IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar:
Mr. Hans Holthuis

Decision of:
1 June 2005

PROSECUTOR

v.

Ljube BOSKOVSKI
Johan TARCULOVSKI

DECISION ON JOHAN TARCULOVSKI'S MOTION CHALLENGING JURISDICTION

The Office of the Prosecutor:

Kenneth Scott
William Smith

Counsel for the Accused:

Dragan Godzo for Ljube Boskoski
Antonio Apostolski for Johan Tarculovski

I. INTRODUCTION

1. Trial Chamber II ("Trial Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is

seised of the “Preliminary Motion” (“Motion”) filed by the Defence for the accused Johan Tarculovski (“Defence” and “Accused” respectively) on 31 March 2005, whereby the Accused seeks to have the Indictment dismissed pursuant to Rule 72(A)(i) and (D)(ii)(iv) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).[1]

2. The Prosecution responded in “Prosecution’s Response to Defence Motion of Johan Tarculovski Challenging the Jurisdiction of the Tribunal” filed 13 April 2005 (“ Response”). No reply has been filed. The Accused filed on 24 May 2005 “Adendum (sic(to the Preliminary Motion, by Mr. Antonio Appostoski, Defence Counsel for Mr. Johan Tarculovski” (“Addendum”).

3. As a preliminary issue, the Trial Chamber notes that under the Rules there is no right of an Accused to file additional arguments to strengthen its original motion after having first filed a motion and then received a response. Further, Rule *126bis* of the Rules only allows a reply after the Trial Chamber has granted leave to file one. No such request was made in the Addendum. The Trial Chamber also draws the attention to the fact that a reply should be limited to issues raised in the response and not reargue matters raised in the Motion. In this particular case the Trial Chamber will however generously treat the Addendum as a reply.

II. SUBMISSIONS OF THE PARTIES

4. First, the Defence submits that the Tribunal is not competent to deal with the present case because the charges in the Indictment do not relate to events before and after the dissolution of Yugoslavia as it is required under the Statute of the Tribunal (“Statute”).[2] It argues that events alleged to have occurred in the Former Yugoslav Republic of Macedonia (“FYROM ”) in 2001 have no relation to the former Yugoslavia and that a national independent referendum organised by the FYROM ended the legal and factual continuity of FYROM with the former Yugoslavia.[3] The Prosecution replies that under Article 8 of the Statute of the Tribunal (“Statute”), the Tribunal is vested with jurisdiction over the territory of the former Socialist Federal Republic of Yugoslavia (“SFRY”) since 1991. It further argues that in the “*Ojdanic* Jurisdiction Decision” the Trial Chamber held that “Prior to its fragmentation, the SFRY consisted of six republics; Serbia, Croatia, Bosnia-Herzegovina, Macedonia, Slovenia and Montenegro” and that, therefore, the jurisdiction of the Tribunal

covers the territory of FYROM.[4]

5. Second, the Defence submits that the temporal jurisdiction of the Tribunal ceased in 1999 with the Kosovo crisis and that therefore the Tribunal has no competence to try the citizens of FYROM for what took place as of 2001.[5] The Prosecution responds that the temporal jurisdiction of the Tribunal began on 1 January 1991 according to the Statute and that currently no end date has been decided by the UN Security Council.[6]

6. Third, the Defence raises several issues regarding the subject matter jurisdiction of the Tribunal. It submits that the "2001 conflict" was an attack against the state of FYROM by organised criminal forces from abroad[7] and that criminal gangs, supported by some Albanian groups in villages near Skopje, carried out guerrilla attacks. These Albanian groups, the so-called ethnic Albanian National Liberation Army (NLA) units, cannot be recognised as a party to an armed conflict under the laws or customs of war.[8] The Prosecution argues that an "armed conflict" is a necessary requirement in order for the substantive crimes under Article 3 of the Statute to fall within the jurisdiction of the Tribunal,[9] and that the NLA was an organised armed force with a command structure which constitutes an element to establish the existence of the armed conflict.[10]

7. Fourth, regarding Count 2 (wanton destruction of cites, towns or villages) and Court 3 (cruel treatment), the Defence argues that during the entire period of the terrorist attacks against the army and the institutions of the FYROM, the state functioned normally.[11] Thus, the allegation that the crimes had committed in court halls or at the Skopje City Hospital is "incomprehensible."[12] In response, the Prosecution submits that the functioning of a State is not a necessary criterion to determine whether an armed conflict existed.[13]

8. Fifth, the Defence asserts that it is evident that the Accused did not participate in a Joint Criminal Enterprise ("JCE"), not only because such enterprise was not committed, but also because he was constantly in Ohrid during relevant period of the Indictment (July-August 2001) and that certain targets were legitimate.[14]

III. DISCUSSION

9. Article 1 of the Statute provides that the Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since 1991." More specifically, Article 8 states, *inter alia*, "[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters." The Trial Chamber finds that it has territorial jurisdiction because the territory of what is today called the FYROM was part of the territory of the former Socialist Federal Republic of Yugoslavia ("SFRY"). The jurisprudence of the Tribunal has consistently recognized that the territory of the former SFRY included the FYROM .[15] Therefore, the Trial Chamber has no hesitation in finding that this Tribunal has territorial jurisdiction over the territory of FYROM, pursuant to Articles 1, 8 and 9 of the Statute.

10. As to the alleged lack of temporal jurisdiction, the Trial Chamber reiterates that under Article 1 of the Statute, the Tribunal has jurisdiction over crimes committed on the territory of the former Yugoslavia since 1991. While the Statute clearly provides in Article 8 of the Statute that the temporal jurisdiction of the Tribunal begins on 1 January 1991, it does not contain a date on which territorial jurisdiction ends. The Trial Chamber is of the view that had the Security Council intended to limit the jurisdiction to events occurring after 2001 as the Defence asserts, it would have so stated. It is also noted that in the Secretary General Report the life span of the Tribunal being "an enforcement measure under Chapter VII" is "linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia."[16] The Trial Chamber finds that the Tribunal has jurisdiction for the time period alleged in the Indictment.

11. Concerning arguments relating to the nature of the conflict and its parties, whether FYROM was a functioning state and the alleged role of the accused in a JCE, the Trial Chamber notes that a solution of this kind of issues, which does not pertain to the arguments of jurisdiction, depends first and foremost on factual determinations. Such determinations can only be made by a Trial Chamber after having duly examined all the evidence tendered during trial. It is premature to address these issues at this stage of the proceedings and the Trial Chamber therefore dismissed the Defence argument that these jurisdictional matters for the Trial

Chamber to deal with at this stage.

12. The Trial Chamber also notes that the Defence submits "I ask, on his behalf, to allow Johan Tarculovski, equally like for the other accused persons, to be represented and defended by his defense attorney, engaged by his wife and his consent, to given the opportunity to defend himself in freedom, without being detained."[17] As no further arguments on these issues are advanced, the Trial Chamber does not treat this "request" as a motion for provisional release. Should the Defence wish to seek provisional release, it must do so with a properly filed and argued motion pursuant to Rule 65 of the Rules. The Trial Chamber further notes that issues relating to assignment of Counsel are primarily a matter for the Registrar of the Tribunal and not the Trial Chamber.

IV. DISPOSITION

13. For the foregoing reasons and pursuant to Rule 72 of the Rules, the Trial Chamber **DISMISSES** the Motion.

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

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Carmel Agius
Presiding Judge

Dated this first day of June 2005,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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1 - Rule 72(A)(i) stipulates: "Preliminary motions, being motions which (i) challenge jurisdiction, shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statement referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for the Rule 84." Rule 72(D)(ii) and (iv) stipulates: "For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to (ii) the territories indicated in Articles 1, 8, 9 of the Statute; (iv) any of the violations indicated in Articles 2, 3, 4, 5, and 7 of the Statute."
2 - Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted

25 May 1993 by Resolution 827.
3 - Motion, p. 7, para. 3-4, p. 8, para. 1. Addendum, pp. 1-2.
4 - Response, p. 2, para. 4. See, *Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic, Nicola Sainovic*, IT-99-37-PT, "Decision on Motion Challenging Jurisdiction" 6 May 2003 ("*Ojdanic* Jurisdiction Decision"), para. 5.
5 - Motion, p. 8, para. 1. Addendum, pp. 1-2.
6 - Response, p. 3, para. 6.
7 - Motion, p. 4, para. 1.
8 - Motion, p. 5, para. 1.
9 - Response, p. 5, paras 11.
10 - Response, p. 6, paras 14-15.
11 - Motion, p. 6, para. 1.
12 - Motion, p. 6, para. 1.
13 - Response, p. 7, para. 18.
14 - Motion, p. 6; Addendum, pp. 5-7.
15 - *Ojdanic* Jurisdiction Decision, para. 5. *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement, 5 December 2003, para. 192; emphasis added. See also, *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 5; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, para. 9. See also *Prosecutor v. Milutinovic et al.*, Case No. IT-99-37-PT, Decision on Motion Challenging Jurisdiction, 6 May 2003, para. 46.
16 - *Report of the Secretary-General pursuant to paragraph 2 of Security Council, Resolution 808(1993)*, 3 May 1993 (S/25704), para. 28. See also Ojdanic Jurisdiction Decision, para. 47.
17 - Motion, p. 8, para. 2.