



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: 15 April 2005  
Original: English

**IN THE REFERRAL BENCH**

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

**Registrar:** Mr. Hans Holthuis

**Decision:** 15 April 2005

**PROSECUTOR**  
v.  
**GOJKO JANKOVIĆ**

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

**The Office of the Prosecutor:**  
Ms. Carla Del Ponte

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

**Counsel for the Accused:**  
Mr. Aleksandar Lazarević  
Mr. Tomislav Visnjić

**THE REFERRAL BENCH** 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 (i) “Motion by the Prosecutor Under Rule 11 *bis*(A)” filed on 29 November 2004, in which the Prosecutor of the Tribunal (“the Prosecutor”) requested that the President of the Tribunal (“the President”) appoint a Trial Chamber to review a request for the referral of the case against Gojko Janković (“the Accused”), then at large, to the authorities of Bosnia and Herzegovina; and the (ii) partly confidential “Motion by the Prosecutor under Rule 11 *bis* with Annexes I, II, III and Confidential Annexes IV and V” filed on 29 November 2004, in which the Prosecutor argued that the case against the Accused satisfied the requirements of Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal (“the Rules”) and is therefore appropriate for transfer to the authorities of Bosnia and Herzegovina (“the Motion”);

**NOTING** the President’s “Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should Be Referred to Another Court under Rule 11 *bis*” filed on 1 December 2004, whereby the President appointed this Referral Bench 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;

**NOTING** that the Accused was transferred to the Tribunal on 14 March 2005 and that the Accused was assigned permanent counsel on 14 April 2005;

**NOTING** that no submission in response to the Motion has yet been made by the Defence;

**CONSIDERING** that the crimes charged in the indictment against the Accused (“the Indictment”)<sup>1</sup> were allegedly committed in Bosnia and Herzegovina, between the period of April 1992 and February 1993, 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”;

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<sup>1</sup>“Amended Indictment”, *Prosecutor v. Janković et al*, Case No. IT-96-23/2-I, 7 Oct. 1999.

**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 Indictment charges the Accused with counts of torture and rape, which allegedly occurred in Buk Bijela, Foča High School, Partizan Sports Hall and other various locations in the town of Foča and surrounding villages, as crimes against humanity and violations of the laws or customs of war;

**CONSIDERING** that the Indictment charges the Accused with individual criminal responsibility pursuant to Article 7(1) of the Statute of the Tribunal (“the Statute”) in relation to all the counts of torture and rape in the various locations in the town of Foča and surrounding villages; and that the Indictment also, or alternatively, charges the Accused with individual criminal responsibility of superiors pursuant to Article 7(3) of the Statute in relation to the counts of torture and rape in Buk Bijela;

**CONSIDERING** that, although the Motion discusses the gravity of the alleged offences and the level of responsibility of the Accused in this case, the Referral Bench 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 Referral Bench also wishes to obtain 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) of the Rules;

**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 6 May 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 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 any additional documents, in English if possible, in addition to those submitted on 25 February 2005 and 23 March 2005 in the case of *Prosecutor v. Zelko Mejakić et al*, Case No.: IT-02-65-PT, which it considers of relevance for the present case.

**FURTHER INVITES** the Government of Bosnia and Herzegovina to file further written submissions or, if relevant, refer back to its previous written or oral submissions before the Tribunal, by 6 May 2005 on the following matters:

1. What are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
2. Any other issue that the Government of Bosnia and Herzegovina considers of relevance in relation to the particular case and that has not yet been addressed in its prior written submissions or in the hearing of 3-4 March 2005.

**ORDERS** the Prosecutor to file further submissions on the following matters by 6 May 2005:

1. What are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
2. Any other issue that the Government of Bosnia and Herzegovina considers of relevance in relation to the particular case and that has not yet been addressed in its prior written submissions or in the hearing of 3-4 March 2005.

**ORDERS** the Defence to provide written submissions on the following aspects by 6 May 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 are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
3. What protective measures are expected to be needed for (Defence) witnesses in view of a potential hearing in Bosnia and Herzegovina?
4. Does the level of intrastate mutual assistance in criminal matters, or as far as necessary interstate mutual assistance, sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
5. Would any issue of due process arise if the ICTY indictments are 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?
6. Would it be possible for the counsel presently retained to continue to represent the Accused if the case is transferred to Bosnia and Herzegovina?
7. 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?
8. Any other relevant issue.

**ORDERS** the Parties to be prepared to make oral submissions on the Prosecutor's request for referral and **INVITES** the Government of Bosnia and Herzegovina to indicate whether it would like to make further oral submissions on the Motion of the Prosecutor.

**REQUESTS** the Registrar of the Tribunal ("Registrar") to transmit this order immediately to the Government of Bosnia and Herzegovina.

**REQUESTS** the Registrar to provide the Accused with copies of the following documents in the case of *Prosecutor v. Zelko Mejakić et al*, Case No.: IT-02-65-PT: (i) Decision for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis*, issued by the Specially Appointed Chamber on 9 February 2005; (ii) Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Decision for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis*, dated 22 February 2005; (iii) Prosecution's Further Submissions pursuant to Chamber's Order of 9 February 2005 dated 21 February 2005; (iv) transcripts of the public hearing of 3 and 4 March 2005; and (v) Response by the Government of Bosnia and Herzegovina to the Request for Further Written Submissions by the Referral Bench in the Mejakić and Stanković Cases dated 22 March 2005.

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



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Judge Alphons Orie, Presiding Judge

Dated this fifteenth day of April 2005  
At The Hague,  
The Netherlands

**[Seal of the Tribunal]**