



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-02-65-PT
Date: 22 September 2004
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Theodor Meron, President

Registrar: Mr. Hans Holthuis

Order of: 22 September 2004

THE PROSECUTOR

v.

**ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEZEVIĆ**

**PRELIMINARY ORDER IN RESPONSE TO THE PROSECUTOR'S REQUEST
UNDER RULE 11 *bis***

The Office of the Prosecutor

Ms. Carla Del Ponte, Prosecutor

Counsel for the Defence:

Mr. Jovan Simić and Mr. Zoran Živanović for Željko Mejačić
Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Mrs. Slobodanka Nedić for Duško Knežević

1. As President 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”), I am seized of the “Request by the Prosecutor under Rule 11 *bis*” (“Motion”) that was filed on 2 September 2004.

Procedural History

2. In 1995, the Prosecutor indicted Željko Mejačić, Momčilo Gruban, and Duško Knežević for crimes allegedly committed while they were running a detention camp in Omarska, a small town roughly fifteen kilometres from Prijedor, Bosnia-Herzegovina.¹ Dušan Fuštar was indicted in 1998 for similar crimes that were alleged to have transpired in a detention camp located in the nearby village of Ketarem.² All four individuals (collectively “Defendants”) eventually surrendered voluntarily in Bosnia-Herzegovina, and they have been in the Tribunal’s custody ever since. After a consolidated indictment was issued against Defendants in July 2002,³ the Trial Chamber granted the Prosecutor’s motion to consolidate their trials,⁴ and the two sides began to exchange preliminary motions in preparation for trial under the auspices of the Tribunal. The Prosecutor has now filed a motion under Rule 11 *bis*, requesting that a Trial Chamber transfer Defendants’ consolidated case to the authorities of Bosnia-Herzegovina for trial in the War Crimes Chamber of the State Court.

Applicable Law

3. Rule 11 *bis* creates a procedural mechanism for effectuating the “referral of cases involving lower and intermediate rank accused” to competent national jurisdictions.⁵ The Prosecutor has an important role to play in this respect.⁶ Rule 11 *bis* (A) gives the President the authority to appoint a Trial Chamber in certain circumstances. In relevant part, the Rule states:

¹ Indictment, Case No. IT95-4-I, filed on 10 February 1995.

² Indictment, Case No. IT-95-8-PT, filed on 21 July 1998.

³ Consolidated Indictment, Case No. IT-02-65-PT, filed on 5 July 2002 (charging defendants with Persecution on Political, Racial, or Religious Grounds; Murder; Inhumane Acts; and Cruel Treatment) (also indicting Predrag Banović).

⁴ Decision on Prosecutor’s Motion for Joinder of Accused, Case No. IT-95-4-PT, 17 September 2002.

⁵ Presidential Statement S/PRST/2004/28, 4 August 2004.

⁶ See, e.g., *Prosecutor v. Ademi et al.*, No.: IT-04-78-PT, Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should Be Referred to Another Court under Rule 11 *bis*, 7 September 2004 (responding to a similar prosecutorial request by appointing an 11 *bis* Trial Chamber).

(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor, and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with Security Council Resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

Discussion

4. In accordance with the Security Council's general directive, the Rule enumerates two qualitative criteria for evaluating the suitability of an 11 *bis* transfer: the gravity of the crimes charged⁷ and the level of responsibility of the accused.⁸ Rule 11 *bis* also makes explicit a pair of objective conditions that must be satisfied prior to transfer: the accused must be guaranteed of receiving a fair trial in the destination State,⁹ and there must be no possibility that the accused will be subject to the death penalty.¹⁰ Furthermore, the Rule suggests that a case should be transferred to the authorities of a State only on the understanding that "those authorities [are able to] *forthwith* refer the case to the appropriate court for trial within that state."¹¹ Finally, the logic of the rule appears to suggest that the receiving State must be "willing and adequately prepared to accept such a case."¹² This last phrase, which is located in 11 *bis*(A)(iii), technically applies to states other than those where the crime was committed

⁷ Rule 11 *bis*(C).

⁸ Rule 11 *bis*(C).

⁹ Rule 11 *bis*(B).

¹⁰ Rule 11 *bis*(B).

¹¹ Rule 11 *bis*(A) (emphasis added).

or the accused was arrested. However, it is not clear how an existing legal case could be referred to a country which is unwilling or unprepared to accept a case for prosecution.

7. In her motion the Prosecutor states that

[i]t appears that Bosnia and Herzegovina would provide all necessary legal and technical conditions for fair trials. Currently, existing national legislation is being reviewed, and, where necessary, amended to create a comprehensive legal framework for the prosecution of war crimes. The Prosecutor has been informed that all legislation amendments are to be submitted to Parliament for adoption in early October 2004. It is envisaged by the Office of the High Representative for Bosnia and Herzegovina that the first war crimes trials before the war crimes chamber of the State Court will commence in January 2005.¹³

On its face this statement raises doubt whether Defendants' case can actually be transferred to Bosnia-Herzegovina at this time. Specifically, the Prosecutor's statement appears to recognize that there is, as yet, no "comprehensive legal framework for the prosecution of war crimes." It is not obvious how a Trial Chamber could make the necessary determination regarding due process in the receiving state before the receiving Court specified by the Prosecutor herself (the War Crimes Chamber) has even been established. Moreover, even assuming that all legislation is passed as planned, the Prosecutor's statement appears to suggest that no court capable of adequately addressing Defendants' case will exist until January 2005. If correct, this surely casts profound doubt on the ability of Bosnia-Herzegovina to refer Defendants' case to an appropriate court for a fair trial "forthwith."

8. In view of these apparent difficulties, I wrote a letter to Ambassador Bernard Fassier, Senior Deputy High Representative in Bosnia-Herzegovina, in which I requested

advice as to whether there is any court in Bosnia and Herzegovina presently capable of trying persons accused of war crimes in a manner which meets international human rights and due process standards. If the answer to the above is negative, I would appreciate your advice as to when the war crimes chamber of the State Court will be operational and able to receive Rule 11 *bis* cases for trial.¹⁴

In his response to my enquiry, Ambassador Fassier stated:

¹² Motion, para. 8 (quoting Rule 11 *bis*(A)(iii)).

¹³ Motion, para. 29.

¹⁴ Letter from ICTY President Theodor Meron to Ambassador Bernard Fassier, 7 September 2004.

I received your letter dated 07 September 2004 related to the request of the ICTY Prosecutor to refer to the BiH authorities a case involving four accused pursuant to Rule 11*bis* of the Rules of Evidence and Procedure and recalling that prior to authorizing such referral, the Trial Chamber must be satisfied that the accused will receive a fair trial.

In this respect, I would refer to the Joint Conclusions of the ICTY and OHR dated 21 February 2003 stating in the introduction that the “prosecution of War Crimes by domestic courts in BiH has proven, thus far, to be ineffective and not in compliance with international standards.” This is the reason why conclusions 1 and 2 provided that the Court of BiH must include a specialized Chamber for War Crimes and the State Prosecutor’s Office must include a War Crimes Department. Since that time, great progress has been made with the creation of mixed panels of international and domestic judges in the State Court and international and domestic prosecutors in the State Prosecutor’s Office to hear and prosecute organized crime cases. It is expected that this progress will enable the Prosecutor’s Office of BiH and the Court of BiH to prosecute and hear war crime cases by January 2005.

Regarding the date when the War Crimes Chamber of the BiH Court will be operational, the recently established Project Management Team has reported to me that it is still expected that the chamber will be operational in January 2005, as planned, despite the fact that a number of important issues still remain to be resolved in the coming months. For example, the creation of appropriate detention facilities is an urgent need[,] and in this respect, there is no possibility to provide necessary facilities prior to January 2005. In addition, the Parliament of BiH is expected to approve in the coming weeks the necessary legislative amendments and the BiH Presidency is expected to endorse in [the] near future the creation of the Common Registry for Organized Crime and War Crimes.

In conclusion, from the OHR perspective, it appears that despite the expeditious implementation of our common project, there will be no possibility to provide before the planned date of January 2005 trials that meet the standards of international due process as required by the ICTY. Any premature referral to BiH before January could even undermine the current efforts to establish that capacity. Therefore, I would strongly recommend that no referral of cases be made prior to that date and that all questions related to these future transfers should be very closely coordinated with the relevant local authority, Mr. Jurcevic, Chief Prosecutor of BiH as he proposed in his letters of 13 September 2004, addressed to you and Ms. Carla del Ponte.¹⁵

9. Ambassador Fassier’s letter does not equivocate: “there will be no possibility to provide before the planned date of January 2005 trials that meet the standards of international due process.” He further confirms that the national parliament has not yet approved the

legislation necessary to make an 11 *bis* transfer possible, and that “a number of [other] important issues still remain to be resolved in the coming months.” He goes so far as to express his opinion that “[a]ny premature referral to BiH before January could even undermine the current efforts” to create a judicial system capable of conducting war crimes trials, and therefore “strongly” recommends that “no referral of cases be made prior to [January 2005].” In short, rather than allaying the concerns raised by the Prosecutor’s request on its face, Ambassador Fassier’s response exacerbates them.

Disposition

10. This is an unusual case. It involves some tension among the need for efficient judicial management of Trial Chamber resources, the need to safeguard Defendants’ procedural rights, and the need to effectuate the basic judicial mission of this Tribunal. Normally, the President would leave all of these questions to a Trial Chamber. Here, however, it appears to be manifest on the face of the Prosecutor’s request, not to mention in the text of the letter from OHR, that there is no jurisdiction presently prepared to take this case. After consultation with the Bureau, and with its approval, I have therefore decided that the Prosecutor should be offered the opportunity to clarify the following issues, as well as any others that she deems important in light of the foregoing discussion:

- In light of Ambassador Fassier’s recent letter, what evidence supports the proposition that “Bosnia and Herzegovina would provide all necessary legal and technical conditions for fair trials”?¹⁶
- In light of Ambassador Fassier’s recent letter, to what extent is Bosnia-Herzegovina capable of referring Defendants’ case to a competent court “forthwith”?

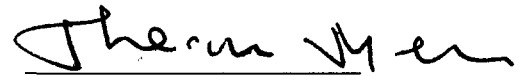
A supplementary motion of 20 pages or less, exclusive of annexes, will therefore be accepted by the Office of the President at any time until 1 October 2004. My disposition of the Prosecutor’s request will be rendered after that time.

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

¹⁵ Letter from Ambassador Bernard Fassier to ICTY President Theodor Meron, 17 September 2004.

¹⁶ Motion, para. 29.

Dated this 22nd day of September 2004,
At The Hague,
The Netherlands.


Judge Theodor Meron
President

[Seal of the International Tribunal]