



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-96-23/2-PT  
Date: 17 August 2006  
Original: English

**IN THE REFERRAL BENCH**

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

**Registrar:** Mr. Hans Holthuis

**Order of:** 17 August 2006

**PROSECUTOR**

v.

**DRAGAN ZELENović**

**ORDER FOR FURTHER INFORMATION IN THE CONTEXT  
OF PROSECUTOR'S MOTION PURSUANT TO RULE 11BIS**

**The Office of the Prosecutor:**

Ms. Carla del Ponte  
Ms. Hildegard Uertz-Retzlaff

**Government of Bosnia and  
Herzegovina:**

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

**Counsel for the Accused:**

Mr. Zoran Jovanović

**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”);

**BEING SEIZED OF** the “Motion by the Prosecutor Under Rule 11*bis* With Annexes I, II, III and Confidential Annexes IV and V” (“Motion”), filed by the Office of the Prosecutor (“Prosecution”) on 29 November 2004, requesting that the Referral Bench order the referral of the case against Dragan Zelenović (“Accused”) pursuant to Rule 11*bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) to the authorities of Bosnia and Herzegovina;

**NOTING** the “Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should Be Referred to Another Court under Rule 11*bis*”, issued by the President of the Tribunal on 1 December 2004, whereby the President appointed this Referral Bench to determine whether the case against the Accused shall be referred to the authorities of Bosnia and Herzegovina;

**NOTING** that the Accused was brought into the custody of the Tribunal on 10 June 2006, that his initial appearance pursuant to Rule 62 of the Rules was held on 13 June 2006, and that he entered a plea of not guilty at a further initial appearance held on 13 July 2006;

**NOTING** that the Accused was assigned permanent counsel by a Decision of the Deputy Registrar of 16 August 2006;

**CONSIDERING** that counsel for the Accused (“Defence”) has not yet had an opportunity to respond to the Motion;

**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 1503 (2003) recommended that the Tribunal 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”;

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

**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 operative indictment against the Accused (“Indictment”)<sup>1</sup>, charging the Accused with counts of torture and rape, which allegedly occurred in Buk Bijela, Foča High School, Partizan Sports Hall and other locations in the town of Foča and surrounding villages in eastern Bosnia and Herzegovina, as crimes against humanity and violations of the laws or customs of war;

**CONSIDERING** that the Indictment charges the Accused with individual criminal responsibility pursuant to Article 7(1) of the Statute of the Tribunal in relation to all counts;

**CONSIDERING** that, although the Motion discusses the gravity of the alleged offences and the level of responsibility of the Accused in this case, the Referral Bench would benefit from detailed submissions on these matters from both the Prosecution and Defence (“Parties”), as well as the Government of Bosnia and Herzegovina, including whether the “level of responsibility” in Rule 11*bis*(C) of the Rules refers to the role of the Accused in the commission of the alleged offences, or to the position and rank of the Accused in the civil or military hierarchy, or both; and whether special weight should be given to any particular considerations relating to the gravity of the alleged offences or the level of responsibility of the Accused;

**CONSIDERING** that the Referral Bench also wishes to obtain submissions from the Government of Bosnia and Herzegovina and the Parties on the compatibility of the legal system of Bosnia and Herzegovina with Rule 11 *bis*(B) of the Rules;

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<sup>1</sup> *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-I, Dragan Zelenović and Radovan Stanković, Indictment, 5 October 1999, filed 21 April 2001.

**FOR THE FOREGOING REASONS**

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

**ORDERS** the Parties and **INVITES** the Government of Bosnia and Herzegovina to file submissions by 22 September 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 in Bosnia and Herzegovina under Rule 11*bis* of the Rules?
2. Is the *level of the responsibility of the Accused* compatible with referral of the case to the War Crimes Chamber of the State Court in Bosnia and Herzegovina under Rule 11*bis* of the Rules? In particular, does Rule 11 *bis*(C) of the Rules refer to the role of the Accused in the 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 Bosnia and Herzegovina with Rule 11*bis*(B) of the Rules, **INVITES** the Government of Bosnia and Herzegovina to provide any additional documents, in English if possible, which it considers of relevance to the present case and which have not yet been submitted in previous pleadings pursuant to Rule 11*bis* of the Rules, by 22 September 2006;

**FURTHER INVITES** the Government of Bosnia and Herzegovina to file further written submissions or, if applicable, refer back to its previous written or oral submissions before the Tribunal, by 22 September 2006 on the following matters:

1. What are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
2. Any other issue that the Government of Bosnia and Herzegovina considers of relevance in relation to the particular case.

**ORDERS** the Prosecution to file further submissions on the following matters by 22 September 2006:

1. What are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
2. Any other issue that the Prosecution considers of relevance in relation to the particular case.

**ORDERS** the Defence to provide written submissions on the following aspects by 22 September 2006:

1. Would the substantive law applicable to the case be the criminal code that was in force in April 1992 or the current criminal code?
2. What are the mechanisms by which the courts in Bosnia and Herzegovina could apply international treaty or customary law in domestic proceedings?
3. What protective measures are expected to be needed for (Defence) witnesses in view of a potential hearing in Bosnia and Herzegovina?
4. Does the level of intrastate mutual assistance in criminal matters, or as far as necessary interstate mutual assistance, sufficiently facilitate a fair trial, especially with respect to summoning witnesses and taking witnesses' depositions?
5. Would any issue of due process arise if the Tribunal indictments are received without prior investigations in Bosnia and Herzegovina? Can the proceedings in this case continue from the stage they currently are before the Tribunal or is there a need for some pre-trial investigatory steps to be taken or repeated?
6. Would it be possible for counsel presently retained to continue to represent the Accused if the case is transferred to Bosnia and Herzegovina?
7. Would observers sent by the Prosecution, in accordance with Rule 11*bis*, be considered by the Defence an appropriate and sufficient tool to monitor and fairness of the proceedings before BiH State Court?

8. Any other relevant issue, including matters which would have been addressed in a response to the Motion.

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

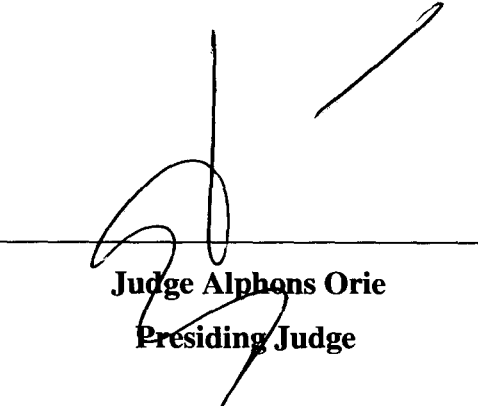
**REQUESTS** the Registrar of the Tribunal to transmit this Order immediately to the Government of Bosnia and Herzegovina.

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

Dated this seventeenth day of August 2006

At The Hague

The Netherlands



**Judge Alphons Orie**  
**Presiding Judge**

**[Seal of the Tribunal]**