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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: 17 January 2008

Original: English

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Liu Daqun
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 17 January 2008

**IN RE: THE FORMER YUGOSLAV
REPUBLIC OF MACEDONIA**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR A RULING
UNDER RULE 73(A) CONCERNING THE EFFECT OF
DEFERRAL UNDER RULE 10 AND RECONSIDERATION OF
THE REQUEST FOR DEFERRAL**

The Office of the Prosecutor

Mr. Serge Brammertz

The Former Yugoslav Republic of Macedonia:

Mr. Ljupco Svirgovski
Public Prosecutor of the Former Yugoslav Republic of Macedonia

THIS TRIAL CHAMBER (“Trial 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 “Prosecution’s motion for a ruling under Rule 73(A) concerning the effect of deferral under Rule 10”, filed on 27 September 2007 (“Motion”).

I. RELEVANT PROCEDURAL HISTORY

1. On 5 September 2002, the Prosecution filed “Prosecutor’s request for deferral and motion for order to the Former Yugoslav Republic of Macedonia” requesting that the Trial Chamber issue a formal request that the Former Yugoslav Republic of Macedonia (“Macedonia”) “defer to the competence of the Tribunal all current and future investigations and prosecutions of alleged crimes committed by members of the National Liberation Army (“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 during 2001, including the alleged crimes committed in Ljuboten.”¹

2. On 25 September 2002, a hearing was held attended by the Prosecution and the Public Prosecutor General of the Former Yugoslav Republic of Macedonia.² At this hearing, the Prosecution clarified that it did not intend to prosecute the low level accused who were part of the investigations but planned to return them to the jurisdiction of Macedonia upon the completion of the investigations.³ Macedonia did not object to the deferral, but requested that if the investigations did not result in a prosecution by the Tribunal, it be given the opportunity to conduct criminal proceedings.⁴ However, Macedonia did object to a request, newly submitted at the hearing by the Prosecution, that a clause be added to the decision that a declaration of primacy of the Tribunal be valid even when it emanates only from the Prosecution, that is, without a formal declaration of primacy having been issued by a Trial Chamber.⁵

3. On 4 October 2002 the Trial Chamber granted the request for deferral of the following five cases:

¹ “Prosecutor’s request for deferral and motion for order to the Former Yugoslavia Republic of Macedonia”, 5 September 2002 (“Motion for Deferral”), para. 1. This motion also included a request for an interim order to stop the criminal proceedings against the two individuals in the “Mavrovo Road Workers” case which was to commence on 11 September 2002, Motion for Deferral, para. 1. On 10 September 2002, the Trial Chamber held an informal hearing and on the same day rejected this request, *see* “Decision on the application of the Prosecutor for an interim order and scheduling order”, 10 September 2002, p. 4. However, Macedonia postponed the proceedings pending the outcome of the Motion for Deferral, Hearing, 25 September 2002, T. 36, 48.

² Hearing, 25 September 2002, T. 1-2.

³ *Ibid.* The Prosecutor stated that she believed it was within her power to return the cases to Macedonia, *id.* T. 45-47.

⁴ *Id.* T. 18.

⁵ *Id.* T. 29-30, 35-36.

- i. the “Lipkovo Water Reserve” case;
- ii. the “NLA Leadership” case;
- iii. the “Mavrovo Road Workers” case;
- iv. the “Neprošteno” case; and
- v. the “Ljuboten” case.⁶

However, the Trial Chamber refused to grant the Prosecution’s request that a declaration of primacy be valid when it emanates only from the Prosecution because (1) this would too greatly inhibit the exercise of Macedonia’s jurisdiction,⁷ (2) the Trial Chamber was not convinced that all future investigations would necessarily satisfy the requirements for deferral under the Rules,⁸ and (3) the Rules clearly set out a procedure by which a Trial Chamber may request a deferral proposed by the Prosecution.⁹

4. On 12 May 2005 the Prosecution notified the Trial Chamber, as well as Macedonia, that on 9 March 2005 an indictment was confirmed with respect to the “Ljuboten” investigations, but that in the remaining investigations “none of the alleged perpetrators reached the level of responsibility required for an indictment to be issued in the event that there was sufficient evidence to link them to the crimes committed.”¹⁰

5. On 19 September 2007, the Public Prosecutor General of Macedonia advised the Prosecution that Macedonia was of the view that the four remaining casefiles could not be transferred back to Macedonia without a court order from a Trial Chamber.¹¹ As a result, the Prosecution filed the Motion in which the Prosecution asks for clarification on:

- i. whether, under the Rules, any further steps are required to transfer the four casefiles back to Macedonia, over and above the Notification; and
- ii. whether the Macedonian Government continues to be bound by the Decision insofar as it refers to the four files until such time as the Trial Chamber rescinds the order of deferral.¹²

On 5 October 2007, the President of the Tribunal assigned the case to this Trial Chamber.¹³

⁶ “Decision on the Prosecutor’s request for deferral and motion for order to the Former Yugoslav Republic of Macedonia”, 4 October 2002 (“Decision”).

⁷ *Id.* para. 49.

⁸ *Id.* para. 52.

⁹ *Id.* para. 53.

¹⁰ “Prosecutor’s notification on deferral”, 12 May 2005 (“Notification”), para. 8.

¹¹ Motion, para. 12.

¹² *Id.* para. 15.

¹³ “Order assigning a case to a Trial Chamber”, 5 October 2007.

II. SUBMISSIONS

6. The Prosecution submits that “previously deferred files may be transferred to the national authorities without a further court order, provided the reason for deferral under Rule 9(iii) no longer exists and that a formal notification is lodged with the Trial Chamber and a copy provided to the national authorities.”¹⁴

7. In the Motion, the Prosecution submits that “[a]ccording to the Macedonian authorities there is a legal requirement of “reciprocity”, in that if the matter was deferred by an order of a Trial Chamber, it could not be transferred back to the Macedonian authorities without a court order.”¹⁵

III. DISCUSSION

8. The Trial Chamber’s authority to request that Macedonia defer to the Tribunal, as contained in the Decision, rests in Article 9(2) of the Statute which states:

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 International Tribunal.

To this end, Rule 9 provides that:

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

[...]

(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.

Rule 10 states that “[i]f it appears to the Trial Chamber seised 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.”

9. The Chamber will first address the Prosecution’s second question, that is, whether the Macedonian government continues to be bound by the Decision. Once a formal request for deferral has been issued, a State is bound by Article 29 of the Statute and Rule 11 to comply with it.¹⁶

¹⁴ Motion, para. 14.

¹⁵ *Id.* para. 12.

¹⁶ Article 29 of the Statute provides that “States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.” Rule 11 provides that if, within sixty days of a formal deferral request, “the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may request the President to report the matter to the Security Council.”

Accordingly, in the Decision, the Trial Chamber recognised that a formal deferral request from the Tribunal can have a blocking effect on the criminal proceedings of a State court. Specifically, in reference to the “Mavrovo Road Workers” case, the Trial Chamber stated that:

[t]he “classical” deferral case may block the exercise of the national 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.¹⁷

10. The jurisprudence has recognised that after:

deferral has been completed there can be no going back to the status quo ante. [The State] has relied upon that deferral to ensure that this International Tribunal will dispose of this case according to its Statute. By its own internal law, passed to facilitate that deferral, [the State] is now precluded from proceeding with its charges against the accused. This International Tribunal now has a responsibility to proceed with a trial of the accused.¹⁸

11. The Trial Chamber notes that “the right to primacy can only be exercised on a formal request to the national court to defer to the competence of the International Tribunal.”¹⁹ In its Decision, this Trial Chamber held:

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.²⁰

As a result, this Trial Chamber declined to give the Prosecutor the authority to assert primacy without a formal request from a Trial Chamber.²¹

12. The attribution of competence leads the Trial Chamber to conclude that the Prosecutor is not able to remove the block on the exercise of national jurisdiction established by a formal deferral request without an order of a Trial Chamber. Therefore, to answer the Prosecution’s second question, Macedonia continues to be bound by the Decision insofar as it refers to the four files until such time as a Trial Chamber rescinds the request of deferral.

13. Turning now to the Prosecution’s first question, whether any further steps are required to transfer the four casefiles back to Macedonia, the Trial Chamber recognises that the Statute, the Rules and the jurisprudence of the Tribunal do not provide any procedure for a Trial Chamber to

¹⁷ Decision, para. 38 (emphasis in original).

¹⁸ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, “Decision on the Defence motion on the principle of *non-bis-in-idem*”, 14 November 1995, para. 36.

¹⁹ *Prosecutor v. Duško Tadić*, Case No. IT-94-1-D, “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”, 8 November 1994, para. 9.

²⁰ Decision, para. 53 (emphasis in original).

²¹ *Ibid.*

revoke a deferral request once it is made.²² However, the Trial Chamber notes that Article 9 of the Statute, before stating that the Tribunal can exercise primacy over a State court, provides that “[t]he International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international and humanitarian law committed in the territory of the former Yugoslavia since 1 January of 1991.” In his report, the UN Secretary General explained that “it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to [serious violations]. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.”²³

14. As noted above, Rule 10 states that “[i]f it appears to a 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.” The authority for this Rule is based in Article 9 of the Statute. Moreover, it must be remembered that Rule 9 concerns “investigations or criminal proceedings”, that is proceedings which have yet to reach the stage where an indictment has been issued. It is not a given that an indictment will be issued once the national investigation has been deferred to the Tribunal. The Trial Chamber therefore holds that Rule 10 implicitly provides for the possibility of a return of the casefile to the national jurisdiction if the grounds of Rule 9 are no longer applicable. In other words, if a Trial Chamber has the authority to make decisions requesting a State to defer to the Tribunal, the Trial Chamber also has the authority to revoke this request.

15. In this respect, the Trial Chamber recalls that in the Decision a “specific procedural mechanism” was mentioned, according to which either party could request a hearing in which the Trial Chamber would reconsider “whether the blocking effect of the deferral on the exercise of the national jurisdiction is still fully justified.”²⁴ The Trial Chamber reasoned that it could find that the conditions were no longer met and could, therefore, reconsider and revoke the deferral request.²⁵

16. Further, the Trial Chamber notes that the jurisprudence of the Tribunal provides that a Trial Chamber has the inherent power to reconsider a decision it has previously made in the event that there is a change of circumstances or if the previous decision was erroneous or has caused an

²² All cases that have had a formal deferral request have also had a subsequent indictment. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, *Prosecutor v. Radovan Karadžić, Ratko Mladić and Mico Stanišić*, Case No. IT-95-5-99, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-D, *Prosecutor v. Mile Mrkšić, Veselin Šlijančanin and Miroslav Radić*, Case No. IT-95-13-R61, *Prosecutor v. Djordje Djukić*, Case No. IT-96-20-T, *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*, Case No. IT-95-6-D.

²³ Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 1993, para. 64.

²⁴ Decision, para. 40.

²⁵ *Ibid.*

injustice.²⁶ The Trial Chamber, being the same Trial Chamber which issued the Decision – with the substitution of Judge Moloto for Judge El Mahdi who is no longer a Judge at the Tribunal – considers, therefore, that it is within its inherent power to reconsider the Decision *proprio motu*. The Trial Chamber further considers that the comments of the Public Prosecutor General of Macedonia at the September 2002 hearing combined with the Prosecution submissions provide the Trial Chamber with all the necessary information. So as to avoid procedural delay, the Trial Chamber holds that there is no need for additional submissions. Therefore, the Trial Chamber will itself dispose of the matter.

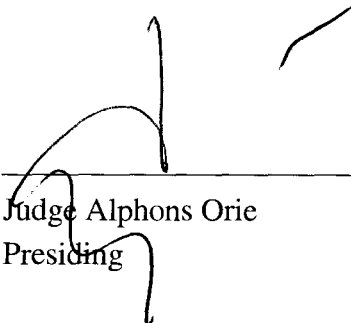
17. It falls then to the Trial Chamber to reconsider the Decision *proprio motu*. As of 12 May 2005, when the Prosecution notified the Trial Chamber and Macedonia that it had completed its investigations, it was no longer the case that “what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,” as required by Rule 9(iii). Therefore, the deferral by Macedonia to the jurisdiction of the Tribunal is no longer appropriate.

²⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73, “Decision on application by Prosecution for leave to appeal”, 14 December 2001, para. 13; *Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21Abis, “Appeals judgement on sentence”, 8 April 2003, para. 49; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, “Decision on request for reconsideration and certification to appeal the decision for admission of the statement of Jadranko Prlić”, 8 October 2007, para. 11.

IV. DISPOSITION

18. For the reasons set out above, pursuant to Article 9 and Rule 10, and finding that it has all the necessary information to decide the matter, the Trial Chamber reconsiders the Decision and revokes the request for deferral by Macedonia. The Trial Chamber further orders the Office of the Prosecutor to transfer all casefiles back to the Government to the Former Yugoslav Republic of Macedonia.

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



Judge Alphons Orie
Presiding

Dated this seventeenth day of January 2008

At The Hague

The Netherlands

[Seal of the Tribunal]