



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-96-23/2-PT
Date: 21 June 2010
Original: English

IN THE REFERRAL BENCH

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

Registrar: Mr. John Hocking

Decision of: 21 June 2010

PROSECUTOR

v.

GOJKO JANKOVIĆ

PUBLIC

**DECISION ON GOJKO JANKOVIĆ'S MOTION OF 12 APRIL
2010**

The Office of the Prosecutor:

Mr. Serge Brammertz

The Mover:

Mr. Gojko Janković

The Government of Bosnia and Herzegovina:

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

1. The Referral Bench of the International Criminal 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 a *pro se* motion signed on 28 February 2010 and filed on 12 April 2010 (“Motion”) by Gojko Janković (“Mover”) subsequent to his referral to the Bosnia and Herzegovina State Court (“BiH State Court”), which found him guilty of crimes against humanity and sentenced him to 34 years in prison.

Procedural History and Submissions

2. The Mover was initially charged with seven other defendants at the Tribunal in an indictment that was confirmed on 26 June 1996.¹ An amended indictment was confirmed against the Mover and four of the other accused on 7 October 1999 (“Indictment”).²

3. The Indictment identified the Mover as a sub-commander of the military police and paramilitary leader in the town of Foča, BiH, and charged him with crimes against humanity and war crimes for acts of torture and rape allegedly committed by him and his subordinates against members of Foča’s Bosnian Muslim population between April 1992 and February 1993.³

4. On 14 March 2005, the Mover was transferred from Banja Luka, BiH, to the Tribunal. The Prosecutor had previously sought, on 29 November 2004, to refer the Mover’s case to the BiH State Court.⁴ On 22 July 2005, the Referral Bench granted the Prosecutor’s request to refer the case to BiH given the nature of the allegations and the Mover’s level of responsibility, as charged in the Indictment.⁵ On 15 November 2005, the Appeals Chamber affirmed the referral, as well as the Referral Bench’s order to the Prosecution to file periodic progress reports monitoring the fairness of the proceedings against the accused in BiH.⁶ The Mover was transferred to BiH on 7 December 2005.

5. Subsequent to the Mover’s transfer, the BiH Prosecutor issued a revised indictment containing several adapted counts and new counts of crimes against humanity.⁷ On 20 March 2007,

¹ Case No. IT-96-23, Indictment, 26 June 1996. The other accused were Radovan Stanković, Dragoljub Kunarac, Radomir Kovač, Zoran Vuković, Dragan Gagović, Janko Janjić and Dragan Zelenović.

² Case No. IT-96-23-PT, First Amended Indictment, 7 October 1999. The remaining accused were Radovan Stanković, Janko Janjić, Zoran Vuković and Dragan Zelenović.

³ Indictment, paras 2.1, 4.3-4.4.

⁴ Case No. IT-96-23/2-PT, Motion by the Prosecutor Under Rule 11*bis* with Annexes I, II, III and Confidential Annexes IV and V, 29 November 2004.

⁵ Decision on Referral of Case Under Rule 11*bis*, 22 July 2005 (“Referral Bench Decision of 22 July 2005”), para. 20.

⁶ Decision on Rule 11*bis* Referral, 15 November 2005 (“Appeals Chamber Decision of 15 November 2005”), paras 59, 77-78.

⁷ Prosecutor’s Second Progress Report, 3 May 2006 (Annex: Organisation for Security and Co-operation in Europe Mission to Bosnia and Herzegovina (“OSCE”), First Report on Case of Gojko Janković, 25 April 2006, pp 1, 19). The

the BiH State Court issued its verdict finding the Mover guilty on seven counts of crimes against humanity, including murder, torture and rape, and acquitting him on two counts of murder and torture, as well as rape.⁸ The Court sentenced the Mover to 34 years of imprisonment.⁹ The BiH Appellate Panel affirmed the Mover's conviction and sentence on 16 November 2007.¹⁰

6. Throughout the legal proceedings in BiH, the Tribunal's Prosecutor filed periodic progress reports based on the detailed monitoring of the Office of the Organisation for Security and Co-operation in Europe Mission to BiH ("OSCE"). The OSCE did not identify issues of concern that, in its assessment, could be considered as infringing upon the Mover's right to a fair trial.¹¹

7. The Motion was filed with the Tribunal on 12 April 2010. First, the Mover submits various general challenges to his trial and conviction: i) violation of the legality principle because the BiH penal code did not exist at the time of the crimes; ii) bias of the BiH State Court and Prosecutor; and iii) various incorrect factual findings (misidentification, misapprehension of his role in the events, incorrect determinations regarding credibility of witnesses, etc.). Second, he argues that he was improperly convicted of charges outside the scope of the Indictment confirmed by the Tribunal in violation of the legal principles governing the referral of cases to national jurisdictions. As a remedy, the Mover proposes that his case be referred back to the Tribunal or that the Tribunal order the BiH State Court to re-try him on the basis of the Tribunal's original indictment rather than the revised BiH indictment.

8. On 14 April 2010, the President of the Tribunal assigned the Motion to the Referral Bench.¹²

BiH Prosecutor made a subsequent amendment to the indictment on 22 December 2006, modifying the description of certain alleged facts. Prosecutor's Fifth Progress Report, 1 February 2007 (Annex: OSCE Fourth Report on Case of Gojko Janković, January 2007, p. 1).

⁸ Prosecutor's Sixth Progress Report, 14 May November 2007 (Annex: OSCE Fifth Report on Case of Gojko Janković, May 2007, p. 2).

⁹ *Ibid.*

¹⁰ Prosecutor's Ninth Progress Report, 14 February 2008 (Annex: OSCE Eighth and Final Report on Case of Gojko Janković, February 2008, p. 1).

¹¹ Prosecutor's Third Progress Report, 1 August 2006 (Annex: OSCE Second Report on Case of Gojko Janković, July 2006, p. 3); Prosecutor's Fifth Progress Report, 1 February 2007 (Annex: OSCE Fourth Report on Case of Gojko Janković, January 2007, p. 1); Prosecutor's Seventh Progress Report, 14 August 2007 (Annex: OSCE Sixth Report on Case of Gojko Janković, July 2007, p. 1); Prosecutor's Eighth Progress Report, 14 November 2007 (Annex: OSCE Seventh Report on Case of Gojko Janković, November 2007, p. 1); Prosecutor's Ninth Progress Report, 14 February 2008 (Annex: OSCE Eighth and Final Report on Case of Gojko Janković, February 2008, p. 1).

The OSCE nonetheless reported that the BiH State Court's practice of "using witness statements as evidence *in lieu* of in-court testimony may have an impact on the right to a fair trial" and might be construed as violating Article 6(3)(d) of the European Convention on Human Rights, which protects a defendant's right to examine the witnesses against him. Prosecutor's Fourth Progress Report, 1 November 2006 (Annex: OSCE Third Report on Case of Gojko Janković, October 2006, pp 4-5).

¹² Order Assigning Motion to Referral Bench, 14 April 2010.

Discussion

9. Rule 11*bis* (B) of the Tribunal's Rules of Procedure and Evidence ("Rules") provides that the Referral Bench may order a referral, *inter alia*, "after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out". The Referral Bench adhered to this standard when referring the Mover's case for prosecution in BiH.¹³ Further, it ordered the Prosecution to file periodic progress reports in order to monitor the fairness of the proceedings.¹⁴ The OSCE reports submitted by the Prosecution did not identify violations of the Mover's right to a fair trial in BiH.¹⁵

10. Contrary to the Mover's implicit assertion, the Tribunal does not have appellate jurisdiction to review general claims regarding the proceedings against a defendant who was convicted in a national jurisdiction subsequent to a referral to that jurisdiction. The Referral Bench consequently declines to review the Mover's general challenges to his trial and conviction in BiH (*i.e.*, alleged violation of the legality principle, alleged bias of the BiH State Court and Prosecutor, alleged incorrect factual findings). Defendants whose cases have been referred to a national jurisdiction should present their post-conviction claims to the jurisdiction's appellate courts.

11. With regard to the Mover's claim that he was improperly convicted of charges outside the scope of the Indictment confirmed by the Tribunal, the Referral Bench notes that the Appeals Chamber has stated that "once cases have been referred by the International Tribunal to the State of Bosnia and Herzegovina pursuant to Rule 11*bis* of the Rules, the Prosecutor's Office of Bosnia and Herzegovina may only initiate criminal prosecution in the State Court of Bosnia and Herzegovina on the basis of an indictment that has *already been confirmed by the International Tribunal*".¹⁶ However, this holding was formulated in the context of the appellate review of a Referral Bench decision erroneously based on the assessment of an indictment which had yet to be confirmed by the Trial Chamber.¹⁷ The Appeals Chamber was not considering a challenge to the amendment of an indictment by a national jurisdiction subsequent to referral, as in the instant case, an issue that has not been specifically considered by the Tribunal thus far.

¹³ Referral Bench Decision of 22 July 2005, paras 46-48, 94, 105. *See also* Appeals Chamber Decision of 15 November 2005, paras 53-54.

¹⁴ Referral Bench Decision of 22 July 2005, paras 102-104. *See also* Appeals Chamber Decision of 15 November 2005, para. 59.

¹⁵ *See supra* note 11.

¹⁶ *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Rule 11*bis* Referral, 23 February 2006, para. 15 (emphasis in original).

¹⁷ *Ibid.*, paras 12-14.

12. The Referral Bench considers that the amendment of an indictment by a national jurisdiction following a referral does not constitute a violation of due process and the right to a fair trial if there is a proper legal and factual basis for the amendment, whether of an existing charge or the addition of a further charge, against the defendant.¹⁸ The Mover has failed to show that there was no proper legal and factual basis for amending the Indictment. The Referral Bench therefore denies on the merits the Mover's claim that he was improperly convicted of charges outside the scope of the indictment confirmed by the Tribunal.

13. In addition to these substantive considerations, the Referral Bench is mindful of the procedure set out in Rule 11*bis* (F), which reads:

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.

14. Under this rule, the Prosecutor, but not the accused, may request the revocation of a referral order. In this case, the Prosecutor has neither sought to revoke the referral order nor challenged the validity of the indictment under which the Mover was tried in BiH. Furthermore, the Motion is untimely under the rule's requirement that a revocation request be submitted "before the accused is found guilty or acquitted". The Mover filed his claim with the Tribunal on 12 April 2010, well after he was convicted by the BiH State Court on 20 March 2007¹⁹ and the BiH Appellate Panel affirmed his conviction on 16 November 2007.²⁰ While it may be decided in an appropriate case that the Referral Bench can revoke a referral order *proprio motu* in the circumstance of a grave violation left unchallenged by the Prosecution or untimely submitted, there is no basis on which this could be done in this case.

15. In sum, the Referral Bench denies the Mover's request to revoke the referral order and return his case to the Tribunal, as well as his request to order the BiH State Court to re-try him on the basis of the Tribunal's original indictment.

¹⁸ Under the Tribunal's own standard, a Trial Chamber has "wide discretion" to amend an indictment pursuant to Rule 50 if the following conditions are met: 1) the amendment "must not result in unfair prejudice to the accused when viewed in light of the circumstances of the case as a whole"; and 2) "if the proposed amendment is material, it must be supported by documentation or other material meeting the *prima facie* standard set forth in Article 19 of the Statute". *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment *et seq.*, 8 July 2008, paras 28, 30.

¹⁹ Prosecutor's Sixth Progress Report, 14 May November 2007 (Annex: OSCE Fifth Report on Case of Gojko Janković, May 2007, p. 2).

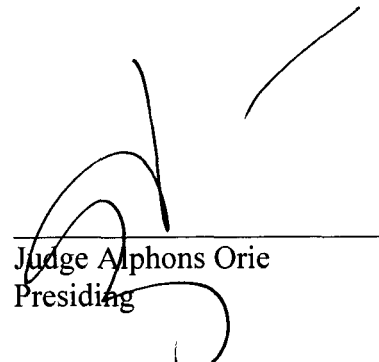
²⁰ Prosecutor's Ninth Progress Report, 14 February 2008 (Annex: OSCE Eighth and Final Report on Case of Gojko Janković, February 2008, p. 1).

Disposition

16. For all of these reasons, the Mover's claims are **DISMISSED**.

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

Dated this twenty-first day of June 2010,
At The Hague,
The Netherlands.



Judge Alphons Orié
Presiding

[Seal of the Tribunal]