



**UNITED  
NATIONS**



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: 17 May 2005  
Original: English

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**IN THE REFERRAL BENCH**

**Before:** Judge Alphons Orie, Presiding  
Judge O-Gon Kwon  
Judge Kevin Parker  
**Registrar:** Mr. Hans Holthuis  
**Decision:** 17 May 2005

**PROSECUTOR**

v.

**RADOVAN STANKOVIĆ**

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**DECISION ON REFERRAL OF CASE UNDER RULE 11 *BIS***

**Partly Confidential and *Ex Parte***

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**The Office of the Prosecutor:**

Carla Del Ponte

**The Government of  
Bosnia and Herzegovina**

**Counsel for the Accused:**

Victor Koppe

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**VII. DISPOSITION .....33**

## I. INTRODUCTION

1. This 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”) is seised of the “Motion by The Prosecutor under Rule 11 *bis* of the Rules of Procedure and Evidence for Referral of Indictment to another Court” (hereinafter “Motion for Referral”).

2. Rule 11 *bis*, entitled Referral of the Indictment to Another Court, was adopted on 12 November 1997 and revised on 30 September 2002.<sup>1</sup> Revision was necessary in order to give effect to the broad strategy endorsed by the Security Council for the completion of all Tribunal trial activities at first instance by 2008.<sup>2</sup> This completion strategy was subsequently summarised in Security Council Resolution 1503 as one of “concentrating on the prosecution of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate....”<sup>3</sup>

3. Since the 30 September 2002 revision of Rule 11 *bis*, there have been three amendments – one of 10 June 2004, one of 28 July 2004, and one of 11 February 2005. In its current form,<sup>4</sup> the Rule provides that:

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the “Referral Bench”), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

<sup>1</sup> In its original form, Rule 11 *bis* provided for transfer of an accused from the Tribunal to the authorities of the State in which the accused was arrested. Transfer required an order from the Trial Chamber suspending the indictment pending the proceedings before the national courts. Such an order necessitated findings by the Trial Chamber that State authorities were prepared to prosecute the accused in their own courts and that it was appropriate in the circumstances for the courts of that State to exercise jurisdiction over the accused.

<sup>2</sup> S/PRST/2002/21; S/RES/1329 (2000).

<sup>3</sup> S/RES/1503 (2003). The Security Council further noted that referral of cases to the War Crimes Chamber of the Court of Bosnia and Herzegovina was an essential prerequisite to achieving the objectives of the completion strategy. *See also* S/RES/1534 (2004); S/PRST/2004/28.

<sup>4</sup> Rules of Procedure and Evidence, IT/32/Rev. 34, 22 Feb 2005.

(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 Referral Bench 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 Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused.

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules.

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.

## II. PROCEDURAL HISTORY

4. The original Indictment against Radovan Stanković was confirmed on 26 June 1996<sup>5</sup> and included seven other persons.<sup>6</sup> An amended Indictment was confirmed against the Accused and four of the original indictees on 7 October 1999.<sup>7</sup> The Accused was apprehended by SFOR forces in the Foča area of Republika Srpska, Bosnia and Herzegovina on 9 July 2002 and transferred the following day to the Tribunal. On 3 March 2003, the Prosecution filed a separate Indictment charging only this Accused.<sup>8</sup> In order to more precisely set forth the factual basis of the charges and to ensure that the Accused was put on sufficient notice of the Prosecution's case, a Third Amended Indictment (the "Indictment") was filed on 8 December 2003 and confirmed on 24 February 2004.<sup>9</sup>

5. On 21 September 2004, the Prosecutor filed a motion for referral of the case to Bosnia and Herzegovina.<sup>10</sup> On 5 October 2004, the President ordered the Referral Bench to determine whether the case should be referred.<sup>11</sup>

6. Defence counsel for the Accused filed a response to the motion on 22 December 2004, objecting in particular to referral of the case to the State Court of Bosnia and Herzegovina.<sup>12</sup>

7. On 9 February 2005, the Referral Bench issued a decision ordering the parties and inviting the Government of Bosnia and Herzegovina to submit responses to specific questions.<sup>13</sup> The

<sup>5</sup> On the date in which Rule 11 *bis* was adopted, 12 Nov 1997, the original Indictment against the Accused had already been confirmed. The Defence has not raised any issue of non-applicability of Rule 11 *bis* resulting from the provision on the operation of amended Rules of Procedure and Evidence contained in Rule 6(D). Having considered the matter *proprio motu*, the Referral Bench does not consider Rule 6(D) to have the effect of rendering Rule 11 *bis* inapplicable in this case.

<sup>6</sup> IT-96-23, Indictment, 26 Jun 1996. Included were Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković. *See Prosecutor v. Kunarac, Kovač, and Vuković*, IT-96-23 & IT-96-23/1-T, Trial Chamber Judgement, 22 Feb 2001; Appeals Chamber Judgement, 12 Jun 2002.

<sup>7</sup> IT-96-23-PT, First Amended Indictment, 7 Oct 1999. The remaining indictees were Dragan Gagović, Gojko Janković, Janko Janjić, and Dragan Zelenović.

<sup>8</sup> IT-96-23/2-I, Second Amended Indictment, 3 Mar 2003.

<sup>9</sup> IT-96-23/2-PT, Prosecutor's Motion Seeking Leave to Amend the Second Amended Indictment, 8 Dec 2003. IT-96-23/2-PT, Third Amended Indictment, 24 Feb 2004.

<sup>10</sup> IT-96-23/2-PT, Request by the Prosecutor under Rule 11 *bis* of Rules of Procedure and Evidence (RPE) for Referral of Indictment to the State of Bosnia and Herzegovina, 21 Sep 2004. (Hereinafter "Prosecution's First Submissions").

<sup>11</sup> IT-96-23/2-PT, Order Transferring a Motion Pursuant to Rule 11 *bis*, 5 Oct 2004; IT-96-23/2-PT, Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court under Rule 11 *bis*, 5 Oct 2004.

<sup>12</sup> IT-96-23/2-PT, Defence's Motion in Accordance Rule 11 *bis* (B), 22 Dec 2004. (Hereinafter "Defence's First Submissions").

Prosecutor filed a response on 21 February 2005,<sup>14</sup> the Government of Bosnia and Herzegovina on 25 February 2005,<sup>15</sup> and the Defence on 1 March 2005.<sup>16</sup>

8. A hearing was held by the Referral Bench on 4 March 2005 with the parties present and with the Government of Bosnia and Herzegovina represented.<sup>17</sup>

9. Further submissions of the Government of Bosnia and Herzegovina were invited on 11 March 2005<sup>18</sup> and received on 22 March 2005.<sup>19</sup> The Prosecution and Defence were invited on 24 March 2005 to respond to these further submissions, but declined.<sup>20</sup> The Accused himself provided two timely submissions on 22 March 2005.<sup>21</sup>

### III. THE ACCUSED AND THE CHARGES

10. It is not disputed that the Accused, Radovan Stanković, is a national of Bosnia and Herzegovina and had his permanent residence in Miljevina, a village located within the municipality of Foča in Republika Srpska.<sup>22</sup>

11. The Indictment charges Radovan Stanković on the basis of individual criminal responsibility under Article 7(1) of the Statute of the Tribunal with four counts of crimes against humanity (two counts of enslavement under Article 5(c) and two counts of rape under Article 5(g)) and four counts of violations of the laws or customs of war (two counts of rape and two counts of outrages upon personal dignity under Article 3).<sup>23</sup> All of the alleged offences are charged as having been committed in the region of the municipality of Foča within the present territory of Bosnia and Herzegovina.

<sup>13</sup> IT-96-23/2-PT, Decision for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis*, 9 Feb 2005.

<sup>14</sup> IT-96-23/2-PT, Prosecution's Further Submissions Pursuant to Chamber's Order of 9 February 2005, 21 Feb 2005. (Hereinafter "Prosecution's Second Submissions").

<sup>15</sup> IT-96-23/2-PT, Response of Government of Bosnia and Herzegovina to the Questions of Specially Appointed Chamber of ICTY, 25 Feb 2005. (Hereinafter "BiH First Submissions").

<sup>16</sup> IT-96-23/2-PT, Defence Motion Pursuant the Chamber's Order dated 9 February 2005, 1 Mar 2005. (Hereinafter "Defence's Second Submissions").

<sup>17</sup> IT-96-23/2-PT, Rule 11 *bis* Motion Hearing (Open Session), 4 Mar 2005. (Hereinafter "Motion Hearing").

<sup>18</sup> IT-96-23/2-PT, Memorandum from Special Chamber to Government of Bosnia and Herzegovina, 11 Mar 2005.

<sup>19</sup> IT-96-23/2-PT, Government of Bosnia and Herzegovina Response to the Additional Questions Requested by the Referral Bench in Letter dated 11 March, 22 Mar 2005. (Hereinafter "BiH Second Submissions").

<sup>20</sup> IT-96-23/2-PT, Memorandum from Special Chamber to Prosecution and Defence, 24 Mar 2005.

<sup>21</sup> IT-96-23/2-PT, Submission Pursuant to Your Rule 11 *bis* (B) & Submission Pursuant to Your Rule 11 *bis* (B) in the Context of the Hearing Pursuant to Your Rule 11 *bis* (B), 22 Mar 2005.

<sup>22</sup> Indictment, para. 2.1.

12. The Prosecution case against the Accused alleges that in 1992 he was a soldier in the Miljevina Battalion of the Foča Tactical Brigade serving under the command of the Serb regional paramilitary leader Pero Elez. He was one of several soldiers temporarily quartered in the abandoned house of a Muslim named Nusret Karaman.<sup>24</sup>

13. The Indictment alleges that from about 3 August 1992 until about 10 October 1992, the Accused – together with Serb soldiers Nedžo and Nidžo Samardžić and Nikola Brčić – was in charge of “Karaman’s house,” using it to detain at least nine Muslim women and girls who were subjected to repeated rapes and sexual assaults.<sup>25</sup>

14. The Accused’s alleged participation included assigning the women and girls to specific Serb soldiers to be raped and otherwise sexually assaulted. The Indictment alleges that the Accused personally raped at least two women, one of whom he allegedly claimed as his own in order to repeatedly rape over a three-month time span.<sup>26</sup>

#### **IV. LEVEL OF RESPONSIBILITY OF ACCUSED AND GRAVITY OF CRIMES CHARGED**

##### **A. Submissions of Parties**

15. With regard to Rule 11 *bis* (C) the Prosecutor submits that the level of the responsibility of the Accused is compatible with the referral of the case to the authorities of Bosnia and Herzegovina.<sup>27</sup> It is argued that the Accused was an infantry soldier with no formal military rank or political position, who shared responsibility for being in charge of activities at “Karaman’s house” with three other Serb soldiers. The Prosecutor thus characterizes the Accused as falling within the category of low to intermediate level perpetrators. The Prosecutor submits that while the charged crimes are serious, when seen in relation to other pending cases, and in light of the “Completion

<sup>23</sup> *Id.* at paras. 3.6, 4.11, and 5.6.

<sup>24</sup> *Id.* at para. 4.1.

<sup>25</sup> *Id.* at paras. 4.2 to 4.10.

<sup>26</sup> *Id.* at paras. 4.8 and 5.3.

<sup>27</sup> Prosecution’s First Submissions, paras. 14-15; Prosecution’s Second Submissions, paras. 4-9.



Strategy” advanced by the UN Security Council, they are not of such gravity as to demand trial at the Tribunal.<sup>28</sup>

16. The Defence submits that the Accused’s position within the state, political, and military chain of command was the lowest, but that it would be premature to make a judgement as to any responsibility on the part of the Accused since the facts with respect to events at “Karaman’s house” have not been established.<sup>29</sup> On this basis, the Defence does not concede that the level of responsibility of the Accused is compatible with referral of the case. Concerning the gravity of the crimes charged, the Defence submits that in *Kunarac, Kovač, and Vuković*,<sup>30</sup> the accused Vuković was charged with a much lesser scope of crimes than the crimes charged in the present Indictment and argues, therefore, that the Accused should be tried before the Tribunal.<sup>31</sup>

17. The Government of Bosnia and Herzegovina submits that the crimes, while grave, are suitable for transfer because they are alleged to have occurred within a short timeframe, in a limited geographic area, with a comparatively small number of victims, and the Accused has no military or governmental standing of significance.<sup>32</sup>

## **B. Discussion**

18. In evaluating the level of responsibility of the Accused and the gravity of the crimes charged, the Referral Bench will consider only those facts alleged in the Indictment – they being the essential case raised by the Prosecution for trial – in arriving at a determination whether referral of the case is appropriate. The Bench will not consider facts put forth by the parties in their submissions which go beyond those alleged in the Indictment.

19. The Accused, who at the time of the alleged offences was a 23-year-old Bosnian Serb infantry soldier, is charged in the Indictment with the enslavement of nine non-Serb women and girls over a three month period of time, and with the rape of two of the women. Two other soldiers are alleged to have shared a measure of responsibility for the offences, most of which took place

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<sup>28</sup> *Id.* at paras. 16-17; paras. 1-3.

<sup>29</sup> Motion Hearing, T.212-T.215.

<sup>30</sup> *Supra* note 6.

<sup>31</sup> Motion Hearing, T.212.

within Karaman's house in the municipality of Foča. In the context of offences dealt with by this Tribunal, the Indictment alleges a factual basis for the crimes which is limited in scope both geographically and temporally, and also in terms of the number of victims affected. It is also clear that the Accused did not have any rank of military significance, and it is not suggested that he had any political role. He was not in any relevant sense a "leader."<sup>33</sup>

### C. Conclusion

20. The Referral Bench is satisfied that the level of responsibility of the Accused and the gravity of the crimes charged are not *ipso facto* incompatible with referral of the case to the authorities of a State meeting the requirements of Rule 11 bis (A).

## V. REFERRAL TO BOSNIA AND HERZEGOVINA

### A. Introduction

21. Principle issues raised in the course of the proceedings include whether the State Court of Bosnia and Herzegovina is the trial court to hear the case; what will be the applicable substantive national law following referral; whether the death penalty could be imposed or carried out (Rule 11 bis (B)); and whether the Accused will receive a fair trial (Rule 11 bis (B)).

### B. Trial Court

#### 1. Submissions of the Parties

22. The Prosecutor submits that the case should be referred to the authorities of Bosnia and Herzegovina,<sup>34</sup> observing that Rule 11 bis does not provide for the Referral Bench to refer a case directly to a particular court within a State.<sup>35</sup> Nonetheless, with regard to the subsequent issue of which substantive law would be applicable to the case once referred, the Prosecutor submits that this determination is a matter specifically and solely within the jurisdiction of the War Crimes

<sup>32</sup> BiH First Submissions, p. 1.

<sup>33</sup> S/RES/1503 (2003).

<sup>34</sup> Prosecution's First Submissions, para. 18 *et seq.*

<sup>35</sup> *Id.* at para. 6.

Chamber of the State Court of Bosnia and Herzegovina to determine.<sup>36</sup> The War Crimes Chamber was inaugurated on 9 March 2005.<sup>37</sup>

23. The Defence submits that if the case is to be referred, the Accused may be tried only before a “national court” of the State to which the case is referred.<sup>38</sup> The argument is made that inclusion of international judges in the composition of the War Crimes Chamber of the State Court of Bosnia and Herzegovina renders it incapable of characterization as a “national court,” and thus it cannot have jurisdiction over the case if referred. The Defence relies on the Criminal Codes of the Federation of Bosnia and Herzegovina (FBiH CC)<sup>39</sup> and Republika Srpska (RS CC)<sup>40</sup> to further argue that the District Court of Trebinje, in Republika Srpska, is the appropriate forum for trial.<sup>41</sup> Reference is made to Articles 26(1) and 28 of the FBiH CC and Article 10(1) of the RS CC, which allocate jurisdiction within the respective entities of Bosnia and Herzegovina according to the territory where the crime was committed and the location of an accused’s residence. Since the Accused is a resident of Foča, which is within the jurisdiction of the District Court of Trebinje, the Defence contends that only this court may exercise jurisdiction over him.

24. The Government of Bosnia and Herzegovina submits that the State Court is the only court competent to hear the case upon referral.<sup>42</sup> The State enacted a statute in 2004 to address the transfer of cases by the Tribunal under Rule 11 *bis*, titled the Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH (hereinafter “BiH Law on the Transfer of Cases”).<sup>43</sup> Article 2(1) provides that cases transferred from the Tribunal will be forwarded by the State authorities to the Bosnia and Herzegovina Prosecutor, who “shall adapt the ICTY indictment in order to make it compliant with

<sup>36</sup> Prosecution’s Second Submissions, para. 15; Motion Hearing, T.206-T.207.

<sup>37</sup> Press Release: Statement of Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, delivered at the Inauguration of the War Crimes Chamber of the State Court of Bosnia and Herzegovina, 9 March 2005, at <http://www.un.org/icty/pressreal/2005/p945-e.htm>.

<sup>38</sup> Defence’s First Submissions, paras. 24-27; Motion Hearing, T.219-T.222. The Defence cites in support of its position Art 9(1) of the Statute of the Tribunal, which reads “The Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.”

<sup>39</sup> Official Gazette of the Federation of Bosnia and Herzegovina, No. 36/03.

<sup>40</sup> Official Gazette of Republika Srpska, No. 49/03.

<sup>41</sup> Defence’s First Submissions, paras. 28-33; Motion Hearing, T.216-T.218.

<sup>42</sup> BiH First Submissions, p. 6; Motion Hearing, T.230.

the BiH Criminal Procedure Code, following which the indictment shall be forwarded to the State Court of BiH.” Within the State Court, the War Crimes Chamber is conferred with the jurisdiction to try a case referred by this Tribunal.<sup>44</sup>

## 2. Discussion

25. Pursuant to the BiH Law on the Transfer of Cases, a case which is referred from the Tribunal to Bosnia and Herzegovina must be transferred from the authorities of the State to the State Prosecutor’s Office and the State Court for disposition. The court cited by the Defence, on the other hand, is not one which is referenced in the BiH Law on the Transfer of Cases. While it is not for the Referral Bench to decide the competency of a national court, it will be presumed that the State Court of Bosnia and Herzegovina is intended to be the forum for trial of the case against the Accused, if referred.

26. With regard to the Defence submission that the War Crimes Chamber of the State Court is incapable of characterization as a “national court,” it is apparently assumed by the submission that to be a national court it must be composed of judges who are nationals of the State concerned. No authority is offered for this proposition. The view of the Referral Bench is that in the relevant context, which is Article 9(1) of the Statute of the Tribunal, there is no apparent justification for giving to the phrase “national court” any meaning other than the normal connotation, which is a court of or pertaining to a nation. The State Court of Bosnia and Herzegovina, of which the War Crimes Chamber is a component, is a court which has been established pursuant to the statutory law of Bosnia and Herzegovina. It is thus a court of Bosnia and Herzegovina, a “national court.” Bosnia and Herzegovina has chosen to include in the composition of the State Court judges who are not nationals of Bosnia and Herzegovina. That is a matter determined by the legislative authorities

<sup>43</sup> Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04.

<sup>44</sup> BiH First Submissions, p. 6; BiH Law on the Transfer of Cases, Art. 2; Agreement between the High Representative for BiH and Bosnia and Herzegovina on the Establishment of the Registry for Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Criminal and Appellate Division of the Court of BiH and the Special Department for War Crimes and the Special Department for Organized Crime, Economic Crime and Corruption of the Prosecutor’s Office of BiH, Official Gazette of Bosnia and Herzegovina 16/02, International Agreements 11/04; Law on the Court of Bosnia and Herzegovina and Laws on Amendments, (hereinafter “BiH Law on the State Court”), Official Gazette of Bosnia and Herzegovina, No. 16/02, 42/03, 42/03, 9/04, 4/04, 35/04, 61/04, Art. 24.

of Bosnia and Herzegovina. The inclusion of some non-nationals among the judges of the State Court does that make that court any less a “national court” of Bosnia and Herzegovina.

27. The Referral Bench interprets the Defence submission as an expression of the Accused’s concern with national or ethnic bias in the judicial system of Bosnia and Herzegovina. With respect to the contention that only a court in the Republika Srpska may preside over the trial of the Accused, and by implication that the State Court may lack the required independence and impartiality in relation to an accused of Bosnian Serb origin, it is worth noting the involvement of Republika Srpska in the nomination and selection of judges to the State Court. The State Court of Bosnia and Herzegovina contains a Criminal Division which is staffed by at least ten judges, who sit in panels or chambers.<sup>45</sup> Judges of the State Court are elected by the Parliamentary Assembly of Bosnia and Herzegovina upon proposal by the Commission for the Nomination of Judges to the Court.<sup>46</sup> The Parliamentary Assembly is composed of two chambers: the House of Peoples and the House of Representatives.<sup>47</sup> One-third of the Delegates of the House of Peoples and one-third of the members of the House of Representatives must be from Republika Srpska.<sup>48</sup> The Commission for the Nomination of Judges to the Court consists of six citizens of Bosnia and Herzegovina: the President and two Vice-Presidents of the Constitutional Court of Bosnia and Herzegovina, the President and Vice-President of the Supreme Court of the Federation of Bosnia and Herzegovina, and the President of the Supreme Court of Republika Srpska.<sup>49</sup> The Constitutional Court is composed of nine members, four of whom are selected by the House of Representatives of the Federation, two by the Assembly of Republika Srpska, and the remaining three selected by the President of the European Court of Human Rights after consultation with the Presidency of Bosnia and Herzegovina.<sup>50</sup> The Presidency consists of three members, one being a Serb directly elected

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<sup>45</sup> BiH Law on the State Court, Art. 23.

<sup>46</sup> *Id.* at Art. 4.

<sup>47</sup> Constitution of Bosnia and Herzegovina (hereinafter “BiH Constitution”), Arts. IV.1 and IV.2.

<sup>48</sup> *Ibid.*

<sup>49</sup> BiH Law on the State Court, Art. 5(1).

<sup>50</sup> BiH Constitution, Art. VI.1(a).

from the territory of Republika Srpska.<sup>51</sup> The judges selected to the Constitutional Court by the President of the European Court of Human Rights must not be citizens of Bosnia and Herzegovina or of any neighboring state.<sup>52</sup> The Constitutional Court elects its President and three Vice-Presidents by rotation from among the judges by a secret ballot.<sup>53</sup>

28. The composition of the State Court takes on an international dimension within the Criminal Division. This Division consists of three Sections or Chambers, one of which is designated for War Crimes.<sup>54</sup> During a transitional period not to exceed five years, two of the three Sections, one of which is the War Crimes Chamber, must be composed of both national and international judges.<sup>55</sup>

29. Both the involvement of Republika Srpska in the judge nomination and selection process of the State Court and inclusion of foreign judges within the Criminal Division and War Crimes Chamber provide a measure, the latter in the first five formative years of the State Court, to guard against bias based upon nationality or ethnicity.

30. The Referral Bench emphasises that it has considered the issue of the jurisdiction and composition of the State Court of Bosnia and Herzegovina and of its War Crimes Chamber, only for the purposes of, and so far as was necessary for it to deal with, the submissions relating to this Motion.

### 3. Conclusion

31. The Referral Bench accepts that the War Crimes Chamber of the State Court of Bosnia and Herzegovina, in accordance with national law, will conduct the trial in any case referred. The Bench does not accept the submission of the Defence which argues that referral is appropriate only if made to the District Court of Trebinje. Although the Bench does not presume to make any binding decision in respect of these matters which would interfere with the authority of the State

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<sup>51</sup> *Id.* at Art. V.

<sup>52</sup> *Id.* at Art. VI.1(b).

<sup>53</sup> Constitutional Court of Bosnia and Herzegovina Rules of Procedure, Arts. 87 and 88.

<sup>54</sup> BiH Law on the State Court, Art. 24(1).

<sup>55</sup> *Id.* at Art. 65(2).

organs of Bosnia and Herzegovina, the State Court will be the focus of the remainder of the decision.

### **C. Applicable Substantive Law**

32. The Referral Bench also stresses that it is not the competent authority to decide in any binding way which law is to be applied in this case if it is referred to Bosnia and Herzegovina. That is a matter within the competence of the State Court of Bosnia and Herzegovina. The Bench must be satisfied, however, that if this case were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which criminalises the alleged behavior of the Accused so that the allegations can be duly tried and determined and which provides for punishment. The Referral Bench must consider, therefore, whether the laws applicable in proceedings before the State Court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused, for offences of the type with which he is currently charged before the Tribunal.

#### **1. Submissions of the Parties**

33. The Prosecution submits that the Criminal Code of Bosnia and Herzegovina and Law on Amendments (BiH CC),<sup>56</sup> enacted in 2003, is the governing national law in this case, as it is through this law that the substantive criminal law at the time of the commission of the offences is applicable.<sup>57</sup> This is due to the operation of Article 4(1) of the BiH CC which states that the law in force at the time of the commission of the crime shall be applied. Article 4(2) further provides that if a law has been amended on one or more occasions after a criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied. The Prosecution submits that all crimes provided under the BiH CC have equivalent provisions under either the substantive national law at the time of the offences – the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC)<sup>58</sup> and the Criminal Code of the Socialist Republic of Bosnia and Herzegovina (SRBiH

<sup>56</sup> Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04.

<sup>57</sup> Prosecution's Second Submissions, para. 13.

<sup>58</sup> Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 44/76.

CC)<sup>59</sup> – or under international law. It is submitted that it will be a matter for the State Court of Bosnia and Herzegovina to determine which of any potentially applicable laws is the more lenient, and therefore applicable.<sup>60</sup> With reference to applicability of international law, the Prosecution cites Article 4a of the BiH CC which provides that Article 4 shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of international law. In reliance upon Article 4a, the Prosecution notes that although the SFRY CC contains no express provisions with respect to crimes against humanity, such crimes were recognised under international law at the time of the commission of the offences.<sup>61</sup>

34. The Defence contends that as the trial can only be held by the District Court of Trebinje in Republika Srpska, the RS CC must apply.<sup>62</sup> Article 4 of the RS CC, as Article 4 of the BiH CC, provides that the law in force at the time of the commission of the offence applies, with the caveat that any more lenient amendment shall be applied.<sup>63</sup> As to the law in effect at the time of the offences, the Defence asserts that only Article 142 of the SFRY CC – wherein rape as one of several listed war crimes against the civilian population – can apply to the case of the Accused.<sup>64</sup>

35. The Government of Bosnia and Herzegovina submits that the BiH CC, rather than the SFRY CC, would apply to the case of the Accused. The submission assumes that by virtue of Article 4(2) of the BiH CC, that Code will apply as it is “more lenient” than the SFRY CC and provides a “more complete exposition of the law.”<sup>65</sup> Relying further on Article 4a, the Government contends that differences in the two codes with respect to specific crimes (e.g., the absence of crimes against humanity in the SFRY CC) may be discounted by virtue of the “codification” in the BiH CC of crimes under international law which existed at the time of the offences. With respect to sentencing, the Government notes that the maximum penalty under the SFRY CC was death,

<sup>59</sup> Official Gazette of the Socialist Republic of Bosnia and Herzegovina, No. 16/77.

<sup>60</sup> Prosecution’s Second Submissions, paras. 13-14.

<sup>61</sup> *Id.* at para. 16.

<sup>62</sup> Defence’s Second Submissions, para. 3.

<sup>63</sup> *Id.* at paras. 6-7.

<sup>64</sup> Motion Hearing, T.243.

<sup>65</sup> BiH Second Submissions, pp. 5-6.



whereas the maximum penalty under the BiH CC is long-term imprisonment – defined as a term of twenty to forty-five years.<sup>66</sup> Ultimately, however, the Government submits that there is no judicially established test for determining when a law is subsequently amended for the purposes of Article 4(2), nor which of two or more laws is the more lenient. It is accepted that it will be for the State Court to determine issues such as these should this case be referred.<sup>67</sup>

## 2. Discussion

36. The Referral Bench finds that, given the legislation in place at the time of the offences alleged to have been committed by the Accused, along with the more recent legislative changes, there is a need to resolve some rather basic issues relating to the trial by the State Court of alleged crimes stemming from the period to which the Indictment relates. While the submissions of the parties differ, it will be for the State Court to resolve any of these issues which may arise should this case be referred.

37. For the purposes of determining the present Motion, it is unnecessary for the Referral Bench to presume to reach any decision on the correct resolution of the various submissions that have been advanced by the parties and by the Government of Bosnia and Herzegovina. Rather than attempting to do so, the Referral Bench will consider what will be the apparent position under each of the possibly applicable set of legal provisions, in order to determine whether there is any significant deficiency which may impede or prevent the prosecution, trial, and if appropriate, the punishment of the Accused for the alleged criminal conduct which is charged in the present Indictment.

### (a) SFRY Criminal Code

38. The offences in the Indictment are alleged to have occurred between 3 August 1992 and 3 November 1992. Under the federal constitutional structure of the former Yugoslavia, the SFRY CC and the SRBiH CC were in force at the time of the alleged conduct of the Accused which is the

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<sup>66</sup> *Id.* at p. 6, citing BiH CC, Art. 42(2).

<sup>67</sup> *Id.* at p. 5-6.

subject of the charges in the present Indictment, both codes having been enacted in 1977. The SFRY CC included a provision – as accepted by the Defence – which proscribed war crimes against the civilian population. Article 142(1) provides the following:

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against the civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health; an indiscriminate attack without selecting a target, by which the civilian population is injured; that the civilian population be subject to killings, torture, inhuman treatment, biological or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of an enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal or disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

Although the whole of Chapter 16 of the SFRY CC is entitled “Criminal Acts against Humanity and International Law,” the SFRY CC did not expressly specify any particular offence therein to be a crime against humanity.<sup>68</sup> The SRBiH CC did not contain any provisions criminalizing either violations of the laws or customs of war or crimes against humanity, so it may be eliminated from further assessment.

39. Thus, at the time of the alleged conduct of the Accused, Article 142(1), which was expressly directed at crimes against a civilian population in time of war, armed conflict or occupation, would appear to apply to the conduct alleged to constitute the two counts of rape which are charged as “war crimes” by Counts 3 and 7 of the present Indictment. This provision of the SFRY CC would also appear applicable to the conduct under the other two counts of rape cumulatively charged as crimes against humanity by Counts 2 and 6 of the present Indictment. The acts of the Accused charged in the present Indictment as enslavement in Counts 1 and 5 would also appear to be within the scope of the provisions of Article 142(1) which make illegal detention and forcible labour war

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<sup>68</sup> Whether or not any of the crimes under Chapter 16 qualify as a species of crimes against humanity is a matter for the State Court of Bosnia and Herzegovina to determine.

crimes.<sup>69</sup> While no provision of the SFRY CC specifically proscribed outrages upon personal dignity as a violation of the laws or customs of war (Counts 4 and 8 in the present Indictment), the prohibitions in Article 142(1) against inhuman treatment and violations of bodily integrity would appear to be substantially analogous.

40. Although the maximum authorised punishment for acts in violation of Article 142(1) was the death penalty, which is now abolished in Bosnia and Herzegovina,<sup>70</sup> Article 38(2) of the SFRY CC permitted a court as an alternative punishment to impose imprisonment for a term of 20 years for criminal acts eligible for the death penalty. Art 48 of this code further provided a system for combining punishments in the event an accused is found to have committed several criminal acts. It provides, *inter alia*, that where a court has decided upon a punishment of 20 years imprisonment for one of the combined criminal acts, then it shall impose that punishment only.<sup>71</sup> Thus, twenty years imprisonment was, at the time of the alleged conduct of the Accused, the maximum authorised non-capital penalty which could be imposed under the SFRY CC.

41. It is also worth noting that the SFRY CC contained a statute of limitations. Article 95(1)(1) provided for a bar to prosecution by lapse of twenty-five years from the commission of a criminal act for which the law provides the capital punishment or the punishment of imprisonment of 20 years. Offences committed in 1992 in violation of Article 142(1), therefore, would not be barred until 2017.

(b) BiH Criminal Code

42. The BiH CC entered into force on 1 March 2003 and proscribes the crimes against humanity of enslavement and rape under Article 172, and the war crime against civilians of rape under Article 173. Although outrages against personal dignity are not specifically proscribed, Articles 172 and 173 address inhumane acts and violations of bodily integrity. Thus, if the BiH CC were to apply, as

<sup>69</sup> Article 155(1) of the SFRY CC made criminal the act of establishing slavery relations. Even if applicable, prosecution of such an offence might be barred in this case by the statute of limitations found in Article 95 of the SFRY CC.

<sup>70</sup> Discussed *infra* at para. 49.

<sup>71</sup> SFRY CC, Art. 48(2)(2).

has been submitted, it would provide apparent coverage of the acts alleged in the Indictment. In pertinent part, Articles 172 and 173 provide:

Article 172 (Crimes against Humanity)

(1) Whoever, as part of a widespread or systematic attack directed against a civilian population, with knowledge of such an attack perpetrates any of the following acts:

....

(c) Enslavement;

....

(g) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape);

....

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

Article 173 (War Crimes against Civilians)

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

....

(c) ... inhuman treatment ... immense suffering or violation of bodily integrity or health;

....

(e) Coercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape);

....

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

43. Long-term imprisonment is defined under Article 42(2) as being a term of twenty to forty-five years. This would constitute the maximum authorised punishment if the BiH CC were applicable. If less than long-term imprisonment were adjudged, then under a system of compounding punishment for concurrent offences, the maximum penalty could not exceed

imprisonment for twenty years.<sup>72</sup> The statute of limitations for an offence for which a punishment of long-term imprisonment is authorised is thirty-five years.<sup>73</sup>

44. The principle of legality, and specifically with respect to the applicability of criminal law in relation to the time an offence is committed, is found in the following provisions of the BiH CC:

Article 3

(1) Criminal offences and criminal sanctions shall be prescribed only by law.

(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Article 4a

Articles 3 and 4 of this code shall not prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of international law.

45. Article 4a was enacted in 2004 and had no comparable counterpart in the SFRY CC. Whether it would apply retroactively, and if so, how it should be interpreted and applied would be matters for the State Court of Bosnia and Herzegovina to determine if the case is referred. If Article 4a is applied retroactively, consideration would need to be given to whether the acts alleged in the Indictment were criminal at the time of commission according to general principles of international law. The State Court may be assisted in this regard by relevant case-law of this Tribunal. Rape was not only a war crime against civilians under the SFRY CC at the time alleged in the present Indictment, it was also found in *Furundzija* to be a crime under international conventional law for both international and non-international armed conflicts, and a crime recognised under customary international law as both a war crime and crime against humanity.<sup>74</sup> In *Kunarac, Kovač, and Vuković*, the history and development of enslavement as a crime against humanity was traced in

<sup>72</sup> BiH CC, Art. 53(2)(b).

<sup>73</sup> BiH CC, Art. 14(1)(a).

extensive detail,<sup>75</sup> the international legal efforts against slavery being regarded as “one of the most important forerunners to the international protection of human rights.”<sup>76</sup> Likewise, the prohibition of outrages upon personal dignity was held in *Aleksovski* to be based on the founding principle upon which rests “the entire edifice of international human rights law, and of the evolution of international humanitarian law.”<sup>77</sup> In light of well-established precedent, it is clear that rape, enslavement, and outrages upon personal dignity were international crimes, both as war crimes and crimes against humanity, whether committed in international or non-international armed conflict, at the time relevant to the present Indictment without need for further elaboration.

### 3. Conclusion

46. In summary, Article 4(1) of the BiH CC would suggest that the SFRY CC, as it was in force in 1992, would be applied to each of the alleged criminal acts of the Accused should this case be referred. The submissions we have received canvass the possibilities, however, that in respect of some or all of the alleged criminal acts of the Accused, other provisions of the BiH CC or general principles of international law might be applied pursuant to Articles 4(2) and 4a respectively of the BiH CC. Should this case be referred, it will be for the State Court of Bosnia and Herzegovina to determine the law applicable to each of the alleged criminal acts of the Accused. Nevertheless, this Referral Bench has been able to satisfy itself, for the reasons already discussed, that whichever of the possible alternatives is held by the State Court to apply, there are appropriate provisions to address each of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure.<sup>78</sup>

<sup>74</sup> *Prosecutor v. Furundzija*, IT-97-17/1, Trial Chamber Judgement, 10 Dec 1998, paras. 165-169; *Kunarac, Kovač, and Vuković*, *supra* note 6, Appeals Chamber Judgement at paras. 127-132.

<sup>75</sup> *Kunarac, Kovač, and Vuković*, Trial Chamber Judgement at paras. 518-543; Appeals Chamber Judgement at paras. 116-124.

<sup>76</sup> *Id.*, Trial Chamber Judgement at para. 519.

<sup>77</sup> *Prosecutor v. Aleksovski*, IT-95-14/1, Trial Chamber Judgement, 25 Jun 1999, para. 54; *Prosecutor v. Kunarac, Kovač, and Vuković*, Appeals Chamber Judgement at paras. 163-164.

<sup>78</sup> *See infra* the discussion regarding non-imposition of the death penalty.

#### **D. Non-Imposition of the Death Penalty**

47. Rule 11 *bis* requires that the Referral Bench be satisfied that the death penalty will not be imposed or carried out if a case is to be referred.

##### **1. Submissions of the Parties**

48. Neither party submits that the death penalty would be imposed or carried out if the case were referred.

##### **2. Discussion**

49. Article 37(1) of the SFRY CC authorised the death penalty only for the most serious criminal acts, to include war crimes against the civilian population in violation of Article 142(1). However, on 7 July 2003, Bosnia and Herzegovina ratified Protocol 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), abolishing the death penalty in all circumstances. The Protocol entered into force for Bosnia and Herzegovina on 29 July 2003.

##### **3. Conclusion**

50. The Referral Bench is satisfied that if the law in effect at the time of the offences is applicable, imposition of the death penalty would nonetheless be precluded as contrary to Article 13 of the ECHR.

#### **E. Fair Trial – Generally**

51. Rule 11 *bis* requires that the Referral Bench be satisfied that an accused will receive a fair trial if a case is to be referred.

##### **1. Submissions of the Parties**

52. The Prosecution submits that in ratifying the ECHR, Bosnia and Herzegovina has given the rights and duties for which it provides – including Article 6 which guarantees fair trial and due process rights – primacy over domestic law.

53. The Defence submits that referral of the case to Bosnia and Herzegovina would violate Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "Torture Convention").<sup>79</sup> The basis lies in three claims: that the State Court of Bosnia and Herzegovina is located in a former military barracks where Serbs were tortured and killed, and thus the Accused would suffer psychological pain and torture; the Accused and witnesses would face intimidation by judges and other judicial personnel due to their ethnic background; and there are many problems with the prisons in Bosnia and Herzegovina.<sup>80</sup>

54. The submissions of Bosnia and Herzegovina in their entirety can be taken as providing assurance of a fair trial if the case is referred. With respect to the latter issue raised by the Defence in particular, the Government of Bosnia and Herzegovina submits that a detention facility located on the grounds of the State Court of BiH has been built in accordance with international standards to accommodate persons whose cases are transferred under Rule 11 *bis*, as well as other persons tried before the Court. In addition, the Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention, and other Measures<sup>81</sup> regulates the operation of the detention facility in accordance with State, European, and international standards.<sup>82</sup>

## 2. Discussion

55. The Referral Bench considers that, for present purposes, it can be accepted that the requirement of a fair criminal trial includes the following<sup>83</sup>:

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<sup>79</sup> Art. 1 provides:

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

<sup>80</sup> Defence's First Submissions, paras. 46-47; Motion Hearing, T.227-T.228.

<sup>81</sup> Official Gazette of Bosnia and Herzegovina, No. 13/05.

<sup>82</sup> BiH First Submissions, p. 4.

<sup>83</sup> See, e.g., Statute of the Tribunal, Art. 21; International Covenant on Civil and Political Rights (1966), Art. 14; ECHR, Art. 6.



The equality of all persons before the court.

A fair and public hearing by a competent, independent, and impartial tribunal established by law.

The presumption of innocence until guilt is proven according to the law.

The right of an accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing

The right of an accused to be tried without undue delay.

The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.

The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings.

The right of an accused not to be compelled to testify against himself or to confess guilt.

56. In comparing these requirements of a fair trial with those provided under the laws of Bosnia and Herzegovina, the BiH Constitution provides a foundation. Article II in particular guarantees the right to a fair hearing in criminal matters, and other rights relating to criminal proceedings.<sup>84</sup>

The enjoyment of these rights are secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>85</sup>

57. In furtherance of the guarantees provided in the BiH Constitution, the Criminal Procedure Code of Bosnia and Herzegovina (BiH CPC)<sup>86</sup> – which is applied by the State Court – makes the following more detailed provisions.

58. Article 234(1) of the BiH CPC provides the right of an accused to a public hearing.

<sup>84</sup> BiH Constitution, Art. II.3(e).

<sup>85</sup> *Id.* at Art. II.4.

<sup>86</sup> Official Gazette of Bosnia and Herzegovina, No. 36/03, 26/04, 63/04, 13/05.

59. Article 3(1) of the BiH CPC and Article 33 of the BiH Law on the State Court codify the presumption of innocence of an accused.
60. Articles 5(1), 6(1), 8, and 78(2)(e) of the BiH CPC and Articles 9 and 34(3) of the BiH Law on the State Court<sup>87</sup> provide that a suspect, on first questioning, must be informed about the charged offences and grounds for suspicion. This includes the right to use one's own language and have interpretive assistance at no cost.
61. Articles 7, 39(1), 46, 48(1), and 78(2)(b) of the BiH CPC and Articles 34(2),(3) of the BiH Law on the State Court provide the right to a defence attorney of one's own choosing and require that an accused be given sufficient time to prepare a defence. If deprived of liberty, a suspect has the right to request appointment of defence counsel if unable to bear the costs due to financial circumstances. Law enforcement officials have a duty to inform a suspect of these rights to counsel.
62. Article 13 of the BiH CPC guarantees the right to be brought before the Court in the shortest reasonable time period and to be tried without delay.
63. Articles 7, 236(1) and 242(2) of the BiH CPC provide for the right of an accused to present his own defence and be tried in his presence.
64. Article 78(2)(a) of the BiH CPC and Article 34(4) and of the BiH Law on the State Court forbid a compelled confession or any other statement from a suspect or accused.
65. Articles 78(2)(d), 259, and 261(1) of the BiH CC provide that an accused has a right to present favourable witnesses and evidence, and examine or have examined witnesses against him.
66. Furthermore, Bosnia and Herzegovina is bound as a party by the ECHR, of which Article 6 in particular guarantees fair trial and due process rights, to include the requirement of a fair trial and independent and impartial tribunal established by law.
67. With reference to the submissions of the Defence, the matter of the location of the State Court – even if the Accused subjectively perceives a negative connotation associated with it – is not

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<sup>87</sup> *Supra* note 43.

one that gives rise to any issue under the Torture Convention or any other issue which would affect the fairness of the trial proceedings. Insofar as the Accused's concern with possible intimidation based on the ethnicity of judicial personnel, the Referral Bench notes again the involvement of Republika Srpska in the nomination and selection of judges to the State Court.<sup>88</sup> Finally, the Accused's generalised claim about prison problems in Bosnia and Herzegovina has not been substantiated and fails to take into account the construction of a new high security detention unit for the State Court.<sup>89</sup> Detainee and prisoner treatment is appropriately regulated by statute.<sup>90</sup> The Referral Bench also notes that Rule 11 *bis* provides that where a referral order is made, the Prosecutor may send observers to monitor the proceedings in the national courts,<sup>91</sup> a provision which may be given enhanced effectiveness by conditions imposed on the Prosecutor by the referral order. Further, at any time after issuance of an order and before an accused is found guilty or acquitted by a national court, the Referral Bench may revoke the order and make a formal request for deferral within the terms of Rule 10 of the Rules of Procedure and Evidence.<sup>92</sup> This monitoring mechanism enables a measure of continuing oversight over trial proceedings should a case be referred.<sup>93</sup>

### 3. Conclusion

68. The Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirement for a fair trial. Although there have been no past referrals from the Tribunal to the authorities of Bosnia and Herzegovina upon which a record might be evaluated, the Bench considers that the legal structure in Bosnia and Herzegovina, as it now stands, is sufficient to safeguard the right of the Accused to a fair trial. The Bench takes into account that provision is made for a system to allow

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<sup>88</sup> *Supra* para. 27.

<sup>89</sup> BiH First Submissions, p. 4.

<sup>90</sup> Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention, and other Measures. *Supra*, note 79.

<sup>91</sup> Rule 11 *bis* (D)(iv).

<sup>92</sup> Rule 11 *bis* (F).

<sup>93</sup> The monitoring mechanism is discussed in more detail, *infra*.

monitoring of the trial of a case which has been referred in order to ensure that the expectations of a fair trial are met. If not, then a referral order may be revoked by this Tribunal.

#### **F. Trial without Undue Delay**

69. The issue of whether the Accused will be brought to trial without undue delay, if the case is referred, was a matter given some prominence in the submissions of the Defence. For that reason, it is addressed separately.

##### **1. Submissions of the Parties**

70. The Defence submits that referral of the case to Bosnia and Herzegovina would violate the Accused's right under Article 21(4)(c) of the Statute of the Tribunal to be tried without undue delay. It is stressed that the Accused has remained in pre-trial detention since his arrest and transfer to the Tribunal on 10 July 2002; the parties have completed all pre-trial obligations and are prepared to proceed to trial before the Tribunal; and that referral to Bosnia and Herzegovina will result in delay as the Indictment must be adapted before being forwarded to the State Court. The Defence, however, concedes that the proceedings could proceed before the State Court from their current stage, taking into account any possible additional delay arising from an objection in regard to the adapted form of the Indictment.<sup>94</sup>

71. The Prosecution submits that specific administrative arrangements it has in place are directed to ensuring the transition of a referred case in a smooth and efficient manner. In this case, all appropriate material (background material, pre-trial brief, witness and exhibit lists, and documentary and demonstrable exhibits) will be provided to the authorities of Bosnia and Herzegovina should a referral order be made.<sup>95</sup>

72. The Government of Bosnia and Herzegovina submits that the right to trial without undue delay is guaranteed by Article 13 of the BiH CPC, thus binding the State Prosecutor to adapt, and the State Court to review, the Indictment as soon as reasonably practicable. In addition, under BiH

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<sup>94</sup> Defence's First Submissions, paras. 35-45; Defence's Second Submissions, paras. 16-19; Motion Hearing, T.221-T.222.

law, the Accused must be released from custody if no indictment is brought or confirmed within six months. Following confirmation of the Indictment, the Accused may only be kept in custody for one year before a first instance verdict is pronounced. If the first instance trial does not result in a verdict during that period, the Accused must be released from custody.<sup>96</sup>

## 2. Discussion

73. First and foremost, statutory safeguards exist under national law to protect an accused's right to trial without undue delay. Article 13 of the BiH CC grants an accused the right to be brought before the Court in the shortest reasonable time period and to be tried without delay, and requires the duration of custody to be reduced to the shortest time necessary. Furthermore, incentives exist under the law to proceed without undue delay. Article 135 of the BiH CPC provides for release from custody where an indictment has not been brought or confirmed within six months maximum of entry into custody, and only then after a thorough procedure for judicial review of any extensions beyond one month in time. Article 137(2) provides that after confirmation of the indictment, custody may last no longer than one year. If during that period, no first instance verdict is pronounced, the custody shall be terminated and the accused released from custody. Release from custody, however, does not terminate the proceedings against an accused.

74. Secondly, as the Defence has acknowledged, the proceedings could continue before the Court in their current stage, subject to the potential for some delay as already discussed as the Indictment must be adapted. The adaptation of the Indictment is required by the procedure in the BiH Law on the Transfer of Cases. Article 2(1) provides that:

If the ICTY transfers a case with a confirmed indictment according to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY. The BiH Prosecutor shall adapt the ICTY indictment in order to make it compliant with the BiH Criminal Procedure Code, following which the indictment shall be forwarded to the Court of the BiH. The Court of BiH shall accept the indictment if it ensured that the ICTY indictment has been adequately adapted and that the indictment fulfills the formal requirements of the BiH CPC.

The nature of what is contemplated by this provision suggests that the procedure should not be lengthy.

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<sup>95</sup> Prosecution's Second Submissions, para. 23.

75. Thirdly, Rule 11 bis (D)(iii) requires the Prosecutor, upon issuance of a referral order by the Bench, to provide to Bosnia and Herzegovina authorities all information relating to the case which the Prosecutor considers appropriate, particularly the material which supports the indictment. Compliance with this rule will require the provision in this case of such information as background material, pre-trial brief, witness and exhibit lists, witness statements, and documentary and demonstrable exhibits. The Referral Bench is aware from proceedings before this Tribunal that this material is to a large extent already disclosed to the Defence.

76. Finally, once proceedings are underway, Article 4 of the BiH Law on the Transfer of Cases provides the Court with discretionary means to expedite the form of the evidence, either, by accepting as proven facts which have been established by legally binding decisions of the Tribunal, or, by accepting relevant documentary evidence from proceedings before this Tribunal.

### 3. Conclusion

77. It has not been shown that any possible delay as a consequence of referral would be of such nature or extent as to outweigh the propriety of referral action. Any delay resulting from referral cannot properly be viewed as undue, unreasonable, or unnecessary. Indeed, referral may well result in the case being brought to trial sooner than would have been possible if the case were to remain with the Tribunal.

## **G. Availability of Witnesses**

### 1. Submissions of the Parties

78. The Prosecution did not raise any issues in its submissions regarding witness availability but noted—to the extent that it might affect witness production from outside of Bosnia and Herzegovina – that (at the time of the submissions) Bosnia and Herzegovina had not yet ratified the European Convention on Mutual Assistance in Criminal Matters (hereinafter “ECMACM”).<sup>97</sup>

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<sup>96</sup> BiH First Submissions, p. 14, *citing* BiH CPC, Arts. 135 and 137(2); Motion Hearing, T.241.

<sup>97</sup> Prosecution’s Second Submissions, paras. 19-22.

79. The Defence submits that witnesses from Republika Srpska need assurances that they will not be arrested for any criminal offence at any time while in the territory of the Federation of Bosnia and Herzegovina to testify.<sup>98</sup> The submissions indicate that this issue relates not to availability of witnesses from outside the State of Bosnia and Herzegovina, but to witnesses from Republika Srpska who may refuse to make themselves available to testify in the State Court of Bosnia and Herzegovina.

80. The Government of Bosnia and Herzegovina submits that the principle of safe conduct for witnesses applies in the context of interstate cooperation, but not within a State. Arrest warrants issued by the State Court may be executed anywhere in the territory of Bosnia and Herzegovina, whether in the Federation of Bosnia and Herzegovina, Republika Srpska, or the District of Brčko. A defence witness from Republika Srpska, for example, would not be exempt from arrest should a lawful warrant exist.<sup>99</sup> Further, witness testimony is obligatory when summoned by the Court, and refusal to appear or justify one's absence may result in apprehension.<sup>100</sup>

## 2. Discussion

81. The issue of witness availability at trial is discussed within the context of an accused's fair trial right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Witness availability issues may be resolved by mutual assistance arrangements.

82. Interstate mutual assistance issues arise only in respect to promoting the attendance of witnesses or evidence from outside Bosnia and Herzegovina. At this time, the Defence has not identified any witnesses or evidence it would wish to call from outside Bosnia and Herzegovina. Since the submissions, there has been a significant development in this regard as Bosnia and Herzegovina ratified the ECMACM in March 2005.<sup>101</sup> The bordering states of Croatia and of

<sup>98</sup> Defence's Second Submissions, paras. 9-11.

<sup>99</sup> BiH Second Submissions, paras. 1-5.

<sup>100</sup> *Id.* at para. 9.

<sup>101</sup> Defence's Second Submissions, para. 4. Official Gazette of Bosnia and Herzegovina, International Agreements, No. 3/05.

Serbia and Montenegro are both parties to the Convention, so that provision now exists to facilitate obtaining testimony of witnesses who reside in neighboring States.

83. The Defence claims a need for safe conduct of witnesses from within Bosnia and Herzegovina, i.e., from Republika Srpska. It is submitted that without safe conduct, a witness could be at risk of arrest outside Republika Srpska. The submission, however, wrongly presumes the applicability of the safe conduct mechanism in the context of witness production within the territorial jurisdiction of a State. Safe conduct is an instrument of international law to secure the presence at trial of a witness who, in order to avoid the risk of arrest for involvement in criminal activity, is reluctant or refuses to appear before a court in a foreign jurisdiction. The foreign court's lack of authority to compel the production of such a witness creates the need for cooperation between the two States concerned, and it is within this context that the safe conduct mechanism contributes to securing the attendance of witnesses at trial. A witness who resides within the jurisdiction of a State, however, is subject to domestic law which may authorise both compulsory witness production and apprehension for failure to appear.

84. For witnesses residing in Bosnia and Herzegovina, participation in providing trial testimony is obligatory. Efforts to secure the testimony of witnesses by either party may be enforceable by an order of the State Court for compulsory apprehension of a witness, pursuant to Article 81(5) of the BiH CPC and Article 5(1) of the Law on the Judicial Police of Bosnia and Herzegovina.<sup>102</sup> This direct enforcement mechanism exists without regard to whether the witness is exposed to the risk of arrest for personal criminal activity as a result of giving evidence.

85. An accused may prefer trial in an international forum for the perceived advantage offered in promoting the presence of reluctant witnesses by virtue of the safe conduct mechanism.<sup>103</sup> On the other hand, an accused may prefer trial in a national court where a direct means of enforcing the presence of witnesses is available. No general assessment can be made as to whether one mechanism is more effective than the other. In either situation, the right of an accused to call

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<sup>102</sup> Official Gazette of Bosnia and Herzegovina, No. 3/03.



witnesses on his or her behalf is given effect. To the extent that Defence witnesses residing in Bosnia and Herzegovina may fail to appear in order to avoid exposure to the risk of arrest, a remedy of protection from exposure to such a risk is not warranted by law. In the present case, the Defence merely anticipates that potential witnesses may be reluctant to give evidence if called. The issue may be entirely hypothetical. In any event, any disadvantage to the Accused by application of the generally accepted mechanism for ensuring witness presence on the national level (direct enforcement) rather than that the mechanism generally accepted at the international level (safe conduct) cannot be properly regarded as prejudicial to his right to a fair trial.

### 3. Conclusion

86. In light of the foregoing, the Referral Bench is not persuaded that the witness availability issues raised by the Defence will deny the Accused a fair trial were this case to be referred.

## H. Witness Protection

### 1. Submissions of the Parties

87. In the event that referral is ordered, the Prosecution requested the Referral Bench to order continued protective measures for nine witnesses, eight of whom are victim witnesses. The existing measures, granted pursuant to Rules 69, 75, and 79 of the Rules of Procedure and Evidence, range from delayed disclosure of identity and testifying through image altering devices to assignment of a pseudonym and closed sessions. No further requests by the Prosecution are presently anticipated, though it is expected that most of the victim witnesses will seek to testify by means of videoconferencing technology.<sup>104</sup>

88. As to witness protection matters, the Defence expects its witnesses at least to need the protection of pseudonyms,<sup>105</sup> although applications have yet to be made by the Defence.

<sup>103</sup> Even before this Tribunal, the safe conduct mechanism may not eliminate the reluctance of witnesses to appear who fear exposure to risk of prosecution.

<sup>104</sup> Prosecution's Second Submissions, para. 18.

<sup>105</sup> Defence's Second Submissions, paras. 9-11.

## 2. Discussion

89. The issue of witness protection, unlike that of witness availability, does not arise directly within the context of an accused's right to a fair trial. It may, however, be viewed as promoting witness presence at trial by providing assurance to witnesses that legal measures exist for their protection. Rule 11 *bis* (D)(ii) provides that the Referral Bench may order existing protective measures for certain witnesses or victims to remain in force. Bosnia and Herzegovina law has provision for witness protection. Measures providing for anonymity of a witness, to include the use of a pseudonym both inside and outside of court, are found in Chapter II of the Bosnia and Herzegovina Law on Protection of Vulnerable Witnesses and Witnesses under Threat.<sup>106</sup> Pursuant to Article 267(4) of the BiH CPC, either party may request an order for such protective measures. The Witness Protection Programme Law of Bosnia and Herzegovina<sup>107</sup> provides for measures outside the courtroom, such as change of identity or issuance of cover documents.

## 3. Conclusion

90. The Referral Bench concludes that no matters of witness protection have been identified or submitted which preclude referral of this case.

### I. Monitoring of Proceedings

#### 1. Submissions of the Parties

91. The Defence submits that, if the case is referred, observers sent by the Prosecutor to monitor the proceedings in the State Court may not have the experience or interest to ensure that the hearing is held in a fair manner from a defence perspective.<sup>108</sup>

92. The Prosecutor, at the time of submissions, was in the course of negotiating an agreement with the Organization for Security and Cooperation in Europe (OSCE) for the monitoring of and reporting on the trial proceedings of a referred case.<sup>109</sup>

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<sup>106</sup> Official Gazette of Bosnia and Herzegovina, No. 21/03, 61/04, Art. 6 *et seq.*

## 2. Discussion

93. Referral of a case implies that the proceedings against an accused become the primary responsibility of the authorities, including the investigative, prosecutorial, and judicial organs, of the state concerned. Rules 11 *bis* (D)(iv) and 11 *bis* (F) serve as remedies against a failure of the relevant state to diligently prosecute a referred case or conduct a fair trial of the accused in a referred case. Rule 11 *bis* (D)(iv) provides for monitoring of proceedings that have been referred. Specifically, the Rule provides that the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf. Further, Rule 11 *bis* (F) enables the Referral Bench, at the request of the Prosecutor, to revoke a referral order at any time before an accused is found guilty or acquitted by a national court, in which event Rule 11 *bis* (G) makes provision to enable the re-transfer of an accused to the seat of this Tribunal in The Hague.

94. It is submitted that monitoring by the Prosecutor may be inadequate to ensure that difficulties experienced by the Defence following the referral of the case are properly appreciated for the purposes of these Rules. There is apparent force in this submission. It appears to be met by the proposal which the Prosecutor has put to the Referral Bench, namely for the monitoring of and reporting on the trial proceedings of a referred case by OSCE. The standing of that organisation and the neutrality of its approach ought to ensure that reports it provides will adequately reflect Defence as well as Prosecution issues. Attention to the procedures for monitoring and reporting is a means by which the Referral Bench may be better assured that the Accused will receive a fair trial.

## 3. Conclusion

95. On the assumption that monitoring of the trial of this case would be undertaken by the OSCE, by arrangement with the Prosecutor, the Referral Bench will not pursue further the issue of the impartial and adequate monitoring of this case if it is referred, at this point in time.

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<sup>107</sup> Official Gazette of Bosnia and Herzegovina 29/04, Art. 7.

## VI. CONCLUSION

96. Having considered the matters raised, in particular the gravity of the criminal conduct alleged against the Accused in the present Indictment and the level of responsibility of the Accused, and being satisfied on the information presently available that the Accused should receive a fair trial and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of this case to the authorities of Bosnia and Herzegovina should be ordered.

## VII. DISPOSITION

For the forgoing reasons, **THE REFERRAL BENCH**

**PURSUANT** to Rules 11 *bis* of the Rules;

**ORDERS** the case of Prosecutor v. Radovan Stanković to be referred to the authorities of the State of Bosnia and Herzegovina, so that those authorities should forthwith refer the case to the appropriate court for trial within Bosnia and Herzegovina;

**DECLARES** that the referral of this case shall not have the effect of revoking the previous Orders and Decisions of the Tribunal in this case. It will be for the State Court or the competent national authorities of Bosnia and Herzegovina, as the case may be, to determine whether different provision should be made for the purposes of the trial of this case in Bosnia and Herzegovina.

**ORDERS** the Registrar to arrange for transport of the Accused and his personal belongings, within 30 days of this Decision becoming final, to Bosnia and Herzegovina in accordance with the procedures applicable to transfer of convicted persons to States for service of sentence;

**ORDERS** the Prosecutor to hand over to the Prosecutor of Bosnia and Herzegovina, as soon as possible and no later than 30 days after this Decision has become final, the material supporting the Indictment against the Accused, and all other appropriate evidentiary material;

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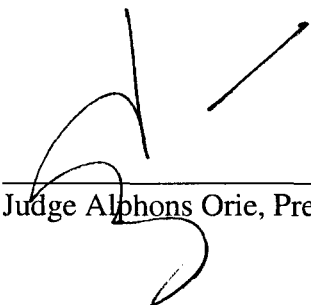
<sup>108</sup> Defence's Second Submissions, para. 22.

**ORDERS** the Prosecutor to continue its efforts to conclude an agreement with an international organisation of notable standing, such as the Organization for Security and Cooperation in Europe, for the purpose of monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina, provided that if an agreement is not concluded, the Prosecutor should seek further direction from the Referral Bench;

**FURTHER ORDERS** the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include the reports of the international organisation monitoring or reporting on the proceedings pursuant to this Decision provided to the Prosecutor.

**AND FINALLY ORDERS** the protective measures set forth in the confidential and *ex parte* Annex to remain in force.

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



Judge Alphons Orie, Presiding

Dated this 17<sup>th</sup> day of May 2005  
At The Hague,  
Netherlands

[Seal of the Tribunal]

<sup>109</sup> Prosecution's Second Submissions, para. 24.