



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

Case No. IT-04-83-PT
Date: 9 July 2007
Original: English

BEFORE THE REFERRAL BENCH

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

Registrar: Mr. Hans Holthuis

Decision of: 9 July 2007

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON MOTION FOR REFERRAL OF CASE
PURSUANT TO RULE 11 *BIS***

Office of the Prosecutor

Ms. Carla Del Ponte
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Counsel for Rasim Delić

Ms. Vasvija Vidović
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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 seized of the “Urgent Motion by the Prosecutor For Referral of the Indictment Pursuant to Rule 11*bis*” (“Motion for Referral”), filed on 5 July 2007, in which the Office of the Prosecutor (“Prosecution”) requests the referral of the case against Rasim Delić (“Accused”) to the authorities of Bosnia and Herzegovina.

2. The Motion for Referral was submitted as an annex to the “Motion by the Prosecutor for Appointment of a Referral Bench Pursuant to Rule 11*bis*” filed before the President of the Tribunal on 5 July 2007. Simultaneously, the Prosecution filed the “Prosecution Motion for Suspension of the Commencement of Trial and all Related Proceedings” (“Motion for Suspension”). The Prosecution contended in the Motion for Suspension that “[a]s a result of the Trial Chamber’s decision to limit the number of witnesses and time available for the Prosecution to present its case, the Prosecution will have insufficient time to lead evidence [...] Consequently, the scope of the case as it exists after the Rule 73*bis* (C) decision now renders the case eligible for transfer pursuant to Rule 11*bis*.”¹

3. On 5 July 2007, Trial Chamber I denied the Motion for Suspension and confirmed that the trial in the present case would start as scheduled on 9 July 2007.

4. Due to the extremely late timing of the Motion for Referral in relation to the imminent start of trial, and also to hear the Defence on the matter, the Referral Bench on 6 July 2007 convened an emergency hearing. At the hearing, Counsel for the Accused opposed referral of the case.²

II. REFERRAL PROCEEDINGS

5. Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), entitled “Referral of the Indictment to Another Court”, was adopted on 12 November 1997 and revised on 30 September 2002.³ Such a revision was necessary in order to give effect to the broad strategy

¹ Motion for Suspension, para. 1. In a Pre-Trial Conference held before Trial Chamber I on 2 July 2007, the Chamber determined the number of witnesses and the time available to the Prosecution to present its case pursuant to Rule 73*bis*(C).

² Hearing of 6 July 2007, transcript pages (T.) 195–225.

³ In its original form, Rule 11 *bis* provided for transfer of an accused from the Tribunal to the authorities of the state in which the accused was arrested. Transfer required an order from the Trial Chamber suspending the indictment pending the proceedings before the national courts. Such an order necessitated findings by the Trial Chamber that state authorities were prepared to prosecute the accused in their own courts, and that it was appropriate in the circumstances for the courts of that state to exercise jurisdiction over the accused. *See* Rules of Procedure and

endorsed by the Security Council for the completion of all Tribunal trial activities at first instance by 2008.⁴ Security Council Resolution 1503 characterised this completion strategy as “concentrating on the prosecution of the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate”.⁵

6. Since the 30 September 2002 revision of Rule 11 *bis*, there have been three amendments: on 10 June 2004,⁶ 28 July 2004,⁷ and 11 February 2005.⁸ In its current form, the Rule 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, 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;

Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.12 (12 November 1997), Rule 11 *bis*. See also Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.25 (30 September 2002), Rule 11 *bis*.

⁴ See Statement by the President of the Security Council, UN Doc. S/PRST/2002/21 (2002); Security Council Resolution 1329, UN Doc. S/RES/1329 (2000).

⁵ Security Council Resolution 1503, UN Doc. S/RES/1503 (2003) (“Security Council Resolution 1503”), preambular para. 7.

⁶ Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.31 (17 June 2004), Rule 11 *bis* (enshrining the amendments adopted at the 10 June 2004 plenary session).

⁷ Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.32 (12 August 2004), Rule 11 *bis* (enshrining the amendments adopted at the 28 July 2004 plenary session).

⁸ Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.34 (22 February 2005), Rule 11 *bis* (enshrining the amendments adopted at the 11 February 2005 plenary session).

- (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.⁹

III. PROCEDURAL HISTORY

7. The initial indictment against the accused dates back to December 2004¹⁰ and was confirmed on 16 February 2005.¹¹ On 25 February 2005, the President of the Tribunal assigned the case to Trial Chamber III.¹² On 28 February 2005, the Accused surrendered and was transferred to the Tribunal where on 3 March 2005 he made his initial appearance.¹³ The Accused pleaded not guilty to all charges.¹⁴

8. On 6 May 2005, Trial Chamber III granted a request by the Accused for provisional release to Bosnia and Herzegovina.¹⁵

9. On 30 June 2006, Trial Chamber III denied an application by the Prosecution to amend the indictment with three additional crime scenes on the grounds that this was likely to a delay the start

⁹ 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*. All subsequent citations to Rules of Procedure and Evidence in the present Decision are to this version of the Rules.

¹⁰ Judge Orić noted that the Prosecution chose to indict the Accused at a time when the first requests for referrals had already been made, and did not request that the case be prosecuted by the authorities of Bosnia and Herzegovina. T. 217-218.

¹¹ Decision on Review of Indictment and Order for Non-Disclosure, 16 February 2005.

¹² Order Assigning a Case to a Trial Chamber, 25 February 2005.

¹³ Scheduling Order for Initial Appearance, 2 March 2005.

¹⁴ Status Conference, T. 3-7.

¹⁵ Decision on Defence Request for Provisional Release, 6 May 2005.

and prolong the course of the trial, although it did allow other minor amendments.¹⁶ Pursuant to the Trial Chamber's instructions, the Prosecution on 14 July 2006 filed an amended indictment ("Indictment"),¹⁷ which is the operative indictment in this case.

10. On 17 April 2007, the President of the Tribunal reassigned the case to Trial Chamber I.¹⁸ The Accused was recalled from provisional release, in view of the nearing start of his trial, effective on 25 June 2007.¹⁹ A Pre-Trial Conference pursuant to Rule 73*bis* was held on 2 July 2007.²⁰ The trial is due to commence on 9 July 2007.²¹

IV. THE ACCUSED AND THE CHARGES

11. According to the Indictment, the Accused was commander of the Main Staff of the Army of Bosnia and Herzegovina ("ABiH") from 8 June 1993 until his retirement on 1 September 2000,²² and as such, the most senior officer of the ABiH, subordinate only to the President of Bosnia and Herzegovina.²³ It is also alleged that the Accused was a member of the expanded Presidency of the Republic of Bosnia and Herzegovina, which was empowered to exercise legislative power in the event of war.²⁴ The Accused therefore is said to have exercised military command and control over all regular ABiH forces in Bosnia and Herzegovina.²⁵

12. The Prosecution alleges that by no later than August 1993, the Accused ordered the establishment of a unit within the ABiH 3rd Corps named the "El Mujahed Detachment", comprised of foreign volunteers who were prepared to conduct a "Holy War" against the enemies of the Bosnian Muslims.²⁶ According to the Indictment, soldiers from the "El Mujahed Detachment" committed killings, maltreatment and rape of civilians and/or enemy soldiers who were captured or had surrendered.²⁷

13. The Indictment charges the Accused with four counts of violations of the laws or customs of war: murder, two counts of cruel treatment and rape. The underlying offences allegedly occurred in June 1993 and between July and September 1995 in locations in Central Bosnia. The Accused is

¹⁶ Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006.

¹⁷ *Ibid.*

¹⁸ Order Reassigning a Case to a Trial Chamber and Assigning *Ad Litem* Judges for Pre-Trial Work, 17 April 2007.

¹⁹ Order Recalling Rasim Delić From Provisional Release, 14 June 2007.

²⁰ Scheduling Order, 22 May 2007.

²¹ *Ibid.*

²² Indictment, para. 3 and Annex A, para. 6.

²³ Indictment, para. 15.

²⁴ Indictment, para. 4.

²⁵ Indictment, paras 15-16, 18.

²⁶ Indictment, paras 12, 14.

²⁷ Indictment, paras 24-27, 33-36, 40-46, 48.

exclusively charged as a superior with failure to prevent or punish the aforementioned crimes pursuant to Article 7(3) of the Statute.

V. GRAVITY OF THE CRIMES CHARGED

14. Rule 11*bis* (C) requires the Referral Bench to consider the gravity of the crimes charged when determining whether a case should be referred.

A. Submissions

15. The Prosecution submits that the Accused is charged with failure to prevent or punish the perpetrators of crimes involving approximately 100 victims, including 82 murders,²⁸ and that the Indictment is most limited in terms of number of victims, geography and span of time, to a degree not requiring adjudication before the Tribunal.²⁹ The Prosecution argues that cases have been referred to domestic jurisdictions involving a higher number of victims and covering a broader geographical area.³⁰

16. The Prosecution further submits that in view of Rule 73*bis* (C) restrictions on time and number of witnesses for the presentation of its case, it is compelled to renounce leading any evidence on one crime-site, thus reducing the overall number of victims to 75.³¹ Doing so would enable it to present only a “truncated picture of the Accused’s total alleged criminal responsibility”.³² The Prosecution further argues that, since the Indictment alleges responsibility of the Accused as a superior under Article 7(3) only, the charges against the Accused are less grave than those brought in other cases under Article 7(1) of the Statute.³³

17. The Defence disagrees with the portrayal of the gravity of crimes submitted by the Prosecution. During the hearing of 6 July 2007, Counsel submitted that the accusations were “indeed very serious”³⁴ and that “in a very short period of time, very serious crimes can, of course,

²⁸ Motion for Referral, para. 11.

²⁹ Motion for Referral, paras 11–14.

³⁰ Motion for Referral, para. 9. The Prosecution refers in particular to the referral of the Lukić & Lukić case. *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, 5 April 2007 (“*Lukić* Referral Decision”).

³¹ Motion for Referral, para. 11. Although the Prosecution concedes that the Trial Chamber’s Decision does not require the Prosecution to drop any counts, “choices must be made about how Š...Ć to proceed with the case.” T. 199.

³² T. 198.

³³ Motion for Referral, para. 17.

³⁴ T. 212.

be committed”.³⁵ Counsel also submitted that cases brought under Article 7(3) of the Statute are “highly complex” and require extensive litigation.³⁶

B. Discussion

18. As the Appeals Chamber has held, the Referral Bench must base its determinations in respect of a request for referral on the operative indictment, as the facts alleged therein constitute the essential case raised by the Prosecution for trial.³⁷ In this context, the Referral Bench observes that the Indictment in this case is essentially the same as the initial indictment of 2005 and has undergone only minor changes as granted on 30 June 2006.³⁸ As a reason to request referral “at the eleventh hour”, the Prosecution merely asserts that the recent restrictions on time and the presentation of witnesses pursuant to Rule 73*bis* (C) render it impossible to present “the full scope of the alleged criminality” of the Accused,³⁹ the remaining charges making the residual case suitable for referral. Nonetheless, the Prosecution seeks referral of the Indictment as it presently stands. The Referral Bench cannot proceed on the basis of a perceived trimmed-down version of the Indictment which has not yet been drafted and submitted for leave pursuant to Rule 50.⁴⁰

19. The Referral Bench recalls that the underlying offences in the Indictment as it stands involve around 100 victims of murder, cruel treatment and rape. These offences were allegedly committed in four locations in Central Bosnia and over a time-span not exceeding three months in 1993 and 1995. In comparison with other cases tried before the Tribunal and those already referred to competent national jurisdictions, it would appear that the factual basis of the present Indictment is not among the most serious, and that the gravity of the crimes are not *ipso facto* incompatible with referral of the case.

VI. LEVEL OF RESPONSIBILITY OF THE ACCUSED

20. Rule 11*bis* (C) requires the Referral Bench to also consider the level of responsibility of an accused when determining whether a case should be referred.

³⁵ *Ibid.*

³⁶ T. 213.

³⁷ *Prosecutor v Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Rule 11*bis* Referral, 23 February 2006, para. 14.

³⁸ “JUDGE ORIE: [...] the scope of the indictment, as it is now, is actually the same as it was in the very beginning, that is, in December 2004? That’s two and a half years ago. MR. MUNDIS: That’s correct.” T. 217.

³⁹ T. 199.

⁴⁰ T. 203-204.

A. Submissions

21. While the Prosecution concedes that the Accused held the highest military rank, it submits that “his actual role in the crimes charged [...] was limited”⁴¹ and that he necessarily played “a much smaller role” in the commission of the underlying offences.⁴² This is so because the Accused is charged only with responsibility as a superior pursuant to Article 7(3) of the Statute, and therefore, he “necessarily played a much smaller role in the commission of the murders or other crimes alleged in the Indictment.”⁴³

22. While the Defence agrees with the Prosecution that the Accused’s role in the commission of the crimes at issue was “minimal”,⁴⁴ it emphasises that the Accused occupied the most senior military position in Bosnia and Herzegovina at the relevant time, and argues that Security Council Resolution 1534 (2004) envisages precisely this type of accused to be tried before the Tribunal.⁴⁵

B. Discussion

23. The Referral Bench recalls that the level of responsibility of an accused relates both to the role of that accused in the commission of the alleged offences and to his or her position and rank in the civil, political, or military hierarchy.⁴⁶ While a high level of responsibility may arise from the alleged level of participation in the commission of crimes alleged in the Indictment, a person holding a high rank may ultimately bear a higher level of responsibility by virtue of that high position.⁴⁷

24. In the present case, it is not in dispute that the Accused was the most senior military person in the ABiH at the time relevant to the Indictment. It is alleged that the Accused was responsible for planning and directing all ABiH operations and for monitoring the activities of all subordinate officers and units of the ABiH,⁴⁸ as well as for the overall state and conduct of the ABiH throughout Bosnia and Herzegovina.⁴⁹ Although he is not charged with having physically perpetrated any of the underlying offences, but with failure to prevent or punish such offences committed by his subordinates, the Referral Bench is not persuaded by the Prosecution that the “remoteness” of the Accused from the underlying offences is such that it diminishes his alleged level of responsibility to

⁴¹ Motion for Referral, para. 15.

⁴² T. 204.

⁴³ Motion for Referral, para. 15. *See also* T. 204.

⁴⁴ T. 214.

⁴⁵ T. 213–214.

⁴⁶ *Lukić* Referral Decision (see fn. 30 *supra*), para. 28.

⁴⁷ *Ibid.*

⁴⁸ Indictment, para. 15.

⁴⁹ Indictment, para. 18.

a degree which would make the case suitable for referral. On the contrary, the Referral Bench agrees with the Prosecution that “[the Accused] is no less culpable for his failure to act under Article 7(3) than he would be for the commission of crimes under 7(1)”.⁵⁰

25. Interpreting the term “most senior leaders”, as envisaged by the Security Council, this Referral Bench has previously held that

individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”.⁵¹

Therefore, the Referral Bench finds that in view the supreme rank and position of the Accused in the Bosnian Muslim military and political hierarchy, he cannot but be described as one of the “most senior leaders” within the meaning of the relevant resolutions of the Security Council.

VII. CONCLUSION

26. While the Referral Bench has found that the gravity of the crimes is not *ipso facto* incompatible with referral of the case, it is of the opinion that the alleged level of responsibility of the Accused requires that the present case be tried before the Tribunal. Referral provides no adequate response to the perceived difficulties that the Prosecution contends arise from the oral decision the Trial Chamber issued under Rule 73bis (C). Therefore, there is no need to consider other factors prescribed by Rule 11bis. In particular, it is not necessary to hear the authorities of Bosnia and Herzegovina as a State to which the case might be referred.

⁵⁰ T. 204.

⁵¹ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para. 22.

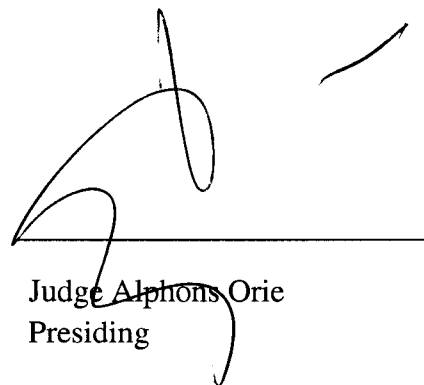
VIII. DISPOSITION

27. For the foregoing reasons, **THE REFERRAL BENCH**

PURSUANT to Rules 11*bis* of the Rules;

DENIES the Motion for Referral.

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



Judge Alphons Orie
Presiding

Dated this ninth day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]