



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-96-23/2-PT
Date: 9 February 2005
Original: English

IN A SPECIALLY APPOINTED CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision: 9 February 2005

PROSECUTOR
v.
RADOVAN STANKOVIĆ

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

The Office of the Prosecutor:

Carla del Ponte
Jan Wubben

The Government of Bosnia and Herzegovina

per: The Embassy of Bosnia and Herzegovina
to The Netherlands, The Hague

Counsel for the Accused:

Milenko Radović

THIS SPECIALLY APPOINTED 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;

NOTING the “Request by the Prosecutor under Rule 11*bis* for Referral of the Indictment to the State of Bosnia and Herzegovina,” filed on 21 September 2004 whereby the Prosecution requests that a Trial Chamber order the referral of the case against Mr. Radovan Stanković (“the Accused”) to the authorities of Bosnia and Herzegovina (the “Request”);

NOTING the President’s “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 5 October 2004, whereby the President appointed this Chamber to determine whether the case against the Accused shall be referred to the authorities of Bosnia and Herzegovina pursuant to Rule 11*bis* of the Rules of Procedure and Evidence (“the Rules”);

NOTING the Status Conference held on 9 November 2004, where the Defence opposed the Request;

NOTING the “Defence’s Motion in Accordance Rule 11*bis*(B),” filed on 22 December 2004 whereby the Defence raises a number of objections relating to a possible referral of the case to the authorities of Bosnia and Herzegovina;

CONSIDERING that the crimes charged in the Indictment were allegedly committed in Bosnia and Herzegovina and that the referral requested falls within the scope of 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 that Rule 11*bis*(C) of the Rules provides that “[in] determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with the Security Council Resolution 1534 (2004) of 26 March 2004, consider the gravity of the crimes charged and the level of responsibility of the accused;”

NOTING that Security Council Resolution 1534 (2004) refers to “the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions;”

NOTING that Security Council Resolution 1503 (2003) recommended that the ICTY concentrate “on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and [transfer] cases involving those who may not bear this level of responsibility to competent national jurisdictions;”

CONSIDERING that the evaluation of whether a case should be referred to the authorities of a State is therefore a two-step process, requiring consideration of (1) whether the gravity of the crimes charged and the level of responsibility of the Accused renders the case appropriate for referral because it involves intermediate or lower-rank accused, and (2) whether the State to which the Prosecution seeks to refer the case is a competent national jurisdiction whose legal system is compatible with the requirements of Rule 11*bis*(B);

CONSIDERING that the Indictment charges the Accused with all forms of individual criminal responsibility referred to in Article 7(1) of the Statute in relation to the crimes of enslavement and rape as crimes against humanity and rape and outrages upon personal dignity as violations of the laws or customs of war in relation to nine identified and a number of unidentified women;

CONSIDERING that although the Prosecution’s Request discusses the gravity of the alleged offences and the level of responsibility of the Accused in this case, the Chamber would benefit from detailed submissions on these matters from the Parties and the Government of Bosnia and Herzegovina, including whether the “level of responsibility” in Rule 11*bis*(C) refers to the role of the Accused in the commission of the alleged offences, or to the position and rank of the Accused in the civil or military hierarchy, or both; and whether special weight should be given to any particular considerations relating to the gravity of the alleged offences or the level or responsibility of the Accused;

CONSIDERING that the Chamber wishes to obtain both submissions on the issue of the gravity of the crimes and the level of responsibility, and submissions by the Government of Bosnia and Herzegovina and the Parties on the compatibility of the legal system of Bosnia and Herzegovina with Rule 11*bis*(B);

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 11*bis* and 54 of the Rules,

I. ORDERS the Parties and **INVITES** the Government of Bosnia and Herzegovina to file submissions by 21 February 2005 on the following questions, including the weight to be given to each of them:

1. Is the gravity of the crimes charged in the indictment compatible with referral of the case to the authority of Bosnia and Herzegovina under Rule 11*bis* of the Rules?
2. Is the level of the responsibility of the Accused compatible with referral of the case to the War Crimes Chamber of the State Court in Bosnia and Herzegovina under Rule 11*bis* of the Rules? In particular, does Rule 11*bis*(C) refer to the role of the Accused in the commission of the alleged offences, or to the position and rank of the Accused in the civil or military hierarchy, or to both?

II. In relation to the compatibility of the legal system of Bosnia and Herzegovina with Rule 11*bis*(B), **INVITES** the Government of Bosnia and Herzegovina to provide the following documents, in English if possible, by 21 February 2005:

1. The relevant provisions of the national criminal code that were in force in Bosnia and Herzegovina in May 1992 and of the current national criminal code relating to war crimes and crimes against humanity, as well as to all modes of criminal liability, the grounds of justification or absolute extenuation and the determination of sentence;
2. The relevant provisions regarding the establishment and jurisdiction of the War Crimes Chamber of the State Court, including the provisions regarding the acceptance of the transfer of ICTY cases to Bosnia and Herzegovina;
3. The relevant provisions relating to the protection of witnesses, before, during and after testimony and a presentation of the measures available to implement the relevant provisions; in particular, are there adequate provisions for meeting last minute requests for protective measures;
4. The relevant provisions on detention at the pre-trial and trial stages (including the detention facilities available for this purpose) and the conditions of such detention, particularly regarding the monitoring and restrictions which may be imposed on the communications by the Accused with other persons outside the detention facility;

FURTHER INVITES the Government of Bosnia and Herzegovina to file written submissions by 21 February 2005 on the following matters:

1. Would the substantive law applicable to the case – if referred – be the criminal code in force in April 1992 or the current criminal code?
2. Pursuant to the law of Bosnia and Herzegovina, is the only court competent to hear the case, if referred, the War Crimes Chamber of the State Court?

3. Would the evidence gathered by the ICTY be directly admissible as such before the competent court in Bosnia and Herzegovina? Is this court in a position to take judicial notice of findings made by the ICTY? In what circumstances, if any, can written statements, transcripts, and depositions be used in evidence?
4. How would the Indictment against the Accused be incorporated and applied in the criminal legal procedure under the applicable law in Bosnia and Herzegovina? Can the Indictment be subsequently amended in the course of the proceedings? If so, to what extent and by which procedure?
5. If the case were to be referred, would there be a need for additional pre-trial investigation or would the case commence at trial stage? Will the prosecutorial services be able to call all the witnesses, including international experts, as intended by the ICTY Prosecution?
6. Would it be possible for the counsel presently retained to continue to represent the Accused if the case is referred to Bosnia and Herzegovina? Is there a system in place in Bosnia and Herzegovina for remuneration of counsel defending an indigent Accused? What guarantees for the right to counsel at pre-trial and trial stage exist under the applicable law of criminal procedure?
7. What is the Government's position with respect to the concerns raised by the Defence that a referral of the case to the authorities of Bosnia and Herzegovina will lead to undue delay of the proceedings against the Accused?
8. If convicted by the State Court, would the Accused be given credit for the time spent in detention at the ICTY?
9. What are the provisions and practice for early release and parole in Bosnia and Herzegovina?
10. Any other relevant issue.

ORDERS the Prosecution to file further submissions on the following matters by 21 February 2005:

1. Would the substantive law applicable to the case be the criminal code that was in force in April 1992 or the current criminal code?

2. Should the BiH indictment accurately reflect all charges of the ICTY Indictment, including the eight counts charging the Accused with crimes against humanity and violations of the laws and customs of war, and all modes of liability listed under Article 7(1) of the Statute?
3. What protective measures are expected to be needed for witnesses, especially in view of a potential hearing in Bosnia and Herzegovina? Is it to be anticipated that witnesses, in their contact with prosecutorial services, will ask for additional protective measures?
4. Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
5. How does the Prosecution envision to implement Rule 11bis(D)(iii) of the Rules (*i.e.* transfer of hard copy, electronic format)?
6. How does the Prosecution envision to monitor the proceedings, pursuant to Rule 11bis(D)(iv) of the Rules?
7. Any other relevant issue.

ORDERS the Defence to provide written submissions on the following aspects by 21 February 2005:

1. Would the substantive law applicable to the case be the criminal code that was in force in April 1992 or the current criminal code?
2. What protective measures are expected to be needed for (Defence) witnesses, especially in view of a potential hearing in Bosnia and Herzegovina?
3. Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
4. Would any issue of due process arise if the ICTY Indictment is received without prior investigations in Bosnia and Herzegovina? Can the proceedings in this case continue from the stage they currently are before the ICTY or is there a need for some pre-trial investigatory steps to be taken or repeated?
5. Would it be possible for the counsel presently retained to continue to represent the Accused if the case is transferred to Bosnia and Herzegovina?

6. Would observers sent by the Prosecutor, in accordance with Rule 11*bis*, be considered by the Defence an appropriate and sufficient tool to monitor the fairness of the proceedings before the BiH State Court?
7. Any other relevant issue.

ORDERS the Parties and **INVITES** the Government of Bosnia and Herzegovina to be prepared to make oral submissions on the Prosecution's request for referral.¹

REQUESTS the Registrar to transmit this order immediately to the Government of Bosnia and Herzegovina.

Done in English and French, the English text being the authoritative.
Done on this ninth February 2005
At The Hague,
The Netherlands



Judge Alphons Orie, Presiding Judge

[Seal of the Tribunal]

¹ See *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, "Scheduling Order for a Referral of a Case Under Rule 11*bis*," 9 February 2005.