



Mechanism for International Criminal Tribunals

Case No. MICT-13-51

Date: 21 May 2014

Original: English

**IN THE APPEALS CHAMBER**

**Before:**

**Judge Theodor Meron  
Judge Jean-Claude Antonetti  
Judge Patrick Robinson  
Judge William H. Sekule  
Judge Burton Hall**

**Registrar:**

**Mr. John Hocking**

**Decision of:**

**21 May 2014**

**PROSECUTOR**

**v.**

**RADOVAN STANKOVIĆ**

***PUBLIC***

**DECISION ON STANKOVIĆ'S APPEAL AGAINST DECISION  
DENYING REVOCATION OF REFERRAL AND ON THE  
PROSECUTION'S REQUEST FOR EXTENSION OF TIME TO  
RESPOND**

**The Applicant:**

Mr. Radovan Stanković, *pro se*

**The Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
Mr. Mathias Marcussen

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of an appeal<sup>1</sup> filed *pro se* and confidentially by Radovan Stanković (“Stanković”) against a confidential decision of the Referral Bench of the International Criminal Tribunal for the former Yugoslavia (“Referral Bench” and “ICTY”, respectively) dismissing his request to revoke the referral of his case to Bosnia and Herzegovina.<sup>2</sup> The Appeals Chamber is also seised of a confidential motion filed by the Office of the Prosecutor (“Prosecution”) requesting an extension of time to respond to the Appeal to which the Prosecution annexes its response.<sup>3</sup>

## I. BACKGROUND

2. The operative indictment charged Stanković, on the basis of individual criminal responsibility pursuant to Article 7(1) of the ICTY Statute, with enslavement and rape as crimes against humanity under Article 5 of the ICTY Statute, and rape and outrages upon personal dignity as violations of the laws or customs of war under Article 3 of the ICTY Statute.<sup>4</sup> The Indictment alleged that the crimes were committed between April and November 1992 in the municipality of Foča, Bosnia and Herzegovina.<sup>5</sup>

3. On 21 September 2004, the ICTY Prosecution requested the referral of the case to the authorities of Bosnia and Herzegovina.<sup>6</sup> On 17 May 2005, the ICTY Referral Bench concluded that the referral was appropriate and ordered, pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (“ICTY Rules”), that the case be transferred to the authorities of Bosnia and Herzegovina.<sup>7</sup> On 1 September 2005, the ICTY Appeals Chamber affirmed the referral order.<sup>8</sup>

<sup>1</sup> Appeal of Your Decision of 12 June 2013, signed on 2 August 2013 and filed in English on 18 September 2013 (confidential) (“Appeal”). Stanković supplemented his Appeal with a further written submission which was filed on 10 December 2013. See Letter to the Ministry of Justice of Bosnia and Herzegovina and to the Hague Tribunal, signed on 9 October 2013 and filed in English on 10 December 2013 (“Supplemental Submission”). Under Rules 92 and 131 of the Rules of Procedure and Evidence of the Mechanism (“MICT Rules”), all proceedings before the Appeals Chamber, including the Appeals Chamber’s orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential. Although the submissions and the underlying decision related to this appeal were filed confidentially, nothing in this decision requires that it be filed confidentially. Accordingly, the Appeals Chamber renders the present decision publicly.

<sup>2</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Radovan Stanković’s Motion of 21 January 2013, 12 June 2013 (confidential) (“Impugned Decision”).

<sup>3</sup> Prosecution Request for Extension of Time to Respond to Stanković’s Appeal, 22 October 2013 (confidential) (“Motion for Extension of Time”). See also Motion for Extension of Time, Annex (confidential).

<sup>4</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Third Amended Indictment (“Indictment”), paras. 3.6, 4.11, 5.6. The Indictment was confirmed on 24 February 2004. See *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Prosecution’s Motion Seeking Leave to Amend the Second Amended Indictment, 24 February 2004, p. 6.

<sup>5</sup> Indictment, paras. 1.1-1.4, 3.3-3.4, 4.1-4.10, 5.1-5.5.

<sup>6</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Request by the Prosecutor Under Rule 11*bis* of the Rules of Procedure and Evidence (RPE) for Referral of the Indictment to the State of Bosnia and Herzegovina, 21 September 2004, para. 31.

<sup>7</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 17 May 2005 (partly confidential and *ex parte*), para. 96, p. 33.

Subsequently, on 29 September 2005, Stanković was transferred into the custody of the authorities of Bosnia and Herzegovina.<sup>9</sup>

4. On 28 November 2005, the State Prosecutor's Office of Bosnia and Herzegovina ("State Prosecutor") issued a revised indictment against Stanković, and, on 14 November 2006, the State Court of Bosnia and Herzegovina found Stanković guilty on four counts of crimes against humanity.<sup>10</sup> Stanković was sentenced to 16 years of imprisonment.<sup>11</sup> On 17 April 2007, the Appellate Panel dismissed Stanković's appeal, granted the State Prosecutor's appeal on sentencing, and increased Stanković's sentence to 20 years of imprisonment.<sup>12</sup> Throughout the proceedings against Stanković in Bosnia and Herzegovina, the ICTY Prosecution filed periodic progress reports before the Referral Bench based on the monitoring reports prepared by the Office of the Organization for Security and Co-operation in Europe Mission to Bosnia and Herzegovina ("OSCE").<sup>13</sup>

5. On 21 January 2013, nearly six years after the conclusion of the proceedings against him, Stanković filed a confidential motion, requesting that his case be returned to the ICTY in order to "conduct a trial and to establish the truth" ("Revocation Request").<sup>14</sup> On 12 June 2013, the Referral Bench dismissed Stanković's motion, finding that no violation of Stanković's right to a fair trial had occurred and that there were no grounds to revoke the referral order and return his case to the ICTY.<sup>15</sup>

6. On 18 September 2013, Stanković's Appeal was filed before the President of the Mechanism.<sup>16</sup> On 27 September 2013, the Prosecution informed the President of its intention not to

<sup>8</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005, para. 1, p. 24.

<sup>9</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Submission of the Deputy Registrar Pursuant to Rule 33(B) on the Transfer of Mr. Radovan Stanković to Bosnia and Herzegovina, 30 September 2005 (partly confidential and *ex parte*), para. 3.

<sup>10</sup> Impugned Decision, para. 5. See also *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Second Progress Report, 20 February 2006 ("Second Progress Report"), para. 5; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Fifth Progress Report, 20 December 2006 (confidential and *ex parte*) ("Fifth Progress Report"), para. 5.

<sup>11</sup> Impugned Decision, para. 5; Fifth Progress Report, para. 5.

<sup>12</sup> Impugned Decision, para. 5; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Seventh Progress Report, 27 June 2007 ("Seventh Progress Report"), para. 6. See also Seventh Progress Report, Annexes A and B.

<sup>13</sup> Impugned Decision, para. 6. See also *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Initial Progress Report, 14 November 2005 (confidential and *ex parte*); Second Progress Report; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Third Progress Report, 7 June 2006; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Fourth Progress Report, 20 September 2006 (with confidential annex); Fifth Progress Report; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Sixth Progress Report, 20 March 2007 ("Sixth Progress Report"); Seventh Progress Report.

<sup>14</sup> Impugned Decision, para. 7 (quoting the Revocation Request).

<sup>15</sup> Impugned Decision, paras. 16-17.

<sup>16</sup> Appeal, p. 3.

respond to the Appeal.<sup>17</sup> It noted, however, that, should the President consider Stanković's submission to constitute a motion and refer it to a chamber for consideration, the Prosecution may seek an extension of time to respond.<sup>18</sup> On 9 October 2013, the President assigned the case to the Appeals Chamber.<sup>19</sup> On 22 October 2013, the Prosecution requested an extension of 24 days to respond to the Appeal and filed its response to the Appeal, in the event that the Appeals Chamber grants the requested extension.<sup>20</sup> Stanković did not respond to the Motion for Extension of Time or reply to the response annexed thereto. On 10 December 2013, Stanković's supplement to his Appeal, advancing two additional paragraphs of arguments, was filed.<sup>21</sup> The Prosecution did not respond to the Supplemental Submission.

## II. PRELIMINARY MATTERS

### 7. Rule 11bis(F) of the ICTY Rules provides:

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.

### 8. Pursuant to this provision, only the ICTY Prosecution has standing to seek the revocation of a referral made pursuant to Rule 11bis of the ICTY Rules. However, as the matter at hand relates to the fairness of the proceedings, the Appeals Chamber is satisfied that the Referral Bench had inherent jurisdiction to consider a direct request from Stanković for the revocation of his referral.<sup>22</sup>

<sup>17</sup> Prosecution's Notification That It Will Not Respond to the Filing from Mr. Stanković, 27 September 2013 (confidential and *ex parte*) ("Prosecution Notification"), para. 1.

<sup>18</sup> Prosecution Notification, para. 1.

<sup>19</sup> Order Assigning Judges to a Case Before the Appeals Chamber, 9 October 2013 (confidential).

<sup>20</sup> Motion for Extension of Time, para. 2; *See also* Motion for Extension of Time, Annex A.

<sup>21</sup> *See* Supplemental Submission.

<sup>22</sup> *Cf. In Re. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008 ("*Ntagerura* Appeal Decision"), para. 12 ("The Applicant seeks leave of the Appeals Chamber to appeal against the Decision of the President and the Decision of the Trial Chamber. While neither the Statute nor the Rules provide for such appeals, the Appeals Chamber has inherent jurisdiction over the enforcement of its orders and any decisions rendered as a consequence thereof."); *Miscellaneous-Kabuga Family-01-A*, Decision (Appeal of the Family of Félicien Kabuga Against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002, p. 3 ("CONSIDERING moreover that the action of the Prosecutor was taken pursuant to a Rule made by the Judges and that, by implication, the Judges, through the appropriate mechanism of a Trial Chamber, retain responsibility to review the working of such action [...]"). The Appeals Chamber observes, however, that accused before the International Criminal Tribunal for Rwanda ("ICTR") have been expressly granted standing to seek revocation in the terms of the decisions ordering their referral. *See, e.g., Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 ("*Uwinkindi* Rule 11bis Decision"), paras. 79, 85. The Appeals Chamber observes that Rule 11bis(F) of the ICTR Rules of Procedure and Evidence tracks the language of Rule 11bis(F) of the ICTY Rules quoted above. In addition, Rule 14(C) of the MICT Rules allows the President to assign, *proprio motu* or at the request of the Prosecution, a trial chamber to decide whether to revoke a request for referral.

9. The Appeals Chamber further observes that Rule 11*bis*(I) of the ICTY Rules and Rule 14(E) of the MICT Rules expressly provide for an appeal as of right from a decision of a trial chamber on the referral of a case. However, Rule 11*bis* of the ICTY Rules and Rule 14 of the MICT Rules are silent on appeals from a decision of a trial chamber concerning revocation of a case. Notwithstanding, decisions on revocation concern, among other things, fundamental questions related to whether the Mechanism should exercise jurisdiction over a case and the fairness of the proceedings of the referred case.<sup>23</sup> In the absence of any provision limiting the right of appeal,<sup>24</sup> the Appeals Chamber considers that a decision on whether or not to revoke a case should be subject to appellate review.<sup>25</sup> For reasons of consistency, the Appeals Chamber considers that such appeals should follow the same procedure as provided for in cases involving appeals from decisions on referral set out in Rule 14(E) of the MICT Rules.<sup>26</sup>

10. The Appeals Chamber recalls that the Mechanism has a duty to monitor cases referred to national courts by the ICTY.<sup>27</sup> Considering that the Appeal was filed after the commencement date of the functioning of the ICTY branch of the Mechanism,<sup>28</sup> the Appeals Chamber is satisfied that it is properly seised of the matter before it. The Appeals Chamber observes that Stanković did not follow the procedure set forth in Rule 14(E) of the MICT Rules.<sup>29</sup> However, given that this is the first appeal of a decision on revocation and that Stanković is proceeding *pro se*, the Appeals Chamber will accept his appeal as validly filed.

<sup>23</sup> The Appeals Chamber recalls that decisions taken pursuant to Rule 11*bis* of the ICTY Rules, and by extension Rule 14 of the MICT Rules, are treated as akin to interlocutory appeals from decisions on preliminary motions challenging jurisdiction. See *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, para. 14.

<sup>24</sup> See, e.g., Rule 80(B) of the MICT Rules (which precludes interlocutory appeals on certain decisions absent certification granted by a trial chamber).

<sup>25</sup> Cf. *Ntagerura Appeal Decision*, para. 12; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 14 (“Rule 75(G) of the Rules, which allows for the possibility of seeking to rescind, vary, or augment protective measures ordered at trial does not provide for an appeal as of right, nor do the [ICTR] Rules address the issue of whether a decision rendered by a Trial Chamber after the close of trial and appeal proceedings is subject to appeal. However, because issues related to access to confidential material by a convicted person concern the important question of balance between the right of the convicted person to access potentially exculpatory material and the need to guarantee the protection of victims and witnesses, the Appeals Chamber considers, *proprio motu*, that an applicant is entitled to challenge a decision by a Trial Chamber, pursuant to Rule 75(G) of the [ICTR] Rules, rendered after the close of trial and appeal proceedings before the Appeals Chamber.”) (internal citation omitted); *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Prosecution’s Notice of Appeal and Scheduling Order, 18 April 2007, paras. 2-4, 8-9 (allowing an appeal from a decision concerning the compensation of an acquitted person and setting out a scheduling order in the absence of procedural rules for disposing of such an appeal).

<sup>26</sup> See Rule 14(E) of the MICT Rules (“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. The appellant shall file an appeal brief within fifteen days after filing the notice of appeal. The opposite Party shall file a response within ten days of the filing of the appeal brief, and the appellant may file a reply within four days of the filing of the response.”).

<sup>27</sup> Article 6(5) of the Statute of the Mechanism (“MICT Statute”).

<sup>28</sup> Security Council Resolution 1966 (2010), para. 1.

<sup>29</sup> The Impugned Decision and its translation in B/C/S were transmitted to the Embassy of Bosnia and Herzegovina on 1 July 2013. Stanković’s appeal was signed on 2 August 2013, transmitted to the Mechanism by the Embassy of Bosnia and Herzegovina on 4 September 2013, and filed in English on 18 September 2013.

11. Turning to the Prosecution's Motion for Extension of Time,<sup>30</sup> the Appeals Chamber notes that the Prosecution was to file a response, if any, by 30 September 2013.<sup>31</sup> The Appeals Chamber may, on good cause being shown by motion, enlarge the time limits prescribed for filing submissions on appeal.<sup>32</sup> In support of its request for extension of time, the Prosecution submits that it understood Stanković's submission to be a letter to the President rather than an appeal.<sup>33</sup> The Appeals Chamber observes that, while Stanković filed the Appeal in the form of a letter addressed to the President, the plain reading of his submissions indicates that he seeks to appeal the Impugned Decision.<sup>34</sup> Consequently, the Appeals Chamber is not persuaded that the Prosecution has shown good cause for the requested extension of time and will not consider the Prosecution's arguments in response as validly filed. In the circumstances of the present case, the Appeals Chamber considers that this will not cause any prejudice to the Prosecution.

### III. STANDARD OF REVIEW

12. Where an appeal is filed against a decision denying a request for revocation of a referral, the issue before the Appeals Chamber is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but whether the Referral Bench has correctly exercised its discretion in reaching that decision.<sup>35</sup> A party challenging such a decision must show that the Referral Bench: (i) misdirected itself either as to the legal principle to be applied, or as to the law which is relevant to the exercise of its discretion; (ii) gave weight to irrelevant considerations or failed to give sufficient weight to relevant considerations; (iii) made an error as to the facts upon which it has exercised its discretion; or (iv) its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Referral Bench must have failed to exercise its discretion properly.<sup>36</sup>

<sup>30</sup> Motion for Extension of Time, paras. 1-2.

<sup>31</sup> The Appeals Chamber notes that, even if the Prosecution was in doubt as to the correct procedure to be followed, a response to an appeal both from a decision where an interlocutory appeal lies as of right and from a decision pursuant to Rule 11bis of the ICTY Rules and Rule 14 of the MICT Rules shall be filed within 10 days of the filing of the motion or the appeal brief, respectively. See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012, paras. 2, 6. See also Practice Direction on Requirements and Procedures for Appeals, MICT/10, 6 August 2013, paras. 19, 23.

<sup>32</sup> See Rule 154(A) of the MICT Rules.

<sup>33</sup> Motion for Extension of Time, para. 2.

<sup>34</sup> See Appeal, p. 3: "SUBJECT: Appeal of your decision of 12 June 2013". See also Appeal, paras. 1, 3.

<sup>35</sup> See *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-AR11bis.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 28 March 2007 ("Kovačević Rule 11bis Decision"), para. 9, citing *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006 ("Mejačić et al. Rule 11bis Decision"), para. 10. See also *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006 ("Ljubičić Rule 11bis Decision"), para. 6.

<sup>36</sup> See *Uwinkindi Rule 11bis Decision*, para. 23; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 4 December 2008, para. 5, citing *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's

#### IV. DISCUSSION

13. Stanković challenges the composition of the Referral Bench which considered his Revocation Request, including the involvement of Judge Alphons Orie in light of statements he made prior to becoming an ICTY Judge.<sup>37</sup> Stanković also contends that, in the Impugned Decision, the Referral Bench ignored OSCE monitoring reports and relied instead on reports submitted by the State Prosecutor.<sup>38</sup> He requests that the Appeals Chamber revoke the referral of his case and review the judgements rendered against him by the courts of Bosnia and Herzegovina.<sup>39</sup> In particular, Stanković argues that his fair trial rights were violated as he was: (i) tried *in absentia*<sup>40</sup> and pursuant to a retroactive application of the law;<sup>41</sup> (ii) denied a public hearing<sup>42</sup> and the right to have effective assistance of counsel;<sup>43</sup> and (iii) convicted on the basis of unreliable evidence for crimes for which the actual perpetrators were found guilty by the ICTY.<sup>44</sup> Stanković also challenges the legitimacy of the judicial proceedings against him in Bosnia and Herzegovina, including the integrity of the Judge who presided over his case at trial.<sup>45</sup> He also argues that transferring his case to the authorities of Bosnia and Herzegovina during the “final stages” of his trial at the ICTY was legally erroneous.<sup>46</sup> Finally, he claims that no final judgement has been rendered against him by the courts of Bosnia and Herzegovina as the appeal proceedings were conducted by the same judges who adjudicated his case on trial.<sup>47</sup>

14. The Appeals Chamber turns first to Stanković’s challenge to the composition of the Referral Bench. Rule 11bis of the ICTY Rules does not require that a request for revocation be considered by a differently composed bench than the one that referred the case to a national jurisdiction. Indeed, Rule 11bis of the ICTY Rules simply refers to the “Referral Bench” throughout, which is defined in Rule 11bis(A) of the ICTY Rules as “a bench of three Permanent Judges selected from the Trial Chambers”. Stanković has also failed to substantiate his submission that there were circumstances requiring the disqualification of Judge Orie. It suffices to recall that Judges enjoy a presumption of impartiality and that there is a high threshold to reach in order to rebut that

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Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 5; *Kovačević* Rule 11bis Decision, para. 9; *Ljubičić* Rule 11bis Decision, para. 6; *Mejakić et al.* Rule 11bis Decision, para. 10.

<sup>37</sup> Appeal, paras. 1, 10.

<sup>38</sup> Appeal, para. 3, *referring to* Impugned Decision, para. 13.

<sup>39</sup> Appeal, para. 15; Supplemental Submission, p. 2.

<sup>40</sup> Appeal, para. 5.

<sup>41</sup> Appeal, paras. 2, 8.

<sup>42</sup> Appeal, para. 5.

<sup>43</sup> Appeal, paras. 5, 8.

<sup>44</sup> Appeal, paras. 6-7, 9; Supplemental Submission, p. 2.

<sup>45</sup> Appeal, paras. 5-6, 12-14; Supplemental Submission, pp. 1-2.

<sup>46</sup> Appeal, paras. 3-4.

<sup>47</sup> Appeal, para. 15.

presumption.<sup>48</sup> Stanković's mere reference to Judge Orić's purported statements challenging the jurisdiction of the ICTY, in his prior capacity as defence counsel for Duško Tadić,<sup>49</sup> fails to meet this high threshold.

15. Turning to Stanković's challenges to the Impugned Decision, the Appeals Chamber notes that the Referral Bench considered that Stanković filed the Revocation Request after the Appellate Panel in Bosnia and Herzegovina had affirmed his conviction.<sup>50</sup> The Referral Bench noted, however, that it "may revoke a referral order *proprio motu* in the circumstance of a grave violation left unchallenged by the Prosecution or untimely submitted".<sup>51</sup> Thus, having examined Stanković's submissions, the Referral Bench concluded that:

[i]n the absence of previously unidentified or grave violations of Stanković's right to a fair trial, the Referral Bench considers that it would be contrary to the intention of Rule 11*bis* to order a case referred to the authorities of a State to be sent back to the Tribunal after the trial and appeal proceedings have concluded in that State.<sup>52</sup>

16. The Appeals Chamber notes that Rule 11*bis*(F) of the ICTY Rules, Article 6(6) of the MICT Statute, and Rule 14(C) of the MICT Rules unequivocally provide that revocation of a referral order may occur *only* before the accused has been found guilty or acquitted by a national court. As recalled above, the proceedings against Stanković before the courts of Bosnia and Herzegovina were completed in April 2007.<sup>53</sup> The Appeals Chamber further notes that, contrary to Stanković's submission,<sup>54</sup> the panel of the State Court and the Appellate Panel of Bosnia and Herzegovina were composed of different judges.<sup>55</sup> Therefore, to the extent that Stanković argues that there is no final judgement against him due to irregularities in the composition of the Appellate Panel, his submission is unsubstantiated.

17. Accordingly, the Appeals Chamber finds that the Referral Bench correctly considered that it would be contrary to the intention of Rule 11*bis* of the ICTY Rules to revoke a referral order after the legal proceedings in the respective State have been completed. Absent any explicit legal basis for such revocation, the Appeals Chamber finds that it need not consider further whether the Referral Bench committed a discernible error in finding that there were no grounds to revoke the referral of Stanković's case to the authorities of Bosnia and Herzegovina.

<sup>48</sup> *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014, para. 181.

<sup>49</sup> See Appeal, paras. 1, 10.

<sup>50</sup> Impugned Decision, para. 16.

<sup>51</sup> Impugned Decision, para. 16. See also Impugned Decision, para. 10, citing *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Gojko Janković's Motion of 12 April 2010, 21 June 2010, para. 14.

<sup>52</sup> Impugned Decision, para. 16.

<sup>53</sup> See *supra*, para. 4.

<sup>54</sup> Appeal, para. 15.

<sup>55</sup> See Sixth Progress Report, Annex B; Seventh Progress Report, Annex B.

## V. DISPOSITION

18. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion for Extension of Time and **DISMISSES** the Appeal.

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

Done this 21<sup>st</sup> day of May 2014,  
At The Hague,  
The Netherlands

  
Judge Theodor Meron, Presiding

Judge Jean-Claude Antonetti appends a separate opinion.

[Seal of the Mechanism]

## OPINION SEPARÉE DU JUGE JEAN-CLAUDE ANTONETTI

La requête du condamné **Radovan Stankovic** soulève la question fondamentale de la compétence d'une autre juridiction postérieurement à la décision de la Cour et de la Chambre d'appel de Bosnie Herzégovine<sup>1</sup>.

Si l'article 11 *bis* du Règlement de procédure et de preuve prévoit au paragraphe F)<sup>2</sup> qu'à tout moment la formation de renvoi peut d'office ou à la demande du Procureur décider, s'il y a lieu d'ordonner un retour ou une demande de dessaisissement. Il ne peut le faire **qu'avant** que l'accusé ne soit déclaré coupable ou acquitté par une juridiction interne. Il se trouve que dans le cas d'espèce, la demande est intervenue après<sup>3</sup> et que de ce fait, cette demande ne peut être que rejetée.

Toutefois, la demande de **Radovan Stankovic** soulève plusieurs problèmes sérieux que je me dois d'évoquer pour la forme.

**En premier lieu**, le Président du Mécanisme résiduel peut-il désigner la Chambre d'appel comme Chambre compétente de l'appel interjeté par **Radovan Stankovic** de la décision de la Chambre présidée par le Juge Orić du 12 juin 2013 ? La réponse est **affirmative** dans la mesure où la décision de la Chambre de première instance est intervenue avant le 1<sup>er</sup> juillet 2013, date de la prise de compétence du Mécanisme résiduel.

**En second lieu**, est-ce que la Chambre constituée par les Juges Orić, Flügel et Kwon avait compétence pour statuer sur la requête de Radovan Stankovic ? Dans la mesure où la Chambre a été constituée par le Président du Tribunal avant le 1<sup>er</sup> juillet 2013 elle est pleinement compétente.

**En troisième lieu**, est-ce que la composition de cette Chambre ne pose pas de problème ? Sur cette question, je réponds par l'affirmative dans la mesure où c'est la même Chambre avec la quasi même composition<sup>4</sup> qui avait ordonné le 17 mai 2005<sup>5</sup> le renvoi de l'affaire devant la juridiction interne.

<sup>1</sup> "Appeal of your decision of 12 June 2013", 18 September 2013.

<sup>2</sup> Selon cet article, « [à] tout moment après qu'une ordonnance a été rendue en application du présent article et avant que l'accusé soit déclaré coupable ou acquitté par une juridiction interne, la Formation de renvoi peut, à la demande du Procureur et après avoir donné aux autorités de l'Etat concernées la possibilité d'être entendues, annuler l'ordonnance et demander officiellement le dessaisissement aux termes de l'article 10 ».

<sup>3</sup> Devant la juridiction de Bosnie Herzégovine, un jugement a été rendu le 14 novembre 2006 condamnant l'Accusé Radovan Stankovic à une peine de **16 ans d'emprisonnement**. Suite à un appel interjeté par l'Accusé, le panel d'appel de Bosnie Herzégovine rejetait les arguments avancés et le condamnant à une peine de **20 ans d'emprisonnement**.

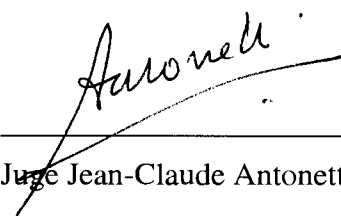
<sup>4</sup> Dans le cadre de la première décision de renvoi prise par la Chambre de première instance le 17 mai 2005, les Juges Orić, Kwon et Parker composaient la formation de renvoi. A l'occasion de la demande de renvoi devant le TPIY formée par l'Accusé le 21 janvier 2013, la Chambre nouvellement désignée sera composée des juges Orić, Flügel et Kwon.

Il m'apparaît en effet que les Juges **Orie** et **Kwon** ne pouvaient pas statuer sur cette requête puisqu'ils sont **impliqués** dans le suivi de la procédure ayant en application de leur décision été informés de l'état d'avancement de la procédure par des rapports du Procureur étayés par les rapports de l'OSCE<sup>6</sup>.

En effet, dans la mesure où la Chambre avait estimé que **Radovan Stankovic** avait droit à un **procès équitable** comment pourraient ils postérieurement suite à une contestation ultérieure sur la même question juger de manière impartiale ? De mon point de vue, ils auraient dû se déporter en demandant au Président de désigner une autre composition<sup>7</sup>.

Sur les autres aspects de la requête de Radovan Stankovic, si les griefs allégués étaient confirmés, il apparaît qu'il n'a pas eu un **procès équitable** dans la mesure où il aurait été assisté par des avocats n'ayant pas procédé à des contre interrogatoires, ce qu'il indique dans ses écritures<sup>8</sup> et par l'existence également d'un juge figurant dans la composition de la Chambre qui était juge de la partie adverse en 1992<sup>9</sup>. Les griefs allégués dans un autre cadre auraient dû logiquement être pris en compte car dans le cadre présent ils ne peuvent l'être car le **Mécanisme résiduel** n'a pas de compétence.

Fait en français et en anglais, la version française faisant foi.



Juge Jean-Claude Antonetti

Le 21 mai 2014  
La Haye (Pays-Bas)

[Sceau du Tribunal]

<sup>5</sup> "Decision on referral of case under Rule 11 *bis*", partly confidential and *ex parte*, 17 May 2005.

<sup>6</sup> "Decision on referral of case under Rule 11 *bis*", partly confidential and *ex parte*, 17 May 2005, p. 34 (« Dispositif »).

<sup>7</sup> "Appeal of your decision of 12 June 2013", 18 September 2013, p. 3.

<sup>8</sup> "Appeal of your decision of 12 June 2013", 18 September 2013, p. 4.

<sup>9</sup> "Appeal of your decision of 12 June 2013", 18 September 2013, p. 6.