



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-01-42/2-I

Date: 17 July 2006

Original: English

IN THE REFERRAL BENCH

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

Registrar: Mr. Hans Holthuis

Order: 17 July 2006

PROSECUTOR

v.

VLADIMIR KOVAČEVIĆ

**ORDER REQUESTING FURTHER INFORMATION IN THE
CONTEXT OF THE PROSECUTOR'S MOTION UNDER RULE 11 *bis*
OF THE RULES**

The Office of the Prosecutor:

Ms. Susan Somers
Mr. Philip Weiner
Mr. David Re

The Government of the Republic of Serbia:

per: The Embassy of Serbia to
The Netherlands, The Hague

Counsel for the Accused:

Ms. Tanja Radosavljević

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 (“Tribunal” or “ICTY”);

NOTING the second amended indictment against Pavle Strugar and Vladimir Kovačević (“Accused”) dated 17 October 2003 (“Indictment”);

NOTING the “Request by the Prosecutor Under Rule 11*bis* for Referral of the Indictment to Another Court” filed on 28 October 2004 (“Prosecutor’s Request for Referral”) requesting that the Referral Bench order the referral of the present case under Rule 11*bis* of the Rules of Procedure and Evidence (“Rules”) to the authorities of Serbia;

NOTING the President’s “Order Appointing a Trial Chamber for the Purposes of determining whether the Indictment should be Referred to Another Court under Rule 11*bis*” filed on 2 November 2004, in which the President appointed this Referral Bench to determine whether the case against Vladimir Kovačević (“Accused”) should be referred to the authorities of Serbia;

NOTING that pursuant to Trial Chamber I’s “Decision on early release” issued on 2 June 2004, the Accused was provisionally released to receive medical treatment in Serbia for a period of six months, which was extended on 2 December 2004 until further notice pending the submission of expert medical reports on the health of the Accused in order for the Trial Chamber to determine the ability of the Accused to enter a plea and to stand trial;

NOTING the “Decision on Accused’s Fitness to Enter a Plea and Stand Trial” issued by Trial Chamber I on 7 April 2006 (“Trial Chamber’s Decision of 7 April 2006”), in which the Trial Chamber determined that the Accused does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings should his mental condition change;

BEING SEIZED OF the “Prosecutor’s Application to Schedule a Hearing on 11*bis* Request” (“Prosecutor’s Application for a Hearing”) submitted to the Referral Bench on 21 April 2006, in which the Prosecution requests a hearing at which the relevant authorities should be invited to address issues relating to the condition of the Accused in light of the Trial Chamber’s Decision of 7 April 2006, as well as the terms relating to the provisional release of the Accused, and the legal framework for proceedings in Serbia;

NOTING the “Defence Motion to Dismiss the Indictment” submitted before Trial Chamber I on 27 April 2006, in which the Defence requests that, instead of proceeding with a Rule 11*bis* hearing, Trial Chamber I should dismiss the Indictment arguing that it is competent to make such a determination because the Accused is not fit to stand trial and the authorities of Serbia have made

submissions on the issue pursuant to domestic law which espouse the views of the Defence on this matter;

NOTING the “Defence Motion regarding the Prosecutor’s Application to Schedule a Hearing on Rule 11*bis* Request” filed on 27 April 2006, in which the Defence requests the Referral Bench to disregard the Prosecutor’s Application for a Hearing until Trial Chamber I decides the “Defence Motion to Dismiss the Indictment” filed before Trial Chamber I, on 27 April 2006;

NOTING the “Prosecution’s Response to the Defence Motion regarding the Prosecutor’s Application to Schedule a Hearing on 11*bis* Request” filed on 10 May 2006 before Trial Chamber I, in which the Prosecution argues that the Rules, the Statute or the Tribunal’s case-law do not empower a Trial Chamber to dismiss an indictment at this stage of the proceedings and that rather, the Referral Bench should proceed with determining the Prosecutor’s Request for Referral;

NOTING the “Order on the Prosecutor’s Request for Referral to Domestic authorities Under Rule 11*bis*” issued on 20 January 2005 (“Order of the Referral Bench”), in which the Referral Bench required the Prosecution to state its position if the Accused’s temporary inability to enter a plea and to stand trial were to become more permanent and to address the question of whether it may be preferable, under such hypothesis, to either refer the case or withdraw the Tribunal’s indictment leaving the State free to exercise domestic jurisdiction over the case; and ordered the Defence to clarify its position on its right to represent the Accused before the Tribunal in his absence and further ordered it to file a written submission on the issue of whether a case can be referred to domestic authorities for trial under Rule 11*bis* as long as the ability of the Accused to enter a plea and to stand trial cannot be or has not been determined;

NOTING that, in response to the questions posed in the Order of the Referral Bench, the Prosecution asserted in its Confidential Annex A of the “Prosecutor’s Submission Pursuant to the Order of the Referral Bench of 20 January 2005” filed on 7 February 2005, that, at the time this Order was issued, medical evidence suggested that the Accused was unfit to stand trial but, since then, a forensic report submitted to the Prosecution and Trial Chamber I shed new light on the Accused’s mental condition which rendered the questions posed by the Referral Bench no longer applicable; and requested that the Referral Bench determine the Prosecution’s Request for Referral on the basis that the Accused was fit to stand trial;

NOTING the “Submission of the Defence Pursuant to Trial Chamber’s Order from 20th January 2005 and 19th April 2005” filed confidentially on 27 April 2005 (“Defence Submission”), in which the Defence argued that, based on domestic law, the Defence had the right to appear before the Tribunal on behalf of the Accused should he be found unfit to enter a plea and stand trial, and in

response to the second question posed by the Referral Bench, it asserted that this issue was not for the Defence to answer but argued instead that, based on domestic case law, the Trial Chamber should dismiss the indictment;

CONSIDERING that if the Tribunal's Statute or Rules do not address the issue of the inability of an accused to enter a plea or to stand trial under Rule 11*bis* proceedings, the Referral Bench may, nonetheless, rely on the general provision of Rule 54 of the Rules to request from interested parties to these proceedings further information;

CONSIDERING that the respective submissions of the Prosecution and Defence¹ on the effects of the Accused's inability to participate in Rule 11*bis* proceedings were filed prior to the rendering of the Trial Chamber's Decision of 7 April 2006, the Referral Bench wishes to receive further submissions from the parties, in light of this Decision, on the questions posed to them in the Order of the Referral Bench;

CONSIDERING that, in case Serbia has personal jurisdiction over the Accused based on his nationality, the referral requested falls within the scope of Rule 11*bis* (A)(iii) of the Rules;

NOTING that, under Rule 11*bis* (B) of the Rules, "[t]he Trial Chamber may order such referral [...] after having given to the Prosecutor and, where applicable, the 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";

NOTING that Rule 11*bis* (C) of the Rules provides that "[i]n determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall, in accordance with the Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused;"

NOTING that Security Council resolution 1534 (2004) refers to "the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions;"

NOTING that Security Council Resolution 1503 (2003) recommended that the ICTY concentrate "on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and [transfer] cases involving those who may not bear this level of responsibility to competent national jurisdictions";

¹ See 'Prosecutor's Submission Pursuant to the Order of the Referral Bench of 20 January 2005', filed on 7 February 2005 and the 'Submission of the Defence Pursuant to Trial Chamber's Order from 20th January 2005 and 19th April 2005', filed confidentially on 27 April 2005.

CONSIDERING that the evaluation of whether a case should be referred to the authorities of a State is a two-step process, requiring consideration of (1) whether the gravity of the crimes charged and the level of responsibility of the Accused renders the case appropriate for referral because it involves intermediate or lower-rank accused, and (2) whether the State to which the Prosecution seeks to refer the case is a competent domestic jurisdiction whose legal system is compatible with the requirements of Rule 11*bis* (B);

CONSIDERING that the Indictment charges the Accused with murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, unlawful attacks on civilians objects and destruction or wilful damage to institutions dedicated to religion, charity and education, the art and sciences, historic monuments and works of art and science, all violations of the laws or customs of war pursuant to article 3 of the Statute;

CONSIDERING further, that, at the material time, the Accused is alleged to have served as commander of the 3rd Battalion of the JNA 472nd Motorised Brigade (also known as the Trebinje Brigade), which was subordinated to the 9th VPS commanded by Miodrag Jokić;

CONSIDERING that the Accused is charged with individual criminal responsibility under both Article 7(1) and 7(3) of the Statute in relation to the aforementioned crimes;

CONSIDERING that the Referral Bench would benefit from detailed submissions from the parties and the Government of the Republic of Serbia on the following: the level of responsibility of the Accused, the gravity of the alleged offences against him and on whether special weight should be given to any particular considerations in light of the fact that the Accused was initially jointly indicted with Pavle Strugar, Miodrag Jokić and Milan Zec while Pavle Strugar and Miodrag Jokić have since been tried and convicted by this Tribunal and that Milan Zec's indictment has been withdrawn;

CONSIDERING that the Referral Bench also wishes to obtain submissions from the parties and the Government of the Republic of Serbia on the effects of the Accused's unfitness to enter a plea and stand trial on a referral pursuant to Rule 11*bis*, on the provisions of Serbian law addressing temporary unfitness of an accused and resumption of prosecution in the event that such unfitness should subside and, finally, on the compatibility of the legal system of Serbia with Rule 11*bis* (B) under these conditions ;

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 11*bis* and 54 of the Rules,

ORDERS the Parties to file written submissions by 11 August 2006 stating their position with respect to whether the Accused's state of mind is a legal impediment to a reference of the case under Rule 11*bis* to Serbia;

ORDERS the Parties and **INVITES** the Government of the Republic of Serbia to file submissions by 11 August 2006 on the following questions, including the weight to be given to each of them:

1. Is the *gravity of the crimes* charged in the indictment compatible with referral of the case to the authorities of Serbia under Rule 11*bis* of the Rules?
2. Is the *level of the responsibility of the Accused* compatible with referral of the case to the authorities in Serbia under Rule 11*bis* of the Rules? In particular, does Rule 11*bis* (C) refer to the role of the Accused in the commission of the alleged offences, or to the position and rank of the Accused in the civil or military hierarchy, or to both?

In relation to the compatibility of the legal system of Serbia with Rule 11*bis* (B), **INVITES** the Government of the Republic of Serbia to provide the following documents, in English if possible, by 11 August 2006:

1. The relevant provisions of the domestic criminal code that were in force in Serbia in December 1991 and of the current domestic criminal code relating to war crimes, including the modes of criminal liability, and the determination of sentence, and also the provisions of the laws then and now in force in Serbia with respect to an accused who, by virtue of mental health, is unfit to plead and to stand trial;
2. The relevant provisions regarding the establishment and jurisdiction of the War Crimes Panels of the District Court of Belgrade including the provisions regarding the acceptance of the transfer of ICTY cases to Serbia;
3. The relevant provisions on detention at the pre-trial and trial stages (including the detention facilities available for this purpose) and documents on the conditions of such detention, particularly regarding the monitoring and restrictions which may be imposed on communication by an accused with other persons outside the detention facility; the provisions for the detention and treatment of an accused whose mental health does not allow him to enter a plea and stand trial;

4. The relevant provisions relating to the protection of witnesses before, during, and after testimony and a presentation of the measures available to implement the relevant provisions; in particular, the existence of adequate provisions for last-minute requests for protective measures;
5. Any other documents, which it considers of relevance to the present case.

FURTHER INVITES the Government of the Republic of Serbia to file written submissions by 11 August 2006 on the following matters:

1. If the case were to be referred, what effects would the Trial Chamber's Decision of 7 April 2006 and the Accused's unfitness to enter a plea and stand trial before the ICTY have on the proceedings before a competent court in Serbia?
2. What are the criminal law provisions and practice in Serbia in a case where an accused is unable, because of his mental health, to enter a plea and to stand trial?
3. What are the provisions and practice regarding resumption of prosecution of an accused who, after having been initially found unfit to plead and to stand trial, is later found to be mentally capable of entering a plea and participating in trial proceedings in Serbia?
4. What, if any, provisions under Serbian law are there to provide for the welfare of a person found to be legally incompetent or insane?
5. Would the substantive law applicable to the case be the criminal code in force in December 1991 or the current criminal code?
6. What are the mechanisms by which the courts in Serbia could apply international treaty or customary law in domestic proceedings?
7. Pursuant to the law of Serbia, is the only court competent to hear the case, if referred, the War Crimes Panel of the District Court of Belgrade?
8. Would the evidence gathered by the ICTY be directly admissible as such before the competent court in Serbia? Is this court in a position to take judicial notice of findings made by the ICTY? In what circumstances, if any, can written statements, transcripts, and depositions be used in evidence?

9. How would the Indictment against the Accused be incorporated and applied in the criminal legal procedure under the applicable law in Serbia? Can the Indictment be subsequently amended in the course of the proceedings? If so, to what extent and by what procedure?
10. If the case were to be referred, would the procedure applicable require an additional pre-trial investigation or could the case commence at trial stage? Will the prosecution be able to call all the witnesses, including international experts, intended to be called by the ICTY Prosecution?
11. Would it be possible for the counsel presently retained to continue to represent the Accused if the case is referred to Serbia? Is there a system in place in Serbia for remuneration of counsel defending an indigent accused? What guarantees for the right to counsel at pre-trial and trial stage exist under the applicable law of criminal procedure?
12. If convicted by the competent court, would the Accused be given credit for the time spent in detention at the ICTY?
13. Any other relevant issue.

ORDERS the Prosecution to file further submissions on the following matters by 11 August 2006:

1. If the case were to be referred to Serbia, what effects would the Trial Chamber's Decision of 7 April 2006 and the Accused's inability to enter a plea and stand trial before the ICTY have on the proceedings before a competent court in Serbia?
2. What are the provisions and practice in a case where an accused is unable, because of his mental health, to enter a plea and to stand trial in Serbia?
3. What are the provisions and practice of resumption of prosecution of an accused who, after having been initially found temporarily unfit to plead and to stand trial, is later considered mentally capable to enter a plea and participate in legal proceedings in Serbia?
4. What protective measures are needed for witnesses, especially in view of a potential hearing in Serbia? Is it to be anticipated that witnesses, in their contact with prosecutorial services, will ask for additional protective measures?
5. Would the substantive law applicable to the case be the criminal code in force in December 1991 or the current criminal code?

6. What are the mechanisms by which the courts in Serbia could apply international treaty or customary law in domestic proceedings?
7. Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
8. How would the Prosecution envision to monitor the proceedings, pursuant to Rule 11bis (D)(iv) of the Rules?
9. Any other relevant issue.

ORDERS the Defence to provide written submissions on the following aspects by 11 August 2006:

1. If the case were to be referred to Serbia, what effects would the Trial Chamber's Decision and the Accused's inability to enter a plea and stand trial before the ICTY have on the proceedings before a competent court in Serbia?
2. What are the provisions and practice in a case where an accused is unable, because of his mental health, to enter a plea and to stand trial in Serbia?
3. What are the provisions and practice regarding resumption of prosecution of an accused who, after having been initially found unfit to plead and to stand trial, is later found to be mentally capable of entering a plea and participating in trial proceedings in Serbia?
4. What protective measures are expected to be needed for defence witnesses, especially in view of a potential hearing in Serbia?
5. Would the substantive law applicable to the case be the criminal code in force in December 1991 or the current criminal code?
6. What are the mechanisms by which the courts in Serbia could apply international treaty or customary law in domestic proceedings?
7. Does the level of interstate mutual assistance in criminal matters sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
8. Would any issue of due process arise if the ICTY Indictment is received without prior investigation by a competent court in Serbia? Can the proceedings in this case continue from their current stage before the ICTY or is an additional pre-trial investigation required?

9. Would it be possible for the counsel presently retained to continue to represent the Accused if the case is transferred to Serbia?
10. Would observers sent by the Prosecutor of the ICTY, in accordance with Rule 11 *bis* (D)(iv), be considered by the Defence an appropriate and sufficient tool to monitor the fairness of the proceedings before a competent court in Serbia?
11. If the Referral Bench calls for a hearing, are defence counsel able to represent the Accused before the Tribunal notwithstanding the present mental health condition of the Accused?
12. Any other relevant issue.

ORDERS the Parties to be prepared to make oral submissions on the Prosecution's Request for Referral and issues related to the mental health of the Accused at a hearing to be scheduled by the Referral Bench upon receipt of the Parties' submissions, and **INVITES** the Government of the Republic of Serbia to indicate whether it wishes to make oral submissions on the Prosecution's Request for Referral.

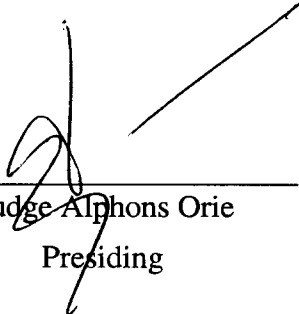
REQUESTS the Registrar to transmit this Order immediately to the Government of the Republic of Serbia.

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

Done on this seventeenth day of July 2006

At The Hague,

The Netherlands



Judge Alphons Orie
Presiding

[Seal of the Tribunal]