



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: 27 April 2007
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BEFORE THE REFERRAL BENCH

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

Registrar: Mr. Hans Holthuis

Decision of: 27 April 2007

PROSECUTOR

v.

MILORAD TRBIĆ

**DECISION ON REFERRAL OF CASE UNDER RULE 11 *BIS*
WITH CONFIDENTIAL ANNEX**

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I. INTRODUCTION

1. 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”) is seised of the partly confidential “Request by the Prosecutor under Rule 11 *bis* for Referral of the Indictment to Another Court” (“Motion for Referral”), in which the Prosecution requests the referral of *Prosecutor v. Trbić* to the authorities of Bosnia and Herzegovina.¹ The Bench hereby renders its decision on the Motion for Referral.

2. Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) governs the referral of cases to national authorities. It is one of the mechanisms intended to aid the Tribunal in meeting the completion strategy endorsed by the UN Security Council, by which the Tribunal should “concentrat[e] on the prosecution of the most senior leaders suspected of being most responsible for crimes within the [Tribunal’s] jurisdiction”, and should “transfer[] cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate”.²

3. In its current form, Rule 11 *bis* provides as follows:

(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:

- (i) in whose territory the crime was committed; or
- (ii) in which the accused was arrested; or
- (iii) having jurisdiction and being willing and adequately prepared to accept such a case,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(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,

¹ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Request by the Prosecutor under Rule 11 *bis* for Referral of the Indictment to Another Court, partly confidential, 4 May 2006 (“Motion for Referral”), paras. 1, 36. The Referral Bench has already held that good cause exists for maintaining the confidentiality of that portion of the Motion for Referral that was filed confidentially. *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order for Further Submissions on Referral Request and Scheduling Order for Hearing, 22 November 2006 (“Order for Further Submissions”), p. 2.

² Security Council Resolution 1503, UN Doc. S/RES/1503 (2003) (“Security Council Resolution 1503”), preambular para. 7. *Accord* Security Council Resolution 1534, UN Doc. S/RES/1534 (2004) (“Security Council Resolution 1534”), paras. 4–5.

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.

- (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.³

³ Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.39 (22 September 2006), Rule 11 *bis*. Rule 11 *bis* was adopted on 12 November 1997 and amended four times thereafter, on 30 September 2002, 10 June 2004, 28 July 2004, and 11 February 2005. See *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, 5 April 2007 (“*Lukić and Lukić* Rule 11 *bis* Decision”), paras. 2–3 & nn. 2–8 (discussing these revisions and citing each version of the Rules in which they can be found).

II. PROCEDURAL HISTORY

A. Indictment of the Accused, Joinder, Severance, and Appeal Against Severance

4. The Prosecutor indicted the Accused on 10 February 2005 along with Vinko Pandurević,⁴ and the Accused was transferred into the Tribunal's custody on 7 April 2005.⁵ A specially constituted Trial Chamber subsequently joined the indictment against the Accused and Pandurević with those of seven others,⁶ and the Appeals Chamber upheld this joinder.⁷ The President of the Tribunal assigned the joined case, *Popović et al.*, to Trial Chamber II on 26 September 2005.⁸ The Prosecution filed the Motion for Referral on 4 May 2006.⁹

5. Considering that the time needed to resolve several issues in the Accused's case would delay the start of trial in *Popović et al.* and therefore "place in jeopardy the right of the [other accused] to an expeditious trial", the Trial Chamber severed the Accused from *Popović et al.* on 26 June 2006 ("Severance Decision").¹⁰ The Chamber made specific reference to the pendency of the Prosecutor's request to refer the Accused's case to the authorities of Bosnia and Herzegovina, and noted additionally that the Chamber had "yet to decide on several outstanding and material submissions relating to the health of the Accused".¹¹ The Trial Chamber granted the Accused's

⁴ See *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Indictment, 10 February 2005. See also *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Decision on Review of Indictment and Order for Non-Disclosure, 24 March 2005, p. 3 (confirming the indictment).

⁵ *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Decision on Motion of Prosecutor to Vacate the Order for Non-Disclosure Entered 30 March 2005, 8 April 2005, p. 2; *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-I, Order for Detention on Remand, 8 April 2005, p. 2.

⁶ See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Decision on Motion for Joinder, 21 September 2005, para. 36.

⁷ *Prosecutor v. Tolimir, Miletić, and Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006, para. 30; *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 28.

⁸ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Order Assigning a Case to a Trial Chamber, 26 September 2005, p. 2.

⁹ See generally Motion for Referral, *supra* note 1.

¹⁰ 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 ("Severance Decision"), p. 4. Subsequent to the Severance Decision, the Registry assigned the number IT-05-88/1-PT to the Accused's case. *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Certificate, 27 June 2006, p. 1.

¹¹ Severance Decision, *supra* note 10, p. 2. See also *ibid.*, Confidential and *Ex Parte* Annex, pp. 1–2 (describing these submissions). As discussed below, the Chamber has since resolved these submissions, concluding that "the evaluations that have been conducted of the mental health of the Accused do not provide a sufficient basis for concluding that he is not competent to stand trial". *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order in Regard to the Preparation for Trial, confidential, 21 March 2007 ("Trial Chamber Competency Order"), p. 4. See also *infra* paras. 31–38 (discussing in detail the impact of questions concerning the Accused's fitness to stand trial on the referral process).

motion for certification to appeal against the Severance Decision.¹² On motion by the Accused, the duty judge suspended the deadline for the Accused to file his substantive appeal.¹³ On 22 March 2007, the Appeals Chamber lifted this suspension, and ordered the Accused to file his appeal by 29 March 2007.¹⁴ The appeal proceedings on this issue are still ongoing.

6. On order of the Trial Chamber, the Prosecution submitted a new indictment against Trbić on 18 August 2006 (“Indictment”),¹⁵ and the Trial Chamber has declared this indictment operative.¹⁶ It is accordingly on the basis of the 18 August 2006 Indictment that the Referral Bench will evaluate the Motion for Referral.¹⁷

B. Motion for Referral, Response, and Further Submissions on Referral

7. As noted above,¹⁸ the Prosecution filed the Motion for Referral on 4 May 2006.¹⁹ The President appointed this Referral Bench on 10 May 2006 to review the request.²⁰ On 14 June 2006,

¹² *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Decision on “Requête de la Défense en certification d’appel (Art. 72(B)(ii)) suite à la Décision de la Chambre datée du 26 juin 2006”, 14 July 2006, p. 3. The Trial Chamber also granted the Accused leave to file a motion for reconsideration of the Severance Decision. *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, p. 6. The Accused opted not to file such a motion.

¹³ *Prosecutor v. Trbić*, Case No. IT-05-88/1-AR.73.1, Urgent Order Granting Suspension of Time, confidential, 20 July 2006, p. 3 (considering that the case on appeal “is yet to be assigned to a bench of the Appeals Chamber”, and ordering that “the time limits applicable to the case on appeal be suspended forthwith and until further notice”). As both the Trial Chamber and this Bench have recognised, the suspension of severance-related appeal proceedings “ha[d] no bearing on any other proceedings in this case that are or may in the future be pending before Trial Chamber II, the Referral Bench, or the Appeals Chamber”. *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motion for Extension of Time, 10 January 2007 (“Referral Bench Time Extension Order”), p. 3. *Accord Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, T. 25 (24 November 2006) (“November 2006 Status Conference”) (Presiding Judge of Trial Chamber II informing the Accused of this fact).

¹⁴ *Prosecutor v. Trbić*, Case No. IT-05-88/1-AR.73.1, Order Lifting the Suspension of Time Limits, confidential, 22 March 2007, p. 3. *See also Prosecutor v. Trbić*, Case No. IT-05-88/1-AR.73.1, Order Assigning Judges to a Case Before the Appeals Chamber, 21 March 2007, p. 3.

¹⁵ *See generally Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Indictment, 18 August 2006 (“Indictment”).

¹⁶ Severance Decision, *supra* note 10, p. 4 (declaring that “[t]he corrected version of the Second Consolidated Amended Indictment [in *Popović et al.*], with the charges against the co-Accused redacted, shall be the operative indictment against the Accused Trbić”).

¹⁷ *See Prosecutor v. Todović*, Case No. IT-97-25/1-AR11bis.1, Decision on Rule 11bis Referral, 23 February 2006, para. 14 (holding that the Referral Bench must base its considerations concerning the referral of a case on the operative indictment).

¹⁸ *See supra* para. 4.

¹⁹ *See generally* Motion for Referral, *supra* note 1.

²⁰ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and 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. *See also Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Motion by the Prosecutor Under Rule 11 bis for Referral of the Indictment, 4 May 2006, para. 1 (requesting the President to appoint a bench of judges to review the Motion for Referral).

Counsel for the Accused filed a confidential response to the Motion for Referral (“Defence Response”) opposing referral.²¹

8. On 22 November 2006, the Referral Bench issued an order calling for further written submissions by the parties and by the Government of Bosnia and Herzegovina (“Bosnia and Herzegovina”) in advance of the 15 January 2007 motion hearing (“Order for Further Submissions”).²² It asked the parties and Bosnia and Herzegovina to provide their views on a number of specific questions, including whether the gravity of the Accused’s alleged criminal conduct and his level of responsibility are compatible with referral to this case to the authorities of Bosnia and Herzegovina under Rule 11 *bis*; whether and what measures exist in Bosnia and Herzegovina to protect the security of detained accused; and whether and what measures exist for the detention and treatment of an accused whose mental health does not allow him to enter a plea and to stand trial.²³ The Prosecution and Bosnia and Herzegovina filed their respective submissions in a timely manner on 19 December 2006²⁴ and 3 January 2007.²⁵ On 10 January 2007, the Referral Bench denied the Accused’s motion for an extension of time to file his written submission,²⁶ and he filed it confidentially on 12 January 2007 (“Defence Further Submissions”).²⁷ Having examined the content of the Defence Further Submissions, the Bench considers that good cause exists for maintaining their confidential status;²⁸ moreover, although they were filed in an untimely fashion, the Bench will nevertheless accept them as validly filed pursuant to Rule 127.

²¹ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Defence Response to “Motion by the Prosecutor Under Rule 11 *bis* for Referral of the Indictment”, confidential and *ex parte*, 2 August 2006 (English translation), 14 June 2006 (French original). This response was timely in accordance with an order of the Trial Chamber granting an extension of time. *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, Pandurević, and Trbić*, Case No. IT-05-88-PT, Order on Defence Motion for Extension of Time to File Response, confidential, 19 May 2006, p. 3. It was filed *ex parte* the Accused’s former co-accused in *Popović et al.*, not the Prosecution, and the Bench has already held that good cause exists for maintaining its confidentiality. Order for Further Submissions, *supra* note 1, pp. 1–2.

²² See *ibid.*, pp. 3–4.

²³ *Ibid.*

²⁴ *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Prosecutor’s Response to Order for Further Submissions on Referral Request and Scheduling Order for Hearing Filed on 22 November 2006, 19 December 2006 (“Prosecution Further Submissions”).

²⁵ *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Referral Bench in Its Order of 22 November 2006, 3 January 2007 (“BiH Submissions”). All citations to the BiH Submissions refer to the page numbers of the English version, which was included in the same filing as the BCS version.

²⁶ *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Order on Defence Motion for Extension of Time, 10 January 2007, p. 5.

²⁷ *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Defence Submission Following Decision Titled “Order for Further Submissions on Referral Request and Scheduling Order for Hearing” of 22 November 2006, confidential, 18 January 2007 (English translation), 12 January 2007 (French original) (“Defence Further Submissions”).

²⁸ *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 (holding that all proceedings

9. At a status conference before the Trial Chamber on 24 November 2006, the Accused asserted that, contrary to what had been submitted in the Defence Response, he does not oppose referral,²⁹ and he repeated this position before the Referral Bench at the 15 January 2007 motion hearing.³⁰ At that hearing, he stated that he had not seen the 14 June 2006 Defence Response, in which arguments are made opposing the Motion for Referral, and that “it was done without [his] agreement or knowledge”.³¹ In the Defence Further Submissions, the Accused asserts in the same vein that he “formally agrees to the referral of his case to Sarajevo for trial pursuant to Rule 11 *bis*, at the earliest convenience”.³² In light of this change of position on the part of the Accused, the Bench will regard as moot those arguments in the Defence Response opposing referral.³³ Nonetheless, even though both parties now agree that the Bench should order referral of this case to the authorities of Bosnia and Herzegovina, the Bench must still undertake an independent analysis to determine whether the case is appropriate for referral under Rule 11 *bis*.

III. THE ACCUSED AND THE CHARGES

10. The Indictment contains seven counts charging the Accused with responsibility for crimes allegedly committed after the fall of the Srebrenica and Žepa enclaves in eastern Bosnia and Herzegovina in July and August 1995. He is alleged to have been a duty officer in the Zvornik Brigade of the Drina Corps of the Army of Republika Srpska,³⁴ holding the rank of captain.³⁵ Despite his nominal rank, it is alleged that in fact he was subordinated to Lieutenant Drago Nikolić, and that he was responsible, *inter alia*, for helping manage the Military Police Company of the Zvornik Brigade, particularly during that company’s activities after the fall of Srebrenica, as described in the Indictment.³⁶

before the Tribunal must take place in public, unless good cause can be shown to the contrary); Order for Further Submissions, *supra* note 1, p. 1 (same).

²⁹ November 2006 Status Conference, *supra* note 13, T. 36 (private session). The Trial Chamber made the transcript of the 24 November 2006 status conference, including those pages where the hearing was conducted in private session, available to the Referral Bench by an order of 21 March 2007. Trial Chamber Competency Order, *supra* note 11, p. 3.

³⁰ *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Motion Hearing, T. 57 (15 January 2007) (“Motion Hearing”) (“Please refer my case under 11 *bis*.”).

³¹ *Ibid.*, T. 55 (private session). *Accord ibid.*, T. 56 (the Accused repeating this position in open session).

³² Defence Further Submissions, *supra* note 27, p. 5.

³³ Most recently, on 18 April 2007, the Accused filed a confidential motion requesting the Referral Bench to render its decision on the Motion for Referral “as soon as possible”. *Prosecutor v. Trbić*, Case No. IT-05-88/1-PT, Motion by the Accused for Respect of the Right to an Expedient Trial, confidential, 26 April 2007 (English translation), 18 April 2007 (French original), p. 3.

³⁴ Indictment, *supra* note 15, para. 29.

³⁵ *Ibid.*, para. 2.

³⁶ *Ibid.*

11. The Indictment avers that the Accused participated in two joint criminal enterprises (“JCEs”) along with the seven accused in *Popović et al.* and others.³⁷ According to the Indictment, the object of the first JCE was the summary execution and burial of thousands of Bosnian Muslim men and boys captured from the Srebrenica enclave from 12 July 1995 until about 19 July 1995;³⁸ the object of the second JCE was the forcible removal of the Bosnian Muslim population from the Srebrenica and Žepa enclaves to areas outside the control of Republika Srpska.³⁹ The Accused is said to have participated in these JCEs by supervising, overseeing, and facilitating the detention and execution of Muslim victims at various sites in the area around the city of Zvornik.⁴⁰ His most significant involvement is alleged to have been at the Grbavci School in Orahovac on 14 July 1995, where it is claimed that he and Drago Nikolić personally supervised the Military Police in guarding Muslim prisoners and transporting them to a nearby field to be summarily executed; the Indictment further avers that the Accused executed several of these prisoners himself.⁴¹ In addition to his participation in these JCEs, the Accused is alleged to have otherwise committed, planned, ordered, instigated, and aided and abetted all the crimes in the Indictment.⁴²

12. For his conduct in contribution to the events described in the Indictment, the Accused is charged with seven statutory crimes: (1) genocide;⁴³ (2) conspiracy to commit genocide;⁴⁴ (3) extermination as a crime against humanity;⁴⁵ (4) murder as a crime against humanity;⁴⁶ (5) murder as a violation of the laws or customs of war;⁴⁷ (6) persecution as a crime against humanity;⁴⁸ and (7) forcible transfer as an inhumane act as a crime against humanity.⁴⁹

³⁷ *Ibid.*, paras. 18–20, 27, 34–35, 43, 96. *See also ibid.*, para. 97 (listing the participants in the JCEs).

³⁸ *Ibid.*, paras. 18–20, 27.

³⁹ *Ibid.*, paras. 34–35, 43.

⁴⁰ *See ibid.*, paras. 29, 52 (describing generally the Accused’s role in the two JCEs). *See also ibid.*, paras. 21.7, 22.4 (Petkovci School); *ibid.*, para. 21.8 (Petkovci Dam); *ibid.*, para. 21.8.1 (Ročević School); *ibid.*, para. 21.9 (Kula School); *ibid.*, para. 21.10 (Kozluk); *ibid.*, para. 21.11 (Branjevo Military Farm); *ibid.*, para. 21.12 (Pilica Cultural Centre).

⁴¹ *Ibid.*, para. 21.6.

⁴² *Ibid.*, paras. 57, 59–60.

⁴³ *Ibid.*, para. 10, p. 16.

⁴⁴ *Ibid.*, p. 18.

⁴⁵ *Ibid.*, p. 19.

⁴⁶ *Ibid.*, p. 20.

⁴⁷ *Ibid.*, p. 20.

⁴⁸ *Ibid.*, p. 21.

⁴⁹ *Ibid.*, p. 26.

IV. REFERRAL OF THE CASE UNDER RULE 11 *BIS*

13. The Referral Bench will now consider whether this case is appropriate for referral under the terms of Rule 11 *bis* as interpreted in the relevant jurisprudence.

A. Gravity of the Crimes Charged and Level of Responsibility

1. Submissions

14. While the Prosecution concedes that the gravity of the crimes charged in this case is “obviously extreme”,⁵⁰ it goes on to stress that “it is clear that the Security Council never envisioned the ICTY prosecuting the hundreds of lower-level persons who bear some measure of individual responsibility for th[e] massive crime” at issue here.⁵¹ For this reason, it contends that “it is far more germane” to focus on the Accused’s level of responsibility.⁵² The Prosecution argues that the Accused’s actual level of responsibility was less than his rank of captain would seem to suggest: he was subordinated to Lieutenant Drago Nikolić, and despite his role in organising and facilitating the transportation and detention of thousands of Muslim men and boys, as well as his personal participation in some killings, “nevertheless he remains an intermediate to lower level perpetrator”.⁵³ Furthermore, there could be many others like him who were also involved in the planning and execution of the events at Srebrenica, and they have not been indicted by the Prosecutor of the Tribunal.⁵⁴ The Prosecution concludes that, “[d]ue to Trbić’s low rank and minimal authority he cannot be considered one of the most senior leaders suspected of being responsible for crimes within the ICTY’s jurisdiction”.⁵⁵ Hence, in the Prosecution’s submission,

⁵⁰ Motion for Referral, *supra* note 1, para. 18. *Accord* Prosecution Further Submissions, *supra* note 24, para. 3 (stating that “the gravity of the crimes charged in the ... Indictment is grave”).

⁵¹ Motion for Referral, *supra* note 1, para. 19. The Prosecution invokes the 23 July 2002 statement of the President of the Security Council, which indicated that the Council endorsed the transfer of cases “involving intermediary and lower-level accused”. Prosecution Further Submissions, *supra* note 24, para. 5 (citing Statement by the President of the Security Council, UN Doc. S/PRST/2002/21 (2002)).

⁵² Motion for Referral, *supra* note 1, para. 19.

⁵³ Prosecution Further Submissions, *supra* note 24, para. 8. *Accord* Motion for Referral, *supra* note 1, para. 17 (arguing that the Accused’s rank of captain “did not accurately reflect his authority and responsibility”); *ibid.*, para. 20 (arguing that the Accused’s role in the crimes at issue was largely (and merely) “one of organisation and facilitation of the transportation and detention of the thousands of prisoners designated for summary execution”); Motion Hearing, *supra* note 30, T. 91.

⁵⁴ Prosecution Further Submissions, *supra* note 24, para. 9. *See also* Motion Hearing, *supra* note 30, T. 87 (“[C]ertainly there could be hundreds of persons like the [A]ccused who participate in the crimes that go into the cases that are tried here. We are trying the highest level of people here.”).

⁵⁵ Motion for Referral, *supra* note 1, para. 21 (internal quotation marks removed; emphasis removed). *Accord* Prosecution Further Submissions, *supra* note 24, para. 9.

despite the gravity of the crimes at issue, his case is appropriate for referral to the authorities of Bosnia and Herzegovina.⁵⁶

15. Although the Accused does not oppose the referral of this case to the authorities of Bosnia and Herzegovina,⁵⁷ his counsel has expressed concerns that the crimes charged in the Indictment – and, in particular, genocide brought about by means of a joint criminal enterprise – appear to be too grave to allow referral under the Tribunal’s Rule 11 *bis* jurisprudence.⁵⁸ Nonetheless, the Accused and his counsel agree with the Prosecution that the Accused’s level of responsibility is not high enough to compel his being tried at the Tribunal, for structural and practical reasons. “[T]he Accused ... did not have absolutely any kind of authority in the hierarchical structure [and] did not actually have the position of an officer”.⁵⁹ From a practical perspective, his effective participation in the alleged crimes was not very significant, and “his tasks and responsibilities were not even in line with his grade of reserve captain”.⁶⁰

16. Like the Prosecution and the Accused, Bosnia and Herzegovina takes the view that the crimes with which the Accused is charged, particularly genocide and conspiracy to commit genocide, are too grave to permit referral.⁶¹ Moreover, the Accused is “inextricably linked to the joint criminal enterprise[s]” alleged against the accused in *Popović et al.*: he knowingly participated in them and played a central role in their realisation.⁶² Bosnia and Herzegovina draws attention to the allegations in the Indictment that the Accused personally arranged and supervised detentions and executions at various sites where many people were killed, and made arrangements for the reburial of victims.⁶³ The Accused thus “played an indispensable role in bringing about the aim of the [JCE] to execute the able bodied Bosnian Muslim men”.⁶⁴ Notwithstanding this important role, however, it is the submission of Bosnia and Herzegovina that his level of responsibility is compatible with referral because he is not one of the “most senior leaders” suspected of

⁵⁶ Motion Hearing, *supra* note 30, T. 76. *See also ibid.* (“If one were to look at even the language of, let’s say, a Dragomir Milošević denial, that does not say that you have to have both, it talks about a balance.”).

⁵⁷ *See supra* para. 9.

⁵⁸ Defence Further Submissions, *supra* note 27, p. 3. *Accord* Motion Hearing, *supra* note 30, T. 68 (“Undeniably genocide is such a grave crime that the question now has been posed, and the answer cannot be an easy one.”); *ibid.*, T. 70 (“If you grant the referral that is being requested by Mr. Trbić and, as his lawyer, I cannot do anything else, then you will go against the jurisprudence because of the gravity of the crime involved.”); *ibid.*, T. 93 (“The lawyer that I am cannot claim that it is possible to refer cases of genocide without further analysis.”).

⁵⁹ Defence Further Submissions, *supra* note 27, pp. 3–4.

⁶⁰ *Ibid.*, p. 4.

⁶¹ BiH Submissions, *supra* note 25, pp. 1–2. *Accord* Motion Hearing, *supra* note 30, T. 71 (“[T]he gravity of the crime ... is not in compliance with the provisions of Rule 11 *bis*[.]”); *ibid.*, T. 72.

⁶² BiH Submissions, *supra* note 25, p. 2.

⁶³ *Ibid.*, p. 2.

⁶⁴ *Ibid.*, p. 3.

responsibility for crimes in the jurisdiction of the Tribunal.⁶⁵ Bosnia and Herzegovina concludes that if referral is ordered, the State Court of Bosnia and Herzegovina (“BiH State Court”) “is fully equipped to provide [a] fair and expeditious trial”.⁶⁶

2. Discussion

17. Rule 11 *bis*(C) provides that, “[i]n determining whether to refer [a] case ..., 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.”⁶⁷ Security Council Resolution 1534, in turn, directs the Tribunal to concentrate on the prosecution and trial of “the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the ... Tribunal”.⁶⁸ In light of this directive, the Appeals Chamber has held that “the International Tribunal is to ... transfer the cases involving those individuals who may not bear this level of responsibility to competent national jurisdictions”.⁶⁹

18. As the Referral Bench clarified in *Lukić and Lukić*, any decision to refer a case under Rule 11 *bis*(A) is discretionary, provided that sub-paragraphs (A)(i), (A)(ii), (A)(iii), and (B) are satisfied.⁷⁰ Rule 11 *bis*(C) is intended to ensure that, in deciding whether to exercise its discretion in favour of or against referring a case – a decision which necessarily is reached having regard to all the relevant circumstances of the case – the Referral Bench takes into account, *inter alia*, the gravity of the crimes charged and the level of responsibility of the accused.⁷¹ These two considerations are not exclusive of other relevant circumstances, and neither is necessarily determinative.⁷² Either, or both in combination, may, in a particular case, persuade the Referral Bench that it should refer the case, or that it should not do so. The major purpose of the rule is to enable the Referral Bench, where it is in the interests of justice to do so, to give effect to the policy of the Security Council, as reflected in Resolution 1534, that the efforts of the Tribunal should be

⁶⁵ *Ibid.*, pp. 3–4. *Accord* Motion Hearing, *supra* note 30, T. 73.

⁶⁶ *Ibid.*, T. 93. *Accord* BiH Submissions, *supra* note 25, p. 3.

⁶⁷ Rule 11 *bis*(C) (footnote removed).

⁶⁸ Security Council Resolution 1534, *supra* note 2, para. 5.

⁶⁹ *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-AR11*bis*, Decision on Savo Todović’s Appeals Against Decisions on Referral Under Rule 11 *bis*, 4 September 2006 (“*Rašević and Todović* Appeal Decision”), para. 22 (citing Security Council Resolution 1503, *supra* note 2).

⁷⁰ *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 26.

⁷¹ *Ibid.*

⁷² *Ibid.*

concentrated on trying the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction.⁷³

19. The Bench recalls its prior jurisprudence establishing principles on how to determine whether the gravity of the crimes charged and the level of responsibility of the accused compel the trial of a particular case at the Tribunal. The gravity of the crimes cannot be assessed only, or even primarily, by reference to their legal description under Articles 2 to 5 of the Statute.⁷⁴ This is true even for the crimes of genocide and conspiracy to commit genocide.⁷⁵ The Appeals Chamber has repeatedly held that no inherent hierarchy exists among the crimes over which the Tribunal has jurisdiction;⁷⁶ a Chamber must instead look to the underlying conduct allegedly constituting a given crime, as well as the surrounding circumstances, to determine that crime's gravity.⁷⁷ When making this determination for purposes of a Rule 11 *bis* referral request, the Bench must accordingly take

⁷³ See Security Council Resolution 1534, *supra* note 2, paras. 4–5. See also *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis* (“*Stanković* Rule 11 *bis* Decision”), para. 40 (holding that, in evaluating the gravity of the crimes charged and the level of responsibility, the Bench will consider only those facts alleged in the indictment, and not facts put forth by the parties that go beyond those in the indictment). *Accord Rašević and Todović* Appeal Decision, *supra* note 69, para. 25; *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 (“*Mejakić et al.* Rule 11 *bis* Decision”), para. 20.

⁷⁴ *Ibid.*, para. 28; *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 27; *Prosecutor v. Ademi and Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, Case No. IT-04-78-PT, 14 September 2005 (“*Ademi and Norac* Rule 11 *bis* Decision”), para. 28.

⁷⁵ This is the first time the Referral Bench has been seised of a request to refer a case where genocide is charged. Although the Bench could have recourse to the precedent of the International Criminal Tribunal for Rwanda (“ICTR”), it is of limited value here, as Rule 11 *bis* of the ICTR Rules does not contain the criteria “gravity of crimes” and “level of responsibility”. See Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, UN Doc. ITR/3/Rev.15 (10 November 2006), Rule 11 *bis*. A Trial Chamber of the ICTR recently issued that Tribunal's first decision referring a case to national authorities; in that case, the accused is charged with conspiracy to commit genocide, genocide, and complicity in genocide. See *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, para. 1; *ibid.*, p. 13 (ordering referral to the authorities of the Netherlands). The Prosecutor had earlier sought, unsuccessfully, to refer this case to Norway. See *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, 30 August 2006, paras. 17–18; *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006, paras. 16–17.

⁷⁶ See *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić* Appeal Judgement”), para. 375; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 590; *Prosecutor v. Kunarac, Kovač, and Vuković*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 171; *Prosecutor v. Tadić*, Case No. IT-94-1-A and IT-94-1-*Abis*, Judgement in Sentencing Appeals, 26 January 2000, para. 69. *Accord Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 802. The Appeals Chamber has affirmed the absence of such a hierarchy despite references to genocide in the jurisprudence – including some of its own – as “the crime of crimes”. See, e.g., *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 53; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 95; *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, 14 December 1999, Partial Dissenting Opinion of Judge Wald, para. 2; *Prosecutor v. Stakić*, Case No. IT-97-24-T, 31 July 2003, para. 502; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, para. 981; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999, para. 451; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998, para. 16.

into account such factors as the number of victims; the time frame and geographic area in which the crimes were allegedly committed; the number of separate incidents in which the accused is allegedly implicated; and the way in which the criminal conduct was allegedly perpetrated.⁷⁸

20. By the same token, the Bench must not look merely at the Article 7(1) and 7(3) forms of responsibility charged in the indictment to determine an accused's level of responsibility, but must instead examine the accused's actual role and degree of participation in each crime.⁷⁹ This assessment is no different where the indictment charges the accused with participating in a JCE, as in the present case.⁸⁰ Also of relevance is the accused's *de jure* or *de facto* rank or position in the political or military hierarchy,⁸¹ and especially whether he orchestrated the actions of others, and thereby inflicted more damage than he could have otherwise.⁸² As specified in Resolution 1534, trial at the Tribunal is not imperative unless the accused allegedly exercised such a significant degree of authority that it is appropriate to speak of him as one of the "most senior leaders",⁸³ rather than merely an intermediate participant.⁸⁴ Nonetheless, this notion of "most senior leaders" is not limited to the architects of an overall policy forming the basis of the criminal allegations.⁸⁵

⁷⁷ See *Stakić* Appeal Judgement, *supra* note 76, para. 375; *Aleksovski*, Case No. IT-94-14/1-A, Judgement, para. 182; *Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović, Papić, and Šantić*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 852.

⁷⁸ *Rašević and Todović* Appeal Decision, *supra* note 69, para. 25. *Accord Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 27; *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 November 2006 ("*Kovačević* Rule 11 *bis* Decision"), para. 20; *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 ("*Ljubičić* Rule 11 *bis* Decision"), para. 18; *Ademi and Norac* Rule 11 *bis* Decision, *supra* note 74, para. 28; *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005 ("*Janković* Rule 11 *bis* Decision"), paras. 19–20; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 21; *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis*, 8 July 2005 ("*Rašević and Todović* Rule 11 *bis* Decision"), paras. 23–24; *Stanković* Rule 11 *bis* Decision, *supra* note 73, paras. 19–20.

⁷⁹ *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 28; *Ademi and Norac* Rule 11 *bis* Decision, *supra* note 74, para. 28.

⁸⁰ *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 24. See also BiH Submissions, *supra* note 25, p. 3 (arguing that this case is inappropriate for referral in part because the Accused "played an indispensable role in bringing about the aim of the [JCE] to execute the able bodied Bosnian Muslim men"); Defence Further Submissions, *supra* note 27, p. 3 (Counsel for the Accused expressing concerns that genocide brought about by means of a joint criminal enterprise appears to be too grave to allow referral).

⁸¹ See *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005 ("*Janković* Appeal Decision"), para. 19; *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 29; *Ljubičić* Rule 11 *bis* Decision, *supra* note 78, para. 19; *Ademi and Norac* Rule 11 *bis* Decision, *supra* note 74, para. 28; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 24; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, 8 July 2005 ("*Milošević* Rule 11 *bis* Decision"), para. 22.

⁸² *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 28.

⁸³ Security Council Resolution 1534, *supra* note 2, para. 5.

⁸⁴ *Milošević* Rule 11 *bis* Decision, *supra* note 81, para. 22. *Accord Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 28.

⁸⁵ *Janković* Appeal Decision, *supra* note 81, para. 20; *Milošević* Rule 11 *bis* Decision, *supra* note 81, para. 22; *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 28.

21. The Referral Bench agrees with the parties and Bosnia and Herzegovina that, looking at the manner and circumstances in which the crimes charged in this case were realised, they are the most serious the Bench has yet been called upon to examine in the context of a Rule 11 *bis* referral request. The Indictment avers that over 7,000 military-aged Bosnian Muslim men and boys were rounded up, held in detention, and then summarily executed;⁸⁶ thousands more women, children, and elderly are said to have been forcibly separated from these men and boys and displaced to areas under Muslim control.⁸⁷ Moreover, even though the crimes are said to have been committed across a relatively limited geographic area, the allegation that this massive operation was carried out, for the most part, over the course of a few days actually augurs in favour of a finding that the crimes are among the gravest ever charged at this Tribunal.⁸⁸ The Bench cannot but conclude that they are.

22. Nevertheless, the Referral Bench also finds a great deal of force in the Prosecution's argument that there were literally hundreds of persons involved in carrying out this operation and who thus bear some degree of criminal responsibility, either as physical perpetrators or as persons directing or providing assistance to the perpetrators.⁸⁹ Despite the grave nature of these alleged events, it was not envisaged that all such persons be tried before this Tribunal. Instead, under the Statute of the Tribunal, national courts remain vested with jurisdiction which is concurrent with that of this Tribunal, and so are able to try those cases for which the Tribunal does not assert its primacy of jurisdiction.⁹⁰ This consideration holds especially true in the wake of Security Council Resolutions 1503 and 1534.⁹¹ For these reasons, the Referral Bench finds it appropriate to give emphasis to the Accused's alleged role in these events, as well as his degree of authority over the other persons involved in them, rather than on the gravity of the crimes charged in the abstract.

23. Upon examining the alleged role and degree of authority of the Accused, it is evident that his level of responsibility was relatively low. He was in fact subordinated to Drago Nikolić and the

⁸⁶ See Indictment, *supra* note 15, paras. 19–20, 27, 48.

⁸⁷ See *ibid.*, paras. 34–35, 46–47.

⁸⁸ Cf. *Ljubičić* Rule 11 *bis* Decision, *supra* note 78, para. 18 (considering that, although the crimes charged were “undoubtedly grave”, they were “limited in geographic scope and temporal frame” and thus “not so serious as to preclude the possibility of trial before another court”).

⁸⁹ See Motion Hearing, *supra* note 30, T. 87.

⁹⁰ See Statute, Art. 9(1) (providing that the Tribunal “shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991”). The Prosecution submits that the Bosnian authorities have indeed prosecuted and continue to prosecute several cases dealing with the events in and around Srebrenica in July 1995. See Motion Hearing, *supra* note 30, T. 88, 91.

⁹¹ See Security Council Resolution 1503, *supra* note 2, preambular para. 7 (calling on the Tribunal to concentrate on “the most senior leaders” and transfer cases involving others “to competent national jurisdictions, as appropriate”); *ibid.*, preambular para. 11 (noting that an “essential prerequisite” to fulfilling the Tribunal's completion strategy is the referral of lower- to intermediate-ranked accused to the war-crimes chamber of the BiH State Court); Security Council Resolution 1534, *supra* note 2, paras. 4–5.

other accused in *Popović et al.*⁹² Furthermore, although the Accused is said to have participated in the JCEs to murder the military-aged Bosnian Muslim men and boys from Srebrenica and to forcibly transfer the rest of the Muslim population,⁹³ the Indictment does not suggest that he played a significant part in formulating the objectives of the JCEs or in planning or orchestrating how they would be brought to fruition. These roles were instead allegedly played by persons well above the Accused in the Bosnian Serb political and military hierarchy, including Radovan Karadžić, Ratko Mladić, and Zdravko Tolimir.⁹⁴ In the view of the Referral Bench, while the Accused did enjoy some limited authority in the Zvornik Brigade, it is clear that he was certainly not among the “most senior leaders suspected of being most responsible for crimes within the jurisdiction of the ... Tribunal”.⁹⁵

3. Conclusion

24. In light of the above, the Referral Bench holds that this case is not *ipso facto* incompatible with referral under Rule 11 *bis*.

B. Determination of the State of Referral

25. The Prosecution requests the referral of this case to the authorities of Bosnia and Herzegovina,⁹⁶ and the Accused also expresses his desire to be referred to that state.⁹⁷ In light of the agreement of the parties, and concurring that Bosnia and Herzegovina is the state with the strongest nexus to the case, the Referral Bench will confine the remainder of its analysis to determining whether referral to the authorities of that state is appropriate in the circumstances.

C. Applicable Substantive Law

26. Although the Referral Bench is not competent to purport to dictate the law to be applied by the national court trying a case referred under Rule 11 *bis*, it must nonetheless be satisfied that if this case were referred to the authorities of Bosnia and Herzegovina, there would exist an adequate legal framework which not only criminalises the alleged conduct of the Accused, but which also

⁹² See Indictment, *supra* note 15, para. 2.

⁹³ See *ibid.*, paras. 18–20, 27, 34–35, 43, 96.

⁹⁴ See *ibid.*, paras. 25, 27, 34, 62.

⁹⁵ Security Council Resolution 1534, *supra* note 2, para. 5.

⁹⁶ Motion for Referral, *supra* note 1, paras. 1, 36; *ibid.*, paras. 25–26 (“[T]he Prosecutor considers that, where possible, a case should be referred to the authorities of the [s]tate where the alleged crimes took place. ... Accordingly, the Prosecutor requests that this case be referred for prosecution to the authorities of BiH.”); Prosecution Further Submissions, *supra* note 24, para. 21; Motion Hearing, *supra* note 30, T. 90.

⁹⁷ Defence Further Submissions, *supra* note 27, p. 5; Motion Hearing, *supra* note 30, T. 57.

provides for appropriate punishment in the event the Accused is convicted.⁹⁸ The parties and Bosnia and Herzegovina have not made submissions on the law to be applied by the appropriate national court – initially the BiH State Court – apart from their specific arguments relating to the safety of detained accused in that state, and the measures that exist there for the detention and treatment of an accused who is unfit to stand trial.⁹⁹ In the absence of any objection relating to this criterion, the Bench will simply refer to its consistent previous determinations that laws are available for application by the BiH State Court for the type of crimes charged in the Indictment – crimes against humanity and violations of the laws or customs of war – and that these laws provide for appropriate punishment if the Accused is convicted.¹⁰⁰

27. This conclusion applies equally to the crime of genocide, which the Referral Bench has not had occasion to address in previous decisions. The Socialist Federal Republic of Yugoslavia (“SFRY”) was one of the first states to ratify the 1948 Genocide Convention, on 29 August 1950.¹⁰¹ Bosnia and Herzegovina separately ratified it on 29 December 1992,¹⁰² and language closely resembling the Convention’s definition of the crime has been incorporated into each of the legal frameworks the BiH State Court may determine to be applicable in this case: Article 171 of the Criminal Code of Bosnia and Herzegovina,¹⁰³ and Article 141 of the Criminal Code of the SFRY.¹⁰⁴ For these reasons, the Bench is satisfied that appropriate provisions exist in Bosnia and

⁹⁸ See *Lukić and Lukić* Rule 11 bis Decision, *supra* note 3, paras. 44–45; *Janković* Rule 11 bis Decision, *supra* note 78, para. 27; *Mejakić et al.* Rule 11 bis Decision, *supra* note 73, para. 43; *Rašević and Todovović* Rule 11 bis Decision, *supra* note 78, para. 34; *Stanković et al.* Rule 11 bis Decision, *supra* note 73, para. 32.

⁹⁹ These arguments are described in detail below. See *infra* paras. 32–36, 39; see also *infra*, Annex, paras. 2–10.

¹⁰⁰ *Lukić and Lukić* Rule 11 bis Decision, *supra* note 3, paras. 47–56; *Ljubičić* Rule 11 bis Decision, *supra* note 78, paras. 31–36; *Janković* Rule 11 bis Decision, *supra* note 78, paras. 31–44; *Mejakić et al.* Rule 11 bis Decision, *supra* note 73, paras. 47–63; *Rašević and Todovović* Rule 11 bis Decision, *supra* note 78, paras. 38–52; *Stanković* Rule 11 bis Decision, *supra* note 73, paras. 36–46.

¹⁰¹ See Convention on the Prevention and Suppression of the Crime of Genocide of 1948, *entered into force* 12 January 1951, 78 U.N.T.S. 277. A list of dates of ratifications of the Genocide Convention is available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

¹⁰² See *ibid.*

¹⁰³ Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 3/03 (English translation), Art. 171:

Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:

- a) Killing members of the group;
 - b) Causing serious bodily or mental harm to members of the group;
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposing measures intended to prevent births within the group;
 - e) Forcibly transferring children of the group to another group,
- shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

¹⁰⁴ Criminal Code of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia No. 44/76 (English translation), Art. 141.

Herzegovina to address the criminal conduct of the Accused as alleged in the Indictment, and that there exists an penalty structure that would permit the appropriate punishment for such conduct.

D. Non-Imposition of the Death Penalty and Fair Trial

1. Non-Imposition of the Death Penalty

28. Rule 11 *bis*(B) precludes referral unless the Referral Bench is satisfied that the death penalty will not be imposed or carried out on the accused. As stated in all previous decisions ordering referral to the authorities of Bosnia and Herzegovina,¹⁰⁵ the 2003 ratification by that state of Protocol 13 of the European Convention on Human Rights satisfies the Bench that the death penalty will not be imposed or carried out against the Accused.¹⁰⁶

2. Fair Trial: Generally

a. Submissions

29. Apart from emphasising that “mass killings in Srebrenica are currently being ably prosecuted by the State Court of BiH”,¹⁰⁷ the Prosecution’s submissions on this item largely repeat arguments made in previous referral requests: according to the Prosecution, the Referral Bench has already determined that the legal system of Bosnia and Herzegovina is compatible with Rule 11 *bis*(B), and this determination has been upheld by the Appeals Chamber.¹⁰⁸ The Accused does not contend that trial in Bosnia and Herzegovina will be unfair, and Bosnia and Herzegovina has not made submissions relating generally to fair-trial guarantees.

b. Discussion

30. The Referral Bench recalls its growing jurisprudence analysing the fair-trial provisions of Bosnian law and the conclusions reached in earlier cases that they supply an adequate basis to

¹⁰⁵ See *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 62; *Ljubičić* Rule 11 *bis* Decision, *supra* note 78, para. 39; *Janković* Rule 11 *bis* Decision, *supra* note 78, para. 48; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 67; *Rašević and Todović* Rule 11 *bis* Decision, *supra* note 78, para. 56; *Stanković* Rule 11 *bis* Decision, *supra* note 73, para. 50.

¹⁰⁶ See Convention on the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953, 213 U.N.T.S. 221, Protocol 13, entry into force 7 July 2003, Eur. T.S. 187, Art. 1 (“The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”). Bosnia and Herzegovina ratified Protocol 13 on 29 July 2003, and it entered into force in that state on 1 November 2003. See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=7&DF=3/25/2007&CL=ENG> (showing the dates of ratification of the Protocol by states parties and the dates of its entry into force in each state).

¹⁰⁷ Motion for Referral, *supra* note 1, para. 32.

¹⁰⁸ *Ibid.*, paras. 28–30.

ensure compliance with the requirement of a fair trial.¹⁰⁹ As correctly indicated by the Prosecution, the Bench's conclusions in this regard have been consistently upheld by the Appeals Chamber when challenged on appeal.¹¹⁰ In light of the absence of any argument that trial will be unfair in the circumstances of this case, the Bench relies on this jurisprudence to conclude that, here too, the applicable laws provide an adequate basis to ensure compliance with the requirement of a fair trial for the Accused. This general conclusion is subject, however, to the Bench's discussion of specific fair-trial issues in the following two subsections of this Decision.

3. Fitness of the Accused to Stand Trial

a. Procedural History, Submissions, and Trial Chamber Order on Fitness

31. In the Order for Further Submissions, the Referral Bench noted that "questions ha[d] been raised by the Trial Chamber seised of pre-trial proceedings in this case relating to the mental health of the Accused", and invited the parties and Bosnia and Herzegovina to make submissions "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 under these conditions".¹¹¹ In raising the issue of the Accused's fitness, the Bench relied on the Trial Chamber's statement in the 26 June 2006 Severance Decision that it "ha[d] yet to decide on several outstanding and material submissions relating to the health of the Accused".¹¹² The Chamber described these submissions in detail in a confidential annex to that decision.¹¹³

32. The Prosecution submits that measures exist in Bosnia and Herzegovina for the detention and treatment of an unfit accused; it cites Articles 110 and 338 of the Bosnian Criminal Procedure Code ("BiH Criminal Procedure Code"), as well as Article 45 of the Law on Non-Contentious Procedure, as "provisions of law which provide for an [a]ccused to be detained at a medical

¹⁰⁹ See especially *Lukić and Lukić* Rule 11 bis Decision, *supra* note 3, paras. 67–93. See also *Ljubičić* Rule 11 bis Decision, *supra* note 78, paras. 43–44, 47–48; *Janković* Rule 11 bis Decision, *supra* note 78, paras. 62–94; *Mejakić et al.* Rule 11 bis Decision, *supra* note 73, paras. 68–117; *Rašević and Todović* Rule 11 bis Decision, *supra* note 78, paras. 72–102; *Stanković* Rule 11 bis Decision, *supra* note 73, paras. 55–68, 73–77.

¹¹⁰ See *Rašević and Todović* Appeal Decision, *supra* note 69, paras. 55–59, 62–63, 68–69, 72–75; *Prosecutor v. Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 4 July 2006, paras. 23–28, 31, 34, 41–43; *Prosecutor v. Mejakić, Gruban, Fuštar, and Knežević*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006 ("Mejakić et al. Appeal Decision"), paras. 68–71, 78–79; *Janković* Appeal Decision, *supra* note 81, paras. 44–54; *Prosecutor v. Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005 ("Stanković Appeal Decision"), paras. 21, 23, 24, 26, 30.

¹¹¹ Order for Further Submissions, *supra* note 1, p. 3.

¹¹² Severance Decision, *supra* note 10, p. 2.

¹¹³ *Ibid.*, Confidential and *Ex Parte* Annex to Decision on Severance of Case Against Milorad Trbić, 26 June 2006 (filed *ex parte* the Accused's former co-accused in *Popović et al.*, not *ex parte* the Prosecution).

institution in order to receive treatment until such time as it is determined that he or she is fit to stand trial.”¹¹⁴ The Accused, for his part, asserts that he “feels perfectly healthy”¹¹⁵ and that “any kind of answer or information that may be given about the types of social, medical or paramedical systems that might be engaged in Bosnia and Herzegovina is irrelevant”.¹¹⁶

33. Bosnia and Herzegovina essentially agrees with the Prosecution that measures exist in the law for the detention and treatment of an unfit accused, invoking Articles 16, 110, 206 to 207, and 338 to 389 of the BiH Criminal Procedure Code.¹¹⁷ It also discusses a case of the District Court of East Sarajevo where, after a psychiatric expert found that the accused was mentally ill, the court adjourned proceedings and committed the accused to the Centre for Social Work in Pale.¹¹⁸ Although a mentally-ill person may not normally be detained for longer than one year in the Federation of Bosnia and Herzegovina and six months in Republika Srpska, the social-care facility must submit regular reports to the court, and the court may extend these time limits on motion of the facility.¹¹⁹

34. Yet contrary to the Prosecution, Bosnia and Herzegovina argues that this case would not be suitable for referral if the Accused were unfit to stand trial because, pursuant to these legal provisions, the BiH State Court could not try him; it would instead have to transfer him into the custody of the authorities responsible for social care.¹²⁰ This is where the problem lies, according to Bosnia and Herzegovina:

[T]he social care centers ... face a problem of the lack of capacities in BiH in relation to suitable medical institutions and their equipment, which would be inadequate for enforcing measures of mandatory commitment to a medical institution when persons, as a result of mental disorder, seriously threaten their lives, health and safety or the lives, health and safety of other persons, which might be the case with Accused Trbić. The Accused could, in that case, due to a factual inability to carry out the forcible measures,

¹¹⁴ Prosecution Further Submissions, *supra* note 24, paras. 14–17 (quotation at para. 17).

¹¹⁵ Defence Further Submissions, *supra* note 27, p. 4. The Accused also made assertions to this effect at the status conference of 24 November 2006 and the 15 January 2007 motion hearing. See November 2006 Status Conference, *supra* note 13, T. 34–36 (private session); Motion Hearing, *supra* note 30, T. 57, 96. The Trial Chamber made the transcript of the 24 November 2006 status conference, including those pages where the hearing was conducted in private session, available to the Referral Bench by an order of 21 March 2007. Trial Chamber Competency Order, *supra* note 11, p. 3.

¹¹⁶ Defence Further Submissions, *supra* note 27, p. 5. At the 15 January 2007 motion hearing, Counsel for the Accused expressed some doubts about the ability of the authorities of Bosnia and Herzegovina to properly care for the Accused should he become unfit to stand trial: “[I]f we were in a situation where an accused was not fully fit mentally speaking, then as far as I understand in Bosnia and Herzegovina ..., there is no institution that is able to deal with such a matter.” Motion Hearing, *supra* note 30, T. 69.

¹¹⁷ BiH Submissions, *supra* note 25, pp. 8–11.

¹¹⁸ *Ibid.*, p. 12 (citing the case of Goran Lale, Case No. K-13/04).

¹¹⁹ BiH Submissions, *supra* note 25, p. 7; Motion Hearing, *supra* note 30, T. 85.

¹²⁰ BiH Submissions, *supra* note 25, p. 12. *Accord* Motion Hearing, *supra* note 30, T. 73, 84 (repeating that if the Accused were found unfit to stand trial, he would be transferred into the custody of the competent social services).

remain without adequate protection and guarantees for his safety and the safety of others.¹²¹

At the motion hearing of 15 January 2007, Bosnia and Herzegovina reiterated that although it has facilities for the treatment of mentally ill persons, such facilities “do not have all the necessary resources in order to deal with these cases”.¹²² It added that “[e]fforts ... are being made to resolve this issue”, and that the government has recently begun to take “all necessary steps” to improve the relevant mental-health facilities and provide them with sufficient funding as soon as possible.¹²³ Bosnia and Herzegovina emphasises, however, that “if it is established that the [A]ccused is fit to stand trial, the state court of Bosnia and Herzegovina is fully equipped to provide [a] fair and expeditious trial”.¹²⁴

35. The Prosecution rejects the arguments of Bosnia and Herzegovina, stating that these potential problems are “highly unlikely in light of the ... recognition of international standards that ha[s] been accorded to the [BiH] state court”.¹²⁵ The Prosecution contends that “the issue of mental health is at best speculative”, and that it has “spun out of control” to the point where Bosnia and Herzegovina is using it “as a basis for effectively shirking responsibility that any national system would have to undertake if it were to conduct trials seriously in the criminal law.”¹²⁶ It further submits that, if these problems really exist, Bosnia and Herzegovina will have to figure out some solution to them, as “no one can guarantee the permanent fitness of any person who is charged.”¹²⁷

36. Subsequently, on 21 March 2007, the Trial Chamber issued an order which addressed the question of the Accused’s fitness to stand trial. Noting the relevant provisions of the Statute,¹²⁸ the key Tribunal jurisprudence on fitness to stand trial,¹²⁹ and that “neither party has moved that the Accused be found not competent to stand trial”,¹³⁰ the Chamber determined that “the evaluations that have been conducted of the mental health of the Accused do not provide a sufficient basis for

¹²¹ BiH Submissions, *supra* note 25, p. 13.

¹²² Motion Hearing, *supra* note 30, T. 73.

¹²³ *Ibid.*, T. 86–88.

¹²⁴ *Ibid.*, T. 93.

¹²⁵ *Ibid.*, T. 74–75.

¹²⁶ *Ibid.*, T. 74.

¹²⁷ *Ibid.*, T. 91. *Accord ibid.*, T. 92 (“[T]he provisions are in the law [and] it is now up to the sovereign state to find a way of implementing them and I am sure that it will do so if the need were ever to arise[.]”).

¹²⁸ Trial Chamber Competency Order, *supra* note 11, p. 3 (citing Statute, Arts. 20–21).

¹²⁹ *Ibid.* (citing *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision re the Defence Motion to Terminate Proceedings, 26 May 2004; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Stanišić Defence’s Motion on the Fitness of the Accused to Stand Trial with Confidential Annexes, 27 April 2006).

¹³⁰ *Ibid.* In paragraph (d) of the disposition, the Trial Chamber directed the Registry to make this confidential order available to the Referral Bench. *Ibid.*, p. 5.

concluding that he is not fit to stand trial”.¹³¹ It concluded that “at the present time, the record does not provide a basis for the Trial Chamber to further consider the issue of the Accused’s competency to stand trial”,¹³² and ordered the parties to proceed with their preparations for trial.¹³³

b. Discussion

37. As noted above, the Trial Chamber has concluded that the record does not provide a basis for it to further consider the issue of the Accused’s competency to stand trial. The record before the Referral Bench provides no reason to deviate from this conclusion. Moreover, although the Bench does not have the authority to determine whether the Accused is fit or unfit to stand trial,¹³⁴ it recalls its positive impression of him during the 15 January 2007 motion hearing, at which he displayed what appeared to the Bench to be rational behaviour, and maintained consistent and well-articulated positions on the matters at issue. There is accordingly little relevance for Bosnia and Herzegovina’s submissions as to its limited facilities in respect of some persons not fit to stand trial.

38. Notwithstanding this determination, the Bench acknowledges that a number of questions have been raised before this Bench and the Trial Chamber concerning the Accused’s fitness to stand trial. In light of these questions, the Bench will note its assessment of the ability of the BiH State Court to provide the Accused with a fair trial in light of Bosnia and Herzegovina’s submissions about its social-care facilities. As previously held, the Bench may order the referral of the case of an unfit accused, provided it is satisfied that safeguards exist in the state of referral for protecting the rights of unfit accused, including the suspension of trial proceedings.¹³⁵ On the whole, given the information provided to the Bench on the protection for unfit accused existing in the law of Bosnia and Herzegovina,¹³⁶ along with that state’s commitment to improving the relevant social-care

¹³¹ *Ibid.*, p. 4.

¹³² *Ibid.*

¹³³ *Ibid.*, p. 5.

¹³⁴ *Prosecutor v. Kovačević*, Case No. IT-01-42/2-AR11bis.1, Decision on Appeal Against Decision on Referral Under Rule 11bis, 28 March 2007 (“*Kovačević* Appeal Decision”), para. 36 (holding that the questions surrounding Kovačević’s fitness to stand trial fell within the mandate of the Trial Chamber, and that it would have been *ultra vires* the Referral Bench’s mandate to consider such questions).

¹³⁵ See *Kovačević* Rule 11 bis Decision, *supra* note 78, paras. 63, 93 (noting that, even though Kovačević had been found unfit to enter a plea or to stand trial at the Tribunal, “the issues arising from [his] current mental health condition would not pose an obstacle for referral of the case to the Republic of Serbia”, and referring the case to the authorities of that state) (quotation at para. 63); *Kovačević* Appeal Decision, *supra* note 134, paras. 21–22 & p. 12 (upholding such referral). Accord Referral Bench Time Extension Order, *supra* note 13, p. 4. Cf. *Stanković* Appeal Decision, *supra* note 110, para. 34 (“The condition of detention units in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction’s criminal justice system. And that is an inquiry squarely within the Referral Bench’s mandate.”).

¹³⁶ See Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina Nos. 3/03, 36/03 (English translation) (“BiH Criminal Procedure Code”), Art. 110 (compelling the court to order a psychiatric

facilities,¹³⁷ the Referral Bench is not of the view that this aspect of the system in that state results in a contravention of the requirement of a fair trial in Rule 11 *bis*(B). The Bench acknowledges the ability of the BiH State Court to properly address any matters relating to the Accused's fitness to stand trial should they arise. It also expects the Prosecution, in its monitoring of proceedings before the BiH State Court, to keep an eye on this issue and report to the Bench if any variations occur in the Accused's mental health or if any proceedings are held in relation to his fitness.

4. Safety of the Accused in Detention in Bosnia and Herzegovina

39. In the Order for Further Submissions, the Referral Bench ordered the parties, and invited Bosnia and Herzegovina, to give their views on "whether measures exist in Bosnia and Herzegovina to protect the security of an accused and his relatives, and what these consist of".¹³⁸ The Prosecution and Bosnia and Herzegovina have provided such views along with specific citations to Bosnian legal provisions,¹³⁹ while the Accused merely asserts that "[o]bjectively, [he] is not in a position to give an opinion on the [security] measures that might exist in Bosnia and Herzegovina."¹⁴⁰

40. The Bench recalls the following observation in its referral decision in *Lukić and Lukić*:

[A]lthough th[e] issue [of an accused's security in detention in the state of referral] is not *prima facie* one to be considered under the first prong of Rule 11 *bis*(B), the Bench will nevertheless consider it, since the security of an accused "touches upon the fairness of [Bosnia and Herzegovina's] criminal justice system", and is therefore always a matter of concern when determining whether a case should be referred pursuant to Rule 11 *bis*.¹⁴¹

In light of this observation, the Bench set forth a two-pronged test for determining whether a case may be referred notwithstanding claims that the accused's safety would be in danger in the state of

evaluation of the accused if suspicion arises that his accountability has diminished, and providing criteria for such an evaluation); *ibid.*, Art. 207 ("If in the course of criminal proceedings it is ascertained that after the criminal offence was committed the Accused has become mentally ill, a decision shall be issued to the effect of adjourning criminal proceedings."); *ibid.*, Art. 388 (if the accused becomes afflicted by mental illness after the commission of the crime such that he is unable to participate in proceedings, the court shall, "upon psychiatric forensic evaluation, adjourn the procedure and send the Accused to the body responsible for issues of social care", and "[w]hen the health condition of the accused has improved to the extent to which he or she is able to take part in the procedure, the procedure shall continue"); BiH Submissions, *supra* note 25, pp. 6–7 (explaining the provisions of the Law on Protection of Persons with Mental Disorders of the Federation of Bosnia and Herzegovina, the Law on Protection of Persons with Mental Disorders of Republika Srpska, the Law on Extra-Contentious Proceedings of the Federation of Bosnia and Herzegovina, and the Law on Extra-Contentious Proceedings of Republika Srpska relating to the detention, treatment, and monitoring of persons affected by mental disorders).

¹³⁷ Motion Hearing, *supra* note 30, T. 86–88.

¹³⁸ Order for Further Submissions, *supra* note 1, p. 3.

¹³⁹ See Prosecution Further Submissions, *supra* note 24, paras. 10–13; BiH Submissions, *supra* note 25, pp. 4–6.

¹⁴⁰ Defence Further Submissions, *supra* note 27, p. 4.

¹⁴¹ *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 64 (footnote removed; quoting *Stanković* Appeal Decision, *supra* note 110, para. 34).

referral. First, the Bench must examine whether any suspicion of threats to the accused's safety are substantiated and based on fact. If so, the Bench must then determine whether the authorities of the state of referral would be able to effectively safeguard the accused against any attacks on his life and limb.¹⁴²

41. The Referral Bench has examined the relevant submissions and performed this analysis in the confidential Annex to this Decision. For the reasons described there, the Bench is satisfied that the authorities of Bosnia and Herzegovina are in a position to provide adequate protection to the Accused against attempts to cause him injury while in custody.¹⁴³ The Bench also acknowledges the ability of the BiH State Court to properly address any matters relating to the Accused's safety should they arise. It encourages the Prosecution to keep an eye on this issue and inform the Bench if events occur or are likely to occur that will pose a risk to his safety. It also recalls its power under Rules 11 *bis*(F) and (G) to revoke the referral of this case and compel the Accused's return to the seat of the Tribunal if, due to unforeseen events, his safety can no longer be guaranteed by the authorities of that state, or if on any other basis it will not be possible for him to receive a fair trial.

5. Conclusion

42. For the reasons discussed above and in the confidential Annex to this Decision, the Referral Bench is satisfied that the death penalty will not be imposed or carried out on the Accused if he is found guilty by the BiH State Court, and that he will receive a fair trial in Bosnia and Herzegovina in accordance with Rule 11 *bis*(B).

E. Witness Protection

43. Referring to the case of *Popović et al.*, to which the Accused was still joined as an indictee at the time the Motion for Referral was filed, the Prosecution submits that, "[a]lthough no protective measures for witnesses or victims have been ordered so far in this case, some of the witnesses have already testified in other cases. It is the Prosecutor's position that the witnesses should remain protected and therefore requests that any protective measures remain in force."¹⁴⁴ As in previous referral decisions, the Referral Bench will order, pursuant to Rules 11 *bis*(D)(ii), 75(F), and 75(G), that any protective measures granted by the Tribunal to victims and witnesses – whether in this case, in *Popović et al.*, or in any other case – continue to have effect in proceedings in this case before the BiH State Court. In order for the relevant authorities of Bosnia and Herzegovina to be

¹⁴² *Ibid.*

¹⁴³ *See infra*, Annex, paras. 11–15.

fully informed of existing protective measures affecting potential victims and witnesses in this case, it will order the Prosecution to disclose confidentially to the BiH State Court and the Prosecutor's Office of Bosnia and Herzegovina the relevant information concerning such victims and witnesses. The Bench remains satisfied that adequate provisions exist in the law of Bosnia and Herzegovina for the protection of victims and witnesses.¹⁴⁵

F. Monitoring of Proceedings

44. The referral of a case has the effect of placing primary responsibility for the proceedings against the accused in the hands of the authorities of the state of referral, including the state's investigative, prosecutorial, and judicial organs. Rules 11 *bis*(D)(iv), (F), and (G) serve as safeguards against a failure to prosecute a referred case diligently, or to give the accused a fair trial.¹⁴⁶ Rule 11 *bis*(D)(iv) provides for the monitoring of proceedings by observers acting on behalf of the Office of the Prosecutor. In the cases already referred by this Bench under Rule 11 *bis*, that office has compiled and filed, on a regular basis, informative reports on the progress of proceedings before the BiH State Court.¹⁴⁷ As it has done in the past, the Bench will order the Prosecution to ensure that proceedings in this case before the BiH State Court are also monitored on a continual basis.¹⁴⁸

¹⁴⁴ Motion for Referral, *supra* note 1, para. 34.

¹⁴⁵ See Witness Protection Programme Law of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 29/04 (English translation); Law on Protection of Vulnerable Witnesses and Witnesses Under Threat, Official Gazette of Bosnia and Herzegovina Nos. 21/03, 61/04 (English translation). See also *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, paras. 96–97 (Referral Bench expressing its satisfaction with measures in Bosnia and Herzegovina for the protection of witnesses).

¹⁴⁶ See *ibid.*, para. 98; *Kovačević* Rule 11 *bis* Decision, *supra* note 78, para. 89; *Janković* Rule 11 *bis* Decision, *supra* note 78, para. 102; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 134; *Rašević and Todović* Rule 11 *bis* Decision, *supra* note 78, para. 110; *Stanković* Rule 11 *bis* Decision, *supra* note 73, para. 93.

¹⁴⁷ See, e.g., *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Sixth Progress Report, 20 March 2007, Annex A (containing the OSCE's "Fifth Report in the Case of Defendant Radovan Stanković Transferred to the State Court Pursuant to Rule 11*bis*" of March 2007); *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Prosecutor's Third Progress Report, 19 March 2007, Annex (containing the OSCE's "Second Report in the Paško Ljubičić Case Transferred to the State Court Pursuant to Rule 11*bis*" of March 2007); *Prosecutor v. Mejakić, Gruban, Fuštar, and Knežević*, Case No. IT-02-65-PT, Prosecutor's Third Progress Report, 3 January 2007, Annex (containing the OSCE's "Second Report in the Željko Mejakić et al. Case Transferred to the State Court Pursuant to Rule 11*bis*" of December 2006).

¹⁴⁸ See *Stanković* Appeal Decision, *supra* note 110, paras. 53–54 (holding that it is within the Referral Bench's inherent powers to order the Prosecutor to send observers on the Tribunal's behalf). Accord *Kovačević* Appeal Decision, *supra* note 134, para. 29 n. 81; *Rašević and Todović* Appeal Decision, *supra* note 69, paras. 105–106; *Mejakić et al.* Appeal Decision, *supra* note 110, para. 94; *Janković* Appeal Decision, *supra* note 81, para. 56. See also *infra* para. 49(f) (paragraph in the disposition containing this order).

45. The reports submitted by the Office of the Prosecutor routinely contain observations and evaluations of neutral and independent monitors, primarily the OSCE.¹⁴⁹ As the Referral Bench has consistently held, the standing of the OSCE and the neutrality of its approach ensures that the reports provided to the Bench will not be biased in favour of the prosecution or reflect only those potential problems faced by the prosecutorial authorities, but will also set forth concerns relating to the defence of the accused and any other issues of general importance for the realisation of a fair trial in the national court.¹⁵⁰

46. The Referral Bench keeps itself well informed of the progress of referred cases through the reports of the Office of the Prosecutor, as well as through other means. As already stated in this Decision¹⁵¹ and in previous decisions on referral under Rule 11 *bis*,¹⁵² if a given case is not being satisfactorily prosecuted or tried, the Bench maintains the power under Rules 11 *bis*(F) and (G) to revoke the referral and compel the return of the accused to the seat of the Tribunal.

V. EFFECT OF REFERRAL ON THE ACCUSED'S SEVERANCE FROM *POPOVIĆ ET AL.*

47. As noted above, on 26 June 2006 Trial Chamber II severed the Accused's case from *Popović et al.*¹⁵³ – a multi-accused case on trial before that Chamber since mid-July 2006¹⁵⁴ – and the appeal proceedings on this issue are still ongoing.¹⁵⁵ There thus remains the possibility that the Appeals Chamber could overturn the Severance Decision. Although the Referral Bench has not yet been called upon to consider the referral of fewer than all of the accused in a multi-accused case, there is nothing in the text of Rule 11 *bis* that prohibits the Bench from referring the case of one accused while leaving his co-accused to be tried at the Tribunal. Furthermore, provided the ordinary conditions for referral are met in respect of a given accused in a multi-accused case, such referral

¹⁴⁹ The Office of the Prosecutor and the OSCE have entered into an agreement for the monitoring of and reporting on trial proceedings of referred cases. See Organization for Security and Co-Operation in Europe Permanent Council, Decision No. 673: Co-Operation Between the Organization for Security and Co-Operation in Europe and the International Criminal Tribunal for the former Yugoslavia, Doc. No. PC.DEC/673 (19 May 2005).

¹⁵⁰ See *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 100; *Kovačević* Rule 11 *bis* Decision, *supra* note 78, para. 90; *Ademi and Norac* Rule 11 *bis* Decision, *supra* note 74, para. 61; *Janković* Rule 11 *bis* Decision, *supra* note 78, para. 103; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 135; *Rašević and Todović* Rule 11 *bis* Decision, *supra* note 78, para. 111; *Stanković* Rule 11 *bis* Decision, *supra* note 73, para. 94.

¹⁵¹ See *supra* para. 41.

¹⁵² *Lukić and Lukić* Rule 11 *bis* Decision, *supra* note 3, para. 98; *Kovačević* Rule 11 *bis* Decision, *supra* note 78, para. 89; *Janković* Rule 11 *bis* Decision, *supra* note 78, para. 102; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 73, para. 134; *Rašević and Todović* Rule 11 *bis* Decision, *supra* note 78, para. 110; *Stanković* Rule 11 *bis* Decision, *supra* note 73, para. 93.

¹⁵³ Severance Decision, *supra* note 10, p. 4.

¹⁵⁴ *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-T, T. 343 (14 July 2006) (Trial Chamber declaring the commencement of trial proceedings).

can be expected to have a significant effect on speeding up trial and appeal proceedings, both for the accused whose case has been referred, and for his co-accused who remain at the Tribunal.¹⁵⁶ In light of these considerations, the Bench takes the view that among its powers must be the competence to refer the case of one accused charged in a multi-accused indictment,¹⁵⁷ and that such an order has the automatic effect of severing the accused's case from that of his co-accused.¹⁵⁸

VI. CONCLUSION

48. Having thoroughly considered all matters raised in relation to the Motion for Referral, in particular the gravity of the criminal conduct alleged against the Accused in the Indictment and his alleged level of responsibility, and being satisfied on the information presently available that he will receive a fair trial and that the death penalty will not be imposed, the Referral Bench finds that the case of *Prosecutor v. Trbić* is appropriate for referral to the authorities of Bosnia and Herzegovina.

¹⁵⁵ See *supra* para. 5.

¹⁵⁶ The Security Council has endorsed Rule 11 *bis* as a critical mechanism for achieving the Tribunal's completion strategy by reducing, where appropriate, the number of accused yet to be tried by the Trial Chambers. See Security Council Resolution 1534, *supra* note 2, paras. 4–5.

¹⁵⁷ The Prosecution is thus correct in arguing that, while “[i]t might be tidier” for separate proceedings in relation to the accused's severance under Rule 82 to precede Rule 11 *bis* proceedings, this sequence of events is not “legally necessary”. Motion Hearing, *supra* note 30, T. 83.

¹⁵⁸ The Bench acknowledges the similar scenario in which one accused has pleaded guilty and has subsequently been severed from the trial of his co-accused. See, e.g., *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-PT, Decision on Motion to Dismiss Charges Against Momir Nikolić, 12 May 2003, p. 2 (noting Momir Nikolić's plea of guilty and his subsequent conviction by a Trial Chamber, and granting the Prosecution's motion to dismiss all charges against him in an indictment in which he had been joined along with Vidoje Blagojević, Dragan Jokić, and Dragan Obrenović); *Prosecutor v. Blagojević, Jokić, and Obrenović*, Case No. IT-02-60-T, Separation of Proceedings and Scheduling Order, 23 May 2003, pp. 2–3 (noting Dragan Obrenović's plea of guilty and his subsequent conviction by a Trial Chamber, “[c]onsidering that ... it would be in the interests of justice to separate the proceedings against ... Obrenović from [those against Blagojević and Jokić]”, and ordering the severance of Obrenović's case from that of Blagojević and Jokić pursuant to Rule 82) (quotation at p. 2); *Prosecutor v. Mejakić, Gruban, Fuštar, Banović, and Knežević*, Case No. IT-02-65-PT, T. 73 (accepting Predrag Banović's guilty plea and ordering that he be severed from the indictment of the other accused).

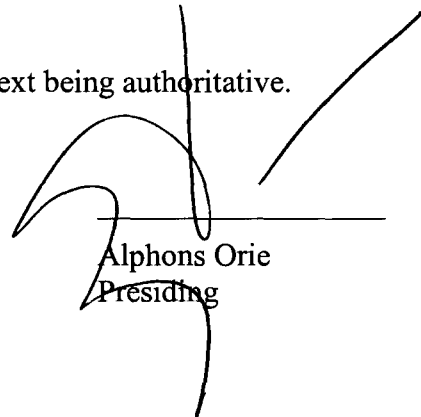
VII. DISPOSITION

49. For the reasons discussed above, pursuant to Rules 11 *bis*, 54, 75, 82, and 127 of the Rules, the Referral Bench hereby **GRANTS** the Motion for Referral, and orders as follows:

- a. The case of *Prosecutor v. Trbić* is hereby referred to the authorities of Bosnia and Herzegovina, so that those authorities may forthwith refer the case to the appropriate national court for trial within that state.
- b. The referral of this case shall not have the effect of revoking previous orders and decisions of the Tribunal in this case. It will be for the appropriate court or the competent national authorities of Bosnia and Herzegovina to determine whether further or different provisions should be made for the purposes of the trial of this case in Bosnia and Herzegovina.
- c. Existing protective measures for victims and witness shall remain in force. Within 30 days of this Decision becoming final, the Prosecution shall disclose confidentially to the BiH State Court and the Prosecutor's Office of Bosnia and Herzegovina the relevant information concerning potential victims and witnesses in this case.
- d. The Registrar shall arrange for transport of the Accused and his personal belongings, within 30 days of this Decision becoming final, to Bosnia and Herzegovina in accordance with the procedures applicable to transfer of convicted persons to states for service of sentence.
- e. The Prosecution shall hand over to the Prosecutor's Office of Bosnia and Herzegovina, as soon as possible after this Decision has become final and no later than the date on which the Accused is transferred, the material supporting the Indictment against the Accused, as well as all other appropriate evidentiary material.
- f. The Prosecution shall continue its efforts, in cooperation with the OSCE and any other international organisation of notable standing, to ensure that proceedings in this case before the national court in Bosnia and Herzegovina are continually monitored.
- g. The Prosecution shall file an initial report to the Referral Bench on the progress made by the Prosecutor's Office of Bosnia and Herzegovina in this case six weeks after the handover of all evidentiary material. Thereafter, the Prosecution shall file a report every three months. These reports shall include information on the course of the proceedings before the competent national court after commencement of trial, and shall include any reports or other information received from any international organisations also monitoring the proceedings.

- h. The Defence Further Submissions are recognised as validly filed.
- i. As discussed in the confidential Annex, leave to withdraw the First Registry Submission¹⁵⁹ is denied.

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



Alphons Orie
Presiding

Dated this twenty-seventh day of April 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵⁹ See First Registry Submission, *infra* note 160, and accompanying text.