



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

Case No. IT-04-78-PT
Date: 20th January 2005
Original: English

IN A SPECIALLY APPOINTED TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge O-Gon Kwon
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Order: 20th January 2005

THE PROSECUTOR

v.

**RAHIM ADEMI
and
MIRKO NORAC**

**ORDER FOR FURTHER INFORMATION IN THE CONTEXT OF THE
PROSECUTOR'S REQUEST UNDER RULE 11BIS**

The Office of the Prosecutor:

Ms. Carla del Ponte

Counsel for the Accused:

Mr. Ćedo Prodanović for Rahim Ademi
Mr. Željko Olujić for Mirko Norac

The authorities of the Republic of Croatia:

The Government of the Republic of Croatia
per: The Croatian Embassy, The Hague, NL

THIS TRIAL CHAMBER (“the 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 (“the Tribunal”);

NOTING the “Request by the Prosecutor under Rule 11*bis*,” filed on 2nd September 2004 (“the Request”), whereby the Prosecution requests that a Trial Chamber order the referral of the case to the authorities of Croatia, after having given the opportunity to the authorities of Croatia to be heard on the Request and the conditions for referral of this case;

NOTING the “Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court under Rule 11*bis*”, filed on 7th September 2004, whereby the President appointed this Trial Chamber to determine whether the case against Rahim Ademi and Mirko Norac shall be referred to the Authorities of the Republic of Croatia pursuant to Rule 11*bis* of the Rules of Procedure and Evidence of the International Tribunal (“the Rules”);

NOTING that the crimes charged in the indictment were allegedly committed in the territory of the Republic of Croatia and that the referral requested therefore falls within Rule 11*bis* (A)(i) of the Rules;

NOTING that, under Rule 11*bis* (B) of the Rules, “[t]he Trial Chamber may order such referral [...] 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”;

NOTING the Chamber’s “Order for Further Submissions on the Gravity of the Crimes and the Level of Responsibility of the Accused” filed by the Chamber on 3rd November 2004 (“the Order”) and addressed to the Parties; and the letter of 10th November 2004 from the Senior Legal Officer to the Republic of Croatia, inviting the Government of the Republic of Croatia as well to submit its views on the gravity of the crimes and the level of responsibility of the Accused;

NOTING the “Response to the Chamber’s Order of November 3, 2004”, filed by *Norac’s Defence* on 9th November 2004; the *Prosecution’s* “Further Submission in Support of the Motion of the Prosecutor under Rule 11*bis*”, filed on 10th November 2004; the “Submission on the Gravity of the Crimes and the Level of Responsibility of the Accused”, filed by *Ademi’s Defence* on 16th November 2004; and the “Response to Prosecutor’s Further Submission in Support of the Motion of the Prosecution under Rule 11*bis*” filed by *Norac’s Defence* on 18th November 2004;

NOTING the “Submission of the Republic of Croatia to the Court’s Order on the Gravity of the Crimes and the level of Responsibility of the Accused”, filed on 30th November 2004;

CONSIDERING that there are now issues and circumstances relevant to the Chamber’s consideration of the Request for referral of this case, and on which the Chamber wishes to obtain the views of the Government of the Republic of Croatia and of the Parties;

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 11*bis* of the Rules,

INVITES the Authorities of the Republic of Croatia to provide, where possible in English, the following information within 21 days of receipt of the present Order:

- 1) the relevant provisions of the 1993 and the 2004 Croatian criminal codes relating to the crimes charged in the indictment, including provisions governing the modes of liability, the grounds of justification or excuse or absolute extenuation from liability and the determination of sentence;
- 2) the relevant provisions regarding the acceptance of the transfer of ICTY cases to Croatia;
- 3) the relevant provisions relating to the protection of witnesses, before, during and after testimony, the measures available to implement the relevant provisions and how these measures have worked in practice; in particular, whether there are adequate provisions for meeting last minute requests for protective measures; and
- 4) the relevant provisions regarding the Croatian system of early release and parole;

FURTHER INVITES the authorities of the Republic of Croatia to file, within 21 days of receipt of this Order, further submissions on the Request, including, in particular, on the following aspects:

- 1) Would the substantive law applicable to the present case, if it is referred, be the 1993 criminal code or the 2004 criminal code? Which law has been applied so far by Croatian courts to criminal cases arising from the armed conflict of 1991-1995?

- 2) Is there any material distinction between the law applied by the ICTY and Croatian law on command responsibility? In particular, does Croatian law consider a commander to be criminally liable if he or she did not know, but had reason to know that his or her subordinates were about to commit or had committed war crimes or crimes against humanity and failed to take the necessary measures to prevent such acts or to punish the perpetrators thereof?
- 3) Will the present case, if referred, necessarily be tried before one of the four County Chambers in Croatia designated to hear war crimes cases and, if not, what is the procedure for determining which Court will then hear the case?
- 4) Are there any grounds, under the applicable Croatian law, on which the material gathered by the ICTY and transferred to Croatia may be declared inadmissible as evidence before Croatian courts? Are the Croatian courts in a position to take judicial notice of findings made by the ICTY? In which circumstances, if any, can written statements and depositions be used in evidence in the Croatian courts?
- 5) Can the ICTY indictment be received as it is in the Croatian legal system or would it need to be altered in order to meet Croatian legal requirements? Can the indictment be subsequently amended in the course of the proceedings? If so, to what extent and by which procedure?
- 6) Are there any legal and/or practical reasons why the counsel presently retained should not continue to represent the accused if the case is transferred to Croatia?
- 7) Is the Croatian Government aware of the Supplementary Report of 22nd June 2004 by the Organization of Security and Co-operation in Europe on "War Crime Proceedings in Croatia and Findings from Trial Monitoring" ("the OSCE Report")? If it is aware, what is its position on the conclusions contained therein, in particular in subparagraph 3 on Sentencing (page 11-12), subparagraph 4 on Delays in the Criminal Procedure (page 12-13) paragraph IV. Lack of Impartial Tribunal (page 13-14) and paragraph V. In Absentia Procedures (page 14-15)?

ORDERS the Prosecution to file within 14 days of the receipt of this Order any further submissions on the Request, including, in particular, the following aspects:

- 1) Would the substantive law applicable to the case be the 1993 criminal code or the 2004 criminal code?
- 2) How does the Prosecution intend to ensure that the proceedings in Croatia will accurately reflect all charges of the ICTY indictment, including the two counts charging the accused with crimes against humanity, and all modes of liability listed in the ICTY indictment, including command responsibility?
- 3) Does the present indictment contain sufficient factual information to satisfy Croatian law especially with regard to the various modes of criminal liability for the crimes charged in the indictment?
- 4) To what extent, if any, would amendments made to the indictment in the course of the Croatian proceedings be acceptable to the Prosecution?
- 5) Is it anticipated that Prosecution witnesses will request protective measures in relation to any proceedings conducted in Croatia? What forms of protective measures are available for such witnesses and on what basis would they be granted?
- 6) Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair conduct of trial, especially in respect of summoning witnesses and taking witnesses' depositions?
- 7) How does the Prosecution anticipate to implement the requirements in Rule 11*bis* (D)(iii) of the Rules in practical terms?
- 8) How does the Prosecution envision monitoring the proceedings, pursuant to Rule 11*bis* (D)(iv) of the Rules, if the case is referred to Croatia?
- 9) What is the Prosecution's position on the conclusions in the paragraphs referred to above in the OSCE Report?

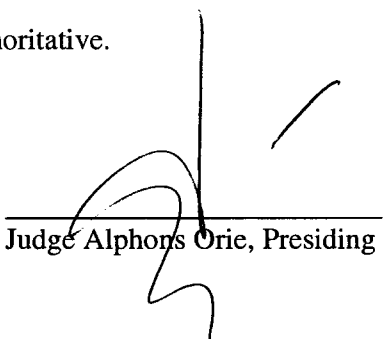
ORDERS the Defence of each Accused to provide, within 14 days of receipt of this Order, further written submissions on the Request, including, in particular, on the following aspects:

- 1) Would the substantive law applicable to the case be the 1993 criminal code or the 2004 criminal code?

- 2) What forms of protective measures are available for witnesses in relation to any proceedings conducted in Croatia and on what basis would they be granted?
- 3) Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair conduct of trial, especially in respect of summoning witnesses and taking witnesses' depositions?
- 4) Would any issue of due process arise if the ICTY indictment is received into court proceedings in Croatia without any prior investigation? In particular, what would be the impact for the defendants of losing the opportunity to be heard by the investigating judge and to participate in the investigations?
- 5) Does either defence team foresee any difficulties caused by the fact that the proceedings are more advanced for one accused than for the other?
- 6) Are there any legal or practical reasons why the counsel presently retained should not continue to represent the accused if the case is transferred to Croatia?
- 7) What is the Defence's position on the conclusions in the paragraphs referred to above in the OSCE Report?

ORDERS the Registrar to transmit this order to the authorities of the Republic of Croatia together with a copy of the indictment.

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



Judge Alphons Orie, Presiding Judge

Dated this twentieth day of January 2005,
At The Hague,
The Netherlands

[Seal of the Tribunal]