



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-02-65-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.

**ŽELKO MEJAKIĆ  
MOMČILO GRUBAN  
DUŠAN FUŠTAR  
DUŠKO KNEŽEVIĆ**

**PARTLY CONFIDENTIAL**

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

WITH CONFIDENTIAL ANNEX

**The Office of the Prosecutor:**

Ms. Carla del Ponte  
Ms. Ann Sutherland

**The Government of Bosnia and Herzegovina**

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

**Counsel for the Accused:**

Mr. Jovan Simić and Mr. Zoran Zivanović,  
for Želko Mejačić  
Mr. Branko Lukić, for Momčilo Gruban  
Mr. Theodore Scudder and Mr. Dragan Ivetić,  
for Dušan Fuštar  
Ms. Slobodanka Nedić, for Duško Knežević

**The Government of Serbia and Montenegro**

*per:* The Embassy of Serbia and Montenegro  
to The Netherlands, The Hague

**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 (“the Tribunal”);

**NOTING** the “Motion by the Prosecutor Under Rule 11 *bis*” filed on 2 September 2004, in which the Prosecution requested that the President appoint a Trial Chamber to review a request for the referral of the case against Želko Mežak, Momčilo Gruban, Dušan Fuštar, and Duško Knežević (collectively, “the Accused”) to the Government of Bosnia and Herzegovina, and the “Partly Confidential Request by the Prosecutor under Rule 11 *bis*”, also filed on 2 September 2004, in which the Prosecution argues that the case against the Accused satisfies the requirements of Rule 11 *bis* and is therefore appropriate for transfer to the Government of Bosnia and Herzegovina (the “Motion”);

**NOTING** the “Preliminary Order in Response to the Prosecutor’s Request under Rule 11 *bis*”, filed on 22 September 2004, in which the President directed the Prosecution to file a supplementary motion supporting her assertions that certain of the criteria of Rule 11 *bis* of the Rules of Procedure and Evidence (“the Rules”) had been met;

**NOTING** the “Supplementary Motion by the Prosecutor Under Rule 11 *bis*”, filed on 30 September 2004, in which the Prosecution submitted that it was not premature for a Trial Chamber to consider the substantive request for referral on its merits, and reiterated its request for the President to appoint a Trial Chamber to review the Motion;

**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 4 October 2004, whereby the President appointed this Chamber to determine whether the case against the Accused shall be referred to the Government of Bosnia and Herzegovina pursuant to Rule 11 *bis* of the Rules, and the President’s “Order Transferring a Motion Pursuant to Rule 11 *bis*”, whereby the Motion was transferred to this Chamber for consideration;

**NOTING** the “Confidential Joint Defence Response to the Prosecution’s Motion Under Rule 11 *bis*”, filed on 18 October 2004 and attached to this Decision as a Confidential Annex, in which the Defence Teams raise a number of objections relating to a possible referral of the case to Bosnia and Herzegovina;

**NOTING** “Serbia and Montenegro’s Submission in the Proceedings Under Rule 11 *bis*”, filed on 14 January 2005, in which the Government of Serbia and Montenegro proposes that the Trial Chamber refer the case against the Accused to Serbia and Montenegro under Rule 11 *bis*, and offers

to provide additional information if the Chamber deems it “necessary for the assessment of Serbia and Montenegro’s capability to try war crimes cases”;

**CONSIDERING** that the crimes charged in the indictment were allegedly committed in Bosnia and Herzegovina and that the referral requested by the Prosecutor 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 [A]ccused, the opportunity to be heard and after being satisfied that the [A]ccused 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 “[i]n determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with 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 Consolidated Indictment charges all the Accused with all forms of individual criminal responsibility referred to in Article 7(1) of the Statute in relation to the crimes of persecutions, murder, and inhumane acts as crimes against humanity, and murder and cruel treatment as violations of the laws or customs of war in relation to the operation of the Keraterm and Omarska camps; and also charges Želko Mejačić, Momčilo Gruban, and Dušan Fuštar with responsibility as superiors under Article 7(3) of the Statute in relation to the same crimes;

**CONSIDERING** that although the Prosecution's Motion 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 of 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 authorities in 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 authorities 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, the existence of 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 monitoring and the restrictions which may be imposed on the communications by the Accused with 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 May 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 as evidence?
4. How would the Consolidated 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 the 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 the pre-trial and trial stages exist under the applicable law of criminal procedure?

7. What is the Government's position with respect to the concerns raised by the Defence Teams 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 May 1992 or the current criminal code?
2. Should the BiH indictment accurately reflect all charges of the ICTY indictment, including the five 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) and Article 7(3) 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 11 bis (D)(iv) of the Rules?

7. Any other relevant issue.

**ORDERS** the Defence Teams to file written 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 May 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 their stage 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 11bis, 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 discuss, by way of oral submissions at the hearing on the Prosecution's Motion, their views on the possible referral of this case;<sup>1</sup>

**INVITES** the Government of Serbia and Montenegro to be prepared to address, by way of oral submission at the hearing on the Prosecution's Motion, its proposal that the case against the Accused be transferred to Serbia and Montenegro, particularly in light of the Prosecution's Motion

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<sup>1</sup> See *Prosecutor v. Međaković et al.*, Case No. IT-02-65-PT, "Scheduling Order for a Hearing on Referral of a Case Under Rule 11 Bis", 9 February 2005.

for referral to Bosnia and Herzegovina, and the Prosecution's assertion in the Motion that "[s]hould more than one State have an interest in the prosecution of a case, the Prosecution would interpret these provisions [of Rule 11 *bis* (A)] as ranking the possible States in descending order of priority";

**REQUESTS** the Registrar to transmit this order immediately to the Government of Bosnia and Herzegovina, and the Government of Serbia and Montenegro;

**REMINDS** the Parties and the Governments of the confidential nature of the Annex attached to this Decision.

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



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Judge Alphons Orie, Presiding Judge

Done on this ninth day of February 2005  
At The Hague,  
The Netherlands

[Seal of the Tribunal]