IT-02-65-PT
D 4685 - D 4627
20 July 2005

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UNITED NATIONS

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

Case No. IT-02-65-PT

Date: 20 July 2005

Original: ENGLISH

IN THE REFERRAL BENCH

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

Registrar: **Mr. Hans Holthius**

Decision of: **20 July 2005**

PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

WITH CONFIDENTIAL ANNEX

DECISION ON PROSECUTOR'S MOTION FOR REFERRAL OF CASE PURSUANT TO RULE 11 *BIS*

The Office of the Prosecutor:
Ms. Carla del Ponte
Ms. Susan Somers

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

Counsel for the Accused:
Mr. Jovan Simić and Mr. Zoran Živanović, for Željko Mejakić
Mr. Branko Lukić, for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar
Ms. Slobodanka Nedić, for Duško Knežević

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

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I. INTRODUCTION

1. 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") is seized of a "Request by the Prosecutor Under Rule 11 *bis*" filed on 2 September 2004 (the "Motion"),[1] in which the Prosecutor of the Tribunal ("Prosecutor") requests the referral of the case of *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević* to the authorities of Bosnia and Herzegovina.

2. Rule 11 *bis* of the Rules of Procedure and Evidence of the International Tribunal (the "Rules"), entitled Referral of the Indictment to Another Court, was adopted on 12 November 1997 and revised on 30 September 2002.[2] Revision was necessary in order to give effect to the broad strategy endorsed by the United Nations Security Council (the "Security Council") for the completion of all Tribunal trial activities at first instance by 2008.[3] 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 [...]".[4]

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,[5] 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
>
> (ii) in which the accused was arrested; or
>
> (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

[1] The Motion included public Annex I and confidential Annexes II and III.
[2] In its original form, as adopted on 12 November 1997 and entitled Suspension of Indictment in Case of Proceedings before National Courts, Rule 11 *bis* provided for the transfer of an accused to the authorities of the State in which the accused was arrested and the suspension of the indictment pending the proceedings before the national court. The order for such a transfer was conditioned on 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.
[3] The completion strategy includes the completion of all investigations by the end of 2004 and all activities by 2010. *See* S/RES/1329(2000) and S/PRST/2002/21.
[4] 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 ("War Crimes Chamber of the State Court") was an essential prerequisite to achieving the objectives of the completion strategy. *See* S/RES/1534 (2004), S/PRST/2004/28.
[5] Rules of Procedure and Evidence, IT/32/Rev. 34, 22 Feb. 2005.

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 Željko Mejakić, Momčilo Gruban, and Duško Knežević was confirmed on 13 February 1995 and included 16 other co-accused.[6] The original indictment against

[6] The Prosecutor withdrew the charges against 11 of the co-accused and trial of 5 of the co-accused was completed. *See Prosecutor v. Mejakić et al.*, "Order Granting Leave For Withdrawal of Charges Against Zdravko Govedarica, Gruban, Nikica Janjic, Predrag Kostic a/k/a/ Kole, Nedeljko Paspalj, Milan Pavlic, Milutin Popovic, Drazenko Predojevic, Zeljko Savic, Mirko Babic, and Dragomir Saponja", Case No. IT-95-4-I, 8 May 1998; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-T, "Judgment", 2 Nov. 2001.

Dušan Fuštar was confirmed on 21 July 1995 and included 12 other co-accused.[7] On 17 September 2002, the indictments against Željko Mejakić, Momčilo Gruban, Duško Knežević and Dušan Fuštar (collectively, "the Accused") were joined and given the present case number.[8] On 21 November 2002, the body of the indictment dated 5 July 2002 and the attached Schedules submitted by the Prosecutor became the operative indictment against the Accused.[9] Thereafter, the Prosecutor was granted leave to amend the schedules of the indictment, and the last amended schedules were submitted on 13 January 2005.[10] This Decision refers to the operative body of the indictment dated 5 July 2002 and the schedules submitted on 13 January 2005 ("Indictment").

5. On 4 October 2004, the President of the Tribunal transferred the present Motion to the Referral Bench for a determination on whether the case should be referred pursuant to Rule 11 *bis*.[11] On 18 October 2004, the Defence[12] filed a confidential "Joint Defence Response to the Prosecution's Motion Under Rule 11 *bis*" ("Initial Response") opposing the Motion.[13]

6. At the instigation of Željko Mejakić and Momčilo Gruban, the Government of Serbia and Montenegro filed "Serbia and Montenegro's Submission in the Proceedings Under Rule 11 *bis*" on 17 January 2005 ("SCG's Written Submission") requesting that the case against the Accused be referred to Serbia and Montenegro.[14]

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[7] The Prosecutor withdrew the charges against 5 of the co-accused, one of the co-accused was incorporated into an amended indictment in another case, and 3 of the co-accused pleaded guilty. *See Prosecutor v. Sikirica et al.*, Case No. IT-95-8-I, "Order Granting Leave For Withdrawal of Charges Against Nikica Janjić, Dragan Kondić, Goran Lajić, Dragomir Šaponja; and Nedjeljko Timarac", 5 May 1998; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30-T, "Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment", 9 Nov. 1998; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-S, "Sentencing Judgement", 13 Nov. 2001.

[8] *Prosecutor v. Mejakić et al.*, and *Prosecutor v. Fuštar et al.*, Case No. IT-94-4-PT and IT-95-8/1-PT, "Decision on Prosecution's Motion for Joinder of Accused", 17 Sept. 2002. Subsequently, one of the other joined co-accused, Predrag Banović, pled guilty. *See Prosecutor v. Banović*, Case No. IT-02-65/1-S, "Sentencing Judgement", 28 Oct. 2003.

[9] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Decision on the Consolidated Indictment", 21 Nov. 2002.

[10] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Decision on Prosecution Motion to Amend Schedule B Item 3 Attached to the Consolidated Indictment", 14 Nov. 2003; "Decision on the Prosecution's Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 *ter* Witness Summaries, and the Pre-Trial Brief Incident Summaries", 17 Dec. 2004; "Submission of Amended Consolidated Indictment Schedules A Through F", 13 Jan. 2005.

[11] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court Under Rule 11 *bis*", 4 Oct. 2004. Prior to assigning the Motion to the Referral Bench, the President offered the Prosecutor the opportunity to clarify issues concerning the War Crimes Chamber of the State Court in light of a letter dated 17 September 2004 from the Senior Deputy High Representative in Bosnia and Herzegovina. Subsequently, the Prosecutor filed her clarification on 30 September 2004. *See Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Preliminary Order in Response to the Prosecutor's Request Under Rule 11 b*is*", 22 Sept. 2004; "Supplementary Motion by the Prosecutor Under Rule 11 *bis*", 30 Sept. 2004.

[12] On most occasions in this Decision, the Referral Bench will refer to "the Defence" as including the respective Defences of the four accused.

[13] The Referral Bench denied the Prosecutor's subsequent request for leave to file a reply to the Initial Response considering that the Prosecutor would be given an opportunity to address the matters raised by the Defence during the course of the proceedings. *See Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Decision on the Prosecution's Request for Leave to File a Reply", 2 Nov. 2004.

[14] SCG's Written Submission, para. 2.

7. On 9 February 2005, the Referral Bench issued a scheduling order for a hearing, and a decision ordering the parties and inviting the Government of Bosnia and Herzegovina to submit responses to specific questions posed by the Referral Bench. In addition, the Referral Bench invited the Government of Serbia and Montenegro to be prepared to address, by way of oral submission at the scheduled hearing, its proposal that the case be transferred to Serbia and Montenegro.[15]

8. The Prosecutor filed its written submission on 21 February 2005 ("Prosecutor's Submission");[16] the Defence of Željko Mejakić filed its written submissions on 21 February 2005 ("Mejakić Defence Submission");[17] the Defences of Momčilo Gruban, Dušan Fuštar, and Duško Knežević collectively filed their written submissions on 25 February 2005 ("First Joint Defence Submission");[18] and the Government of Bosnia and Herzegovina filed its written submissions on 25 February 2005 ("First BiH Submission").[19]

9. At the hearing of 3 and 4 March 2005, the Referral Bench heard the parties and representatives of the Governments of Bosnia and Herzegovina and Serbia and Montenegro.

10. On 18 March 2005, the Defence, with leave, filed additional written submissions ("Second Joint Defence Submission").[20]

11. Further submissions of the Government of Bosnia and Herzegovina were invited on 11 March 2005 and received on 23 March 2005.[21] The Prosecution and Defences were invited on 24 March 2005 to respond to these further submissions.[22] The Prosecutor declined but the Defence

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[15] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Scheduling Order for a Hearing on Referral of a Case Under Rule 11 *bis*", 9 Feb. 2005; partly confidential "Decision for Further Information in the Context of the Prosecutor's Request under Rule 11 *bis*", 9 Feb. 2005.

[16] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Prosecution's Further Submissions Pursuant to Chamber's Order of 9 February 2005", 21 Feb. 2005.

[17] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, confidential "The Motion of the Defence of Željko Mejakić in Complying to the Order of the Specially Appointed Chamber for Further Information in the Context of the Prosecutor's Request Under Rule 11 *bis*", 21 Feb. 2005.

[18] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, confidential "Corrigendum to 22 February 2005 Joint Defence Response to the Trial Chamber Decision for Further Information in the Context of the Prosecution's Request Under Rule 11 bis", 25 Feb. 2005. The corrigendum contained the corrected entire version of the defence filing of 22 Feb. 2005. *See* confidential "Joint Defence Response to the Trial Chamber Decision for Further Information in the Context of the Prosecution's Request Under Rule 11 bis", 22 Feb. 2005.

[19] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "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* of 9 February 2005", 25 Feb. 2005.

[20] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Joint Supplemental Submission by the Defence Teams of All the Named Accused in Opposition of the Prosecution's Motion Under Rule 11 *bis*", 18 Mar. 2005. The Defence filed, with leave, the Second Joint Defence Submissions because they had not yet received the First BiH Submission at the time of the hearings. *See* Hearing of 3-4 March 2005, T. 177-178, 279.

[21] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Letter to the Government of Bosnia and Herzegovina from Herman von Hebel, Senior Legal Officer", 11 Mar. 2005; "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", 23 Mar. 2005.

[22] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Memorandum from Special Chamber to Prosecution and Defence", 24 Mar. 2005.

filed further submissions on 31 March 2005 ("Final Joint Defence Submission").[23] On the same day, Željko Mejakić filed a personal submission "as a contribution to the hearing held on 3 and 4 March on the deferral of the case to another court on the basis of Rule 11 *bis*".

III. THE ACCUSED AND THE CHARGES

12. The Indictment against the Accused alleges crimes which arise in the context of the detainment of non-Serbs, principally Bosnian Muslims and Bosnian Croats, in the Omarska and Keraterm Camps during the period between May 1992 and August 1992. These two camps were set up in the Prijedor municipality, located in Bosnia and Herzegovina, after the takeover of the municipality by Bosnian Serb forces. During the relevant period, the Indictment alleges that the Accused, all born in the Prijedor municipality, now Republika Srpska in Bosnia and Herzegovina,[24] held the following positions: Željko Mejakić, born on 2 August 1964, was the Commander of the Omarska Camp; Momčilo Gruban, born on 19 June 1961, was a guard shift commander of the Omarska Camp; Dušan Fuštar, born on 29 June 1954, was a guard shift commander of the Keraterm Camp; and Duško Knežević, born on 17 June 1967, had sufficient authority to be able to enter into the Keraterm and Omarksa Camps although it is not alleged that he held an official position.

13. Each of the Accused is charged with five counts: Persecution as a Crime Against Humanity pursuant to Article 5(h) of the Statute of the International Tribunal ("Statute"); Murder as a Crime Against Humanity pursuant to Article 5(a) of the Statute; Murder as a Violation of the Laws or Customs of War pursuant to Article 3 of the Statute; Inhumane Acts as a Crime Against Humanity pursuant to Article 5(i) of the Statute; and Cruel Treatment as a Violation of the Laws or Customs of War pursuant to Article 3 of the Statute. Each of the Accused, with the exception of Duško Knežević, allegedly bears individual criminal responsibility pursuant to both Articles 7(1) and 7(3) of the Statute. With respect to Duško Knežević, only Article 7(1) of the Statute is relied on.

14. Željko Mejakić and Momčilo Gruban were transferred from Serbia and Montenegro to The Hague on 4 July 2003 and 2 May 2002, respectively. Dušan Fuštar and Duško Knežević were transferred from Bosnia and Herzegovina to The Hague on 31 January 2002 and 18 May 2002, respectively. All the Accused voluntarily surrendered to the authorities for transfer to the Tribunal and all pleaded not guilty to the charges against them.

15. With the exception of Momčilo Gruban, the Accused are currently held at the United Nations Detention Unit of the Tribunal ("UNDU"). Momčilo Gruban had been granted provisional

[23] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Further Supplemental Response Made Jointly on Behalf of all the Accused in Opposition to the Prosecution's Submission Pursuant to Rule 11 *bis*", 31 Mar. 2005.

release on 17 July 2002 to reside in Belgrade, but has been ordered to return to the UNDU to be present for the delivery of this Decision.[25]

IV. REFERRAL OF THE CASE PURSUANT TO RULE 11 *BIS*

A. Gravity of Crimes Charged and Level of Responsibility of Accused

1. Submission

16. With regard to Rule 11 *bis*(C), the Prosecutor submits that the gravity of the crimes charged against the Accused and their level of responsibility are compatible with a referral of the case to Bosnia and Herzegovina. Regarding the question of the gravity of the crimes, the Prosecutor submits that although the crimes alleged are "sufficiently grave to be tried at the International Tribunal", the crimes cannot be "characterised as grave to the extent that *demands* that they be tried at the International Tribunal".[26] Regarding the question of the level of responsibility, the Prosecutor submits that it "requires an assessment of two related factors (a) the structural level of the accused, in terms of his or her place in a particular governmental-military-political hierarchy, and also (b) the role of the accused him - or herself *vis-à-vis* the crimes charged".[27] Under this assessment, the Prosecutor submits that Željko Mejakić can be defined as an intermediate level perpetrator and the remaining Accused can be defined as intermediate or lower-level perpetrators.[28]

17. The Defence submits that the gravity of the crimes charged against the Accused and their level of responsibility are incompatible with a referral of a case. Regarding the question of the gravity of the crimes, it is submitted that the gravity of the crimes alleged does not permit a referral. In particular, the Defence submits that the nature of the crimes alleged to have been committed pursuant to a joint criminal enterprise prevents a referral.[29] In making this submission, the Defences of Momčilo Gruban, Dušan Fuštar, and Duško Knežević state "even though the crimes alleged directly against the Accused are not of the highest gravity, their connection to others through the device of the joint criminal enterprise warrants careful treatment, that can only be accomplished if the same Tribunal that has considered and is considering other aspects of this joint

[24] During the hearing held on 3-4 March 2005 and in subsequent submissions, the Referral Bench has been informed by the Defence that Dušan Fuštar was born in Serbia.
[25] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Decision on Request for Pre-Trial Provisional Release", 17 July 2002; "Scheduling Order", 8 July 2005. As ordered by the Referral Bench, Momčilo Gruban arrived at The Hague on 18 July 2005.
[26] Prosecution's Submission, para. 2. (emphasis in original).
[27] *Id.*, at para. 4.
[28] Motion, paras 24-25; Prosecutor's Submission, paras 7-9; Hearing of 3-4 March 2005, T. 144.
[29] First Joint Defence Submission, pp. 3-4; Second Joint Defence Submission, paras 21-23; Hearing of 3-4 March 2005, T. 149-151.

criminal enterprise is the Tribunal to hear and adjudicate this case".[30] Regarding the question of the level of responsibility, the Defence of Željko Mejakić submits that a commander of a camp, where "more than 32 people [were] allegedly murdered, and where thousands of prisoners [were] confined illegally, tortured, beaten and mistreated", holds the highest level of responsibility.[31] The Defences of Momčilo Gruban, Dušan Fuštar, and Duško Knežević submit that, although these Accused are not senior leaders when compared to other accused before the Tribunal, "they are nonetheless charged with command authority for the crimes allegedly committed by others", and as such, must be considered "senior" under Security Council Resolution 1534.[32]

18. The Government of Bosnia and Herzegovina submits that the gravity of the crimes charged against the Accused and their level of responsibility are compatible with a referral of the case. The Government supports its submission by comparing this case to other indictments and accused before the Tribunal. In doing so, the Government submits that the crimes, although grave, occurred within a more limited temporal and geographical scope and that the level of these Accused falls within the terms of intermediate and lower-level accused.[33]

19. The Government of Serbia and Montenegro did not make any submissions on this question.

2. Discussion

20. In evaluating the gravity of the crimes charged and the level of responsibility of the Accused, the Referral Bench will consider only those facts alleged in the Indictment – as they constitute the case which the Prosecutor raises 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 or the Governments of Bosnia and Herzegovina and of Serbia and Montenegro in their submissions which differ from those alleged in the Indictment

21. The crimes alleged against the Accused are grave as they include the crimes of persecution, murder, and inhumane treatment of a large number of victims in two camps which were in operation for approximately three months. When considered in the context of the other cases currently before the Tribunal, it becomes apparent that the crimes alleged in this case, while very serious, are not among the most serious as they are limited in geographical and temporal scope. Hence, they do not necessarily require the case to remain at the Tribunal.

[30] First Joint Defence Submission, pp. 3-4.
[31] Mejakić Defence Submission, p. 5. *See* Hearing of 3-4 March 2005, T. 171-173.
[32] First Joint Defence Submission, p. 5.
[33] First BiH Submission, pp. 1-2.

22. The fact that the Accused are charged with participation in a joint criminal enterprise does not change this analysis. The Defence submission is that the crimes charged relate to events which are alleged to be part of a wide-reaching joint criminal enterprise that has resulted in multiple indictments and proceedings in this Tribunal. In particular, it is contended that the charged conduct was

> a planned, highly coordinated joint criminal enterprise *among the accused and the Serb political authorities* in the whole of Bosnia and Herzegovina. As such, the Consolidated Indictment seeks to hold these Accused culpable for actions and crimes *allegedly committed by others, including* persons who have already been tried by the ICTY, and *those who have cases pending, as well as those leadership individuals who are still at large.*[34]

This misunderstands what is alleged in the Indictment. It is alleged that the take-over of Prijedor by Bosnian Serb police and army forces "initiated a series of events, organised and directed first by the Crisis Staff and later by the Serbian Municipal Assembly", which resulted in the "death or forced departure of most of the non-Serb population of Priedor Municipality".[35] These events included the unlawful detainment and confinement of "more than 7,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area in the Keraterm, Omarska and Trnopolje camps".[36]

23. However, with respect to the joint criminal enterprise, it is later pleaded that the Omarksa and Keraterm camps were set up by the Crisis Staff "in order to carry out a *part of* the overall objective of the joint criminal enterprise *of the Bosnian Serb leadership* [...]".[37] The Indictment inclusively particularises those who participated in the joint criminal enterprise as Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić, Dragoljub Prcać, Duško Sikirica, Damir Došen and Dragan Kolundžija, as well as the present Accused.[38] Critically, however, it is expressly pleaded in paragraph 19 of the Indictment that "the participation of the accused in the joint criminal enterprise was limited to their activities within the two camps". Thus, while a major joint criminal enterprise is identified, which is alleged to have involved the highest political leadership, it is not the Prosecutor's case that these Accused were participants at that level in what may be described as the 'big picture'. Rather, it is merely alleged against these Accused that they participated in the joint criminal enterprise by acts and conduct at the Keraterm and Omarska camp, conduct which was a means of implementing a part of the objectives of the alleged joint criminal enterprise.[39]

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[34] First Joint Defence Submission, p. 3 (emphasis added). *See* Second Joint Defence Submission, paras 19-26.
[35] Indictment, para. 10.
[36] Indictment, para. 12.
[37] *Id.*, at para. 19 (emphasis added).
[38] *Id.*, at para. 21.
[39] *See Prosecutor v. Tadić*, Case No. IT-94-1-A, "Judgement", 15 July 1999, paras 195-196, 202-204, 220 (in which the Appeals Chamber discusses the three categories of the common purpose doctrine, including the second category of "concentration camp" cases).

24. The Referral Bench does not accept, therefore, the Defence submission that the gravity of the offences charged against these particular Accused is properly assessed by virtue of the gravity of the whole of the joint criminal enterprise involving the political leadership. The emphasis is on the particular acts and conduct of these Accused at the camps. The level of responsibility of these Accused is also to be evaluated by reference to their particular positions and functions, not by reference to the responsibility of the political leadership.

25. The Defence submissions also seek to rely on this mistaken and exaggerated statement of the joint criminal enterprise allegations against these Accused, to suggest that their trial will have such implications for other pending or anticipated trials in this Tribunal, and will in turn be so affected by those and past trials, "as to forestall the referral" of this case to another jurisdiction.[40] In the view of the Referral Bench, once the case actually alleged against these Accused is accurately understood, it becomes apparent that it is unlikely that the trial of these Accused will have significant implications for any pending or future trials before this Tribunal or that other trials conducted here will have significant implications for this trial. This submission is not at all persuasive.

26. In terms of the level of responsibility of the Accused, the responsibility of Željko Mejakić stands out as it is alleged he was the commander of Omarska Camp whereas the other Accused were guard shift commanders or an individual with no official position within the two camps. Nevertheless, as the alleged commander of the camp but holding no other official position, Željko Mejakić cannot be considered to fall into the category of the "most senior leaders" suspected of being most responsible for crimes under the jurisdiction of this Tribunal as resolved by the Security Council.[41] The remaining Accused were not in any relevant sense "leaders".

3. Conclusion

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

B. Application of Rule 11 *bis* in Light of the Laws of Extradition

1. Submission

28. The Defence submits that the laws of extradition prohibit the referral of their case to Bosnia and Herzegovina without the consent of Serbia and Montenegro because some of the Accused were

[40] First Joint Submission, pp. 3-4.

transferred to the Tribunal from Serbia and Montenegro.[42] It is contended that this is especially pertinent as some of the Accused are citizens of Serbia and Montenegro.[43] The Prosecutor disagrees.[44]

2. Discussion

29. Extradition is the formal surrender of a person, by the requested state to the requesting state, for the purpose of trial before a court of (or to serve a sentence in) the requesting state. States often engage in extradition obligations through treaties, but extradition can also be based on reciprocity or comity. As States enjoy freedom whether or not to engage in extradition relations with other States, they also determine the conditions upon which they engage in extradition relations: one such commonly agreed condition is the rule of specialty. This rule usually includes limitation on the scope of the charges before the court of the requesting state for which the transfer is sought and a prohibition against the requesting state re-extraditing the individual to a third country without the consent of the state that had granted extradition. The right to refuse the extradition of its own nationals is often agreed between States, although this is less commonly practiced in the common law tradition. The rule of specialty, however, is not directly linked to the non-extradition of nationals; this is merely one condition upon which some States engage in extradition relations, *i.e.*, States may refuse to extradite its nationals. In this context, nationality is generally determined at the time of the decision to extradite.[45]

30. In the instant case, the Accused all submitted that they voluntarily surrendered to come to The Hague in order to be tried by the Tribunal, *i.e.*, the Accused were not transferred by virtue of the exercise of the coercive powers of the State. For that purpose, they reported to the Tribunal or relevant State authorities in order to be transferred to The Hague.[46] The Referral Bench accepts that even though there may be quite some pressure involved in a decision to voluntarily surrender, the fact remains that these Accused were not transferred to The Hague by force or intimidation. Their voluntary surrender has a further particular relevance since, even under extradition law, it is not

[41] *Supra*, para. 2.
[42] Although no explicit denial of consent was expressed by Serbia and Montenegro, it has expressed concerns about the transfer of the Accused to another jurisdiction and stated during the hearing that it "fully supports the argument regarding extradition put forward by Defence counsel Lukić today". Hearing of 3-4 March 2005, T. 229.
[43] Second Joint Defence Submission, para. 110; Hearing of 3-4 March 2005, T. 162-170.
[44] Hearing of 3-4 March 2005, T. 196, 266-267.
[45] *See* European Convention on Extradition (Council of Europe, 1957), Art. 6; Convention Relating to the Extradition Between Member States of the European Union (European Union, 1996), Art. 7.
[46] The submissions as to the intermediary to which each of the Accused surrendered have been inconsistent. *See* Hearing of 3-4 March, T. 148, 164, 175, 258.

self-evident that the rule of specialty would apply if an extraditee consents to his extradition by accepting a simplified procedure.[47]

31. Significantly, in the view of the Referral Bench, and leaving aside the way the Accused were originally transferred to The Hague, transfer pursuant to Rule 11 *bis* would not amount to an extradition *stricto senso* for the following reasons.[48] As in the original transfer of the Accused to the Tribunal, the transfer of the Accused to the State authorities pursuant to a referral under Rule 11 *bis* is not the result of an agreement between the State and the Tribunal: the States are under an obligation to ensure compliance with any order for surrender or transfer of an accused to the custody of the Tribunal pursuant to Article 29 of the Statute. Their obligation to cooperate with the Tribunal derives directly from Chapter VII of the United Nations Charter and the States are not in a position to impose any conditions on the transfer an accused. Hence, a State may not purport to invoke the rule of specialty or non-transfer of its nationals where a transfer is ordered under Rule 11 *bis*, including nationals who obtained the State's nationality after their transfers.

3. Conclusion

32. The laws governing extradition do not apply to prevent the referral of the case against the Accused pursuant to Rule 11 *bis* of the Rules.

C. Determination of the State of Referral

1. Submission

33. The Prosecutor submits that the appropriate place for this case to be referred to is Bosnia and Herzegovina. The Prosecutor submits that should more than one State have an interest, the

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[47] *See* Convention on Simplified Extradition Procedure Between the Member States of the European Union (European Union, 1995), Arts. 9; Treaty Between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of The Netherlands, on Extradition and Mutual Assistance in Criminal Matters (1962), Arts 9, 13-14.

[48] In a decision from the Appeals Chamber, which concerned the amendment of an indictment after the transfer of an accused to the International Tribunal, the Appeals Chamber held:

> The fourth and final point concerns the argument of the defence that there exists in customary international law a speciality principle which prohibits the prosecution of the accused on charges other than that on which he was arrested in Bosnia and Herzegovina and brought to The Netherlands. In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal.

Prosecutor v. Kovačević, Case No.IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998.

criteria in Rule 11 *bis*(A) reflect a preferential ordering among competing States which gives greatest weight to the State in whose territory the crime was committed under Rule 11 *bis*(A)(i).[49]

34. The Defence submits that if a referral is deemed appropriate, the state of referral should be Serbia and Montenegro "based upon the nationalities of the accused".[50] Insofar as the Defence submits that grounds of nationality support its case being referred to Serbia and Montenegro, the submissions have been inconsistent. They included: "two of the four accused (Gruban and Mejakić) are lawful citizens of Serbia and Montenegro" and "the Accused Dušan Fuštar also was previously a citizen of Federal Yugoslavia (Serbia and Montenegro)";[51] all the Accused are "citizens of Serbia and Montenegro";[52] and Dušan Fuštar was never a citizen of Bosnia and Herzegovina.[53] These Defence submissions were not clarified by Serbia and Montenegro's submissions, which included: Momčilo Gruban, Dušan Fuštar and Duško Knežević are nationals of Serbia and Montenegro;[54] and "two of the four accused" are its citizens with a third accused in the process of obtaining citizenship.[55]

35. Bosnia and Herzegovina submits that the appropriate place for the case to be referred is Bosnia and Herzegovina due to, *inter alia*, the territoriality principle; the nationality of the Accused in that they are nationals of Bosnia and Herzegovina; and the residence of the victims in Bosnia and Herzegovina. In terms of the nationality, it indicated that the Accused may have dual citizenship in that they were all citizens of Bosnia and Herzegovina, by birth, but may also have obtained other citizenship upon the disintegration of the former Yugoslavia.[56]

36. At the instigation of Željko Mejakić and Momčilo Gruban, Serbia and Montenegro submitted that it was "willing and adequately prepared to accept a referral of this case to its judiciary" and that for purposes of Rule 11 *bis*, their voluntary surrender should be regarded as "arrest", which is the word used in the Rule.[57] Further, Serbia and Montenegro submits that as *parens patriae*, it has "special rights and responsibilities" towards its nationals "under general international law of diplomatic protection" and that "a strict application of the principle of territoriality would simplify the case too much".[58]

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[49] Motion, para. 8; Prosecutor's Submission, para. 35; Hearing of 3-4 March 2005, T. 145-146, 198-199, 267.
[50] First Joint Defence Response, p. 19. *See* Hearing of 3-4 March 2005, T. 208.
[51] Initial Response, para. 72.
[52] First Joint Defence Submission, p. 19; Second Joint Defence Submission, p. 35.
[53] Second Joint Defence Submission, p. 35; Hearing of 3-4 March 2005, T. 278.
[54] SCG's Written Submission, para. 7.
[55] Hearing of 3-4 March 2005, T. 259-260.
[56] *Id.*, at T. 220-221, 260.
[57] SCG's Written Submission, paras 4-5.
[58] SCG's Written Submission, para. 7; Hearing of 3-4 March 2005, T. 226-229, 259-260.

37. Subsequent to the above submissions, the Prosecutor and Defence made additional submissions regarding the nationality of the Accused on 27 May 2005 and 10 June 2005, respectively. The Prosecutor submits that its enquiries indicate that Momčilo Gruban and Duško Knežević acquired Serbia and Montenegrin nationality in July of 2004 and January of 2005, respectively, and that further information regarding Željko Mejakić and Dušan Fuštar is still pending.[59] The Defence submits that Momčilo Gruban, who arrived at The Hague with a "Yugoslav Passport", obtained that nationality "after having lived in Serbia for 8 years", and that Duško Knezević obtained that nationality "based on the citizenship of his wife, and after [being] living in Serbia from 1996".[60] With respect to Dušan Fuštar, the Defence submits that "having been born in the Republic of Serbia, having never denounced that citizenship, and having never accepted any other citizenship, he is best described as a natural-born citizen of Serbia and Montenegro".[61] No further submission regarding Željko Mejakić was made by the Defence

2. Discussion

38. The issue of nationality remains unclear. It does appear that Momčilo Gruban and Duško Knežević have sought and obtained citizenship of Serbia and Montenegro, but only after their respective arrivals in The Hague. At least one of the remaining two Accused has sought such citizenship since arriving in The Hague. Perhaps with the exception of Dušan Fuštar, all appear to have been born in Bosnia and Herzegovina, and all four Accused were residents there at the time relevant to the Indictment.[62] In any event, it does not appear that citizenship has a significant relevance to the determination of the issue to which State should referral be ordered. That is so even if it had been established, which is not the case, that all Accused are now citizens of Serbia and Montenegro.

39. As a procedural matter, the Referral Bench notes that the Motion, in which the Prosecutor requests the referral of the case to Bosnia and Herzegovina, is the only formal request before the Referral Bench. The Defence and Serbia and Montenegro are not in a position to file a formal request for referral to Serbia and Montenegro pursuant to Rule 11 *bis*. At the same time, this does not bind the Referral Bench to consider only Bosnia and Herzegovina as a possible state of referral;

[59] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Prosecutor's Supplemental Submission", 27 May 2005, Attachments (unofficial translation).
[60] According to the Defence, Momčilo Gruban and Dusko Knežević went through all the necessary legal procedures "years before there was any talk of Rule 11 *bis* referral". *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Joint Defence Response to the Prosecutor's Supplemental Submission", 10 June 2005, para. 7.
[61] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, "Joint Defence Response to the Prosecutor's Supplemental Submission," 10 June 2005, paras 3, 6, 8.
[62] As charged in the Indictment, Željko Mejakić was a police officer and Commander of the Omarksa Police Station; Momčilo Gruban "was a reserve policemen who had been called to perform full time duty at Omarksa camp; Dušan

the Referral Bench may order referral to a State *proprio motu* pursuant to Rule 11 *bis* (B) of the Rules.

40. The Referral Bench observes, however, that it is not able to accept the submission of the Prosecutor and Bosnia and Herzegovina that referral should be to the state where the crimes were committed because Rules 11 *bis* (A) prescribes a hierarchy of states for the referral of cases and should be interpreted as ranking the possible states in descending priority. It is contended that this is the proper construction of the Rule, and is also consistent with established principles of international and domestic law. As a matter of construction, the Rule appears, relevantly, to be concerned only to identify the alternatives and gives no indication of a hierarchy of, or priority between, states. Further, it has not been shown that there is an established priority in international law in favour of the State in whose territory a crime was committed. International extradition treaties, whether multilateral or bilateral, offer some analogy, but these do not typically provide for primacy of any one ground of jurisdiction.[63] In domestic jurisdictions, the question is often regulated by statute and there is no universal provision or practice.

41. In the present case, the crimes are alleged to have been committed in Bosnia and Herzegovina, against persons living in Bosnia and Herzegovina, and by persons living in Bosnia and Herzegovina, of whom at least three were then citizens of Bosnia and Herzegovina, and two of whom were transferred to this Tribunal from Bosnia and Herzegovina. In the view of the Referral Bench, those considerations weigh heavily in favour of referral being to Bosnia and Herzegovina, if referral is found to be appropriate in this case and if there are no reasons which weigh significantly against referral to Bosnia and Herzegovina. By contrast, the only apparent nexus between the Accused or their alleged crimes and Serbia and Montenegro is either or both that two of the Accused voluntarily surrendered to the Tribunal from that State, and that at least some of the Accused, perhaps all of them, are currently citizens of Serbia and Montenegro. In the view of the Referral Bench, the nexus with Serbia and Montenegro is much weaker with respect to the individual case of each Accused than the nexus with Bosnia and Herzegovina. Having regard to the circumstances of the case, the arguments in favour of referral *proprio motu* to Serbia and Montenegro are comparatively of little weight.

Fuštar "worked as a mechanic at Autotransport Prijedor; and Duško Knežević "worked as a waiter". Indictment, paras 1-3, 5.

[63] *See* UN Model Treaty on Extradition (1990), Art. 16; European Convention on Extradition (Council of Europe, 1957), Art. 17.

3. Conclusion

42. The Referral Bench is persuaded for the reasons indicated that Bosnia and Herzegovina has a significantly greater nexus with the trial of each of these Accused for the offences alleged against them than Serbia and Montenegro. The Referral Bench will therefore consider whether, in light of all relevant factors, referral for trial of the case to the authorities of Bosnia and Herzegovina would be appropriate. Only if there are significant problems with this will the Referral Bench come to consider whether it should act *proprio motu* to refer the case to Serbia and Montenegro.

D. Applicable Substantive Law

43. The Referral Bench 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 which would be within the competence of the State Court of Bosnia and Herzegovina ("State Court") if referral is ordered.[64] The Referral 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 not only criminalizes the alleged conduct of the Accused so that the allegations can be duly tried and determined, but which also provides for appropriate punishment in the event that conduct is proven criminal. The Referral Bench must therefore consider 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 currently charged before the Tribunal.

1. Submissions

44. The Prosecutor submits that the 2003 Criminal Code of Bosnia and Herzegovina ("BiH CC") is the applicable substantive national law if the case is referred to Bosnia and Herzegovina pursuant to Rule 11 *bis*. This is despite Article 4(1) of the BiH CC which provides that the law in force at the time of the commission of the crime shall be applied. However, the Prosecutor relies on Article 4(2) of the BiH CC which provides that, if the law in force at the time of the crime has since been amended, the law which is more lenient is to be applied; the submission being that the BiH CC is the more lenient. The Prosecutor 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 1977

[64] Pursuant to 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 Transfer"), 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. Based on this provision, the Referral Bench will assume that a case referred to Bosnia and Herzegovina pursuant to Rule 11 *bis* will be tried before the State Court. BiH Official Gazette, No. 37/03, 54/04, 61/04.

Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY CC") and the Criminal Code of the Socialist Republic of Bosnia and Herzegovina ("SRBiH CC") - or under international law as it existed at the time of the commission of the alleged crimes. With reference to the applicability of international law, the Prosecutor 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 states that, although the SFRY CC contains no express provisions with respect to the crimes against humanity or command responsibility, the concepts were part of international law at the time the offences were committed, and that the BiH CC merely codified what was customary international law. Insofar as sentencing is concerned, the Prosecutor submits that the BiH CC is more lenient as, unlike the SFRY CC, it does not provide for the death penalty.[65]

45. The Defence submits that the SFRY CC is the applicable substantive national law if the case is referred to Bosnia and Herzegovina since it is more lenient than the BiH CC for the following reasons (i) command responsibility as provided by Article 7(3) of the Statute of the Tribunal was not recognised under SFRY CC, although the "direct execution or commission of war crimes through planning, instigating, ordering, aiding and abetting" was a culpable act; (ii) the notion of joint criminal enterprise, as provided by Article 7(1) of the Statute, was not a "recognizable mode of liability"; and (iii) the Constitution of the Serbian Republic of Bosnia and Herzegovina, adopted in 1992, abolished the death penalty.[66] Finally, the Defence submits that the SFRY CC did not expressly provide for the application of customary international law and that the principle of legality, explicitly provided for in Article 3 of SFRY CC, prevents the application of customary international law to the Accused.[67] The Defence accepts that the SFRY CC contained provisions addressing crimes against humanity.[68]

46. Bosnia and Herzegovina submits that the BiH CC is the applicable substantive national law if the case is referred to Bosnia and Herzegovina pursuant to Rule 11 *bis* as it "provides a more complete exposition of the law" and is more lenient in comparison to the SFRY CC, in particular because the BiH CC abolished the death penalty.[69] It submits that where the BiH CC differs from the SFRY CC, BiH CC "merely codifies in the law of Bosnia and Herzegovina crimes that were

[65] Prosecutor's Submission, paras 13-15.
[66] Second Joint Defence Submission, paras 58-60, 62, 66, 68-71, 74-75; Final Joint Submission, para. 20; Hearing of 3-4 March 2005, T. 186-187, 206-208.
[67] Second Joint Defence Submission, para. 76.
[68] During oral argument, the Defence submitted that the SFRY CC addressed crimes against humanity and command responsibility. *See* Hearing of 3-4 March 2005, T. 185.
[69] First BiH Submission, p. 5.

already crimes under international law in April 1992".[70] Accordingly, Bosnia and Herzegovina submits that the SFRY CC is "not more lenient by virtue of having failed to employ the terms of Crimes Against Humanity and Command Responsibility explicitly, because the concepts were nonetheless part of domestic law and international law".[71] Moreover, Bosnia and Herzegovina submits that since Article 16 of the [S]FRY Constitution, in force at the time of the crimes, stated that "international treaties and generally accepted rules of international law shall be a constituent part of the internal legal order", application of the law on command responsibility to the Accused, as contained in the BiH CC, would "not violate the principle of non-retroactivity".[72] In the end, however, Bosnia and Herzegovina submits that "ultimately, it will be for the State Court to decide which code applies after having heard the arguments from the parties on the substantive differences between the codes, the issue of sentencing and any other issues that the parties may deem relevant to the inquiry".[73]

2. Discussion

47. Given the legislation in place at the time of the offences alleged in the Indictment and the more recent legislative changes, there will be a need to resolve some rather basic issues relating to the trial of the alleged crimes if the case is referred to Bosnia and Herzegovina. It is accepted, as submitted by the Government of Bosnia and Herzegovina,[74] that there is not any judicially established test to be applied to questions such as which of the two laws is the more lenient, and to the applicability to events occurring at the time relevant to the Indictment of international law as part of the internal law of Bosnia and Herzegovina. With regard to the former of these questions, it has certainly not been established that leniency is determined by attempting to compare two different Codes overall for their general effect, rather than by considering separately each particular provision applicable at the time to the conduct charged and comparing it with the subsequent amendment as it affects, *i.e.*, amends, that provision.

48. 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 competing submissions that have been advanced by the parties and by the Government of Bosnia and Herzegovina on the question of the competing applicable substantive law. Rather than attempting to do so, the Referral Bench will consider what will be the apparent position under each of the possibly applicable sets of

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[70] *Id.*
[71] BiH Submission, p. 5. *See* Hearing of 3-4 March 2005, T. 238.
[72] Hearing of 3-4 March 2005, T. 238 and 242. In pertinent part, Article 16 of the SFRY Constitution provided:
> ...treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order.

[73] First BiH Submission, p. 6.
[74] *Id.*

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 the subject of charges in the present Indictment.

(a) SFRY CC

49. The offences in the Indictment are alleged to have occurred between 24 May 1992 and 30 August 1992. Under the federal constitutional structure of the former Yugoslavia, the SFRY CC, having been enacted in 1977, was in force at the time of the conduct of the Accused which is the subject of the charges in the present Indictment.[75] The SFRY CC included a provision which proscribed war crimes against the civilian population. Article 142(1) of the SFRY CC 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, in which Article 142(1) is included, 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.[76]

50. Thus, at the time of the alleged conduct of the Accused, Article 142(1) made it a crime to order or commit against the civilian population, in violation of the rules of international law effective at a time of war, armed conflict, or occupation, the following acts which appear to apply to the allegations against the Accused as set forth in the Indictment: killings, inhuman treatment and illegal detention.

51. In the Indictment, the acts of murder (Count 3) and cruel treatment (Count 5) are alleged as violations of the laws or customs of war. The acts of persecution (Count 1), murder (Count 2) and

[75] The SRBiH CC was also in force, but as it did not contain any provisions criminalising either violations of the laws or customs of war or crimes against humanity, it may be eliminated from further assessment.

inhumane acts (Count 4) are alleged as crimes against humanity. All acts are alleged to have been committed in context of the detainment of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Omarska and Keraterm camps.

52. Thus, although the word "killings" is used in Article 142(1) to describe the criminal behavior, the provision would appear to apply to the acts of murder alleged against the Accused as violations of the laws or customs of war, and to the acts of murder cumulatively charged against the Accused as crimes against humanity. The provision of Article 142(1) which makes "inhuman treatment" a war crime would also appear to apply to the acts in the Indictment charged as cruel treatment as violations of the laws or customs of war, and inhumane acts cumulatively charged against the Accused as crimes against humanity.

53. There is no provision of the SFRY CC which specifically proscribed persecution (Count 1) as a crime against humanity. However, Article 154 of the SFRY CC made criminal the act of "Racial and Other Discrimination", by providing:

> (1) Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognised by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.
>
> (2) The sentence set forth in paragraph 1 of this article shall be imposed on those who persecute organisations or individuals for their advocating equality among the people.
>
> (3) Whoever spreads ideas on the superiority of one race over another, or advocates racial hatred, or instigates racial discrimination, shall be punished by imprisonment for a term exceeding three months but not exceeding three years.

Although it does not appear that Article 154 of the SFRY CC corresponds directly to the crime of persecution as a crime against humanity, and although the punishment provided is relatively modest, these matters do not necessarily preclude a referral of this case given the alleged circumstances of the charge of persecution and the nature and variety of the other offences also charged against the Accused.[77]

54. Although the maximum authorized punishment at the time of the alleged crimes for acts in violation of Article 142(1) was the death penalty, which is now abolished in Bosnia and Herzegovina,[78] 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. Article 48 of the SFRY CC further provided a system for combining punishments in the event an accused is

[76] 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.

[77] The underlying crimes of persecution alleged against the Accused include murder, beatings, sexual assault, confinement in inhumane conditions, harassment, humiliation and psychological abuse of Bosnian Muslims, Bosnian Croats and other non-Serbs in the Omarksa and Keraterm Camps. *See* Indictment, paras 15-16, 29.

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.[79] 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.

55. It should also be noted that the SFRY CC contained a limitation provision. Article 95(1)(1) provided for a bar to prosecution after a lapse of twenty-five years from the commission of a criminal act for which the law provides capital punishment or the punishment of imprisonment of 20 years. Offences committed in 1992 in violation of Article 142(1), for example, would not be barred until 2017.

56. In terms of the individual criminal responsibility that the Accused allegedly bear, Chapter 2 of the SFRY CC, entitled Criminal Conduct and Criminal Liability, contained provisions which appear to address the various modes of liability charged against the Accused. These provisions include Articles 11 (Criminal Liability), 13 (Intent),[80] 14 (Negligence), 18 (Preparation), 19 (Attempt), 22 (Complicty), 23 (Incitement), 24 (Aiding), 25 (The Limits of Responsibility and Punishability of Accomplices, Inciters and Aiders), 26 (Criminal Responsibility and Punishability of the Organisers of Criminal Associations), and 30 (The Mode of Commission of a Criminal Acts).

57. In its decision on referral under Rule 11 *bis* in *Prosecutor v. Mitar Rašević and Savo Todović*, the Referral Bench considered whether there were provisions in the SFRY CC in 1992 which were comparable in effect to Article 7(3) of the Statute with respect to command responsibility.[81] It was concluded that, while there were provisions in the SFRY CC which appeared to address most of the field covered by Article 7(3), it was uncertain whether the SFRY CC would permit the imposition of liability where a commander did not know that a crime had been, or was about to be, committed by persons under his command, but had "reason to know", and yet failed to prevent the offence, or punish the offenders. The current charges against the four Accused are all based on individual criminal responsibility under Article 7(1) of the Statute of the Tribunal, with criminal responsibility pursuant to Article 7(3) also charged against only three of the Accused. Given the factual circumstances alleged in the present case, the Referral Bench does not

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[78] *See infra*, paras 66-67.
[79] SFRY CC, Art. 48(2)(2).
[80] Although the English translation of the title provided by Bosnia and Herzegovina was "Premeditation", the Referral Bench finds, after consultation with the translation unit of the Tribunal, that the more appropriate English translation is "Intent".
[81] *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-PT, partly confidential "Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II", 8 July 2005, paras 50-51.

regard this possible and limited difference in the law as an obstacle to the referral proposed by the Motion.

(b) BiH CC

58. The BiH CC entered into force on 1 March 2003 and proscribes crimes against humanity under Article 172 and war crimes against civilians under Article 173. If the BiH CC were to apply, it would provide apparent coverage of all 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:
>
> (a) Depriving another person of his life (murder);
>
> ...
>
> (h) Persecutions against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
>
> ...
>
> (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) killings... inhuman treatment ... immense suffering or violation of bodily integrity or health;
>
> ....
>
> shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

59. Long-term imprisonment is defined under Article 42(2) as being a term of twenty to forty-five years. This would constitute the maximum authorized 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.[82] The limitation period for an offence for which a punishment of long-term imprisonment is authorised is thirty-five years.[83]

60. The modes of criminal responsibility, as set out in Article 180 of the BiH CC, are similar to that of Article 7(3) of the Statute.

In pertinent part, Article 180 provides:

> Article 180 (Individual Criminal Responsibility)
>
> (1) A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against humanity), 173 (War Crimes Against Civilians), 174 (War Crimes against the Wounded and Sick)....shall be personally responsible for the criminal offence...
>
> (2) The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof...

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

> Article 3 (Principle of Legality)
>
> (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 (Time Constraints Regarding Applicability)
>
> (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 (Trial and Punishment For Criminal Offences Pursuant to the General Principles of International Law)
>
> 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.

62. 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 to determine if the case is referred. If Article 4a is applied retroactively,

[82] BiH CC, Art. 53(2)(b).
[83] *Id*, at Art. 14(1)(a).

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 which has found persecution,[84] wilful killing and murder,[85] and inhumane acts and cruel treatment,[86] to be crimes under international law, whether committed in international or non-international armed conflict, at the time relevant to the Indictment. With respect to command responsibility, there is also relevant case-law of this Tribunal which has confirmed that command responsibility was part of customary international law in its application to war crimes committed in the course of an internal armed conflict at the time relevant to the Indictment.[87]

3. Conclusion

63. 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 this Bench has 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 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 most, if not all, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure.[88]

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[84] *See, e.g., Prosecutor v. Blaskić*, Case No. IT-95-14-T, "Judgement", 3 Mar. 2000, paras 218-233; *Prosecutor v. Blaskić*, Case No. IT-95-14-A, "Judgement", 29 July 2004, paras 129-160. *See also Prosecutor v. Tadić*, Case No. IT-94-1-AR 72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 Oct. 1995 ("Tadić Jurisdiction Decision"), para. 141 (in which the Appeals Chamber states "Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all"); *Prosecutor v. Tadić*, Case No. IT-94-1-T, "Judgement", 7 May 1997, paras 618-623 (in which the Trial Chamber discusses the customary status of the prohibition against crimes against humanity, and states that such a finding is implicit in the Tadić Jurisdiction Decision), 694-697, 707 (in which the Trial Chamber states that persecution, can "take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element").

[85] *See, e.g., Prosecutor v. Delalić, et al.*, Case No. IT-96-21-T, "Judgement", 16 Nov. 1998, paras 420-425, 431-439; *Prosecutor v. Delalić, et al.*, Case No. IT-96-21-A, "Judgement, 20 Feb. 2001, paras 419-426.

[86] *See, e.g., Prosecutor v. Delalić, et al.*, Appeals Chamber Judgement, 20 Feb. 2001, paras 419-426. *See also Prosecutor v. Jelisić et al.*, Case No. IT-95-10-T, "Judgement", 14 Dec. 1999, paras 34, 51-52 (in which the Trial Chamber stated that the "notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning").

[87] *See Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibilty", 16 July 2003, para. 31.

[88] *See infra*, paras 66-67.

E. Non-Imposition of the Death Penalty and Fair Trial

64. Rule 11 *bis* (B) of the Rules requires that the Referral Bench be satisfied that the death penalty will not be imposed or carried out, and an accused will receive a fair trial if a case is to be referred.

1. Non-Imposition of Death Penalty

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

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

67. 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 Protocol 13 to the ECHR.

2. Fair Trial

68. The Referral Bench considers that, for present purposes, it can be accepted that the requirement of a fair criminal trial includes the following:[89]

> 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 be tried without undue delay.
>
> 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 in his presence, and to defend himself in person or through legal assistance of his own choosing.

[89] *See, e.g.*, Statute, Art. 21; International Covenant on Civil and Political Rights (1996) ("ICCPR"), Art. 14; ECHR, Art. 6.

> 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.

a. General Fair Trial Considerations

69. In comparing these requirements of a fair trial with those provided under the laws of Bosnia and Herzegovina, the Constitution of Bosnia and Herzegovina ("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.[90] The enjoyment of these rights are secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[91]

70. In furtherance of the guarantees provided in the BiH Constitution, Criminal Procedure Code of Bosnia and Herzegovina ("BiH CPC") makes the following more detailed provisions.

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

72. Article 3(1) of the BiH CPC and Article 33 of the Law on the Court of Bosnia and Herzegovina ("BiH Law on the State Court") codify the presumption of innocence of an accused.

73. 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 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.

74. 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

[90] BiH Constitution, Art. II.3(e).
[91] *Id.*, at Art. II.4.

circumstances. Law enforcement officials have a duty to inform a suspect of these rights to counsel.

75. Article 13 of the BiH CPC guarantees the right to be brought before the State Court in the shortest reasonable time period and to be tried without delay.

76. 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.

77. Article 78(2)(a) of the BiH CPC and Article 34(4) of the BiH Law on the State Court forbid a compelled confession or any other compelled statement from a suspect or accused.

78. 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.

79. Furthermore, Bosnia and Herzegovina is bound as a party by the ECHR and the ICCPR, of which in particular Article 6 and Article 14, respectively, guarantee a fair trial and an independent and impartial tribunal established by law.

80. 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,[92] 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.[93] This monitoring mechanism enables a measure of continuing oversight over trial proceedings should a case be referred.[94]

81. As a general matter to the question of fair trial, 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. Since there have been no cases referred from the Tribunal to the authorities of Bosnia and Herzegovina which have yet been tried,[95] there is no basis upon which this issue can be evaluated by reference to past actual experience. The Referral 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. This observation is unaffected by the 2003 Report of "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina:

[92] Rule 11 *bis* (D)(iv).
[93] Rule 11 *bis* (F).
[94] *Infra*, paras 134-135.
[95] *See Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, partly confidential and *ex parte* "Decision on Referral of Case Under Rule 11 *bis*", 17 May 2005.

Progress and Obstacles" published by the Organisation for Security and Cooperation in Europe Mission to Bosnia and Herzegovina ("OSCE Report"). The Referral Bench notes that its focus is on the obstacles faced by the judiciary, until recently, *within* the entities of Bosnia and Herzegovina in hearing war crime cases, but does not comment on the functioning of the newly created War Crimes Chamber of the State Court. Further in this context, the OSCE Report submits that the ultimate success for prosecuting war crimes in Bosnia and Herzegovina will depend upon, *inter alia*, an effective War Crimes Chamber of the State Court.[96]

82. Nonetheless, since the Defence raises specific matters regarding the question of whether the Accused will receive a fair trial if their case is referred, the Referral Bench shall address them in subsection (b) below. The Referral Bench had some difficulty following some of the Defence submissions due to inconsistencies and inaccurate citations and representations of the law of Bosnia and Herzegovina. However, the main issues that appeared to be raised are discussed under the headings: Composition of the State Court; Indictment before the State Court; Materials from the Tribunal's Cases before the State Court; Witnesses Before the State Court-Delay; Detention of the Accused; Right to Counsel of Accused's Own Choosing; and Readiness for Trial to Commence at the Tribunal.

b. Specific Fair Trial Considerations

i. Composition of the State Court

83. The Defence argues that there is no legal guarantee of an impartial and independent court in Bosnia and Herzegovina able to try war crimes cases. The basis of the Defence argument is that the conflict in Bosnia and Herzegovina has affected all citizens of Bosnia and Herzegovina and that the mechanism for the election of judges does not provide for the selection of judges who were not victims of war crimes and are able to be impartial.[97] The Prosecutor and Bosnia and Herzegovina disagree.[98]

84. The State Court contains a Criminal Division comprising of at least ten judges, who sit in panels or chambers.[99] The 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

[96] The OSCE Report reads "The ultimate success of the process of prosecuting war crimes will be not only dependent upon the effectiveness of the new War Crimes Chamber, but also on the ability of the cantonal and district courts to fulfil their role in handling the majority of war crimes cases". OSCE Report, p. 51.
[97] Initial Response, paras 33-34; Second Joint Submission, para. 77; Hearing 3-4 March 2005, T. 156-157, 180-181.
[98] Prosecutor's Submission, para. 28; Hearing 3-4 March 2005, T. 213-214, 219.
[99] Law on the State Court, Art. 23. *See* BiH Official Gazette, 42/03, Art. 6.

Court, which is comprised of members of the Constitutional Court of Bosnia and Herzegovina, the Supreme Court of the Federation of Bosnia and Herzegovina and the Supreme Court of the Republika Srpska.[100]

85. The composition of the State Court takes on an international dimension within the Criminal Division. This Division consists of three Chambers, one of which is designated for War Crimes.[101] During a transitional period not to exceed five years, two of the three Chambers, one of which is the War Crimes Chamber, must be composed of both national and international judges.[102]

86. In addition to the process of electing judges of the State Court described in the foregoing, a process clearly designed to ensure the impartiality and independence of the judges, the laws of Bosnia and Herzegovina have provisions for the disqualification of a judge who is unable to perform his or her professional duties.[103] The reasons for disqualification include, *inter alia*, circumstances which "raise a reasonable suspicion as to his impartiality."[104] The recusal of a judge can be brought at the initiation of the judge himself or the parties.[105]

87. Therefore, the Referral Bench finds no merit in the claim that there are no legal guarantees for the Accused to stand before an impartial and independent court if tried by the State Court.

ii. Indictment Before the State Court- Delay

88. The Defence argues that unfair prejudice and undue delay would arise because the Prosecutor of the State Court has an "unfettered right to amend the Indictment of the ICTY" by adding charges and defendants, and that the Prosecutor may do so even during trial.[106] The Prosecutor and Bosnia and Herzegovina disagree.[107]

89. As a general matter, the Referral Bench understands that the adaptation of the Indictment is required by the procedure in the BiH Law on Transfer. 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

[100] *Id.*, at Arts 4-5.
[101] *Id.*, at Art. 24(1). *See* BiH Official Gazette, No. 61/04, Art. 8.
[102] *Id.*, at Art. 65(2). *See* BiH Official Gazette, No. 61/04, Arts 8, 17.
[103] *Id.*, at Art. 39; BiH CPC, Art. 29-33.
[104] BiH CPC, Art. 29.
[105] BiH CPC, Art. 30; Law on the State Court, Art. 30.
[106] Initial Response, paras 37, 40; Mejakić Defence Submission, pp. 9 -11; First Joint Defence Submission pp. 14-15; Second Joint Defence Response, paras 89, 94, 96-97; Hearing of 3-4 March 2005, T. 157-158.
[107] Prosecutor's Submission, para. 28; First BiH Submission, pp. 9-11.

> 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, particularly in light of the submission of Bosnia and Herzegovina that "as a general matter, the BiH Prosecutor will use the indictment prepared by the ICTY with only such formal changes as are necessary to bring the indictment into conformity with BiH procedural law" and that the "BiH Prosecutor would be bound to adapt the ICTY indictment and file the adapted indictment with the Court of BiH as soon as reasonably practicable".[108]

90. With respect to the addition of new charges or accused, nothing before the Referral Bench indicates that new charges and accused would be added to the indictment before the State Court. The Referral Bench is certainly aware that the Prosecutor may do so pursuant to Article 2(2) of the BIH Law on Transfer. However, even if that were to be the case, in discharging his duty, the reviewing judge must "examine each count in the indictment and materials submitted by the Prosecutor in order to establish grounded suspicion," within 8 days of receipt of the indictment.[109] This is similar in essence to the procedure before the Tribunal.[110]

91. The Defence submits that Article 275 of the BiH CPC, allows the Prosecutor to amend the Indictment at will during the trial stage.[111] Article 275 provides:

> Article 275 (Amendment of the Indictment)
>
> If the Prosecutor evaluates that the presented evidence indicates a change of the facts presented in the indictment, the Prosecutor may amend the indictment at the main trial. The main trial may be postponed in order to give adequate time for preparation of the defence. In this case, the indictment shall not be confirmed.

Whether the Prosecutor can amend an indictment at will, or only at the commencement of the trial, and whether leave of the court is required, are matters which have not yet been considered by the War Crimes Chamber of the State Court. Whatever may be the procedural position, it is clear from Article 275 that the court is required to allow adequate time, after amendment, for preparation of the defence. Further, it must be remembered that in this Tribunal, an indictment may be amended with leave at any stage of a trial.[112] A procedural provision which allows amendment of an indictment, if the need arises during the development of the evidence in a trial, does not of itself lead to unfairness of the trial.

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[108] First BiH Submission, pp. 12, 14.
[109] BiH CPC, Arts 227- 228.
[110] *See* Rule 47 of the Rules.
[111] Mejakić Defence Submission, p. 10 (incorrectly cites Article 290 of the BiH CPC); First Joint Defence Submission, para. 96.
[112] Once an Indictment has been confirmed by the reviewing judge and the case of an accused is before a Trial Chamber, further confirmation is not required where an indictment is amended by leave. *See* Rule 50 (A) of the Rules.

iii. Materials from the Tribunal's Cases Before the State Court

92. The Defence submits that the discretion of the State Court to admit materials from other cases of the Tribunal, such as judgements, statements, and depositions, may be detrimental as it may hinder the ability of the Accused to defend themselves.[113] Related to the State Court's ability to admit such materials, the Defence submits that the non-binding nature of Tribunal decisions, in particular the Trial Chamber's judicial notice decision in this case on adjudicated facts, causes unfair prejudice and undue delay to the Accused.[114] The Prosecutor and Bosnia and Herzegovina disagree.[115]

93. While these submission are not altogether clear to the Referral Bench, it understands that the Defence submissions relate to its concerns over Articles 3, 4, and 5 of the BiH Law on Transfer which provides:

> Article 3 (General Principle)
>
> (1) Evidence collected in accordance with the ICTY Statute and [Rules] may be used in proceedings before the court in BiH.
>
> (2) The courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial.
>
> Article 4 (Facts Established by Legally Binding Decisions by the ICTY)
>
> At the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept as documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.
>
> Article 5 (Evidence Provided to ICTY by Witnesses)
>
> (1) Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY [Rules], shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.
>
> (2) The courts may exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value;
>
> (3) Nothing in this provision shall prejudice the defendant's right to request the attendance of witnesses as referred to in Paragraph 1 of this Article for the purpose of cross-examination. The decision on the request shall be made by the court.

[113] Mejakić Defence Submission, pp. 10-11; Second Joint Defence Response, paras 78-80, 83-86, 101-102; Hearing of 3-4 March 2005, T. 159.
[114] Initial Response, paras 42-43; Mejakić Defence Submission, pp. 10-11; First Joint Defence Submission, p. 17; Second Joint Defence Response, paras 78, 81-82; Hearing of 3-4 March 2005, T. 159, 192. *See* "Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94 (B)", 1 April 2004.
[115] Prosecutor's Submission, para. 30; First BiH Submission, pp. 6-9; Hearing of 3-4 March 2005, T. 193.

94. There is no support to be found in the Defence submission for the proposition that the discretion of the State Court to admit materials from the Tribunal's cases would hinder the ability of the Accused to defend themselves.[116] Article 3 of the BiH Law on Transfer, entitled "General Principle" is, just as its title indicates, a general principle providing that "evidence collected in accordance with the ICTY Statute and [Rules] may be used in proceedings before the courts in BiH". Article 5 of the BiH Law on Transfer, entitled "Evidence Provided to ICTY by Witnesses", is a provision for the admission of transcripts from ICTY trial proceedings and depositions taken in accordance with Rule 71 of the Rules provided that the evidence is relevant to a fact in issue. The Tribunal has provisions within its own Rules providing for similar procedures.[117] In Article 5 of the BiH Law on Transfer, paragraphs 2 and 3 explicitly provide that the court may exclude evidence given by a witness with protective measures where its probative value is outweighed by its prejudicial value and that nothing in the provision shall prejudice the Accused's right to request the attendance of witnesses for the purpose of cross examination. There is nothing to suggest that the Accused ability to defence themselves will be hindered pursuant to Article 5 of the BiH Law on Transfer.

95. The effect of Article 4 of the BiH Law on Transfer is essentially the same as Rule 94 of the Rules of this Tribunal.[118] Any exercise of discretion by the State Court to accept as proven facts established by an earlier decision of this Tribunal is explicitly required to be made only after the parties have been heard. It is true, as the Defence submits, that Article 4 does not compel the State Court to accept and apply the decision of the Trial Chamber of this Tribunal in this case concerning previously adjudicated facts. Rather, Article 4 empowers the State Court to apply that decision but requires that the parties are heard before a decision is made to do so. It appears to the Referral Bench that this provision is fair and appropriate. It ensures that any concerns of the Defence can be considered by the State Court when it reaches its decision whether or not to apply the adjudicated facts decision of this Tribunal. This provides a means by which the interests of the Defence are duly protected.

96. With respect to the submission of the Defence regarding the materials from the Tribunal's case, the Referral Bench observes that the Defence appears to be implying that the provisions of the law of Bosnia and Herzegovina would allow the State Court to reject all materials favourable to the

[116] Second Joint Defence Response, paras 78-81, 102; Mejakić Defence Submission, pp. 10-11.
[117] Rule 92 *bis*(D) of the Rules provides that the Trial Chamber may admit transcripts from other proceedings before the Tribunal, while Rule 90 of the Rules provides that Trial Chamber may order a deposition be taken for use at trial.
[118] Rule 94 of the Rules provides:
(1) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
(2) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

Defence. If this is its submissions, the Defence wrongly perceives the provision. These are neutral provisions, which can be invoked by both parties. The final determination lies with the State Court, which must balance the interests of both Prosecution and Defence.

iv. Witnesses Before the State Court

97. The Defence submits that (i) Articles 11, 12, 13, 19, 21 and 22 of the Law on Protection of Vulnerable Witnesses Under Threat ("Vulnerable Witness Protection Law") would deny the right of the Accused to examine witnesses against him; (ii) the protective measures available to Defence witnesses in the State Court are inadequate; and (iii) the Defence will not be able to secure the attendance of some witnesses because there are no safe-conduct guarantees, in particular, for witnesses within Bosnia and Herzegovina.[119] The Prosecutor and Bosnia and Herzegovina disagree.[120]

98. The issue of witness availability at trial is discussed within the context of an accused's 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. These witness availability issues may be resolved by mutual assistance arrangements. It is this context that the Referral Bench deals with the concerns raised by the Defence.

99. The Referral Bench does not view Articles 11, 12, 13, 19, 21, and 22 of the Vulnerable Witness Protection Law as infringing upon the rights of the Accused so as to prevent a referral.

100. Article 11 does not limit the rights of the Accused to examine the witness, but it provides, as an exception, that a protected witness under specific circumstances need not personally appear at the public hearing. However, Article 11 allows for cross examination in such a case by other measures such as an *in camera* proceeding. Article 12 is a provision for protective measures regarding the identity of a witness. Such protective measures also exist in the Tribunal and, as in the practice of the Tribunal, paragraph (8) of the same Article provides that "sufficient details shall be released for the defence to prepare examination of a witness." Article 13 provides for measures protecting the witness from public identification and consequential risks, and there is nothing to suggest that the provisions would operate to infringe upon the rights of the accused to examine a witness.

[119] Initial Response, paras 50-58; Mejakić Defence Submission, pp. 7-8; First Joint Defence Submission, pp. 11-13; Second Joint Defence Submission, paras 40-48, 50-51; Final Joint Defence Submission, paras 2, 6-14; Hearing of 3-4 March 2005, T. 159-160, 179, 181-183, 190-191, 217-218, 234, 240, 268, 274-275, 277.
[120] Hearing of 3-4 March 2005, T. 217-218, 234, 240, 268.

101. Articles 19, 21, and 22 concern a type of proceeding, described as a 'witness protection hearing', which is conducted in the absence of the parties. Only the witness, the Court and minute taker are present.[121] Thereafter, the record of the proceeding is read at the main trial and if there are any additional questions for the witness, upon motion by the parties or *ex officio* by the Court, they may be asked in a further witness protection hearing.[122] The circumstances in which such a hearing is held are limited; they are exceptional and where there is a "manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony".[123] It is clear that the hearing is intended to provide adequate protection for a particular group of witnesses.[124] Further, there is nothing in these provisions that would deny the right of the Accused to examine witnesses; the provisions specifically allow additional questions to be posed.

102. With respect to the ability of the Defence to obtain the attendance of witnesses on behalf of the Accused, the Referral Bench notes that interstate mutual assistance issues arise with respect to promoting the attendance of witnesses or securing evidence from outside Bosnia and Herzegovina. As the Defence expects that a number of its witnesses reside in Serbia and Montenegro, it is significant that Bosnia and Herzegovina ratified the European Convention on Mutual Assistance in Criminal Matters ("ECMACM") in March 2005.[125] Serbia and Montenegro is also a party to the Convention, so the legal means now exist to facilitate the appearance of witnesses residing in Serbia and Montenegro for trial in Bosnia and Herzegovina, either through travel or by other means such as letters rogatory.

103. For witnesses residing in Bosnia and Herzegovina, including Republika Srpska, attendance to give evidence when summoned 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.[126] This national direct enforcement mechanism exists without regard to whether the witness is at risk of arrest for personal criminal activity. To the extent that Defence witnesses residing in Bosnia and Herzegovina may fail to appear because of a (perceived) risk of arrest, the issue may be entirely hypothetical. The Defence merely contends that potential witnesses may be reluctant to give evidence if called. In any event, any disadvantage to the

[121] Vulnerable Witness Protection Law, Art. 19.
[122] *Id.*, at Arts 21-22.
[123] *Id.*, at Art. 14.
[124] *Id.*, at Arts 14-15.
[125] BiH Official Gazette, International Agreements, No. 3/05.
[126] BiH Official Gazette, No. 3/03.

Accused by virtue of this national procedure, which reflects a generally accepted direct enforcement mechanism for ensuring the presence at trial of a witness, cannot be properly regarded as prejudicial to the right to a fair trial.

104. The Defence claims a need for safe conduct of witnesses. The claim was made in regard to witnesses from Serbia and Montenegro at a time when the Defence was under the impression that Bosnia and Herzegovina had not ratified the ECMACM.[127] The ratification in 2005 has removed the basis for this concern. It is submitted by the Defence that without safe conduct, a witness could be at risk of arrest. The submission, however, wrongly presumes the applicability of the safe conduct mechanism in the context of witness production within 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 in 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. An accused may prefer trial in an international forum for the perceived advantage of promoting the presence of reluctant witnesses by virtue of the safe conduct mechanism.[128] 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 witnesses on his or her behalf is given effect.

105. Finally, the Referral Bench does not agree with the Defence implication that the protective measures available for Defence witnesses in the State Court are inadequate.[129] There are provisions in the Witness Protection Programme Law of Bosnia and Herzegovina, which provide for protective measures outside the courtroom, such as change of identity or issuance of cover documents.[130] The Vulnerable Witnesses Protection Law further contains the provisions which have been described in the preceding paragraphs.[131] These include, *inter alia*, the use of a pseudonym for a witness both inside and outside of court.[132] Pursuant to Article 267(4) of the BiH CPC, either party may request

[127] Hearing of 3-4 March 2005, T. 159-160, 179, 181-183.
[128] Even before this Tribunal, the safe conduct mechanism may not eliminate the reluctance of witnesses to appear who fear exposure to risk of prosecution.
[129] Mejakić Defence Submission, p. 8; Initial Joint Defence Submission, p.11; Second Joint Defence Submission, para. 50; Hearing of 3-4 March 2005, T. 159-160, 181-182.
[130] BiH Official Gazette, No. 29/04, Art. 7.
[131] *Supra*, paras 100-101.
[132] BiH Official Gazette, No. 21/03, 61/04, Art. 6 *et seq.*

an order for such protective measures. From what has been submitted, the Referral Bench is satisfied that the Registry of the War Crimes Chamber of the State Court will take responsibility for the administration and provision of support services to the War Crimes Chamber. This includes the organisation and coordination of activities related to witness protection during the transitional period.[133]

106. The submissions of the Defence concerning the reluctance of its witnesses to testify, due to their negative perception of the witness protective measures available, are unsubstantiated and may prove to be entirely hypothetical. The Referral Bench finds that this is not a factor to be considered for purposes of a review under Rule 11 *bis*. Adequate witness protective measures exist and the Referral Bench finds that there is no reason to believe that such perceptions, if they exist, will not adapt to the present situation.

v. Detention of the Accused

107. With respect to the detention of the Accused in Bosnia and Herzegovina, the Defence argues that the "sorely inadequate general prison system in BiH" and the lack of a special prison facility for those accused of war crimes that would protect the Accused, being Serbs, from victimisation, should be a bar to a referral.[134] Also, the Defence submits that there is injustice compared to others before the State Court in that the period of detention of the Accused at the UNDU will not be considered in Bosnia and Herzegovina.[135] The Prosecutor and Bosnia and Herzegovina disagree.[136]

108. There is no factual support offered for the Defence's general submission that the "sorely inadequate general prison system in BiH" and the lack of a prison for those accused of war crimes should be a bar to a referral.[137] A high security detention unit has been established and that it is expected to be in operation under the guidance of international experts.[138] In addition, detainee and prisoner treatment is appropriately regulated by statute.[139]

109. The Defence submission that there is injustice in comparison to others before the court of Bosnia and Herzegovina, because the period of detention of the Accused at the UNDU will not be

[133] BiH Official Gazette, No. 11/04.
[134] Initial Response, para. 61; Second Joint Defence Submission, para. 53; Hearing 3-4 March, T. 273-274.
[135] Initial Response, para. 46; First Joint Defence Submission, p. 18; Second Joint Defence Submission, paras 104-105; Hearing of 3-4 March 2005, T. 158, 160-161.
[136] Prosecutor's Submission, para. 31; First BiH Submission, pp. 4, 14.
[137] Second Joint Defence Submission, para. 53.
[138] First BiH Submissions, p. 4; Submission from the Office of Registry for Organised Crime and War Crimes, 25 Feb. 2001.
[139] Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures.

considered in Bosnia and Herzegovina, is not an issue which prevents a referral.[140] The law of Bosnia and Herzegovina provides that the maximum period of pre-trial and trial detention will not exceed one and half years.[141] There is no similar limit, however, on the time spent in detention if tried before the Tribunal. The Accused, therefore, suggests that if the case is referred they will be disadvantaged by comparison with those who have been in pre-trial detention in Bosnia and Herzegovina. This is a misleading comparison. The relevant issue is whether the Accused will suffer a disadvantage, if the case is referred, by comparison with the position if the case is not referred. If the case is not referred there is no limit on the time spent in detention. It should also be noted that Article 2 of the BiH Law on Transfer provides that time spent in custody at the ICTY shall be considered in the determination of sentence so that the time spent in pre-trial detention in The Hague is not ignored.

vi. Right to Counsel of Accused's Own Choosing

110. The Defence argues that referral of the case would "prevent current counsel from representing the Accused and thus would deny the Accused the right to effective and competent counsel of his choosing".[142] In doing so, the Defence argues that (i) not all of present defence counsel will be able to practice before the State Court since they do not have a licence to do so; (ii) the lack of a remuneration system for counsel for indigent accused will result in an ineffective representation; and (iii) any newly appointed counsel would be unable to prepare the case in light of the preparation of the present defence counsel.[143] The Prosecutor and Bosnia and Herzegovina disagree.[144]

111. The right of an Accused to counsel of his or her own choosing is not without limitation, even before this Tribunal.[145] The right to counsel of one's own choosing extends only to counsel who are entitled to appear before the court of trial; the accused must confine his or her choice accordingly. This is so even where an accused engages his or her own counsel. The right to publicly paid counsel of one's own choice is also limited.[146] This does not, however, mean that an

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[140] Second Joint Defence Submission, para. 104-105, and First Joint Defence Submission, p. 18.
[141] BiH CPC, Arts 135, 137.
[142] Second Joint Defence Submission, p. 3.
[143] Initial Response, para. 47-48; Mejakić Defence Submission, p. 11-13; Second Joint Defence Submission, paras 3-17; Hearing of 3-4 March 2005, T. 151, 158-159, 188, 275-276.
[144] Prosecutor's Submission, para. 32; First BiH Submission, p. 13.
[145] *See* Statute of the Tribunal, Art. 21; Rules of Procedure and Evidence, Rules 44-46.
[146] *See Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, "President of the Tribunal Decision on Assignment of Defence Counsel", 13 Aug 2003, para. 20; *Prosecutor v. Knežević et al.*, Case No. IT-95-4-PT & IT-95-8/1-PT, "Trial Chamber Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel", 6 Sep 2002, p. 3; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, "Trial Chamber Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-counsel", 3 Jul 2003, paras 74-75; *Prosecutor v. Blagojević*, Case No. IT- 02-60-AR73.4, "Public and Redacted Reasons for Decision on Appeal by

indigent accused is without effective representation by counsel. Both the Statute of the Tribunal and the BiH CPC provide for assignment of counsel where an accused has insufficient means to pay. Article 7(1) of the BiH CPC provides than an accused "has a right to present his own defence or to defend himself with the professional aid of a defence attorney of his own choice", a right which is reiterated in Article 36(3) of the BiH Law on the State Court. Further, an accused is charged with a criminal offence for which a prison sentence of ten years or more may be adjudged, then representation by counsel is mandatory in accordance with Article 45(3) of the BiH CPC. If an accused cannot pay for counsel, he or she will be asked to select counsel from a list maintained by the State Court. If no selection is made, one will be appointed by the State Court.[147] This system is similar to the one applied at this Tribunal.

112. The Referral Bench does not agree with the Defence argument that referral of the case would prevent current counsel from representing the Accused, given the provision under the BiH Law on the State Court which permits the special admission of attorneys to appear before it even though not licensed to practice in Bosnia and Herzegovina.[148] A positive effect can be expected, also in view of the very recent amendments to the State Court's rules of procedure to grant special permission for defence counsel to appear before the State Court if they previously appeared before the Tribunal in a case that has been transferred pursuant to Rule 11 *bis*.[149] It is clear that an avenue exists for the present counsel to continue representation and receive remuneration for their efforts.[150] Even if the present counsel did not continue to represent the Accused in Bosnia and Herzegovina, the Accused would not be denied counsel.

113. Finally, just as the Prosecutor must provide to the authorities of Bosnia and Herzegovina all information relating to the case which she considers appropriate, particularly the material which supports the Indictment, pursuant to Rule 11 *bis* (D)(iii), there is nothing that prevents current defence counsel from doing the same even if they were no longer to represent the Accused. It is not apparent, in this hypothetical situation, why present defence counsel would not efficiently pass to the new attorney the work product of the case.

Vidoje Blagojević to Replace his Defence Team", 7 Nov. 03; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.1, "Appeals Chamber Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel", 24 Nov 2004, para. 19; *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR73.1, "Appeals Chamber Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić", 6 Oct 2004, para. 8.

[147] BiH CPC, Art. 45(6).

[148] BiH Law on the State Court, Art. 12(2).

[149] The amendments to the State's Court's rules of procedures were adopted on 30 June 2005 but, at the time of writing, they had not yet entered into force.

[150] For the 2005 budget allocations for legal aid and international defence consultants, see the Submission from the Office of Registry for Organised Crime and War Crimes, 25 Feb. 2005.

vii. Readiness for Trial to Commence at the Tribunal

114. The Defence submits that undue delay would arise since the trial against the Accused is ready to commence at the Tribunal.[151] The Prosecutor has made no direct submission with respect to this issue.

115. The Referral Bench is aware that pre-trial proceedings are well advanced. However, there is a distinction between the date of readiness for trial and the date on which the case can be listed for hearing, given the number of cases presently awaiting trial and the many competing considerations which will influence when a trial actually commences. In this respect, there can be no confidence that the trial of this case would commence immediately, or in the near future, should the case remain at the Tribunal.

116. Moreover, 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. 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.

3. Conclusion

117. The Referral Bench is satisfied that the death penalty will not be imposed or carried out and that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina are generally comparable with the fair trial guarantees provided in Article 21 of the Statute.

F. Application of Rule 11 *bis* in light of Rule 6 (D) of the Rules

1. Submission

118. The Defence argues that the use of Rule 11 *bis* to refer these Accused to Bosnia and Herzegovina would prejudice their rights and so be contrary to Rule 6(D) of the Rules.[152] The Prosecutor submits that there is "no evidence that the rights of the accused will be prejudiced, or that the State Court will be less reliable and exhibit less due process guarantees than the ICTY".[153]

[151] Initial Response, paras 3-4, 24. *See* Hearing of 3-4 March 2005, T. 157-159, 273.
[152] Initial Response, para. 25; Second Joint Defence Submission, p. 35; Final Joint Defence Submission, paras 4, 14; Hearing of 3-4 March 2005, T. 174-175, 272.
[153] Prosecutor's Submission, para. 27; Hearings of 3-4 March 2005, T. 197, 267.

2. Discussion

119. Rule 6(D) of the Rules provides:[154]

> An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.

120. The Defence submission is advanced on the basis that the amendment to the rules, by which provision is now made for the procedure allowing referral of this case to a national court, would operate to prejudice the rights of these Accused in this pending case were referral ordered pursuant to Rule 11 *bis*.

121. The submissions of the parties did not give attention to the meaning and scope of Rule 6(D), nor did the submissions of the Accused identify what "rights", within the meaning of the Rule, it was contended would be prejudiced in the event that referral were ordered. [155]

122. It does not appear necessary to exhaustively analyse Rule 6(D) in all its possible applications, nor to examine some of the assumptions underlying the Defence submissions, to deal with the present Motion. The purpose of the Rule may be sufficiently described for present purposes as being to ensure that amendments to the Rules do not operate so as to prejudice the existing rights of the accused in a pending case.

123. The context of the Rule indicates that the "rights" contemplated are confined, at least, to those rights to which an accused, or a convicted or acquitted person, in a pending case has a legal

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[154] Rule 6(C) of the Criminal Tribunal for Rwanda is similar to that of Rule 6(D) of the Rules in that, although it provides that an amendment should enter into force immediately, it provides that an amendment "shall not operate to prejudice the rights of the accused in any pending case." In speaking to the application of an enactment in light of Rule 6(C) , the Appeals Chamber wrote:

> It is true that a provision stipulating that a statute is to commence at a certain time does not necessarily mean that the statute is to govern previous conduct into which an inquiry is pending at that time. But it depends on the language of the commencement provision. Here there is one commencement provision; it applies to amendments of all kinds. Therefore, every amendment enters into force "immediately", *i.e.*, whether substantive or procedural, it applies to all cases of which the Tribunal is then or may in future be seised, the sole qualification being that the amendment, of whatever kind, must not "operate to prejudice the rights of the accused in any pending case". So, the real and only question under the Rules, as they have been crafted, is whether the new amendment to Rule 15*bis* will operate to prejudice the rights of the Appellants.

"Decision in the Matter of Proceedings Under Rule 15bis (D)", *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15 *bis*, 24 Sept. 2003, para. 14.

[155] The Referral Bench found the following in its review of the Defence submissions: a general comment to the prohibition against *ex post facto* legislation without explicit reference to Rule 6(D) in the Initial Response; no reference in the First Joint Defence Response and Mejakić Defence Response; a general statement that Rule 6(D) would apply to "prevent that amendment from gravely impacting and prejudicing the accused" and that Rule 6(D) "requires that these amendments to Rule 11 *bis* cannot worsen the condition of the accused" during the Hearing of 3-4 March 2005; a general reference that application of Rule 11 *bis* would be "contrary to [Article] 6(D)" and that it would "operate to prejudice the rights of these accuseds, insofar as Rule 11 *bis* concerning referral was amended and enacted only **after** they had already surrendered, and proceedings against them had commenced" in the Second Joint Defence Response; and reference to witnesses before the State Court in terms of safe conduct and protective measures in the

entitlement, and do not extend to that wide variety of advantages or benefits which are frequently described as rights, particularly by those seeking to secure them, but to which there is no legal entitlement. Further, while the Rule may be somewhat obscurely expressed in its reference to the rights of a convicted or acquitted person in a pending case, this would appear to extend, for example, to those persons whose case is the subject of a pending appeal or who might seek review under Rule 119.

124. While, in their submissions on this issue, the Accused did not specifically identify any particular right which they contend would be prejudiced by the operation of the amendment, the effect of their submissions suggests that what they contend is:

> (a) they would be denied their "right" to be tried by this Tribunal; and
>
> (b) they would be denied a number of attributes of a fair trial, attributes they would enjoy if the case were tried by this Tribunal, so that their right to a fair trial would be prejudiced. The Referral Bench will consider the submissions on this basis.

125. To the extent that the Accused may claim prejudice to their "right" to be tried by this Tribunal, the Referral Bench considers this claim to be mistaken and unjustified. An accused who has come into the custody of the Tribunal, whether by arrest by a State or voluntary surrender, is subject to the legal powers and jurisdiction of the Tribunal. There is no provision, however, by which an accused has a right to be tried by this Tribunal. Although the Tribunal has primacy over national courts, Article 9 of the Statute specifically provides for concurrent jurisdiction with national courts. When first adopted in 1997, Rule 11 *bis* only provided for referral to a state in which the accused was arrested. In September 2002 the scope of Rule 11 *bis* was widened by providing an option to refer a case to the state in which the crime was committed. On the assumption that in respect of each accused this case was pending in September 2002, the Referral Bench has considered whether the Accused, more specifically Željko Mejakić and Momčilo Gruban, could invoke a right not to have their cases referred to any state other than the state in which they were arrested. While the limited scope of the text initially adopted of Rule 11 *bis* may not have enabled the Tribunal to refer a case to a state which was not the state of arrest, by no means can that be understood as creating an entitlement, *i.e.*, as granting a right to an accused, to be tried only before the Tribunal, or to be exempted from referral by the Tribunal to another state for trial. Both by virtue of the language and the subject matter of the original Rule 11 *bis*, and the amendments to it, in the view of the Referral Bench it is clear that the Rule is concerned to deal with the procedural powers of the Tribunal, rather than to confer rights on an accused.

Final Joint Defence Response. Initial Response, para. 25; Second Joint Defence Submission, p. 35 (emphasis in original); Hearing of 3-4 March 2005, T. 174-175, 272; Final Joint Defence Submission, paras 4, 14.

126. From the viewpoint of an accused, however, there is an entitlement to the due exercise of the Tribunal's powers and jurisdiction. These are set out in the statutory resolutions of the Security Council relating to this Tribunal. Originally, there was an emphasis on trial by the Tribunal. In more recent years, however, further resolutions specifically require this Tribunal to consider referral of some cases to competent national jurisdictions for trial, so that the Tribunal could concentrate on cases of the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction.[156]

127. It must be appreciated, therefore, that by virtue of the statutory resolutions of the Security Council, an accused who is charged before this Tribunal may be tried by this Tribunal, or may be referred to a competent national jurisdiction for trial. It is part of the jurisdiction and power of this Tribunal to determine whether or not an accused should be referred to a competent national jurisdiction for trial, and if so which jurisdiction. It cannot be said, therefore, that an accused has a "right" to be tried by this Tribunal and no other court, or that his surrender or arrest was only for the purpose of trial by this Tribunal. Rule 11 *bis*, under which the present Motion is brought, is consistent with those resolutions of the Security Council which are directed to the completion of the mission of the Tribunal.

128. In other parts of this Decision the Referral Bench considers those matters which it is contended would prejudice the Accused's right to a fair trial. It is more convenient to deal with these in conjunction with other issues and under headings which also provide some indication of the essential point of concern. The Referral Bench has considered whether the conditions necessary for the fairness of a trial would exist, in the event of a referral, not only because of the Accuseds' submissions raising Rule 6(D), but also in the wider context that a decision to refer this case can only be made if the Referral Bench is satisfied that the conditions necessary for a fair trial exist in the national jurisdiction.

129. The Referral Bench notes that a trial in another jurisdiction may very well have practical advantages as well as disadvantages. For an accused, an advantage may include more ready communication with the judges by virtue of the use of a common language, while a disadvantage might be a less convenient means of securing the attendance of a witness. However, there is no legal entitlement for an accused to be free of all such disadvantages, or to be tried where, in the particular case, such disadvantages are expected to be the least, or such advantages the most. While such advantages and disadvantages can be expected to vary between cases, accused and competent jurisdictions, because of many factors including inevitable differences in laws and procedures, these should be distinguished from the rights of an accused within the meaning of Rule

[156] *See supra*, para. 2.

6(D). The relevant entitlement of an accused is to a fair trial. That need not be affected by such disadvantages or advantages.

130. The Referral Bench has also considered matters such as the availability of appellate procedures in the event of referral and the question of the death penalty, which appeared to the Referral Bench to have relevance to the Rule 6(D) issue and also to the wider question of a fair trial. Further to the extent that the submissions may have sought to suggest that a referral may prejudice the Accused's rights by making them available to a jurisdiction to which they would not otherwise have been available, the Referral Bench has considered this issue in the context of its discussion of the law of extradition.[157]

3. Conclusion

131. For the above reasons and those given in preceding sections of this Decision, the Referral Bench is not persuaded that a referral of this case to Bosnia and Herzegovina or to another competent national jurisdiction pursuant to Rule 11 *bis* would prejudice the rights of the Accused within the meaning of Rule 6(D), and is satisfied that Rule 6(D) does not operate to prevent referral of this case.

G. Monitoring of Proceedings

1. Submission

132. The Defence submits that, if the case is referred, observers sent by the Prosecutor to monitor the proceedings in Bosnia and Herzegovina can not be impartial or have an interest to ensure that the hearing is held in a fair manner.[158]

133. 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.[159]

2. Discussion

134. 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. Nevertheless, Rules 11 *bis* (D)(iv) and 11 *bis* (F) serve as precautions against a failure to diligently prosecute a referred case or conduct a fair trial. Rule 11 *bis* (D)(iv) provides for

[157] *See supra*, paras 29-31.
[158] Mejakić Defence Submission, p. 13; First Joint Defence Submission, p. 16; Hearing of 3-4 March 2005, T. 278.
[159] Prosecution's Submissions, para. 24.

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.

135. 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. While there is some 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 an appropriate organisation such as the OSCE. 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. It appears that arrangements have now been made between the Prosecutor and the OSCE for these purposes. The standing of the OSCE and the neutrality of its approach ought to ensure that reports it provides will adequately reflect Defence as well as Prosecution issues. .

3. Conclusion

136. On the assumption that monitoring of the trial of this case, if referred, would be undertaken by the OSCE, or a similar organisation, by arrangement with the Prosecutor, the Referral Bench has no need at this stage to further consider the aspect of the submission concerning impartial and adequate monitoring of this case

V. CONCLUSION

137. 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 will receive a fair trial, and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of the case of *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević* to the authorities of Bosnia and Herzegovina should be ordered.

VI. DISPOSITION

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

PURSUANT to Rules 11 *bis* of the Rules;

HEREBY GRANTS the Motion and **ORDERS** that the case of *Prosecutor v. Željko Mejakić,, Momčilo Gruban, Dušan Fuštar and Duško Knežević* 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, *i.e.*, the State 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 to determine whether different provision should be made for the purposes of the trial of this case in Bosnia and Herzegovina;

ORDERS the Registrar of the Tribunal to arrange for transport of each of the Accused and their 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 in the case has become final, the material supporting the Indictment against that Accused, and all other appropriate evidentiary material;

ORDERS the Prosecutor to continue its efforts in cooperation with the Organization for Security and Cooperation in Europe, or another international organisation of notable standing, to ensure the monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina. If arrangements for monitoring and reporting should prove ineffective, 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 any reports received by the Prosecutor from the international organisation monitoring or reporting on the proceedings;

AND FINALLY ORDERS that the protective measures granted to victims and witness as set forth in the confidential Annex are to remain in force and that requests for protective measures pending before this Tribunal should be re-submitted to the State Court of Bosnia and Herzegovina for determination.

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

Presiding
Judge Alphons Orie

Dated this twentieth of July 2005
At The Hague
The Netherlands

[Seal of the Tribunal]