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Tribunal Pénal  
International pour  
l'ex-Yougoslavie



## Press Release

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REGISTRY

GREFFE

The Hague, 20 July 2005  
CT/MOW/993e

### **TRIBUNAL DECIDES TO REFER THE CASE AGAINST ŽELJKO MEJAKIĆ MOMČILO GRUBAN, DUŠAN FUŠTAR AND DUŠKO KNEŽEVIĆ TO BOSNIA AND HERZEGOVINA**

*Please find below a summary of the Decision delivered by the Referral Bench, composed of Judge Orić (presiding), Judge Kwon and Judge Parker, as read out by the Presiding Judge.*

#### SUMMARY

This sitting of the Referral Bench of the International Tribunal has been convened for the delivery of its Decision on a Motion of the Prosecutor for this case to be referred for trial to the authorities of Bosnia and Herzegovina.

The Motion for referral was supported by the Government of Bosnia and Herzegovina. The Government of Serbia and Montenegro, however, requested this Bench to act on its own volition to refer this case instead to the authorities of Serbia and Montenegro for trial. The accused were opposed to referral preferring trial before this Tribunal, but submitted that if referral was appropriate, the case should be referred to Serbia and Montenegro.

We would note that the third member of the Bench which has heard and decided this case, Judge O-Gon Kwon, is unable to be present this afternoon. Judge O-Gon Kwon is in full agreement with the reasons set out in the written Decision and with the Orders which will be made.

It is not proposed to read out the full written Decision of the Bench at this hearing. Instead, a summary of key points will be given. It is emphasised that the summary is not part of the written Decision, which is the only authoritative account of the Bench's reasons. Copies of the written Decision will be made available at the conclusion of this hearing.

While this Tribunal is established by the United Nations with powers to try cases against persons responsible for serious violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, it has never had the exclusive power to do so. The courts of the present nations in the territory of the former Yugoslavia have not been denied jurisdiction to try such cases.

By resolutions of the Security Council of the United Nations, which are referred to in the written Decision, this Tribunal has been requested by the Security Council to concentrate on cases involving the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction, and to transfer cases involving those who may not bear this level of responsibility to competent national jurisdictions for trial.

Hence, the Motion of the Prosecutor to refer this case to Bosnia and Herzegovina.

Rule 11*bis* of this Tribunal's Rules allow referral for trial to be ordered to the authorities of

- (1) a State where the crime was committed, or
- (2) a State where the accused was arrested, or
- (3) a State which has jurisdiction and which is willing and adequately prepared to accept the case.

Internet address: <http://www.un.org/icty>

Media Office/Communications Service

Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands  
Tel.: +31-70-512-5343; 512-5356 Fax: +31-70-512-5355

The gravity of the alleged crimes and the level of responsibility of the accused must be considered, and, before ordering referral, this Bench must be satisfied that the accused will receive a fair trial, and that the death penalty will not be imposed or carried out if the trial should result in a conviction.

## **THE CHARGES**

The four Accused are charged with having committed crimes which arise in the context of the detainment of non-Serbs, principally Bosnian Muslims and Bosnian Croats, in camps at Omarska and Keraterm in Bosnia and Herzegovina, between May and August 1992. It is alleged that the Accused Željko Mejakić was the Commander of the Omarska Camp at that time, Momčilo Gruban was a guard shift commander at the Omarska Camp and Dušan Fuštar at the Keraterm Camp, and that Duško Knežević held no official position but was able to enter both of those camps when he wished.

Each of the Accused is charged with five offences:

1. Persecution, as a crime against humanity,
2. Murder, as a crime against humanity,
3. Murder, as a violation of the laws and customs of war,
4. Inhumane Acts, as a crime against humanity,
5. Cruel Treatment, as a violation of the laws and customs of war.

Each of the Accused, except Duško Knežević, is alleged to bear criminal responsibility pursuant to both Articles 7(1) and 7(3) of the Statute of the International Tribunal, whereas only Article 7(1) is relied on against Duško Knežević.

## **GRAVITY OF CHARGES AND LEVEL OF RESPONSIBILITY OF ACCUSED**

For reasons set out in the written Decision, the Referral Bench is satisfied that the crimes alleged against the Accused are indeed grave. Nonetheless, when they are considered in the context of other cases which this Tribunal deals with, they are not among the “most serious”.

Even though Željko Mejakić is alleged to have been the Commander of the camp at Omarska, he cannot be considered to be among the “most senior leaders”. The other three are not “leaders” in any relevant sense.

Accordingly, the Referral Bench is satisfied that neither the gravity of the alleged offences, nor the level of responsibility of the Accused, at the time precludes the referral of this case to the authorities of a nation which meets the requirements of Rule 11*bis*.

## **REFERRAL TO BOSNIA AND HERZEGOVINA OR SERBIA AND MONTENEGRO**

The offences charged are alleged to have been committed in Bosnia and Herzegovina, against persons living in Bosnia and Herzegovina, and by the Accused who were then living in Bosnia and Herzegovina. At least three of the Accused were citizens of Bosnia and Herzegovina at the time of the alleged offences, and two of them were transferred to this Tribunal from Bosnia and Herzegovina.

By contrast, the nexus with Serbia and Montenegro is limited. Nationality was the primary justification advanced by the Defence and Serbia and Montenegro. It does appear that while two of the Accused are citizens of Bosnia and Herzegovina by birth, they were also granted citizenship of Serbia and Montenegro in July 2004 and January 2005 respectively, that is, after these Accused were placed in custody by this Tribunal. A third was born in Bosnia and Herzegovina but it has not been established that he has also been granted citizenship of Serbia and Montenegro. Only the fourth appears to be a citizen of Serbia and Montenegro by birth.

Both Bosnia and Herzegovina, and Serbia and Montenegro, affirm that they are willing and adequately prepared to accept the case for trial. However, given the strength of the connections of the case with Bosnia and Herzegovina, the Referral Bench has concentrated its attention on referral to that State, on the basis that, only if it was found that other considerations weighed significantly against such referral would the Referral Bench return to a detailed consideration of ordering referral *proprio motu* to Serbia and Montenegro. It has not proved necessary to do so.

## **THE LAW OF BOSNIA AND HERZEGOVINA**

If the case were referred to Bosnia and Herzegovina, the law in force there provides that the trial will be conducted by the State Court. It would be necessary for the State Court to determine the law applicable to each of the alleged criminal acts of the Accused. This Referral Bench has no authority to purport to determine those issues in any binding way. Nevertheless, the Bench has considered the possible alternatives and has been satisfied, for reasons set out in the written Decision, that whatever alternative is applied, there are appropriate provisions which permit the prosecution of the Accused for most, if not all, of the criminal acts alleged in the present indictment, and which provide for adequate penalties in the event of convictions.

## **FAIR TRIAL**

The Referral Bench has given detailed consideration to the question whether there would be a fair trial if the case were referred to Bosnia and Herzegovina. In addition to general fair trial considerations the Referral Bench has dealt specifically in its written Decision with each of the following concerns raised by the Defence.

1. The composition of the State Court;
2. The capacity to amend the present indictment if referral is ordered;
3. The use of materials and judgement of this Tribunal in the State Court;
4. Whether the Accused could examine the witnesses against them, whether they could obtain the attendance of Defence witnesses, and whether there are adequate safe conduct and witness protection measures;
5. The detention of the Accused during trial;
6. The availability to the Accused of Counsel of Choice;
7. Delay caused by referral.

The Referral Bench notes, in particular, the changes that have been made to the law of Bosnia and Herzegovina to ensure fair trial guarantees generally comparable to those which apply in this Tribunal. The War Crimes Chamber of the State Court has also been established to try referred cases. This is comprised of both international and national judges. The procedure for appointing the national judges directly involves judicial and parliamentary representatives of Republika Srpska.

The Referral Bench is satisfied that the concerns raised by the Defence are not well founded. Our reasons are set out fully in the written Decision. In addition, the Rules of this Tribunal provide for the monitoring of a referred case, which provides a further assurance of a fair trial.

## **DEATH PENALTY**

The Referral Bench is satisfied that the death penalty has been abolished in Bosnia and Herzegovina.

## **CONCLUSION**

Having considered the matters raised by the submissions, and in particular the gravity of the alleged criminal conduct of the Accused and their level of responsibility, and also being satisfied on

the information presently available that the Accused will receive a fair trial, and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of this case to the Authorities of Bosnia and Herzegovina for trial, should be ordered.

## **DISPOSITION**

For the forgoing reasons, **THE REFERRAL BENCH**

**PURSUANT** to Rules 11 *bis* of the Rules;

**HEREBY GRANTS** the Motion and **ORDERS** that the case of *Prosecutor v. Željko Mejačić, Momčilo Gruban, Dušan Fuštar and Duško Knežević* be referred to the authorities of the State of Bosnia and Herzegovina, so that those authorities should forthwith refer the case to the appropriate court, *i.e.*, the State Court, for trial within Bosnia and Herzegovina;

**DECLARES** that the referral of this case shall not have the effect of revoking the previous Orders and Decisions of the Tribunal in this case. It will be for the State Court or the competent national authorities of Bosnia and Herzegovina to determine whether different provisions should be made for the purposes of the trial of this case in Bosnia and Herzegovina;

**ORDERS** the Registrar of the Tribunal to arrange for transport of each of the Accused and their 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;

**ORDERS** the Prosecutor to hand over to the Prosecutor of Bosnia and Herzegovina, as soon as possible and no later than 30 days after this Decision in the case has become final, the material supporting the indictment against that Accused, and all other appropriate evidentiary material;

**ORDERS** the Prosecutor to continue its efforts in cooperation with the Organization for Security and Cooperation in Europe, or another international organisation of notable standing, to ensure the monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina. If arrangements for monitoring and reporting should prove ineffective, the Prosecutor should seek further direction from the Referral Bench;

**FURTHER ORDERS** the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include any reports received by the Prosecutor from the international organisation monitoring or reporting on the proceedings;

**AND FINALLY ORDERS** that the protective measures granted to victims and witnesses as set forth in the confidential Annex are to remain in force and that requests for protective measures pending before this Tribunal should be re-submitted to the State Court of Bosnia and Herzegovina for determination.

The Referral Bench added that, in order to avoid any uncertainty, the Accused Momčilo Gruban should remain in custody until the Pre-trial Chamber has considered the effect of this Decision on his pre-trial release.

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*The full text of the Decision is available on the Tribunal's website [www.un.org/icty](http://www.un.org/icty). Hard copies can also be obtained from the Media Office. Courtroom proceedings can be followed on the Tribunal's website.*