Deferral of the “Mavrovo Road Workers” case

31. The investigation of the “Mavrovo Road Workers” case deals with events, reported to have taken place on 7 August 2001 on the highway under construction Skopje-Tetovo, in the area of the village Grupcin. It concerns the abduction of a group of five road workers by NLA members. The road workers were detained in the nearby woods for several hours during which they were beaten and abused. Knives were used to carve letters in their backs.⁴⁰ The Public Prosecutor General mentioned a number of 23 suspects under investigation, two of whom are held in detention.⁴¹ These two suspects are indicted and the trial in the criminal court in Skopje was about to start on 11 September 2002. The court adjourned the hearing of the case until 5 October 2002.⁴²

32. Both the Prosecutor and the Public Prosecutor General stated that the results of the investigations by the Macedonian authorities have been made available to the Prosecutor, and the Chamber is fully satisfied that the Republic of Macedonia has complied with its obligations under Rule 8 to provide relevant information upon request of the Prosecutor.

33. The Prosecutor conducted additional investigations and concluded that on the basis of the results the two individuals in detention could not successfully be indicted before the Tribunal. The Prosecutor therefore reported to the Macedonian authorities in her letter of 26 June 2002 that she had decided not to indict these two individuals and that it would be for

³⁷ *The Macedonian Filing*, p. 3

³⁸ *The Macedonian Filing*, p. 4

³⁹ *Transcript*, p. 16

⁴⁰ *Proposals for Criminal Prosecution Submitted by Public Prosecution of the Republic of Macedonia to the International Criminal Tribunal in February 2002*, (Proposal for Criminal Prosecution – Case “Mavrovo Road Workers”, Exhibit M 4

⁴¹ *Transcript*, p. 32

⁴² *Transcript*, pp. 36, 48

the competent Macedonian authorities “to decide on the status of these two individuals in question”.⁴³

34. On the basis of the letter of 26 June 2002, the Macedonian authorities could have legitimately concluded that there were no objections from the Office of the Prosecutor against the exercise of jurisdiction in respect of the two persons in detention and that, therefore, they were, in accordance with Article 9 (1) of the Statute, entitled to exercise their national jurisdiction by prosecuting these individuals under the national laws of the Republic of Macedonia. The Macedonian authorities thus rightly took the position that neither Article 9 (2) of the Statute, nor Rules 9 and 10 of the Rules opposed against the exercise of national jurisdiction by prosecuting the two individuals.

35. In the view of the Chamber, however, the investigation of the events and the possible criminal responsibility of others than those two accused persons cannot be viewed as entirely separated from the ongoing proceedings against the two individuals in the Court of Skopje. These two individuals can therefore not be excluded from the investigations of the Prosecutor so that the deferral of the “Mavrovo Road Workers” case will also have its effects on the national proceedings against them. Rule 9 of the Rules provides for deferral to the competence of the Tribunal not only of investigations but also of criminal proceedings already instituted in a national court

36. In the case concerned the Chamber is confronted with a unique situation: While the Prosecutor seeks the deferral of the investigation of an event with the potential involvement of a larger number of persons including the two individuals that are at trial before a domestic court, she does *not* intend – at least for the time being - to prosecute these two individuals whose case shall be deferred to the Tribunal.

37. The Chamber notes that the afore-described constellation of the deferral application is substantially different from all deferral precedents in the jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda. The “classical” deferral application in both Tribunals requested the deferral of a concrete investigation or proceedings that had been initiated before a domestic court.⁴⁴ In these cases, the Prosecutor applied for a request for

⁴³ *Prosecutor's Request, Annex D*

⁴⁴ *Pros. v. Duško Tadić, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Duško Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)*, Case No. IT-94-1-D, 8 November 1994; *Pros. v. Radovan Karadžić, Ratko Mladić and Mico Stanišić, Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings*

deferral *in order to prosecute the very same person* with regard to the same underlying facts before the Tribunal. The other, more atypical deferral cases were the ones where the deferral of rather wide-scale investigations, concerning either a specific geographic area or a specific group of perpetrators, was requested.⁴⁵ A common denominator, however, of all deferral cases in both Tribunals is that in none of the precedents the Prosecutor ever requested that a case against an individual be deferred while the Prosecutor explicitly expressed her intention towards both the national state and the Chamber *not* to prosecute this individual before the Tribunal.

38. The Chamber understands that this situation presumably results from the intertwining of the investigations against all 23 alleged involved persons, a potential difference in the legal appreciation of the available evidence and in the procedural systems of the Tribunal and the domestic courts of the Republic of Macedonia. Nevertheless, the Chamber is seriously concerned about the blocking effect of a deferral of this specific case on the exercise of the national jurisdiction of the Republic of Macedonia. The “classical” deferral case may block the exercise of the national jurisdiction, but, at the same time, it does open up the jurisdiction of the Tribunal with regard to a specific case. Such a deferred case will, therefore, be tried in a different “forum”, but it will be tried. In the case concerned, the Republic of Macedonia, however, would be barred from exercising its jurisdiction and the criminal proceedings that had been instituted by them would *not* be conducted at all; at least for the time being.

in the Matter of Radovan Karadžić, Ratko Mladić and Mico Stanišić, Case No. IT-95-5-99, 15 May 1995; *Pros. v. Dražen Erdemović, In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Federal Republic of Yugoslavia in the Matter of Dražen Erdemović*, Decision, Case No. IT-96-22-D, 29 May 1996; *Pros. v. Mile Mrkšić, Veselin Šlijančanin and Miroslav Radić*, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer to the Pending Investigations and Criminal Proceedings to the Tribunal, Case No. IT-95-13-R61, 10 December 1998; *Pros. v. Djordje Djukić*, Decision on Preliminary Motions of the Accused, Case No. IT-96-20-T, 26 April 2002; *Pros. v. Alfred Musema*, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for Deferral to the competence of the International Criminal Tribunal for Rwanda in the matter of Alfred Musema (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-5-D, 12 March 1996; *Pros. v. Theoneste Bagosora*, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the matter of Theoneste Bagosora (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-7-D, 17 May 1996.

⁴⁵ *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Crimes Against the Population of the Lasva River Valley*, Decision, Case No. IT-95-6-D, 11 May 1995; *Pros. v. Radio Television Libre de Mille Collines*, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the matter of Radio Television Libre Des Mille Collines Sarl (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence), Case No. ICTR-96-6-D, 12 March 1996.

Insert jurisprudence

39. The Chamber notes that neither the wording of Article 9 (1) of the Statute or Rules 9 and 10 of the Rules nor the established jurisprudence⁴⁶ of the Tribunal or the International Criminal Tribunal for Rwanda do provide a solution for this rather unusual scenario of concurrent jurisdiction. Due to the factors described above, the Chamber takes the view that the blocking effect of the deferral of the criminal proceedings against the two individuals on the national jurisdiction of the Republic of Macedonia needs to be remedied to give due weight to the principle of concurrent jurisdiction, as established in Article 9 (1) of the Statute. The Chamber, in the specific circumstances of the case, finds it appropriate that the blocking effect of the national jurisdiction from a deferral of the specific case be limited by a specific procedural mechanism.

40. The Chamber notes both the legitimate interest of the Prosecutor to investigate the “Mavrovo Road Workers” case in an unhindered way and the equally legitimate interest of the Republic of Macedonia to see prosecuted the individuals who, on the basis of the evidence collected by their national authorities, are alleged to have committed the crimes concerned. It therefore wishes to invite both parties, alternatively or co-operatively, if either of them wishes to do so, to apply for a new hearing before the Chamber within a period of 9 months from the day this decision is rendered. Such hearing would serve the purpose to reconsider whether the blocking effect of the deferral on the exercise of the national jurisdiction is still fully justified. The Chamber wishes to encourage both parties to consider this specific procedural mechanism to ensure that the blocking effect of the deferral of this case on the exercise of the national jurisdiction of the Republic of Macedonia is maintained at the lowest possible level.

41. Taking into account these considerations, the Chamber is satisfied that the investigation and prosecution of the “Mavrovo Road Workers” case, i.e., the investigations and proceedings with regard to the 23 individuals who allegedly participated in the abduction, abuse and mistreatment of five road workers near the village Grupcin, is closely related to, if not identical with the investigations and future prosecutions initiated by the Prosecutor before the Tribunal and that parallel investigations may have negative implications for the work of the Prosecutor. In view of the agreement of the parties that the “Mavrovo Road Workers” case should be deferred to the competence of the Tribunal, the Chamber is also satisfied that the issuance of a formal request to the Republic of Macedonia that its courts defer to the competence of the Tribunal is appropriate.

⁴⁶ see above, footnote 44 and 45

4. The Deferral of the “Ljuboten” and “Neprošteno” investigations

42. In contrast to the three afore-mentioned cases, the alleged perpetrators of the “Ljuboten” and “Neprošteno” incidents are not yet known. The “Ljuboten” investigation concerns the killing of five persons in the village of Ljuboten in August 2001 during the conflict between the NLA and Macedonian security forces.⁴⁷ In the “Neprošteno” case, a mass grave that was discovered in the region of the village of Neprošteno-Tetovo is investigated. In both investigations, the Macedonian authorities co-operated with the Office of the Prosecutor of the Tribunal regarding the exhumation of the bodies.⁴⁸

43. During the hearing on 25 September 2002, the Public Prosecutor General submitted that the “Ljuboten” investigation was conducted under the jurisdiction of the Skopje court while the “Neprošteno” investigation was under the jurisdiction of the Tetovo court and that both cases were active and still being investigated.⁴⁹ Upon question of the Chamber, the Public Prosecutor General confirmed that the Republic of Macedonia would not oppose to the deferral of both investigations to the competence of the Tribunal.

44. On the basis of the arguments presented by both parties in their filings and orally in the hearing, the Chamber is satisfied that the elements of Rule 9 (iii) of the Rules are fulfilled. The Chamber is further satisfied that, in the concrete circumstances of the case, taking into account the fragile security situation described by the Public Prosecutor, the deferral is appropriate in the meaning of Rule 10 (A) of the Rules. Consequently, the Chamber finds it appropriate to issue a formal request to the Republic of Macedonia that its courts defer these investigations to the competence of the Tribunal.

5. The Deferral of “all current and future investigations and proceedings”

45. In addition to the request for deferral of the above-captioned individual cases and investigations, the Prosecutor applies for the issuance of a formal request by the Chamber to the Republic of Macedonia that its courts defer to the competence of the Tribunal “all current and future investigations and prosecutions” of alleged crimes committed by NLA

⁴⁷ The Chamber notes that the Prosecutor’s Request in the context of these investigations refers to “activities of the Macedonian forces against Macedonian Albanian *civilians*” (Prosecutor’s Request, p. 2), while the Macedonian Filing (p. 4) speaks of the killing of “5 people, *terrorists*, members of the so called NLA).

⁴⁸ *The Macedonian Filing*, pp. 4, 5

members during 2001 and of allegations concerning the activities of the Macedonian forces against Macedonian Albanian civilians during 2001.⁵⁰

46. The Chamber notes that neither in the Prosecutor's Request nor during the hearing, the Prosecutor submitted substantial reasoning for her far-reaching application. During the hearing, the Prosecutor argued that her main interest, with regard to future investigations, would be that the judicial authorities of Macedonia be obliged to inform and keep informed the Office of the Prosecutor of the Tribunal. She further argued that the over-all deferral request was submitted to avoid that the Prosecutor, in each individual case, would have to apply with a Chamber for a request for deferral.⁵¹ During the oral hearing, the Prosecutor modified her application and requested that the Chamber enters a "clause" in its decision according to which the judiciary of the Republic of Macedonia be obliged to inform the Prosecutor about findings in their future investigations and, in particular, due to which the Republic of Macedonia would be bound to comply with any declaration of primacy by the Prosecutor in the absence of a formal request for deferral to the competence of the Tribunal by a Chamber.⁵²

47. The Public Prosecutor General proposed to the Chamber to deny this part of the Prosecutor's request.⁵³ He promised that the Republic of Macedonia will continue to inform the Prosecutor according to Article 18 of the Statute of the Tribunal with regard to all future cases and investigations. At the same time, the Public Prosecutor General underlined that it is the constitutional duty of the law and law enforcement bodies in the Republic of Macedonia to investigate and prosecute perpetrators of severe violations of International Humanitarian Law.⁵⁴ The Public Prosecutor General further opposed the alternative proposal of the Prosecutor that the Chamber include a "clause" in their decision that would give the power to invoke primacy over cases to the Prosecutor without the interference of a Chamber. He submitted that the process of deferral has been regulated in Rule 10 of the Rules and that this provision does not allow for a transfer of competence to the Prosecutor, as applied for.⁵⁵

48. The Chamber notes that the granting of the Prosecutor's Request in this regard would have an intense frustrating effect on the national jurisdiction with regard to crimes

⁴⁹ *Transcript*, p. 35

⁵⁰ *Prosecutor's Request*, p. 1

⁵¹ *Transcript*, pp. 29, 30

⁵² *Transcript*, p. 30

⁵³ *Transcript*, p. 18

⁵⁴ *Transcript*, p. 19

committed during the year 2001, either by NLA members or by members of the Macedonian forces. As a matter of fact, such a request for deferral would effectively block the domestic courts from initiating any investigation or prosecution with regard to these groups of alleged perpetrators.

49. In this regard, the Chamber recalls that the principle of concurrent jurisdiction and of the primacy of the Tribunal over national courts, as established by the Statute of the Tribunal, does not intend “to preclude or prevent the exercise of jurisdiction by national courts”.⁵⁶ On the contrary, as stated by the Secretary General in his Report to the Statute of the Tribunal, “... national courts *should be encouraged to exercise their jurisdiction*”⁵⁷ in accordance with their relevant national laws and procedures”.⁵⁸ The Chamber further takes note of the current stage of the mission of the Tribunal.⁵⁹ In the view of the Chamber, it is obliged to take into account all of the afore-mentioned factors when applying the deferral provisions of Rules 9 and 10 of the Rules, in particular, in deciding about the “*appropriateness*” of a deferral pursuant to Rule 10 (A) of the Rules.

50. In the case concerned, it does not appear *appropriate* to the Chamber to issue a formal request for deferral in such broad language. In its decision, the Chamber took into account not only the intense frustrating effect on the domestic jurisdiction and the other factors referred to above. It further was guided by the fact that the jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda does not provide any precedent the Prosecutor could rely on.⁶⁰

⁵⁵ *Transcript*, p. 19

⁵⁶ The *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* clearly explains that the preclusion of prevention of the exercise of jurisdiction by national courts of the Former Yugoslavia was never the intention of the Security Council when enshrining the principle of concurrent jurisdiction in the Statute of the Tribunal; S/25704, 3 May 1993, para 64.

⁵⁷ Emphasis added for the purpose of this Decision.

⁵⁸ The *Report of the Secretary General* (footnote 56), para 64.

⁵⁹ According to a current *Statement by the President of the Security Council*, the Tribunal must achieve its objective to complete all trial activities in first instance by the year 2008; S/PRST/2002/21, 23 July 2002.

⁶⁰ Neither the case law of the Tribunal nor any deferral decision of the International Criminal Tribunal for Rwanda (“ICTR”) contain any reference to “future” investigations against unknown perpetrators but only allow for the deferral of “currently ongoing” investigations and prosecutions. See for the Tribunal: *Pros. v. Duško Tadić, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia in the Matter of Duško Tadić (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)*, Case No. IT-94-1-D, 8 November 1994; *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Crimes Against the Population of the Lasva River Valley, Decision*, Case No. IT-95-6-D, 11 May 1995; *Pros. v. Radovan Karadžić, Ratko Mladić and Mico Stanisčić, Application by the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina of its Investigations and Criminal Proceedings in the Matter of Radovan Karadžić, Ratko Mladić and Mico Stanisčić*, Case No. IT-95-5-99, 15 May 1995; *Pros. v. Dražen Erdemović, In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the International Tribunal Addressed to the Federal Republic of Yugoslavia in the Matter of Dražen Erdemović, Decision*, Case No. IT-96-22-D, 29 May 1996; *Pros. v. Mile Mrkžić, Veselin Šlijančanin and Miroslav Radić, Decision on the Proposal of the Prosecutor for a Request to the Federal Republic of Yugoslavia (Serbia and Montenegro) to Defer to*

51. In addition, the Chamber noted the Statement of the President of the Security Council who recently commented on the prosecution strategy of the Tribunal to be followed in the future and demanded that the prosecution of perpetrators, for the remaining time of the Tribunal's mission, should concentrate on high-level perpetrators only.⁶¹ Taking into account the aim of Tribunal and the expressed interest of the Macedonian authorities to conduct domestic investigations and prosecutions, it appears inappropriate to the Chamber to request the deferral of *all current and future* investigations and prosecutions, notwithstanding their potential seriousness or seize or the status of the alleged perpetrators, to the competence of the Tribunal

52. Lastly, the Trial Chamber is not satisfied from the presentation of the Prosecutor that *all* potential future investigations and prosecutions that may be initiated by the competent courts in the Republic of Macedonia will *necessarily* be "closely related to, or otherwise involve, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal", as required by Rule 9 (iii) of the Rules.

53. Finally, the Chamber agrees with the Public Prosecutor General that the procedure for deferral of cases as enshrined in Rules 9 and 10 of the Rules is to be followed in each case and without exemption. These Rules allow the Prosecutor *to propose* that a formal request for deferral be made (Rule 9), but they also unambiguously state that it is only for a Trial Chamber, seized of such a proposal, *to decide and finally issue a formal request* to the State concerned. Therefore, the alternative oral application of the Prosecutor to insert a "clause" in the decision, "transferring" the competence of the Chamber for a request for deferral to the Prosecutor, must also be rejected.

the Pending Investigations and Criminal Proceedings to the Tribunal, Case No. IT-95-13-R61, 10 December 1998; *Pros. v. Djordje Djukić, Decision on Preliminary Motions of the Accused*, Case No. IT-96-20-T, 26 April 2002. With regard to the jurisprudence of the ICTR see *Pros. v. Alfred Musema, Decision of the Trial Chamber on the Application by the Prosecutor for a formal Request for Deferral to the competence of the International Criminal Tribunal for Rwanda in the matter of Alfred Musema (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)*, Case No. ICTR-96-5-D, 12 March 1996; *Pros. v. Theoneste Bagosora, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the matter of Theoneste Bagosora (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)*, Case No. ICTR-96-7-D, 17 May 1996; *Pros. v. Radio Television Libre de Mille Collines, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the matter of Radio Television Libre Des Mille Collines Sarl (Pursuant to Rules 9 and 10 of the Rules of Procedure and Evidence)*, Case No. ICTR-96-6-D, 12 March 1996.

⁶¹ The President of the Security Council clearly demanded that "the ICTY should concentrate its work on the prosecution and trial of the civilian, military and paramilitary *leaders* suspected of being responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, *rather than on minor actors*" (Emphasis added for the purpose of this Decision); *United Nations, Security Council, Statement by the President of the Security Council, S/PRST/2002/21, 23 July 2002.*

VI. Disposition

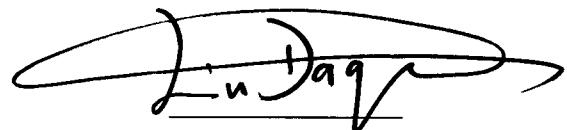
THE TRIAL CHAMBER FOR THE FOREGOING REASONS

HEREBY GRANTS THE PROSECUTOR'S REQUEST IN PART AND DECIDES THE FOLLOWING:

1. The Government of the Republic of Macedonia is formally requested to order its national courts to defer to the competence of the Tribunal all investigations and prosecutions with regard to the "NLA Leadership" case, the "Mavrovo Road Worker" case, the "Lipkovo Water Reserve" case and the "Ljuboten" and "Neprošteno" investigations.
2. The Government of the Republic of Macedonia is further requested to forward to the Office of the Prosecutor the results of all investigations and a copy of the court's records and the judgments of its national courts, if any, with regard to the cases and investigations as listed under item 1.
3. The parties are invited to apply for a hearing on the Deferral of the domestic proceedings against the two individual accused in the "Mavrovo Road Workers" case within a period of nine months, should either of them wish to bring to the attention of the other party or the Chamber any future implications.
4. The Registrar is requested to notify the Government of the Republic of Macedonia and the Prosecutor of the Decision and Formal Request.

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

Dated this fourth day of October 2002,
At The Hague,
The Netherlands



Judge Liu Daqun
Presiding Judge

[Seal of the Tribunal]