



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-05-88/1-PT

Date: 22 November 2006

Original: English

BEFORE THE REFERRAL BENCH

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

Registrar: Mr. Hans Holthuis

Order of: 22 November 2006

PROSECUTOR

v.

MILORAD TRBIĆ

**ORDER FOR FURTHER SUBMISSIONS ON REFERRAL
REQUEST AND SCHEDULING ORDER FOR HEARING**

Office of the Prosecutor

Ms. Carla Del Ponte

Mr. Peter McCloskey

Ms. Susan Somers

Counsel for Milorad Trbić

Mr. Stéphane Piletta-Zanin

The Government of Bosnia and Herzegovina

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

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”);

BEING SEISED OF the partly confidential “Request by the Prosecutor under Rule 11 *bis* for Referral of the Indictment to Another Court”, filed on 4 May 2006 (“Referral Request”), in which the Prosecution requests the Referral Bench to refer the case against Milorad Trbić (“Accused” or “Trbić”) to the authorities of Bosnia and Herzegovina pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”);¹

NOTING the “Defence Response to ‘Motion by the Prosecutor Under Rule 11 *bis* for Referral of the Indictment’”, filed confidentially in the original French on 14 June 2006 (“Response”), in which the Accused opposes the Referral Request on a number of grounds, including that it would be unsafe for the Accused and his family if he were transferred to Bosnia and Herzegovina;² and that the crimes with which he is charged, including genocide, are too grave to permit referral under Rule 11 *bis*;³

NOTING that the Response was filed *ex parte* Trbić’s former co-Accused in Case No. IT-05-88, and not *ex parte* the Prosecution;⁴

CONSIDERING that all proceedings before the Tribunal must take place in public, unless good cause is shown to the contrary;⁵ that “*ex parte* filings ... should be accepted only where disclosure to the other party of the information conveyed in the filing would likely prejudice unfairly either the party making the filing, or some person involved in or related to that filing”;⁶

¹ The Referral Bench became seized of Rule 11 *bis* proceedings in this case by virtue of an order dated 10 May 2006. See *Prosecutor v. Trbić*, Case No. IT-05-88-PT, Order Appointing a Referral Bench for the Purpose of Determining Whether the Indictment Should Be Referred to Another Court under Rule 11 *bis*, 10 May 2006, p. 2.

² Response, pp. 2–3, 9.

³ *Ibid.* p. 9.

⁴ Trbić’s case was severed from Case No. IT-05-88 on 26 June 2006. See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Decision on Severance of Case Against Milorad Trbić with Confidential and *Ex Parte* Annex, 26 June 2006 (“*Trbić* Severance Decision”).

⁵ *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-PT, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006, para. 5. *Accord Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-PT, Order on Motions for Access to Confidential Material, 27 September 2006, pp. 5, 7 (considering that none of the relevant filings contained any information of a sensitive nature, and that no good cause had been shown for classifying them as confidential, and consequently ordering the Registry to lift their confidential status); *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motions for Reconsideration of Severance Decision and Time Extensions, 5 July 2006 (“*Trbić* July 2006 Order”), p. 5 (same); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence’s Motion for Temporary Modification of Provisional Release Conditions, 8 February 2006, p. 3 (same); *Prosecutor v. Simić, Tadić, and Zarić*, Case No. IT-95-9-T, Order, 24 September 2002, p. 2 (considering that “proceedings must be in public unless good cause is shown for filings to be made on a ‘confidential’ basis”).

⁶ *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-PT, Confidential Order on Motion for Protective Measures, 12 October 2006, p. 3.

and that “the party making the filing is under an obligation to identify why disclosure of the filing to the other party would cause such prejudice”;⁷

CONSIDERING that the Response and the confidential portion of the Referral Request contain sensitive information that is not in the public domain, and that the Response contains sensitive information that is not known to Trbić’s former co-Accused in Case No. IT-05-88;

CONSIDERING, therefore, that good cause exists for the maintenance of the confidential status of the Response and the confidential portion of the Referral Request; and that the Accused has adequately demonstrated that disclosure to his former co-Accused in Case No. IT-05-88 would likely result in prejudice;

CONSIDERING that the evaluation of whether a case should be referred to the authorities of a state is a “two-step process”,⁸ requiring consideration of the following:

- a. whether the gravity of the crimes charged and the level of responsibility of the accused renders the case appropriate for referral, because the case involves intermediate or lower-ranking accused;⁹ and
- b. whether the state to which the Prosecution seeks to refer the case is a competent national jurisdiction whose legal system is compatible with the requirements of Rule 11 *bis*(B);¹⁰

CONSIDERING that Rule 11 *bis*(B) provides that the Referral Bench may order referral “at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard”;

CONSIDERING that, although the Referral Request discusses the gravity of the alleged crimes and the level of responsibility of the Accused in this case,¹¹ the Referral Bench would benefit from further written submissions on these matters from the parties and the Government of Bosnia and Herzegovina, including whether special weight should be given to any particular

⁷ *Ibid. Accord Haradinaj et al.*, Decision on Prosecution’s Application for Pre-Trial Protective Measures for Witnesses, 20 May 2005, pp. 4–5.

⁸ *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision for Further Information in the Context of the Prosecutor’s Motion under Rule 11*bis*, 5 September 2005, p. 1. *Accord Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Order for Written Submissions and Scheduling Order for Hearing, 30 June 2006, p. 2; *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, Decision for Further Information in the Context of the Prosecutor’s Motions under Rule 11*bis*, 14 April 2005 (“*Rašević and Todović* Decision”), p. 2; *Prosecutor v. Milošević*, Case No. IT-98-29/1-PT, Order for Further Submissions on the Gravity of the Crimes and the Level of Responsibility of the Accused, 9 February 2005, p. 1.

⁹ Rule 11 *bis*(C) of the Rules (citing Security Council Resolution 1534 (2004), which refers to “the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions”). See also Security Council Resolution 1503 (2003) (recommending that the Tribunal transfer cases not involving those suspected of being most responsible for crimes within the Tribunal’s jurisdiction).

¹⁰ Rule 11 *bis*(B) of the Rules (permitting referral only where the Referral Bench is satisfied that the state to which the accused is to be referred will give him a fair trial and will not impose the death penalty on him).

¹¹ See Referral Request, paras. 16–20.

considerations relating to the gravity of the alleged crimes or the level of responsibility of the Accused, and the compatibility of the legal system of Bosnia and Herzegovina with Rule 11 *bis*(B);¹²

CONSIDERING FURTHER that questions have been raised by the Trial Chamber seized of pre-trial proceedings in this case relating to the mental health of the Accused;¹³ and that the Referral Bench wishes to obtain submissions from the parties and the Government of Bosnia and Herzegovina on the provisions of Bosnian law addressing an accused's possible lack of fitness to enter a plea and to stand trial, and on the compatibility of the legal system of Bosnia and Herzegovina with Rule 11 *bis*(B) under these conditions;

PURSUANT TO Rules 11 *bis*, 54, and 74 of the Rules,

HEREBY ORDERS AS FOLLOWS:

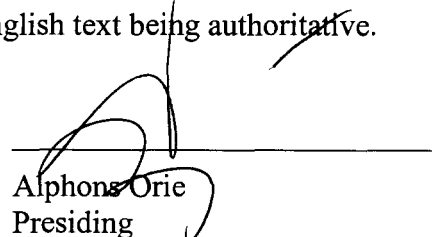
1. The Referral Bench orders the parties, and invites the Government of Bosnia and Herzegovina, to file submissions by Friday, 5 January 2007 addressing
 - a. the following four questions, including the weight to be given to each of them:
 - i. whether the gravity of the crimes charged in the Indictment dated 18 August 2006 is compatible with referral of this case to the authorities of Bosnia and Herzegovina under Rule 11 *bis*;
 - ii. whether the level of responsibility of the Accused is compatible with referral to this case to the authorities of Bosnia and Herzegovina under Rule 11 *bis*;
 - iii. whether measures exist in Bosnia and Herzegovina to protect the security of an accused and his relatives, and what these consist of; and
 - iv. whether measures exist in Bosnia and Herzegovina for the detention and treatment of an accused whose mental health does not allow him to enter a plea and to stand trial; and
 - b. any matters the parties or the Government of Bosnia and Herzegovina may deem relevant regarding the compatibility of the legal system of Bosnia and Herzegovina with Rule 11 *bis*(B). Submissions may be made by reference to and commentary on views expressed in one or more of the following decisions:
 - i. *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, 12 April 2006;
 - ii. *Prosecutor v. Janković*, Case No. IT-06-23/2-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annex, 22 July 2005;

¹² Cf. *Rašević and Todović* Decision, *supra* note 8, p. 2.

¹³ *Trbić* Severance Decision, *supra* note 4, p. 2. See also *Trbić* July 2006 Order, *supra* note 5, p. 1.

- iii. *Prosecutor v. Mejakić, Gruban, Fuštar, and Knežević*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2005;
 - iv. *Prosecutor v. Rašević and 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; and
 - v. *Prosecutor v. 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.
2. The Referral Bench invites the Government of Bosnia and Herzegovina to address the following additional questions in a written submission to be filed by Friday, 5 January 2007:
- i. If this case were referred, what effects would the possibility of the Accused's lack of fitness to enter a plea and to stand trial have on the proceedings before a competent court in Bosnia and Herzegovina?
 - ii. What are the provisions and practice of criminal procedure in Bosnia and Herzegovina where an accused is unable, because of his mental health, to enter a plea and to stand trial?
3. A hearing shall be held in one of the courtrooms of the Tribunal on Monday, 15 January 2007 at 9:30 a.m. The Referral Bench orders the parties to attend and make oral submissions, and invites the Government of Bosnia and Herzegovina to attend and make oral submissions.

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



Alphons Orie
Presiding

Dated this twenty-second day of November 2006
At The Hague
The Netherlands

[Seal of the Tribunal]