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UNITED NATIONS

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-01-42/2-I

Date: 17 November 2006

Original: English

IN THE REFERRAL BENCH

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

Registrar: **Mr. Hans Holthuis**

Decision of: **17 November 2006**

PROSECUTOR

v.

VLADIMIR KOVAČEVIĆ

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

WITH CONFIDENTIAL AND PARTLY EX PARTE ANNEXES

The Office of the Prosecutor:

Ms. Susan Somers
Mr. David Re
Mr. Philip Weiner
Mr. Aleksandar Kontić

The Government of the Republic of Serbia

per: The Embassy of the Republic of Serbia to The Netherlands, The Hague

Counsel for the Accused:

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CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 2

III. THE ACCUSED AND THE CHARGES 4

IV. REFERRAL OF THE CASE PURSUANT TO RULE 11*BIS* 5

A. GRAVITY OF CRIMES CHARGED AND LEVEL OF RESPONSIBILITY OF THE ACCUSED 5
1. Submissions 5
2. Discussion 6
3. Conclusion 6
B. DETERMINATION OF THE STATE OF REFERRAL 7
1. Submissions 7
2. Discussion 7
3. Conclusion 7
C. APPLICABLE SUBSTANTIVE LAW 7
1. Submissions 8
2. Discussion 10
(a) SFRY Criminal Code 10
(b) Serbian Criminal Code 12
(c) Command Responsibility 13
3. Conclusion 15
D. THE ACCUSED'S CURRENT MENTAL HEALTH CONDITION 15
1. Preliminary Observations 15
2. Procedural Fairness 16
3. Welfare of the Accused 17
4. Conclusion 18
E. NON-IMPOSITION OF THE DEATH PENALTY AND FAIR TRIAL 18
1. Non-Imposition of Death Penalty 18
2. Fair Trial 19
3. Conclusion 21
F. WITNESS PROTECTION 22
1. Submissions 22
2. Discussion 22
3. Conclusion 23
G. MONITORING OF PROCEEDINGS 23
1. Submissions 23
2. Discussion 24
3. Conclusion 24

V. CONCLUSION 24

VI. DISPOSITION 25

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 "Request by the Prosecutor Under Rule 11*bis* for Referral of the Indictment to Another Court" ("Motion for Referral"), filed by the Office of the Prosecutor ("Prosecution") on 28 October 2004 in the case of Vladimir Kovačević ("Accused").

2. 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.[1] Revision was necessary in order to give effect to the broad strategy endorsed by the Security Council for the completion of all Tribunal trial activities at first instance by 2008.[2] This completion strategy was subsequently summarised in Security Council Resolution 1503 as one of "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 [...]."[3]

3. Since the 30 September 2002 revision of Rule 11*bis*, there have been three amendments – one of 10 June 2004, one of 28 July 2004 and one of 11 February 2005. In its current form,[4] the Rule provides that:

> (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.

[1] 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.

[2] S/PRST/2002/21; S/RES/1329 (2000).

[3] S/RES/1503 (2003).

[4] Rules of Procedure and Evidence, IT/32/Rev. 39, 22 September 2006.

(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.

II. PROCEDURAL HISTORY

4. The initial indictment of 22 February 2001 against the Accused included Pavle Strugar, Miodrag Jokić and Milan Zec.[5] The indictment was amended on 26 July 2002[6] and on 31 March 2003.[7] The operative indictment against the Accused is the Second Amended Indictment ("Indictment") of 17 October 2003.[8]

5. The Accused was arrested in Belgrade on 25 September 2003 and transferred to the United Nations Detention Unit ("UNDU") on 23 October 2003. Hearings were held on 3 November 2003, 28 November 2003 and 15 March 2004. The Accused did not enter a plea due to his mental health condition.

[5] *Prosecutor v. Pavle Strugar, Miodrag Jokić, Milan Zec and Vladimir Kovačević*, Case No. IT-01-42-I, Indictment, 22 February 2001. This indictment was confidential until unsealed on 2 October 2001.

[6] Upon filing, the Prosecution also sought leave for application to amend this Amended Indictment, *see Prosecutor v. Pavle Strugar, Miodrag Jokić and Vladimir Kovačević*, Case No. IT-01-42-PT, Prosecution's Amended Indictment and Application for Leave to Amend, 26 July 2002. The Trial Chamber granted the Prosecution's application for leave and ordered the Prosecution to file the proposed Amended Indictment, which was to be known as "Amended Indictment," *see Prosecutor v. Pavle Strugar, Miodrag Jokić and Vladimir Kovačević*, Case No. IT-01-42-PT, Decision on the Prosecutor's Amended Indictment and Application for Leave to Amend, 17 March 2003.

[7] *Prosecutor v. Pavle Strugar, Miodrag Jokić and Vladimir Kovačević*, Case No. IT-01-42-PT, Amended Indictment, 31 March 2003.

6. On 2 June 2004, Trial Chamber I issued an order granting provisional release to the Accused on mental health grounds for an initial period of six months.[9] An order extending provisional release until further notice was issued on 2 December 2004.[10] The Accused has since been accommodated in a medical institution in Serbia.[11]

7. On 28 October 2004, the Prosecution filed the Motion for Referral.[12] On 2 November 2004, the President of the Tribunal appointed this Referral Bench for the purpose of considering the Motion and determining whether the case should be referred.[13] The Prosecution on 7 February 2005 resubmitted its request with the Second Amended Indictment attached.[14]

8. On 7 April 2006, Trial Chamber I found that the Accused was unfit to enter a plea or to stand trial.[15] On 27 April 2006, in view of the condition of the Accused, counsel for the Accused ("Defence") filed a motion to dismiss the Indictment, which would also have rendered moot any hearing before the Referral Bench. The Trial Chamber denied this motion on 1 September 2006 on the basis that the Accused's present mental health condition did not exclude the resumption of proceedings in the future and thus there was no reason to terminate the proceedings.[16]

9. On 14 July 2006, the Referral Bench issued an Order to the Parties and invited the Government of the Republic of Serbia[17] to submit responses to specific questions.[18] The Government of the Republic of Serbia filed a response on 10 August 2006,[19] the Prosecution on

[8] *Prosecutor v. Pavle Strugar and Vladimir Kovačević*, Case No. IT-01-42-PT, Second Amended Indictment, 17 October 2003.
[9] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Provisional Release, 2 June 2004.
[10] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision to Extend the Order for Provisional Release, 2 December 2004.
[11] *See also* para. 23 *infra*.
[12] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Request by the Prosecutor Under Rule 11*bis* for Referral of the Indictment to Another Court, 28 October 2004 ("Prosecution's First Submissions").
[13] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should be Referred to Another Court Under Rule 11*bis*, 2 November 2004.
[14] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Prosecutor's Re-submission of Rule 11*bis* Request Pursuant to Chamber's Order of 20 January 2005, 7 February 2005.
[15] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Accused's Fitness to Stand Trial, 7 April 2006 (confidential). A public version was filed on 12 April 2006.
[16] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Defence Motion to Dismiss the Indictment, 1 September 2006. A request for certification for appeal was denied, *see Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Defence Request for Certification for Interlocutory Appeal of Decision on Defence Motion to Dismiss the Indictment from 1 September 2006, 27 September 2006.
[17] Montenegro declared independence from the State Union of Serbia and Montenegro on 4 June 2006. Both Serbia and Montenegro had agreed that in the event of Montenegro leaving the State Union, all rights and duties under international law would relate to and be fully valid for Serbia as the successor State: *see* Article 60(4) of the Constitutional Charter of the State Union of Serbia and Montenegro, Official Gazette of Serbia and Montenegro, no. 1/2003.
[18] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Order Requesting Further Information in the Context of the Prosecutor's Motion Under Rule 11*bis* of the Rules, 17 July 2006.
[19] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Republic of Serbia's Submission Relating to the Prosecutor's Motion Under Rule 11*bis* of the Rules, 10 August 2006 ("Serbia's Submissions").

11 August 2006[20] and the Defence on 11 August 2006.[21]

10. The motion hearing was held by the Referral Bench on 15 September 2006 with the Parties present, along with the Government of the Republic of Serbia.[22]

III. THE ACCUSED AND THE CHARGES

11. According to the Indictment, the Accused Vladimir Kovačević, a/k/a 'Rambo,' was born on 15 January 1961 in the town of Nikšić, then the Socialist Republic of Montenegro.[23]

12. The Indictment alleges that, beginning in the autumn of 1991, the Accused was the Commander of the Third Battalion of the Yugoslav Peoples' Army ("JNA") 472 (Trebinje) Motorised Brigade and held the rank of Captain First Class.[24] According to the Indictment, from 6 December 1991 through 31 December 1991, the Accused participated in a military campaign by the JNA directed at the territory of the municipality of Dubrovnik, Croatia. The Indictment alleges that, on 6 December 1991, the Accused ordered, committed, or otherwise aided and abetted in the unlawful artillery and mortar shelling of the old town of Dubrovnik conducted by the JNA forces under his command. It is alleged that, as a result of this unlawful shelling, two civilians were killed and three civilians were seriously wounded.[25]

13. The Indictment further alleges that, on 6 December 1991, the Accused ordered, committed or otherwise aided and abetted in the destruction or wilful damage to dwellings and other buildings and the unlawful shelling of civilian objects. During the course of this attack, hundreds of shells impacted in the old town area of Dubrovnik, a UNESCO world heritage site in its entirety, causing damage to many buildings protected as cultural property, including the complete destruction of six.[26] The Indictment also alleges that, alternatively, the Accused knew or had reason to know that forces under his command, direction and/or control were committing the acts described above and failed to take necessary and reasonable measures to prevent the commission of such acts or punish the perpetrators thereof.[27]

[20] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Prosecution's Further Submissions Pursuant to Referral Bench's Order of 17 July 2006, 11 August 2006 ("Prosecution's Second Submissions").
[21] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Submission of the Defense in Accordance to the Order of the Referral Bench from 17th July 2006, 11 August 2006 ("Defence Submissions").
[22] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Rule 11*bis* Motion Hearing, 15 September 2006 ("Motion Hearing"), transcript pages (T.) 473-493 (partly in private session).
[23] Indictment, para. 2.
[24] *Ibid.*
[25] Indictment, paras 13, 18-19.
[26] Indictment, paras 24 -27.
[27] Indictment, paras 21, 29.

14. The Accused is charged with six counts of violations of the laws or customs of war.[28] These counts consist of one count each of murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science. It is alleged that the Accused incurs responsibility for these crimes both under Article 7(1) and 7(3) of the Statute of the Tribunal ("Statute").[29]

IV. REFERRAL OF THE CASE PURSUANT TO RULE 11*BIS*

A. Gravity of Crimes Charged and Level of Responsibility of the Accused

1. Submissions

15. In the context of Rule 11*bis*(C), the Prosecution submits that, while the crimes charged are objectively serious, they are of a level of gravity that is compatible with referral to a national court when compared with the objective gravity of the crimes alleged in indictments either presently in trial or awaiting trial before the Tribunal.[30] The Prosecution also points out that the crimes alleged are both geographically and temporally limited.[31]

16. The Prosecution submits that the phrase "level of responsibility of the accused" as set forth in Rule 11*bis*(C) refers both to the position of an accused in the military-political hierarchy and to his or her role *vis-à-vis* the crimes charged.[32] As regards the instant case, the Prosecution states that the level of responsibility of the Accused would be entirely compatible with the referral of his case to the authorities of the Republic of Serbia, as the Accused allegedly was an intermediary or lower-level commander whose superiors have already been tried before the Tribunal.[33] The Prosecution further submits that the referral of this case would be consistent with the implementation of the completion strategy.[34]

17. The Defence agrees with the Prosecution's assessment that the gravity of the crimes charged makes the case suitable for referral and further submits that the consequences of the alleged offences, particularly in terms of human life and bodily harm, are significantly lower than in other cases before the Tribunal.[35] The Defence also agrees with the submission of the Prosecution that the

[28] Indictment, paras 21(a)-(c), 29(a)-(c).
[29] Indictment, paras 10-11.
[30] Prosecution's Second Submissions, para. 2.
[31] Prosecution's Second Submissions, para. 7.
[32] Prosecution's Second Submissions, para. 13
[33] Prosecution's Second Submissions, paras 4, 9; Motion Hearing, T. 474.
[34] Prosecution's Second Submissions, para. 12.
[35] Defence Submissions, para. 5.

Accused was in a middle or lower-ranking position in the military hierarchy and that therefore the level of responsibility of the Accused is compatible with referral of the case.[36] The Defence nonetheless opposes referral due to the Accused's medical condition and the related circumstances.[37]

18. The Republic of Serbia also submits that the gravity of the crimes charged makes the case suitable for referral.[38] It concurs with the Prosecution that the phrase "the level of responsibility of the accused" refers both to the role of the accused in the commission of the alleged offences and to the position and rank of the accused in the civil and military hierarchy. It submits that, applying this test to the instant case, the case is compatible with referral.[39]

2. Discussion

19. In evaluating the level of responsibility of the Accused and the gravity of the crimes charged, the Referral Bench will consider only those facts alleged in the Indictment – these being the essential case raised by the Prosecution for trial – in determining whether referral of the case is appropriate.

20. According to the Indictment, the Accused participated in a military campaign by the JNA from 6 December 1991 through 31 December 1991 directed at the territory of the municipality of Dubrovnik, Croatia. In the context of the offences dealt with by this Tribunal, the factual basis for the alleged crimes is limited in scope, both geographically and temporally, and also in terms of the number of victims affected. With respect to level of responsibility, while the Accused may have been in command of others, this was at a battalion level, whereas the military operation in the Dubrovnik area was carried out by a much larger force of the JNA. Two other individuals, each more senior in military rank than the Accused, have already been convicted for their role in the attack on Dubrovnik.[40] The Referral Bench does not therefore find a sufficient basis for characterising the Accused as a "most senior leader" as envisioned by the completion strategy.

3. Conclusion

21. The Referral Bench is satisfied that the gravity of the crimes charged and the level of

[36] Defence Submissions, para. 7; Motion Hearing, T. 476.
[37] Motion Hearing, T. 477-483 (partly in private session).
[38] Serbia's Submissions, para. 3.
[39] Serbia's Submissions, para. 8.
[40] See *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 and *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005.

responsibility of the Accused are not *ipso facto* incompatible with referral of the case to the authorities of a State which meets the requirements of Rule 11*bis*(A).

B. Determination of the State of Referral

1. Submissions

22. The Prosecution requests that the case should be referred to the authorities of the Republic of Serbia.[41] The Defence does not oppose the request that Serbia be the State of referral.[42]

2. Discussion

23. The Referral Bench notes that in the instant case, the crimes alleged in the Indictment were committed in the Republic of Croatia against citizens of the Republic of Croatia. The Accused, who was and is a citizen of Serbia, has been accommodated in a mental health facility in the Republic of Serbia since 6 June 2004, pursuant to the Order for Provisional Release issued by Trial Chamber I.[43]

3. Conclusion

24. The Referral Bench is satisfied that there are no reasons for considering a State other than the Republic of Serbia for referral of the instant case. In addition, the Referral Bench notes that, as the Accused's current state of health does not favour his transfer to another medical facility, referral to a State other than Serbia might be detrimental to his mental health condition. The Referral Bench therefore turns to consideration of whether, in light of all relevant factors, referral of the case to the authorities of the Republic of Serbia would be appropriate.

C. Applicable Substantive Law

25. The Referral Bench stresses once again that it is not the competent authority to decide in any binding way which law is to be applied in this case if it is referred to the Republic of Serbia.[44] That is a matter which would be for the competent national court to decide, presumably the Belgrade

[41] Prosecution's First Submissions, para. 1. While the Prosecution's original request was for referral to the authorities of Serbia and Montenegro, Montenegro has since declared independence from the State Union and all rights and duties under international law have been conferred upon Serbia as the successor State, *see* fn. 17 *supra*.
[42] Motion Hearing, T. 476-477.
[43] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision for Provisional Release, 2 June 2004; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision to Extend the Order for Provisional Release, 2 December 2004.
[44] *See Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis*, 22 July 2005, para. 27; *Prosecutor v. Željko Mejakić* et. al., Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis*, 20 July 2005, para. 43.

District Court.[45] The Referral Bench must be satisfied that if this case were to be referred to the Republic of Serbia, there would exist an adequate legal framework which not only criminalises the alleged conduct of the Accused so that the allegations can be duly tried and determined, but which also provides for appropriate punishment in the event that conduct is proven to be criminal. The Referral Bench must therefore consider whether the laws applicable in proceedings before the competent national court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused for offences of the type currently charged before the Tribunal.

1. Submissions

26. The Prosecution submits that the applicable substantive law is the Criminal Code of the Socialist Federal Republic of Yugoslavia of 1977 ("SFRY CC"),[46] as it was in force at the time of the alleged conduct of the Accused.[47] The Prosecution submits that this legal framework contained provisions for criminalising the alleged conduct of the Accused. The Prosecution refers to Article 142 of the SFRY CC which criminalised "War Crimes Against the Civilian Population" and Article 151 of the SFRY CC which criminalised the destruction of cultural or historic monuments and buildings.[48] The Prosecution further submits that there exist two additional mechanisms by which international law can be applied. The first of these mechanisms is the Constitution of the SFRY of 1974,[49] Article 210 of which provided that international treaties shall be applied by the courts.[50] The Prosecution notes that Article 16 of the Constitutional Charter of the State Union of Serbia and Montenegro of 2002 also provided that ratified international treaties and generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and the law of the member states.[51] The second of these mechanisms exists by reference to the case law of this Tribunal and other international tribunals and through the interpretation and application of customary international law.[52]

27. The Prosecution further submits that the applicable law with respect to sentencing is contained within Article 4(2) of the SFRY CC which provided that if the law changes one or more

[45] Serbia's Submissions, para. 16.
[46] Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 44/76.
[47] Prosecution's Second Submissions, para. 30.
[48] Prosecution's Second Submissions, paras 34-35.
[49] Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 9/74.
[50] Prosecution's Second Submissions, para. 36.
[51] Prosecution's Second Submissions, fn. 18. The Referral Bench notes that a similar provision exists in the new Serbian Constitution, which was proclaimed on 8 November 2006. Article 16 of the new Serbian Constitution provides that generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and be applied directly.
[52] Prosecution's Second Submissions, para. 37.

times after the criminal offence is committed, the law which is more lenient to the perpetrator shall be applied.[53] While the SFRY CC authorised the death penalty for certain offences, this form of punishment was abolished in 1993, with offences punishable at the time of commission by the death penalty now carrying a penalty of 40 years imprisonment.[54]

28. The Defence refers to Article 5(1) of the Criminal Code of Serbia and Montenegro of 2006 ("current Criminal Code"),[55] which provides that the applicable law is the one in force during the commission of a crime.[56] The Defence also points to Article 5(2) of the current Criminal Code, which provides that, if the law has been changed one or more times after the criminal offence is committed, the law most favourable for the accused shall be applied.[57] The Defence submits that the SFRY CC with amendments from 1993 is the most favourable and is thus the applicable substantive law.[58] With respect to the relevant mechanisms in Serbia for the application of international treaties and customary law, the Defence defers to the judicial authorities of Serbia.[59]

29. The Government of the Republic of Serbia submits that the applicable law to the facts of this case is the SFRY CC. The Government notes that in 1992, after the dissolution of the Socialist Federal Republic of Yugoslavia ("SFRY"), the Federal Republic of Yugoslavia adopted the SFRY CC. The relevant provisions remained unchanged in the 2003 Basic Criminal Code of the Republic of Serbia.[60] The Government further notes that in September 2005, Serbia enacted its current Criminal Code, effective as of 1 January 2006. As the current Criminal Code stipulates that the most lenient law is to be applied in case of a change in legislation after the commission of the criminal act, the Government submits that the applicable law is the SFRY CC.[61] The Government notes that Chapter 16 of the SFRY CC proscribed "Criminal Acts Against Humanity and International Law."[62] The Government also refers to several mechanisms by which international treaties and customary law can be applied in Serbian courts. While recognising that provisions of international law which are not self-executing may require implementing legislation, the Government observes that Article 2(2) of the Law on Cooperation of Serbia and Montenegro with the International Tribunal ("Cooperation Law")[63] specifies that "[t]he provisions of the Statute of the International Criminal Tribunal are generally accepted rules of international law."[64] The

[53] Prosecution's Second Submissions, para. 31.
[54] *Ibid.*
[55] Official Gazette of the Republic of Serbia, nos. 85/2005, 88/2005, 107/2005.
[56] Defence Submissions, para. 14.
[57] *Ibid.*
[58] Defence Submissions, para. 15.
[59] Defence Submissions, para. 16.
[60] Official Gazette of the Republic of Serbia, no. 39/2003.
[61] Serbia's Submissions, para. 10.
[62] *Ibid.*
[63] Official Gazette of the Republic of Serbia, nos. 67/2003 and 135/2004.
[64] Serbia's Submissions, paras 12-13.

Government contends that, when read together with Article 16 of the Constitutional Charter of the State Union of Serbia and Montenegro of 2002, this determination signifies that the provisions of the Statute have primacy over the law of Serbia and Montenegro.[65]

30. With respect to sentencing, the Government observes that in 1993 the death penalty was substituted by the imprisonment of 20 years in all articles where it was prescribed as one of the punishments, and in 2001 the imprisonment of 20 years was substituted by the imprisonment of 40 years.[66] The Government submits that, as the more lenient regulation must be utilized, the maximum verdict which can be delivered in response to the alleged offences of the Accused is 20 years imprisonment.[67]

2. Discussion

31. For the purposes of determining the present Motion for Referral, it is unnecessary for the Referral Bench to presume to reach any decision on the correct resolution of the various submissions that have been advanced by the Parties and by the Government of the Republic of Serbia, as it would be for the competent national court to resolve these issues should this case be referred. Rather, the task of the Referral Bench is to consider each of the possibly applicable sets of legal provisions in order to determine whether there is any significant deficiency which may impede or prevent the prosecution, trial and, if appropriate, punishment of the Accused for the alleged criminal conduct which is charged in the present Indictment.

32. The various submissions advanced by the Parties and by the Government of the Republic of Serbia, while differing slightly with respect to the maximum punishment which they contend could be applied to the Accused were he found guilty,[68] appear to agree that the applicable substantive law is the SFRY CC. Thus, the Referral Bench will first examine the SFRY CC to determine whether it provides an adequate legal framework for criminalising the alleged conduct of the Accused, and, if necessary, for punishing the Accused.

(a) SFRY Criminal Code

33. The offences in the Indictment are alleged to have occurred between 6 December 1991 and 31 December 1991. The SFRY CC, having been enacted in 1977, was in force at the time of the

[65] Serbia's Submissions, para. 13. The Referral Bench notes that the new Serbian Constitution has a similar provision, *see* fn. 51 *supra*.
[66] Serbia's Submissions, para. 10.
[67] *Ibid*.
[68] *See* paras 27, 28, 30 *infra*. The Prosecution argues that acts punishable by the death penalty at the time of commission now carry a penalty of 40 years imprisonment, while the Defence and Government of the Republic of Serbia contend that the penalty is 20 years imprisonment.

alleged conduct of the Accused. The SFRY CC included a provision which proscribed war crimes against the civilian population. Article 142(1) provided the following:

> Whoever in violation of the rules of international law in time of war, armed conflict or occupation, orders an attack against the civilian population, settlements, individual civilians or persons hors de combat, resulting in loss of life, serious bodily injury or severe impairment to peoples' health; or orders an indiscriminate attack affecting the civilian population; or [...] unlawful and arbitrary destruction or large-scale appropriation of property not justified by military need [...]; or whoever commits any of the foregoing acts shall be punished by imprisonment for not less than five years or by death penalty.

34. Thus, if applicable to the alleged conduct of the Accused, Article 142(1) of the SFRY CC would appear to cover the acts of murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, and unlawful attacks on civilian objects alleged against the Accused as violations of the laws or customs of war.

35. The SFRY CC also included a provision which proscribed indiscriminate attacks affecting civilian objects under special protection of international law. Article 142(2) provided the following:

> The same punishment as referred to in paragraph 1 of this Article shall be imposed on whoever, in violation of the rules of international law in time of war, armed conflict, occupation, orders: an attack against objects under special protection of international law [...] or whoever commits any of the foregoing acts.

36. Thus, Article 142(2) of the SFRY CC would appear to cover the acts of destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science alleged against the Accused in count six of the Indictment as a violation of the laws or customs of war, since the types of structures and objects alleged to have been destroyed or damaged enjoy protection under the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 and Article 56 of the 1907 Hague Regulations.

37. Another provision directly relevant to count six of the Indictment is Article 151 of the SFRY CC which proscribed the destruction of cultural and historical monuments. Article 151 provided the following:

> (1) Whoever, in violation of the rules of international law in time of war or armed conflict, destroys cultural or historical monuments and buildings, or establishments dedicated to science, art, education or humanitarian purposes, shall be punished by imprisonment for not less than one year.

> (2) If, by the act referred to in paragraph 1 of this Article, a clearly recognisable object that represents a cultural and spiritual heritage of the people for which reason it enjoys the special protection of international law, has been destroyed, the perpetrator shall be punished by imprisonment for not less than five years.

38. With respect to the penalty structure provided by the SFRY CC, the maximum authorised punishment for acts in violation of Article 142(1) was the death penalty, which is now abolished in the Republic of Serbia. Article 38(2) of the SFRY CC permitted a court, as an alternative punishment, to impose imprisonment for a term of 20 years for criminal acts eligible for the death penalty. Article 48 of the SFRY CC further provided a system for combining punishments in the event an accused is found to have committed several criminal acts. Article 48(2)(2) provided that where a court has decided upon a punishment of 20 years imprisonment for one of the several criminal acts, then it shall impose that punishment only. Thus, twenty years imprisonment was, at the time of the alleged conduct of the Accused, the maximum authorised non-capital penalty which could be imposed under the SFRY CC.

39. It should also be noted that the SFRY CC contained a limitation period for prosecution. Article 95(1)(1) provided for a bar to prosecution after a lapse of twenty-five years from the commission of a criminal act for which the law provided capital punishment or the punishment of imprisonment of 20 years. Offences committed in 1991 in violation of Article 142(1), for example, would not be barred until 2016.[69]

(b) Serbian Criminal Code

40. The Referral Bench also notes the possibility that the competent Serbian court may decide to apply the current Criminal Code. The current Criminal Code contains several provisions which criminalise the alleged conduct of the Accused. Chapter 34 of the current Criminal Code proscribes "criminal offences against humanity and other rights guaranteed by international law." Article 372(1) of the current Criminal Code is entitled "War Crimes Against Civilian Population." It proscribes the commission or ordering of (i) an "attack on civilian population," (ii) a "wanton attack without target selection harming civilian population or civilian buildings under special protection of international law," and (iii) an "attack against military targets knowing that such attack would cause collateral damage among civilians or damage to civilian buildings that is obviously disproportionate with the military effect." Article 372(3) proscribes the commission or ordering of the murder of civilians. Article 383 proscribes the commission or ordering of the destruction of cultural or

[69] Further, Article 96(2) provided that this limitation period will be suspended for any time during which prosecution cannot be initiated or continued for reasons provided by law.

historical monuments or objects, institutions or facilities dedicated to religion, the arts, sciences, education or humanitarian causes.

41. With respect to the penalty structure, the current Criminal Code provides for a minimum penalty of imprisonment for five years for acts in violation of Article 372(1) while it provides for a minimum term of imprisonment of ten years and a maximum term of imprisonment of forty years for acts in violation of Article 372(3). The current Criminal Code provides for a term of between three and fifteen years imprisonment for acts in violation of Article 383, unless the destruction is of "a cultural facility or institution enjoying special protection under international law," in which case the punishment shall be imprisonment of between five and fifteen years. Article 45(1) of the current Criminal Code specifies that a sentence of imprisonment may not be less than thirty days or more than twenty years in duration, but Article 45(3) allows for "the most serious criminal offences" to be punished with a sentence of up to forty years imprisonment.

42. The Referral Bench is thus satisfied that the current Criminal Code, were it held by the competent national court to be the applicable law, would constitute an adequate legal framework for duly trying and determining the allegations in this case and for providing for appropriate punishment in the event that conduct is proven to be criminal.

(c) Command Responsibility

43. If the case is referred, it will ultimately be for the competent Serbian court to determine whether the concept of command responsibility applies either through provisions of the SFRY CC, the current Criminal Code, or as a norm of customary international law.[70] The Referral Bench notes a difference in terminology relating to command responsibility between the SFRY CC and the law applied in this Tribunal, namely Article 7(3) of the Statute. The concept of "direct" command responsibility in the SFRY CC appears largely confined to the notion of "ordering," "organising" or "instigating" crimes, which in the Tribunal's jurisprudence fall within the scope of Article 7(1) rather than of Article 7(3). For example, Article 142 of the SFRY CC made it a crime not only to commit war crimes against the civilian population, but also to order such crimes. Article 145 made it a crime to organise a group for the purpose of committing war crimes against the civilian population, or to call on or instigate the commission of such crimes. However, there were other provisions in the SFRY CC which appear to address parts of the field covered by Article 7(3). Article 11(2), for example, provided that offenders are liable for criminal acts committed negligently, insofar as the act in question is punishable by law. Article 30 provided for the

[70] The submissions advanced by the Parties and the Republic of Serbia do not address the issue of command responsibility.

criminalisation of an act committed by omission if the offender abstained from performing an act which he or she was obligated to perform.

44. The current Criminal Code contains provisions which appear to address most of the field covered specifically by Article 7(3) of the Statute concerning command responsibility. Article 384 proscribes "failure to prevent crimes against humanity and other values protected under international law." Article 384 appears to cover situations in which a superior exercising *de jure* or *de facto* control knew that a subordinate was about to commit criminal acts or had done so and failed to take necessary or reasonable measures to prevent such acts. Article 384 provides that:

> (1) A military commander or person who in practise is discharging such function, knowing that forces under his command or control are preparing or have commenced committing offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obliged to take to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.
>
> (2) Any other superior who knowing that forces under his command or control are preparing or have commenced committing of offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obliged to take to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.

45. Article 384(3) also covers situations in which the offences specified in Articles 384(1) and (2) were committed by negligence and provides for a punishment of imprisonment of between six months and five years in these situations. Thus, Article 384(3) of the current Criminal Code appears to cover to some degree situations in which a commander did not know that a crime had been, or was about to be, committed by persons under his command, but had "reason to know," and yet failed to prevent the offence.

46. The Referral Bench is conscious that the competent Serbian court may decide not to apply the mode of liability of command responsibility to the conduct of the Accused during the time relevant to the Indictment. The Referral Bench recognises that an acquittal on this basis cannot be excluded if the prosecution fails to establish the requisite intent. Given that all current charges against the Accused are based on individual criminal responsibility under Article 7(1) of the Statute, with criminal responsibility pursuant to Article 7(3) charged in the alternative, the Referral Bench does not regard this possible and limited difference in the law as an obstacle to the referral proposed by the Motion.

3. Conclusion

47. In summary, it appears that the SFRY CC, as it was in force in December 1991, is likely to be applied to the alleged criminal conduct of the Accused should this case be referred. While it will be for the competent national court to determine the law applicable to the alleged criminal conduct of the Accused, this Referral Bench has been able to satisfy itself that, within the possible legal frameworks which could be applied, there are appropriate provisions to address most, if not all, of the criminal acts of the Accused alleged in the present Indictment and that there is an adequate penalty structure.

D. The Accused's Current Mental Health Condition

1. Preliminary Observations

48. As mentioned before, the Accused is currently accommodated in a medical facility in Serbia[71] and has been found unfit to enter a plea or to stand trial before the Tribunal.[72] On 27 April 2006, the Defence filed two motions, one to Trial Chamber I, requesting dismissal of the Indictment and one to the Referral Bench, opposing the holding of a hearing on the 11*bis* Request while a decision by Trial Chamber I on this matter was pending.[73] On 1 September 2006, Trial Chamber I denied the Defence motion to dismiss the Indictment.[74] The Defence subsequently posed no objection to proceeding with the referral hearing on 15 September 2006. The Referral Bench considers that, under the circumstances, no prejudice has been caused to the Accused's right to be heard, as Rules 11*bis*(A) and (B) allow for referral proceedings even when the accused is not in the custody of the Tribunal.

49. The Defence opposes referral of this case exclusively on the basis that Serbian domestic procedures following referral would "derogate the already poor mental health" of the Accused.[75]

50. When considering referral of the instant case, the Referral Bench will consider the following issues within the context of the Accused's mental health condition. First, the mental health condition of the Accused gives rise to fair trial considerations, in particular whether the applicable procedural law in Serbia provides safeguards that an accused does not have to stand trial if he or she

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[71] *See* para. 23 *infra*.
[72] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Accused's Fitness to Stand Trial, 7 April 2006 (confidential).
[73] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Defense Motion to Dismiss the Indictment, 27 April 2006; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Defense Motion Regarding the Prosecutor's Application to Schedule a Hearing on 11*bis* Request, 27 April 2006.
[74] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Defence Motion to Dismiss the Indictment, 1 September 2006. On 28 September 2006, Trial Chamber I denied a request by the Defence for certification to appeal this decision. *See* fn. 16 *supra*.
[75] Motion Hearing, T. 477-483.

is mentally unfit. In this context, the Referral Bench will also consider whether the applicable law in the Republic of Serbia requires the ongoing monitoring, or periodical review, of the mental health condition of the Accused and the resumption of the trial process should he become fit to stand trial. Finally, the Referral Bench will consider whether there are appropriate mechanisms in place in the Republic of Serbia for providing for the welfare of the Accused in view of his mental health condition at present and in the event that he continues to be unfit to stand trial.

2. Procedural Fairness

51. At the outset, the Referral Bench notes that the Serbian Criminal Procedure Act ("CPA")[76] provides safeguards in so far as an accused will not have to stand trial if he or she is found to be unfit. Article 252(1) requires that investigation be postponed if the accused suffers from a mental illness. Article 308 makes provision for adjournment and resumption of trial in such case.

52. According to the Prosecution, if the case were referred, the responsibility would fall on the competent Serbian authorities to determine afresh if the Accused is fit to stand trial. The Prosecution further submits that the applicable procedural law in the Republic of Serbia provides for the monitoring of the mental health condition of the Accused so that, should he become fit for trial, proceedings against him would resume.[77] The Prosecution argues that the Trial Chamber's Decision on Accused's Fitness to Stand Trial of 7 April 2006, when read in conjunction with Article 1(2) of the Cooperation Law, obligates the Republic of Serbia to monitor the mental health condition of the Accused in order to determine whether proceedings should be resumed.[78]

53. The Defence refers to the above-mentioned Articles 252 and 308 of the CPA to illustrate the domestic practice of dealing with an accused who is unable to enter a plea and stand trial due to his or her mental health.[79]

54. The Government of the Republic of Serbia submits that a subsequently-occurring mental disorder does not impact an accused's criminal responsibility at the time the alleged criminal offence was committed. A mental disorder does, however, have a procedural effect.[80] The Government concurs with the Prosecution's submission that, if the case were referred, the competent Serbian authorities would determine anew whether the Accused is fit to stand trial.[81] If the Accused were again found unfit to stand trial, the Government submits that additional periodical

[76] Official Gazette of the Republic of Serbia, nos. 70/2001, 68/2002.
[77] Prosecution's Second Submissions, para. 19.
[78] *Ibid.*
[79] Defence Submissions, para. 11.
[80] Serbia's Submissions, para. 9.
[81] Motion Hearing, T. 487.

reports of psychiatrists would be required and that, if the Accused's mental health condition improved sufficiently, proceedings would be reinstated.[82]

55. The Referral Bench recognises that, should referral be ordered, the question of the ability of the Accused to stand trial would be a matter for the competent national court in Serbia to determine. However, the Referral Bench has been able to satisfy itself that appropriate provisions exist in the Republic of Serbia for resuming prosecution against an accused previously found unfit to stand trial if his or her mental health condition improves. The Referral Bench also notes that Article 51(2) of the Serbian law on extra-judicial procedure ("Law on Extra-judicial Procedure")[83] provides that a medical institution detaining an accused shall submit periodical reports about the patient's health condition to the competent court. The Referral Bench is thus also satisfied that the Republic of Serbia would be obligated to regularly monitor the mental health condition of the Accused and to resume the trial process should he become fit for trial.

56. The Referral Bench thus concludes that, if this case were to be referred to Serbia, there is an appropriate procedure in place to ensure that the Accused would not have to stand trial if he is found unfit. Moreover, the Referral Bench is satisfied that mechanisms exist for the ongoing monitoring, or periodical review, of the health of the Accused and the resumption of proceedings against him should he become fit to stand trial.

3. Welfare of the Accused

57. The Government of the Republic of Serbia submits that the Law on Extra-judicial Procedure contains provisions for the welfare of a person found to be legally incompetent or insane and further submits that the Accused would remain accommodated at a medical institution in Serbia if the case were referred.[84] The Government notes that if the mental health condition of the Accused does not improve, the Accused's stay at the medical institution in which he is currently accommodated could be prolonged for as long as necessary.[85]

58. The Referral Bench also notes that the applicable procedural law in the Republic of Serbia contains several provisions which provide for the welfare of an accused who suffers from a mental health condition. Article 38 of the Law on Extra-judicial Procedure concerns the proceedings for legal capacity deprivation and provides that a person against whom such a proceeding is held must be examined by at least two 'doctor specialists' who are to give their findings and opinion about his

[82] Motion Hearing, T. 487-488, 491-492.
[83] Official Gazette of the Republic of Serbia, nos. 25/82, 48/88, 46/95, 18/05.
[84] Serbia's Submissions, para. 9; Motion Hearing, T. 491-492.
[85] Motion Hearing, T. 492.

mental health condition and capacity for reason. After such findings are given, the Court can determine that the person be placed temporarily in a medical institution for a maximum of three months.

59. Article 45(1) of the Law on Extra-judicial Procedure allows a court to decide on accommodation and detention of a mentally-disordered person in suitable health premises when it proves to be necessary, due to the nature of the illness, for the person to be in detention or have limited contact with the environment.

60. Article 52 of the Law on Extra-judicial Procedure allows a court to decide for a patient to be released from a medical institution before the determined detention period. Article 53 provides that a medical institution, if of the opinion that the patient needs further detention for reasons of medical treatment after the detention period decided by the court has terminated, must submit a proposal to the court for prolongation of the patient's detention.

61. Article 54 of the Law on Extra-judicial Procedure provides that the court's decisions on questions arising from Article 52 and 53 shall be based upon an interview and medical examination of the patient, provided that such a process is feasible and does not threaten the health condition of the patient.

62. Taking into account the above-mentioned provisions, the Referral Bench is satisfied that there are appropriate mechanisms in place in the Republic of Serbia to provide for the welfare of the Accused in view of his mental health condition at present and in the event that he continues to be unfit to stand trial.

4. Conclusion

63. In summary, the Referral Bench finds, for the reasons given above, that the issues arising from the Accused's current mental health condition would not pose an obstacle for referral of the case to the Republic of Serbia.

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

64. Rule 11*bis* also requires that the Referral Bench be satisfied that the death penalty will not be imposed or carried out and that an accused will receive a fair trial if a case is referred.

1. Non-Imposition of Death Penalty

65. Neither Party nor the Government of the Republic of Serbia submits that the death penalty would be imposed or carried out if the case were referred.

66. Article 37(1) of the SFRY CC authorised the death penalty only for the most serious criminal acts, including war crimes, against the civilian population in violation of Article 142(1). However, in 1993, imprisonment of 20 years was substituted for the death penalty in all articles previously providing for such punishment.[86] Further, on 3 March 2004, Serbia ratified Protocol 13 to the European Convention on Human Rights ("ECHR"), abolishing the death penalty in all circumstances. The Protocol entered into force for Serbia on 1 July 2004.

67. The Referral Bench is satisfied that if the law which was in effect at the time of the offences is applicable, this law no longer provides for the death penalty in Serbia. Further, in any event, imposition of the death penalty would be precluded as being in violation of Protocol 13 to the ECHR.

2. Fair Trial

68. Rule 11*bis* further requires that the Accused would be given a fair trial in the State of referral. The Parties and the Government of the Republic of Serbia do not specifically address this point. The Referral Bench considers that, in addition to the specific fair trial issues discussed earlier arising in the context of the Accused's mental health condition, it can be accepted that the requirements of a fair criminal trial include the following:[87]

> The equality of all persons before the court.
>
> A fair and public hearing by a competent, independent, and impartial tribunal established by law.
>
> The presumption of innocence until guilt is proven according to the law.
>
> The right of an accused to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.
>
> The right of an accused to be tried without undue delay.
>
> The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
>
> The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.
>
> The right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and

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[86] Serbia's Submissions, para. 10; *See also* para. 30 *infra*.

[87] *See, e.g.*, Art. 21 of the Statute of the Tribunal; Art. 14 of the International Covenant on Civil and Political Rights (1966); Art. 6 of the ECHR (1950).

without payment by him in any such case if he does not have sufficient means to pay for it.

The right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings.

The right of an accused not to be compelled to testify against himself or to confess guilt.

69. The new Serbian Constitution, proclaimed on 8 November 2006 ("Serbian Constitution"), and the Serbian Criminal Procedure Act ("CPA")[88] mirror each of these requirements.

70. Article 21 of the Serbian Constitution states that all citizens are equal before the Constitution and the law and prohibits all direct or indirect discrimination on any grounds.

71. Article 34(3) of the Serbian Constitution and Article 3(1) of the CPA provide that no one may be considered guilty of a criminal offence until so proven by a final judgement of a court of law.

72. Article 33(1) of the Serbian Constitution and Articles 4 and 5(1) of the CPA provide that a suspect must be informed promptly about the charged offences and grounds for suspicion. Article 9 of the CPA provides for the right to use one's own language and have assistance with interpretation at no cost.

73. Articles 29 and 33(6) of the Serbian Constitution and Article 16 of the CPA guarantee the right to be brought before the Court in the shortest reasonable time period and to be tried without delay.

74. Article 13(5) of the CPA provides that the defendant must be accorded adequate time and opportunity to prepare his or her defence. Article 75(2) of the CPA provides for the right of defence counsel to communicate orally and in confidence with the suspect deprived of liberty and the defendant in detention. According to Article 13(3) of the CPA, law enforcement officials have a duty to inform a suspect of his rights to counsel. Article 13(4) of the CPA provides that if the defendant does not retain a defence counsel by himself, the court shall appoint one for him.

75. Articles 33(2) and 33(4) of the Serbian Constitution and Article 13(1) of the CPA provide for the right of an accused to conduct his own defence and be tried in his presence.

76. Article 5(1) of the CPA forbids a compelled confession or any other compelled statement from a suspect or accused. Article 12 of the CPA further provides that it is forbidden and

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[88] *See also* para. 51 *infra*.

punishable to employ any kind of violence against a person who is deprived of liberty or whose liberty is restricted or to extort a confession or any other statement from the defendant or any other person participating in the proceedings. The criminal offence of extortion of a confession is covered by Article 136 of the current Criminal Code.

77. Article 33(5) of the Serbian Constitution provides that any person prosecuted for a criminal offence shall have the right to examine witnesses against him and to demand that witnesses on his behalf be examined in his presence and under the same conditions as witnesses against him. Article 96 of the CPA stipulates that persons likely to furnish information regarding the offence at issue shall be summoned as witnesses. Article 103 of the CPA provides generally for the questioning of witnesses.

78. Article 17 of the CPA provides:

> 1. The court and state authorities participating in the criminal proceedings shall be bound to determine all facts necessary to render a lawful decision truthfully and completely.
>
> 2. The court and state authorities shall be bound to examine and determine with equal solicitude facts tending to incriminate the defendant, as well as those favourable to him.

79. Furthermore, Serbia is bound as a party by the ECHR, of which Article 6 in particular guarantees, in similar terms as the Statute of the Tribunal, a fair trial before an independent and impartial tribunal established by law. Article 32 of the Serbian Constitution also makes this guarantee in similar language.

80. The Referral Bench also notes that Rule 11*bis* provides that where a referral order is made, the Prosecutor may send observers to monitor the proceedings in the national courts,[89] a provision which may be given enhanced effectiveness by conditions imposed on the Prosecution by the referral order. Further, at any time after issuance of an order and before an accused is found guilty or acquitted by a national court, the Referral Bench may revoke the order and make a formal request for deferral within the terms of Rule 10 of the Rules.[90] This monitoring system allows for a mechanism of continuing oversight of trial proceedings if a case is referred.

3. Conclusion

81. The Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Serbia would provide an adequate basis to ensure compliance with the requirements of a fair trial. No specific areas of concern have been identified by the Parties or by the Government of the

[89] Rule 11*bis* (D)(iv); *see also* paras 87-91 *infra*.
[90] Rule 11*bis* (F).

Republic of Serbia in this area. The Referral Bench also observes that Rule 11*bis* provides for a system of monitoring of the trial of a case which has been referred. By this means, it is possible to better ensure that the expectations of a fair trial are met. If they are not, a referral order may be revoked by this Tribunal.

F. Witness Protection

1. Submissions

82. On 20 October 2005, the Prosecution requested that, if the case is referred to Serbia, the Referral Bench order the continuation of protective measures granted with respect to two witnesses in prior proceedings before the Tribunal ("Motion for Protective Measures").[91] The Prosecution also submits that it has sought protective measures for other witnesses before the Trial Chamber but that no decision has been made yet on this request.[92] Referring to the Law on Protection of Participants in Criminal Proceedings ("Protection Law"),[93] the Prosecution contends that adequate measures for the protection of witnesses may be ordered in Serbian domestic proceedings.[94]

83. Due to the Accused's current condition, the Defence submits that it has not had the opportunity to communicate with or receive instructions from him regarding potential witnesses.[95] As a result, the Defence does not specify any protective measures expected to be needed for Defence witnesses.

2. Discussion

84. The Referral Bench notes that the Republic of Serbia has provisions in place for the protection of witnesses. On 1 January 2006, the above-mentioned Protection Law entered into force. It governs terms and procedures for providing protection and assistance to participants in criminal proceedings who face danger due to testifying or offering information for the purpose of proving a criminal offence. Pursuant to Article 3 of the Protection Law, these participants include witnesses. The Protection Law provides for a protection program which, under Article 14, can apply measures including physical protection of persons and property, change of place of residence, or the concealing or change of identity.

[91] *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Request by the Prosecutor for Order that Protective Measures Remain in Force, 20 October 2005 (with confidential Annexes I and II and *ex parte* and confidential Annex III).
[92] Prosecution's Second Submissions, para. 25.
[93] Official Gazette of the Republic of Serbia, no. 85/2005.
[94] Prosecution's Second Submissions, para. 28.
[95] Defence Submissions, para. 13.

85. Rule 11*bis*(D)(ii) empowers the Referral Bench to order that protective measures for certain witnesses or victims remain in force. No protective measures have been ordered in the instant case. However, protective measures have been granted with respect to two witnesses in prior proceedings, which would take effect pursuant to Rule 75(F) were trial proceedings conducted before the Tribunal. As the only protective measures ordered have been in other trials, the Referral Bench finds it appropriate to grant the Prosecution's request and order that these protective measures, whose application is not limited to the instant case, take effect in any proceedings before the competent national court.

3. Conclusion

86. The Referral Bench is satisfied that adequate provisions exist within Serbian law for the protection of witnesses and that therefore, additionally, the right of the Accused to call and examine witnesses pursuant to Article 21 of the Statute would be protected were the case to be referred. The Referral Bench concludes that no matters of witness protection have been identified which preclude referral of this case.

G. Monitoring of Proceedings

1. Submissions

87. The Prosecution submits that it has reached an agreement with the Organisation for Security and Cooperation in Europe ("OSCE") for the monitoring of trial proceedings in a referred case in the former Yugoslavia, and that it has access to the OSCE's monitoring records and reports.[96] The Prosecution further notes that the OSCE has already monitored trials referred to Bosnia and Herzegovina pursuant to Rule 11*bis* and is currently monitoring trials taking place before the War Crimes Chamber in Belgrade.[97]

88. The Defence submits that the monitoring of proceedings by representatives of the Prosecution amounts to a *de facto* influence and would conflict with the principle that courts be independent of such influence.[98] The Defence further submits that the possibility of revocation of the referral order as provided by Rule 11*bis*(F) must be specifically considered in this case in light of the mental health condition of the Accused.[99]

[96] Prosecution's Second Submissions, para. 42.
[97] *Ibid.*
[98] Defence Submissions, para. 19.
[99] *Ibid.*

2. Discussion

89. Referral of a case implies that the proceedings against an accused become the primary responsibility of the authorities, including the investigative, prosecutorial, and judicial organs, of the State concerned. Nevertheless, Rules 11*bis*(D)(iv) and 11*bis*(F) serve as precautions against a failure to diligently prosecute a referred case or conduct a fair trial. Rule 11*bis*(D)(iv) provides for monitoring of proceedings that have been referred. Specifically, the Rule provides that the Prosecution may send observers to monitor the proceedings in the national courts on its behalf. Further, Rule 11*bis*(F) enables the Referral Bench, at the request of the Prosecution, to revoke a referral order at any time before an accused is found guilty or acquitted by a national court, in which event Rule 11*bis*(G) makes provisions to enable the re-transfer of an accused to the seat of this Tribunal in The Hague.

90. It is submitted by the Defence that monitoring by the Prosecution constitutes a *de facto* influence and pressure on the judicial authorities of Serbia. The Referral Bench finds this claim to be unsubstantiated. Moreover, the standing of the OSCE and the neutrality of its approach ensure that the reports it provides will adequately reflect Defence as well as Prosecution issues and that it will not constitute any undue influence on the judicial authorities of Serbia.

3. Conclusion

91. Noting that arrangements have been made between the Prosecution and the OSCE for monitoring of the trial of this case, should it be referred, the Referral Bench has no need at this stage to further consider the aspect of the submissions concerning impartial and adequate monitoring of this case.

V. CONCLUSION

92. Having considered the matters raised, in particular the gravity of the criminal conduct alleged against the Accused in the present Indictment and the level of responsibility of the Accused, and being satisfied based on the information presently available that the Accused will receive a fair trial if his mental health condition sufficiently improves and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of the case of *Prosecutor v. Vladimir Kovačević* to the authorities of the Republic of Serbia should be ordered.

VI. DISPOSITION

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

PURSUANT to Rule 11*bis* of the Rules

GRANTS the Motion for Referral and the Motion for Protective Measures, and

ORDERS the case of *Prosecutor v. Vladimir Kovačević* to be referred to the authorities of the Republic of Serbia, so that those authorities should forthwith refer the case to the appropriate court for trial within the Republic of Serbia;

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 appropriate court or the competent national authorities of the Republic of Serbia to determine whether further or different provision should be made for the purposes of the trial of this case in the Republic of Serbia;

ORDERS the Prosecution to hand over to the Prosecutor of the Republic of Serbia, as soon as possible and no later than 30 days after this Decision has become final, the material supporting the Indictment against the Accused, and all other appropriate evidentiary material;

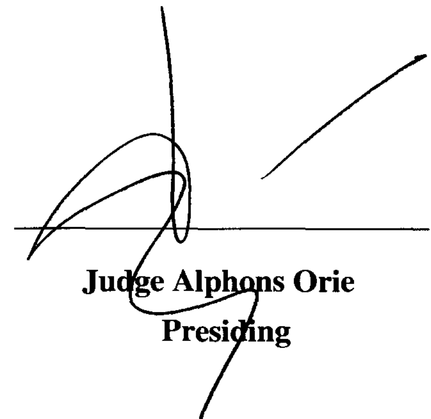
ORDERS the Prosecution to continue its efforts to ensure the monitoring and reporting on the proceedings of this case before the competent national court in Serbia;

FURTHER ORDERS the Prosecution to file an initial report to the Referral Bench on the progress made by the Prosecutor of the Republic of Serbia 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 before the competent national court after commencement of trial, such reports to comprise or to include any reports received by the Prosecution from the international organisation monitoring or reporting on the proceedings; and

ORDERS the existing protective measures for witnesses to remain in force, as detailed in the confidential and partly *ex parte* Annexes A and B attached to this Decision.

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

Dated this seventeenth day of November 2006
At The Hague
The Netherlands



Judge Alphons Orie
Presiding

[Seal of the Tribunal]