IT-04-78-PT
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14 September 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 Former Yugoslavia since 1991

Case No.: IT-04-78-PT
Date: 14th September 2005
Original: English

IN THE REFERRAL BENCH

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

Registrar: **Mr. Hans Holthuis**

Decision: **14th September 2005**

THE PROSECUTOR

v.

RAHIM ADEMI and MIRKO NORAC

DECISION FOR REFERRAL TO THE AUTHORITIES OF THE REPUBLIC OF CROATIA PURSUANT TO RULE 11*bis*

The Office of the Prosecutor:

Ms. Carla del Ponte

The Government of the Republic of Croatia:

per: The Embassy of the Republic of Croatia
The Hague; The Netherlands

Counsel for the Accused:

Mr. Čedo Prodanović for Rahim Ademi
Mr. Željko Olujić for Mirko Norac

Amici Curiae:

Professor Mirjan Damaška
Professor Davor Krapac

I. INTRODUCTION

1. The Referral Bench is seized of the Prosecutor's Request of 2nd September 2004 ("the Request") to refer the case against Rahim Ademi and Mirko Norac ("the Accused") to the authorities of Croatia pursuant to Rule 11*bis* of the Rules of Procedure and Evidence ("the Rules").

2. Rule 11*bis*, entitled "Referral of the Indictment to Another Court", was adopted on 12th November 1997 and revised on 30th September 2002.[1] Revision was necessary in order to give effect to the broad strategy endorsed by the Security Council for the completion of all Tribunal trial activities at first instance by 2008.[2] This completion strategy was subsequently summarized in UN Security Council Resolution 1503 of 28th August 2003 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 ...."[3]

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

> (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:
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> (i) in whose territory the crime was committed; or
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> (ii) in which the accused was arrested; or
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> (iii) having jurisdiction and being willing and adequately prepared to accept such a case,
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> so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
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> (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.

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[1] In its original form, Rule 11*bis* provided for transfer of an accused from the Tribunal to the authorities of the State in which the accused was arrested. Transfer required an order from the Trial Chamber suspending the indictment pending the proceedings before the national courts. Such an order necessitated findings by the Trial Chamber that State authorities were prepared to prosecute the accused in their own courts and that it was appropriate in the circumstances for the courts of that State to exercise jurisdiction over the accused.
[2] S/PRST/2002/21; S/RES/1329 (2000).
[3] S/RES/1503 (2003). The Security Council further noted that referral of cases to the War Crimes Chamber of the Court of Bosnia and Herzegovina was an essential prerequisite to achieving the objectives of the completion strategy. *See also* S/RES/1534 (2004); S/PRST/2004/28.
[4] Rules of Procedure and Evidence, IT/32/Rev. 34, 22nd Feb 2005.

(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. Upon the Prosecutor's Request for referral, Defence Counsel for Norac responded briefly on 14th September 2004, supporting the request for referral to Croatia for the reasons advanced by the Prosecutor. The Defence Counsel for Ademi did not respond to the Prosecutor's Request as such.

5. By Order of 3rd November 2004, the Referral Bench ordered the Parties to file submissions on the gravity of crimes and the level of responsibility of the Accused. By letter of that same date, the Croatian Government was invited to submit its observations on those questions.

6. The Norac Defence filed its submission on 9th November 2004, the Prosecutor on 10th November 2004, and Counsel for Ademi on 16th November 2004.[5] The Norac Defence replied

[5] *See* Norac's "Response to the Chamber Order of November 3, 2004"; and the Prosecutor's "Further Submission in Support of the Motion of the Prosecutor under Rule 11*bis*"; and Ademi's "Submission on the Gravity of the Crimes and the Level of Responsibility of the Accused". Ademi's response was filed out of time, but Counsel for Ademi had orally requested leave for a late filing, which was granted orally by the Referral Bench on 12th November 2004.

on 18th November 2004 to the Prosecutor's submission. The Government of Croatia submitted its views on 30th November 2004.[6]

7. Having considered the submissions by the Parties and the Government of Croatia, on 20th January 2005, the Referral Bench issued an Order for Further Information, in which it identified a number of specific issues relating to the applicable substantive criminal law and criminal procedural law of Croatia and posed a number of questions on these matters to the Government of Croatia and the Parties, respectively.[7]

8. The Ademi Defence responded on 3rd February 2005 and the Prosecutor did so on 7th February 2005. The Croatian Government responded on 9th February 2005, as did the Defence Counsel for Norac on 11th February 2005.

9. On 26th October 2004, Professors Mirjan Damaška and Davor Krapac filed a "Request for Leave to Appear as *Amici Curiae*". The Referral Bench invited the Government to clarify whether the two designated "*Amici Curiae*" would appear as representatives of the Government or as independent legal experts in their own right without any instructions or remuneration by the Government.

10. The Minister of Justice of the Republic of Croatia informed the Referral Bench that, while Professors Damaška and Krapac had been appointed by the Government, they would appear in their personal capacity as independent legal experts and without any instructions from the Government. It was also confirmed that they would not be involved in preparing the Government's own submissions. The Referral Bench decided on 7th February 2005 to grant leave to Professors Mirjan Damaška and Davor Krapac to appear as *Amici Curiae* and invited them to submit a brief.[8] They did so on 11th February 2005.[9]

11. A hearing was held on 17th February 2005. The Prosecutor and each of the Accused were represented by counsel. The Government of Croatia was represented by Mr. Jakša Muljačić, Assistant Minister of Justice, and Dr. Željko Horvatić, Legal Advisor to the Minister of Justice. The Amici appeared by Professor Krapac.

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[6] The Croatian Government's "Submission of the Republic of Croatia to the Court's Order on the Gravity of the Crimes and the Level of Responsibility of the Accused". The Government had orally applied for leave to file its response in delay, which was granted orally by the Referral Bench on 22nd November 2004.

[7] "Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis*", addressed to the Government of Croatia and the Parties.

[8] Decision of 7th February 2005 on Submission of an *Amici Curiae* Brief Pursuant To Rule 74 of the Rules.

[9] Human Rights Watch had also requested, by letter of 22nd October 2004, leave to file an *Amicus Curiae* brief on the applicability of "command responsibility" in Croatian law. The Referral Bench asked the Organization to specify in further detail the issues it wished to explore in its Brief. Human Rights Watch replied on 31st January 2005, however, that, it was unable to submit a brief as suggested due to constraints of time and resources.

12. The Registrar was invited to also attend the hearing and to present his views on potential issues and problems involved in referral of cases from the Tribunal to national authorities. He submitted a Memorandum to the Referral Bench on these issues on 16th February 2005.

13. During the hearing, the Prosecutor argued that the events charged in the Indictment occurred in the context of an international armed conflict and on 14th March 2005, she filed an additional written submission to this effect.

III. THE CHARGES AND THE ACCUSED

14. The original Indictment against Rahim Ademi was confirmed on 8th June 2001 and a second Amended Indictment was issued on 1st February 2002. Mirko Norac was indicted on 20th May 2004. By Order of 30th July 2004, Trial Chamber I granted the Prosecutor's Motion of 27th May 2004 for joinder of the two cases and confirmed a Consolidated Indictment against the two Accused.

15. The Indictment charges both Accused with 2 counts of crimes against humanity (persecutions of Serbs and murder of at least 29 Serb civilians and 5 Serb soldiers *hors de combat*), and 3 counts of violations of the laws and customs of war (murder, wanton destruction of cities, towns or villages and plunder of Serbian property) for crimes committed during the Croatian military operation in the so-called "Medak Pocket", an area 4-5 km wide and 5-6 km long (appr. 25-30km^2), located in Krajina in the South Western part of Croatia, from 9th to 17th September 1993.[10] The Indictment states that the Medak Pocket Operation was designed to drive all non-Croats permanently out of this predominantly Serb enclave. Prior to the attack, approximately 400 Serb civilians inhabited the area. The Indictment also alleges that the Medak Pocket became uninhabitable as a result of the operation and that the villages of the Pocket were completely destroyed.[11]

16. It is alleged that each Accused is individually responsible pursuant to Article 7(1) of the Tribunal's Statute and also as a superior is responsible for the acts of his subordinates under Article 7(3) of the Statute in relation to Counts 1, 4 and 5, but only under Article 7(3) in relation to Counts 2 and 3 (the killings, charged as murder).

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[10] The Indictment alleges, *i.a.*, that one named victim was killed, mutilated and desecrated, and that another victim was burned alive in public while being mocked. Serious injuries were caused by means of shooting, stabbing, cuttings of fingers, severe beatings with rifle butts, burning with cigarettes, jumping on bodies, tying bodies to a car and dragging them along the road, and by mutilation. At least 164 homes and 148 barns, outbuildings and other buildings were totally destroyed by use of explosives and fire, after being looted of personal goods, furniture and animals. Wells were poisoned and rendered unusable by throwing oil and dead bodies and animals therein.
[11] Indictment, para. 50.

17. Rahim Ademi was born in Karać, Kosovo, on 30th January 1954 and graduated from a Military Academy of the Yugoslav National Army (JNA) in 1976. It is alleged that in April or May 1993, Ademi was appointed the Acting Commander of the Gospić Military District with the rank of Brigadier. He held this position throughout the "Medak Pocket Operation" from 9th to on or about 17th September 1993. It is further alleged that Ademi, by virtue of his high-ranking position, played a central role in the developing, planning, and either or both ordering and executing the Medak Pocket Operation. He surrendered voluntarily to Croatian authorities and was transferred to the Tribunal on 25th July 2001, but was subsequently granted provisional release to Croatia on 20th February 2002.[12]

18. Mirko Norac was born on 19th September 1967 in Otok, Croatia. It is alleged that in 1992, he was appointed as Commander of the 6th Guards Brigade, which was later renamed the 9th Guards Motorised Brigade, and that he retained this position throughout the Medak Pocket Operation, during which he was appointed Commander of Sector 1, a special combat group formed for the purposes of that Operation. The Indictment charges him with the same counts as Ademi but only in respect of the acts committed by the particular units under his command in Sector 1.[13] Norac has been convicted in Croatia for war crimes unrelated to the Tribunal's Indictment and was detained there having been sentenced to a term of 12 years imprisonment when the Indictment against him was confirmed. After being brought to the Tribunal for initial appearance on 8th July 2004, Norac was returned to Croatia under pre-trial detention ordered by this Tribunal and to continue to serve the Croatian sentence concurrently with his pre-trial detention.

IV. THE GRAVITY OF THE CRIMES CHARGED AND THE LEVEL OF RESPONSIBILITY OF THE ACCUSED

a. Submissions

19. In her assessment of the gravity of the crimes, the Prosecutor pointed to the *number* and the *civilian status* of the victims, the killing of the victims at close range, the destruction of civilian houses, barns and outbuildings, the pollution of wells and to the looting and plunder of personal belongings, all of which indicates that the crimes were of considerable gravity. In the end, however, the Prosecutor argued that, while it would be suitable and appropriate for this case to be prosecuted at the ICTY, the Referral Bench might also find the case suitable for

[12] Trial Chamber I Order for Provisional Release, filed 20th February 2002. He returned to Croatia on the following day.

referral in the specific context of the completion strategy and the Security Council's indications.[14]

20. In respect of the gravity of crimes, the Norac Defence submitted that it would be premature to venture into any determination of the gravity of the crimes as long as no evidence had yet been submitted. The Ademi Defence added that there are no legal criteria on which basis the gravity of crimes can be determined, because there is no differentiated span of sentences of the Tribunal.[15]

21. The Government of Croatia pointed to the fact that neither of the Accused were charged with genocide, but (only) with crimes against humanity and war crimes, which, in their submission, form the lower levels of the hierarchy of the crimes within the Tribunal's jurisdiction.

22. As far as the nature of the crimes is concerned, the *Amici* submitted that there is no meaningful way to assess their gravity in absolute terms; each of the crimes was very serious on its own merit. Yet the Operation was of a relatively small scale and took place over a relatively short time, involving a relatively small number of troops, and covering a relatively small area.

23. Turning then to the issue of the level of responsibility of the two Accused, the Prosecutor submitted that, regardless of whether the case were to be referred or not, the level of responsibility as stipulated in Rule 11*bis* should be understood to include both the *military rank* of the Accused and his *actual role* in the commission of the crimes, which in both respects and for both Accused were high.

24. The Government noted that the Accused were charged with individual responsibility as direct perpetrators under Article 7(1) of the Statute in relation to only three of the five Counts which, in the Government's submission, suggested a *lesser degree* of criminal responsibility than had they been charged with direct and individual responsibility for all five Counts.

25. The Norac Defence submitted that Norac only held a "lower, non-strategic rank" at the relevant time; that his specific operative assignment was then limited; that he did not belong to "headquarters or planned groups" (sic); that he was young and had only limited military

[13] These units included the 9th Guards Motorized Brigade, the Gospić Home Guard Battalion, the Lovinac Home Guard Battalion, units of the 111th Brigade and units of the Special Forces of the MUP.
[14] *See* the Prosecutor's "Further Submission in Support of the Motion of the Prosecutor under Rule 11*bis*", par. 7.
[15] *See Transcripts* of the proceedings from 17th February 2005, at p. 21.

experience; that he was seriously wounded in the operation; and finally that he was not in charge of, or held any authority in police or judicial matters.[16]

26. The Ademi Defence contests Ademi's appointment as Acting Commander in Chief of the Gospić Military District and that he had *de facto* authority over the relevant units as alleged in the Indictment. The Ademi Defence did not otherwise respond to the questions posed by the Referral Bench.ž

27. *The Amici* submitted that both Accused were positioned at the intermediate level between their superiors (the Minister of Defence and the Chief of Staff) and subordinate units of moderate size and lower tactical significance operating in the field under their instructions and that the Accused, thus, did not possess sufficient authority to be categorized as being "most responsible" for the crimes committed in the Medak Pocket. In addition, the units subordinate to the Accused were not *the only* units involved in the Operation; other units (such as the Special Police) under the command of other operational officers were involved as well and acted independently of the Accused.

b. Discussion.

28. In respect of the gravity of crimes, the Bench will take the Indictment as its point of reference, the charges still to be proven at trial. The Indictment alleges that at least 29 civilian Serbs and 5 Serb soldiers placed *hors de combat* were killed during the Operation, that a substantial number of houses and outbuildings were destroyed, and that the entire Medak Pocket was rendered uninhabitable after the Operation. These allegations are very serious. The Referral Bench agrees with the observation made by the *Amici* that it is impossible to measure the gravity of any crime in isolation. Whether or not the gravity of these particular crimes is so serious as to demand trial before the Tribunal, however, depends on the circumstances and context in which the crimes were committed and must also be viewed in the context of the other cases tried by this Tribunal. Serious as the charges are in the present case, nevertheless, the Medak Pocket Operation was a single military incident which lasted a limited period of time and occurred within a relatively confined geographical area. In the Referral Bench's view, having regard to the nature and circumstances of many offences charged in other cases before this Tribunal, these alleged crimes are not so serious as to preclude the possibility of trial in Croatia.

[16] *See* Norac's "Response to the Chamber Order of November 3, 2004" filed on 9th November 2004, at para.10.

29. As far as the level of responsibility of the Accused is concerned, the Referral Bench recalls that in light of the history and purpose of Rule 11*bis*, the level of responsibility should be interpreted so as to include both the *military rank* of the Accused and their *actual role* in the commission of the crimes. Ademi held the rank of Brigadier and Norac that of Colonel at the relevant time, and on the basis of the facts alleged in the Indictment it is contended that the Accused possessed the authority to issue operational orders to the units under their command, and that they in fact did give such orders during the Medak Pocket Operation.

30. In assessing the level of responsibility of the two Accused, the role of the late General Janko Bobetko also has some relevance. Both from the Indictment against the Accused and the indictment publicly brought against General Janko Bobetko, it appears that the latter was not only, as Chief of the Main Staff of the HVO forces, superior to both the Accused, but also directly involved in the preparation and the execution of the Medak Pocket Operation.[17] The role of General Bobetko in both the Indictments is underlined by the fact that it was on his order that General Novaković on 15th September 1993 signed the cease-fire agreement, which was the result of the negotiations at a political and military level, initiated shortly after the attack by the Croatian forces. While the superior-subordinate relationship between General Bobetko and the Accused cannot be finally determined without having heard all relevant evidence, the Referral Bench is unable in this respect to find that the role of the Accused in the context of the Medak Pocket Operation was such as to preclude referral to a national jurisdiction because of their level of seniority and responsibility.

c. Conclusion

31. The Referral Bench is satisfied that the gravity of the crimes charged against the two Accused and their respective levels 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).

V. THE APPLICABLE SUBSTANTIVE LAW

32. 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 the Republic of Croatia. That is a matter which would be within the competence of the designated Court in Croatia if referral is ordered. The Bench must be satisfied, however, that if this case were to be referred to

[17] The Referral Bench notes that General Janko Bobetko passed away on 29th April 2003 in Zagreb and that an Order was issued on 24th June 2003 to terminate the proceedings against him.

Croatia, 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 to be criminal. The Referral Bench must therefore consider whether the laws applicable in proceedings before the competent Court in Croatia 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.

a. Submissions

33. The Ademi Defence submits that the 1993 "Fundamental Criminal Statute of Croatia" (the FCSC) should apply because of the prohibition of retroactive application of criminal laws.[18] Although this law does not provide explicitly for command responsibility, which was only subsequently introduced as an express form of criminal liability in the amendments of the "Criminal Act of Croatia" in 1997/2004 (the CAC), the Ademi Defence argued that parts of command responsibility could nevertheless be covered by Article 28 of the 1993 FCSC, which deals with *omission* to act where there is an obligation to act.[19] To the extent in which Croatian national law would not fully embrace criminal liability for command responsibility, however, the Ademi Defence asserted that this form of criminal liability was incorporated anyway in Croatian law by virtue of Articles 86 and 87 of Additional Protocol I to the Geneva Conventions, and Article 1(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Both Additional Protocol I and the Convention were ratified by the Socialist Federal Republic of Yugoslavia (SFRY) and subsequently adhered to by Croatia and had become a directly applicable part of Croatian law by virtue of Article 134 of the Croatian Constitution. The Norac Defence, in essence, took the same position.[20]

34. The Prosecutor agreed but argued that customary international and treaty law (notably Article 87 of Additional Protocol I to the Geneva Conventions), more than Croatian domestic

[18] *See* Ademi's "Submission on the Request of the Trial Chamber", filed on 3rd February 2005, at para. 7.
[19] After its independence in 1991, Croatia temporarily retained the Federal Criminal Law of the former Socialist Federation of Yugoslavia and transformed it into Croatia's "Fundamental Criminal Statute of the Republic of Croatia" (FCSC), in the People's Gazette no. 31, 1993. The current Criminal Code of the Republic of Croatia, (the "Criminal Act of Croatia", the CAC), published in the People's Gazette no. 110, 1997, was adopted in 1997, entered into force in 1998 and was amended in July 2003. However, the Constitutional Court of Croatia declared the 2003 amendments unconstitutional for insufficient Parliamentary support. The legislative process was therefore repeated and the new provisions ultimately entered into force in 2004.
[20] *See* Norac's "Further Submission of the Defence of Mirko Norac Pursuant to Chamber's Order of 20th January 2005", filed on 11th February 2005, at para. 8. – Croatia succeeded to Additional Protocol I in May 1992 and to the UN 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in October 1992.

law, would provide a reliable and comprehensive basis for command responsibility in a Croatian prosecution of a superior's failure to prevent and punish crimes committed by his subordinates.[21] In her "Further Submission" of 14 March 2005, the Prosecutor sought to further support the application of this Article to the Medak Pocket at the relevant time on the basis that the armed conflict then was indeed *international* in character. This Further Submission did not address the fact, however, that the Indictment does not allege the existence of an international armed conflict.

35. The Croatian Government agrees that the 1993 FCSC would apply to this case if it were referred, but cautions that the issue of retroactive application of the 1997/2004 CAC had still not been definitely settled in Croatia and would ultimately be determined by judicial interpretation. Pursuant to Article 12, paras. 1 and 2, of the 2003 "Croatian Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against the International Law on War and Humanitarian Law", the State Prosecutor will initiate proceedings against the Accused before one of the four especially designated *County Courts* in Osijek, Rijeka, Split or Zagreb upon assignment by the President of the Supreme Court of the Republic of Croatia.[22]

36. The *Amici* submit, *inter alia*, that, although crimes against humanity were not included in the 1993 FCSC, there are designated offences to similar effect which can be used in the present case.[23] Unlike the ICTY Statute, Croatian law distinguishes between perpetrators and accomplices; *complicity* is charged either as instigation and aiding, or as organization of criminal association and requires the presence of an immediate perpetrator who actually commits the crime, a causal link between the accomplice's action and the perpetration of the crime, and intent of the accomplice to further the crime.[24] Command responsibility, in other words, could be charged under Croatian law as a form of complicity, but only insofar as the (superior) accomplice intended to further the crime, and in fact did so. Likewise, criminal liability under Article 28 of the 1993 FCSC for *omission* to prevent the commission of a crime

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[21] *See* the "Prosecution's Further Submisisons Pursuant to Chamber's Order of 20th January 2005", filed on 7th February 2005, at para. 4; and the "Prosecution's Further Submission in Support of the Motion Filed Under Rule 11*bis*", filed on 14th March 2005, at para. 25.

[22] *See* the "Submission of the Republic of Croatia to the Court's Order for Further Information on Certain Jurisprudential Aspects of the Croatian Law in the Context of the Prosecutor's Request under Rule 11*bis*", filed on 9th February 2005, at para. 3 on page 3.

[23] *See* the *Amici* Brief at p. 5; acts charged in the ICTY Indictment as crimes against humanity could be charged in Croatia as: war crimes against civilian population (FCSC Art. 120); war crimes against the wounded and sick (FCSC Art. 121); war crimes against prisoners of war (FCSC Art. 122); unlawful killing and wounding of the enemy (FCSC Art. 124); unlawful taking of the belongings of those killed or wounded on the battle field (FCSC Art. 125); brutal treatment of the wounded, sick and prisoners of war (FCSC Art.128); destruction of cultural objects and objects of historic significance (FCSC Art. 129); and racial and other discrimination (FCSC Art. 133).

[24] *See* FCSC Sections 20, 21, 22 and 24.

or failure to punish the perpetrator requires knowledge by the superior of the imminent or actual commission of the crime.

37. The Government and the *Amici* submit, however, that these differences between the Tribunal's jurisprudence on command responsibility and the applicable law of Croatia will not necessarily lead to acquittal. It is suggested, thus, that the Croatian courts, although not bound to do so, may choose to apply customary international law because, at the time of the alleged criminal conduct, command responsibility was part of customary international law. A second possibility, proposed by both the Croatian Government and *Amici*, would be to apply Additional Protocol I to the Geneva Conventions, which has been ratified by Croatia. This incriminates, in general terms, the negligent failure of a commander to prevent or to punish breaches of the Geneva Conventions. A third possibility, favoured by the *Amici,* would be to apply "creatively" the 1993 FCSC provisions. This would require the Croatian court to hold that a commander's failure to act was attributable to his indirect intent. It is suggested that because of the tenuous line separating advertent negligence and indirect intent, a finding of *dolus eventualis* in many cases would be easy to establish. It is further argued that a commander's failure to punish could be treated as aiding and abetting the perpetrator after the crime or as a "failure to report" the alleged crime.

b. Discussion

38. For the purposes of determining the present Motion, it is unnecessary for the Referral Bench to presume to reach any decision on the correct resolution of the various submissions that have been advanced by the parties and by the Government of the Republic of Croatia. 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 legal provisions, in order to determine whether there is any significant deficiency which may impede or prevent the prosecution, trial, and if appropriate, the punishment of the Accused for the alleged criminal conduct which is charged in the present Indictment.

39. Were the 1997/2004 CAC to be held to apply to this case, a position contemplated by the submissions of the Government, there are provisions therein which appear to fully reflect the effect of Article 7(3), of the Tribunal's Statute with respect to command responsibility. It remains a significant issue, however, whether the 1997/2004 CAC has retrospective effect in this way. As has been indicated, that is an issue to be settled by judicial interpretation in Croatia.

40. The law which was in operation at the time of the alleged offences was the 1993 FCSC. The Chamber accepts the submissions of the Parties that the charges brought against the Accused are covered by substantive provisions of the 1993 FCSC in a way that would allow convictions and sentences similar to outcomes that could be reached under the Tribunal's Statute and Rules.[25] One limited exception may well exist, however, in the field of command responsibility.

41. It is clear from the submissions of the Government and the *Amici* that there is a difference in terminology relating to command responsibility between the 1993 FCSC and the law applied in this Tribunal (*i.e.* Article 7(3) of the Statute). The concept of "direct" command responsibility in Croatian law appears confined to the notion of "ordering", which in the Tribunal's jurisprudence falls within the scope of Article 7(1) rather than of Article 7(3). However, there are other provisions in Croatian law which appear to cover most of the field which in this Tribunal is known as command responsibility. Thus, Article 28 of the 1993 FCSC governing criminal offences perpetrated by omission provides that a crime may be committed if the perpetrator "failed to perform when he had a duty to perform", while Article 116 of the 1993 FCSC governs aiding the perpetrator after the commission of the crime. Nevertheless, there are some discrepancies between the operation of these provisions and the jurisprudence of the Tribunal. As submitted by the *Amici*, it appears that under Croatian law, criminal responsibility for omission attaches only if the element of causation is met, *i.e.* if it is established as highly probable that the accused's actions would have averted the criminal consequences. Therefore, criminal responsibility for omission may not extend to a failure to act after the commission of the crime. More significantly, however, it is apparent from the submissions of both the Government and the *Amici* that a failure by a superior to prevent a crime by subordinates under his command, or to punish the perpetrators, where the superior had "reason to know" that an offence was about to be committed or had been committed (Article 7(3)), may not suffice to establish criminal responsibility against the superior under Croatian law.[26]

42. Although the law in Croatia in this respect is not yet tested, the Referral Bench accepts the expectations of the *Amici*, which were supported by the Government and to some extent by the Prosecution, that on its correct interpretation the 1993 FCSC will be found to cover most of

[25] Article 120 of the 1993 FCSC criminalises at a time of war or armed conflict *inter alia* the acts of killing, torture or inhuman treatment of the civilian population, imposition of measures of intimidation and terror, and the unlawful or wanton destruction or large scale appropriation of property, which are charged in the present Indictment, either as separate counts or as underlying acts for the charge of persecutions (count 1). The conduct alleged to constitute the offence of persecution is criminal under Croatian law but the element of discriminatory intent is not applicable.

the field covered by Article 7(3) of the Statute concerning command responsibility. However, where a commander did not know that an offence was, or was about to be, committed by persons under his command, but had "reason to know", inactivity by the commander may not entail criminal liability of the commander under the 1993 FCSC in every situation in which Article 7(3) would provide for criminal liability, because the intent requirements differ.

43. The *Amici's* suggestions as to how this limitation in the 1993 FCSC, should it be held to be the applicable law, could be overcome by the Croatian Court, at this stage are conjectural. A number of difficult legal issues would need to be considered by the Croatian Court. The Bench considers, however, that it is not in a position to predict which of these suggestions, if any, would ultimately prevail in the Croatian Court.

44. For the purposes of this motion it is preferable, therefore, for the Bench to proceed on the basis that Croatian law may not entirely cover the field dealt with by Article 7(3) of the Statute in the limited way identified above.

45. In its submission the Prosecution has recognized this possibility, but submits that, if the 1993 FCSC is held to be the applicable law, the risk of a consequential acquittal of the Accused in the present case is not great and should not preclude referral. The Referral Bench recalls that command responsibility is alleged in all 5 counts in the Indictment, even exclusively so in counts 2 and 3, and the Bench is conscious that an acquittal on this basis cannot be excluded if the Prosecution fails to establish any subjective intent. Given the factual circumstances alleged in the present case and the options available under Croatian law to cover the alleged conduct of the Accused, however, the Referral Bench does not regard this possible and limited difference in the law as an obstacle to the referral proposed by the Motion. The Bench further considers that if the acts that in the end can be proven would all fall outside the scope of the provisions of the law to be applied, the case against the Accused would have lost most of its significance and weight. It further notes that this possible limited difference between the 1993 FCSC and Article 7(3) of the Statute is likely to be common to all Republics of the former Yugoslavia due to their shared legal tradition.

c. Conclusion

46. On the basis of these considerations, the Referral Bench is not persuaded that it should exclude referral for the reason only that there may well be found to be a limited difference between the law applied by the Tribunal and the Croatian Court. Should this case be referred, it

[26] *See* paras. 34-35 above.

will be for the incumbent County Court in Croatia 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 reasons already discussed, that whichever of the possible alternatives is held by the County 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.

VI. WITNESS PROTECTION AND MUTUAL LEGAL ASSISTANCE

a. Submissions

47. The Parties and the Government pointed out that adequate protection of witnesses is an essential element of a fair trial since the possibility of hearing their testimony at trial may depend on protection offered to them and their families. The Parties, the Government and the *Amici* were in agreement that Croatian law currently includes sufficient legal means and remedies to adequately protect witnesses from danger or threats of danger. Under the 2003 Croatian Witness Protection Act, measures for witness protection in Croatia are decided by a special Commissariat, presided over by a member of the Supreme Court and subsequently implemented by special units under the Ministry of Interior. The measures available for witness protection in Croatia under the 2003 Croatian Witness Protection Act and the 2003 Act on Implementation of the ICC Statute are comparable to those frequently applied at the ICTY, ranging from relocation of witnesses, non-disclosure of the witnesses' identity, use of pseudonyms, testifying with image and voice distortion to testimony through video-link.[27]

48. The Government further submitted that witness protection has been enhanced by interstate mutual legal assistance in criminal matters after Croatia's ratification of the European Convention on Mutual Assistance in Criminal Matters and the first of its two Additional Protocols, and by the recent bilateral agreements of January and February 2005 between the State Prosecutor in Croatia and Prosecutors in Serbia & Montenegro and Bosnia & Herzegovina, respectively. Although there had been difficulties in judicial and law enforcement co-operation in the past, these agreements were designed to improve the situation, and the Organisation for Security and Co-operation in Europe (OSCE) has acknowledged in its November 2004 Status Report that initiatives regarding regional co-operation are intensifying.

[27] *See* Section 8 of the Croatian Act on the Implementation of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against International Law on War and Humanitarian Law, published in the People's Gazette No. 175 (2003); and Sections 15-21 of the Croatian Witness Protection Act of 1st October 2003, published in the People's Gazette No. 163/2003.

b. Discussion

49. Both witness protection and mutual assistance in criminal matters are instrumental to the issue of witness availability. The availability of witnesses at trial is relevant to the fairness of a trial as it may affect 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 the witnesses against him.

50. The possibility of providing physical protection to witnesses who personally, or whose family members, may be in danger as a result of their testimony, may positively influence the availability of such witnesses and is therefore relevant to the fairness of the trial. Mutual assistance arrangements similarly promote the attendance of witnesses and the accessibility of evidence from outside Croatia. The bordering states of Serbia and Montenegro and Bosnia and Herzegovina are both parties to the European Convention on Mutual Judicial Assistance, so that provision now exists to facilitate obtaining testimony of witnesses who reside in those neighbouring States, including measures for safe conduct of witnesses from one country to another and adoption by a member State of certain protective measures for witnesses residing within its borders.

51. For witnesses residing in Croatia, the provision of trial testimony is obligatory. Efforts to secure the testimony of witnesses by either party may be enforceable by an order of the County Court for compulsory apprehension of a witness pursuant to the 2003 Croatian Witness Protection Act.

c. Conclusion

52. In light of the foregoing, the Referral Bench is satisfied that the arrangements for witness availability and witness protection in Croatia are sufficient to ensure a fair trial, if the case is referred to Croatia. The Referral Bench notes that neither Party to this case has requested any protective measures for its prospective witnesses to be put in place by the Trial Chamber.

VII. FAIR TRIAL

53. Rule 11*bis* (B) requires that the Referral Bench be satisfied that an accused will receive a fair trial if a case is referred. The Accused have raised no concern in this respect. Whereas the Referral Bench has in several cases been confronted with such concerns, the issue of the fairness of the trial may be looked upon in a broader context where the Accused will be tried by a Court of the State of which they are nationals and where there is unlikely to be any risk of

bias of an ethnical or national origin. Under these circumstances, the issue of a fair trial may also require attention to the impartiality of a trial in terms of the prosecutorial and judicial approach to the case that might reflect a lack of due diligence for the legitimate interests of non-Croat victims. In the present context, the explicit requirement under Rule 11*bis* for a fair trial of the Accused is properly complemented by a concern for fairness towards other interested parties, such as victims and the international community, and has a relevance as a policy consideration for the referral Bench when it considers whether or not to refer a case.

54. While the Accused made no substantive submissions on this matter, the Prosecution and the Government were both in agreement that all necessary legal and technical requirements are in place in Croatian law to ensure a fair trial. The *Amici* and the Government further submitted that, despite the criticism of judicial bias against non-Croat war crimes perpetrators tried before Croatian Courts raised in the past by various international non-governmental organisations, no fear or risk could be sustained in the present case of an unfair trial to the Accused.

55. In comparing the requirements of a fair trial with those provided under Croatian law, the Constitution of Croatia provides a foundation. Chapter III of the Croatian Constitution, in particular Articles 21-31, guarantee the right to a fair hearing in criminal matters, and other rights relating to criminal proceedings. The enjoyment of these rights are secured to all persons in Croatia without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[28]

56. The Referral Bench is aware of assessments of the Croatian judicial system made by the OSCE and Human Rights Watch and other non-Governmental organisations, which suggested that war crimes trials in Croatia against Croat accused had been conducted differently from trials conducted against non-Croat accused.[29] The Referral Bench, however, accepts the guarantees for a fair trial in Croatian law and is cognizant of the measures taken by the Croatian State Prosecutor and the Croatian Government to improve the situation addressed by the OSCE and the non-Governmental organizations. The Referral Bench is satisfied that if the case is referred to Croatia, there are appropriate measures now in place to ensure a fair trial.

57. 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, a

[28] Croatia's Constitution of December 1990, Article 14.
[29] *See* Human Rights Watch, "Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro", at page 9-17; and OSCE: "Supplementary Report: War Crime Proceedings in Croatia and Findings from Trial Monitoring; Executive Summary", 22 June 2004.

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.[30] This monitoring mechanism enables a measure of continuing oversight over trial proceedings should a case be referred. Although the monitoring mechanism serves also to guarantee the fairness of the trial to the Accused, as repeatedly expressed by the Referral Bench and accepted by the Appeals Chamber, it was primarily created to ensure that a case would be diligently prosecuted once it had been referred. That purpose is of specific interest in this case.[31]

VIII. THE DEATH PENALTY

58. Rule 11*bis* also requires that the death penalty will not be imposed or carried out if the case is referred. The Parties and the *Amici* are in agreement with the Government that the death penalty has been abolished under Croatian law. Indeed, the death penalty was abolished by Article 21 of the Croatian Constitution and, further, Croatia is a party to Protocol 13 of 2002 to the European Convention on Human Rights.

59. The Referral Bench is satisfied that the death penalty will not be imposed or carried out if the case is referred to Croatia.

IX. MONITORING

60. Rule 11*bis* (D)(iv) of the Rules provides that the Prosecutor may send observers to monitor the proceedings in the national Courts on her behalf. At the hearing on 17th February 2005, the Prosecution asserted that this matter was subject to the discretion of the Prosecutor and that the possibility of making an arrangement with a monitoring entity was being explored. The Referral Bench notes that the Understanding of 19th May 2005 on Co-operation between the OSCE and the Tribunal apparently comprehends the monitoring of trials in the Republic of Croatia.

61. Having regard to many matters considered in this Decision, it will be desirable to ensure that there is an adequate system of monitoring in place. It is important that any system of monitoring of the fairness of the trial should also be cognizant of and responsive to genuine concerns raised by the Defence, as well as by the Prosecution. The Rules provide for this

[30] *See* Rule 11*bis* (F).

Tribunal to have an ongoing capacity to take action to have a case which has been referred to a national jurisdiction recalled to this Tribunal. With these matters in mind, and in view of the Appeals Chamber's Decision of 1st September 2005 in *Stanković*, the Referral Bench will require a report every three months from the Prosecutor, following an initial report after six weeks.[32]

X. DISPOSITION

FOR THESE REASONS,

PURSUANT TO Rule 11*bis* of the Rules,

THE REFERRAL BENCH

HEREBY GRANTS the Motion and **ORDERS** that the case of the *Prosecutor v. Rahim Ademi and Mirko Norac* be referred to the Authorities of the Republic of Croatia, so that those Authorities should forthwith refer this case to the appropriate Court, *i.e.* one of the four County Courts, for trial in Croatia;

ORDERS that all Orders and Decisions issued previously by the Tribunal in this case shall remain in force until they are either amended or withdrawn, or other provision is made, by the appropriate Court or the competent national authorities of the Republic of Croatia;

ORDERS the Prosecutor to hand over to the Prosecutor of the Republic of Croatia, as soon as possible and no later than 30 days of this Decision becoming final, the material supporting the Indictment against the Accused and all other appropriate evidentiary material; and

FINALLY ORDERS the Prosecutor to file an initial report to the Referral Bench on the progress made by the Croatian Prosecutor in the prosecution of the Accused six weeks after transfer of the evidentiary material to the appropriate Court in the Republic of Croatia and,

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[31] *See* the Referral Bench's Decisions for referral in *Stanković* (IT-96-23/2-PT), 17th May 2005; in Mejakić (IT-02-65-PT), 20th July 2005; and the Appeals Chamber's Decision in *Stanković* (IT-96-23/2-AR11bis.1), 1st September 2005.

[32] *See* the Appeals Chamber's "Decision on Rule 11*bis* Referral", 1st September 2005, at para. 59.

thereafter, regular reports every three months after commencement of trial on the course of the proceedings before the appropriate Court in the Republic of Croatia.

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

Signed this fourteenth day of September, 2005,
At The Hague,
The Netherlands

Judge Alphons Orie, Presiding Judge

[Seal of the Tribunal]