UNITED NATIONS

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

Case No. IT-97-25/1-PT

Date: 8 July 2005

Original: English

IN THE REFERRAL BENCH

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

Registrar: **Mr. Hans Holthuis**

Decision: **8 July 2005**

PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

Partly Confidential

DECISION ON REFERRAL OF CASE UNDER RULE 11 *BIS* WITH CONFIDENTIAL ANNEXES I AND II

The Office of the Prosecutor:

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The Government of Bosnia and Herzegovina

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

Counsel for the Accused:

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I. INTRODUCTION

1. This 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 (hereinafter "Tribunal") is seized of the "Motion by The Prosecutor under Rule 11 *bis* with Annexes I, II, III and Confidential Annexes IV, V, and VI"[1] in the case of Savo Todović (hereinafter "*Todović* Motion for Referral"), and the "Motion by The Prosecutor under Rule 11 *bis* with Annexes I and II and Confidential Annexes III and IV" in the case of Mitar Rasević (hereinafter "*Rašević* Motion for Referral").[2]

2. Rule 11 *bis*, entitled Referral of the Indictment to Another Court, was adopted into the Rules of Procedure and Evidence of the Tribunal on 12 November 1997 and revised on 30 September 2002.[3] 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.[4] 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 ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate […]"[5]

3. Since the 30 September 2002 revision of Rule 11bis, 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,[6] the Rule provides that:

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[1] IT-97-25/1-I, Motion by The Prosecutor under Rule 11 *bis* with Annexes I, II, III and Confidential Annexes IV, V, and VI, 1 Nov 2004.
[2] IT-97-25/1-PT, Motion by The Prosecutor under Rule 11 *bis* with Annexes I and II and Confidential Annexes III and IV, 4 Nov 2004.
[3] In its original form, Rule 11 *bis* provided for transfer of an accused from the Tribunal to the authorities of the State in which the accused was arrested. Transfer required an order from the Trial Chamber suspending the indictment pending the proceedings before the national courts. Such an order necessitated findings by the Trial Chamber that State authorities were prepared to prosecute the accused in their own courts and that it was appropriate in the circumstances for the courts of that State to exercise jurisdiction over the accused.
[4] S/PRST/2002/21; S/RES/1329 (2000).
[5] S/RES/1503 (2003). The Security Council further noted that referral of cases to the War Crimes Chamber of the Court of Bosnia and Herzegovina was an essential prerequisite to achieving the objectives of the completion strategy. *See also* S/RES/1534 (2004); S/PRST/2004/28.
[6] Rules of Procedure and Evidence, IT/32/Rev. 34, 22 Feb 2005.

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

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

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004) , consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;

(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. Savo Todović and Mitar Rašević were originally jointly charged with Milorad Krnojelac in an Indictment (hereinafter "Original Indictment") filed 11 June 1997 and confirmed on 17 June 1997.[7] On 15 June 1998, the Stabilisation Force in Bosnia and Herzegovina apprehended Milorad Krnojelac and subsequently transferred him to the Tribunal for trial. On 15 March 2002, he was sentenced by the Trial Chamber to seven and a half years of imprisonment for crimes committed in his position as warden of the Kazneno-Popravni Dom (hereinafter "KP Dom") prison facility in the municipality of Foča, Bosnia and Herzegovina.[8] On 17 September 2003, the Appeals Chamber imposed a new sentence of fifteen years of imprisonment.[9]

5. On 15 August 2003, the Accused Rašević surrendered to the Tribunal from Belgrade, Serbia and Montenegro. He has since remained in detention awaiting trial. On 12 May 2004, pursuant to a Decision of the Trial Chamber dated 28 April 2004,[10] the Prosecution filed an Amended Indictment related to the Accused Rašević only.[11] The *Rašević* Amended Indictment was confirmed by the Trial Chamber in two decisions.[12]

6. On 1 November 2004, while the Accused Todović was still at large, the Prosecutor filed the *Todović* Motion for Referral. On 4 November 2004, the Prosecutor filed the *Rašević* Motion for Referral. On 2 November 2004 and 5 November 2004, the President of the Tribunal appointed this Referral Bench to consider whether the cases against the Accused Todović and Rašević should be referred.[13]

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[7] IT-97-25/1-I, Indictment, 11 Jun 1997. On the date in which Rule 11 *bis* was adopted, 12 Nov 1999, the original Indictment against both Accused had already been confirmed. The Defence has not raised any issue of non-applicability of Rule 11 *bis* resulting from the provision on the operation of amended Rules of Procedure and Evidence contained in Rule 6(D). The Bench finds no reason to specifically address the issue *proprio motu*.

[8] *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber Judgement, 15 Mar 2002. Foča was renamed Srbinje after the conflict ended, but has been consistently referred to by this Tribunal as it was known during the time of the conflict. *See* Trial Chamber Judgement, para. 49.

[9] *Prosecutor v. Krnojelac*, IT-97-25, Appeals Chamber Judgement, 17 Sep 2003.

[10] IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 Apr 2004.

[11] IT-97-25/1-PT, Amended Indictment, 12 May 2004.

[12] IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 Apr 2004; IT-97-25/1-PT, Decision on the Defence's Preliminary Motion Pursuant to the Rules 50(C) and 72(A)(ii) of 10 June 2004, 27 Jul 2004.

[13] IT-97-25-I/1, Order Appointing a Trial Chamber for the Purpose of Determining Whether the Indictment Should be Referred to Another Court under Rule 11 *bis*, 2 Nov 2004; IT-97-25/1-PT, Order Appointing a Trial Chamber for the Purpose of Determining Whether the Indictment Should be Referred to Another Court under Rule 11 *bis*, 5 Nov 2004.

7. On 15 January 2005, the Accused Todović surrendered from Republika Srpska, an entity of Bosnia and Herzegovina, to the Tribunal. On 20 April 2005, the Prosecution filed an Amended Indictment against the Accused Todović in order to reconcile his indictment with the *Rašević* Amended Indictment, as ordered by the Trial Chamber.[14] On 17 May 2005, the Trial Chamber ordered the Prosecution to file a new motion for leave to amend the indictment, joining it with the *Rašević* Amended Indictment.[15] The new motion was filed on 25 May 2005, and contained the proposed Joint Amended Indictment at Annex A.[16]

8. As of the date of this Decision, the proposed Joint Amended Indictment is awaiting a decision on acceptance by the Trial Chamber. Thus, the Original Indictment remains formally current against the Accused Todović. Even so, given the history of the Indictments and the pending Motion to once again join the two Accused in the one Indictment, the Referral Bench will consider the merits of the present Motions for Referral on the basis that the proposed Joint Amended Indictment will be the operative indictment for both Accused. The proposed Joint Amended Indictment is based upon the same basic factual substratum as the Original Indictment brought against the Accused Todović and the *Rašević* Amended Indictment. The major difference between the proposed Joint Amended Indictment and the Original Indictment is that the Joint Amended Indictment reduces the number of Counts against the Accused Todović from eighteen to twelve by eliminating six Counts, all cumulative to Counts charging the same behaviour as war crimes and crimes against humanity, alleging grave breaches under Article 2 of the Statute of the Tribunal. The proposed Joint Amended Indictment thus aligns the factual and legal allegations against both Accused with those in the *Rašević* Amended Indictment, and joins the two cases in the one Indictment. The Referral Bench is persuaded that consideration of the Joint Amended Indictment (hereinafter "Indictment") as the operative indictment against the two Accused for the purpose of

[14] IT-97-25/1-PT, *Prosecutor v. Todović and Rašević*, Prosecution's Motion for Leave to Amend the Original Indictment, Annex A, 20 Apr 2005.
[15] IT-97-25/1-PT, *Prosecutor v. Todović and Rašević*, Order on the Partly Confidential Prosecution's Motion for Leave to Amend the Original Indictment, 17 May 2005.
[16] IT-97-25/1-PT, *Prosecutor v. Todović and Rašević*, Prosecution's Motion for Leave to Amend the Operative Indictments with attached Annexes A and B And Confidential Annexes C and D, 25 May 2005; Annex A: Proposed Joint Amended Indictment with Schedules A to E.

referral results in no prejudice to either Accused. It will be convenient in this decision, therefore, to refer to the one case in which the two Accused are joined, rather than to two separate cases, so as to satisfy the expression of the Bench's reasons. Nevertheless, where the relevant circumstances differ as between the two Accused, we have considered them separately.

9. On 14 February 2005, the Referral Bench issued a decision ordering the parties, and inviting the Government of Bosnia and Herzegovina, to submit responses to specific questions.[17] In doing so, the Referral Bench considered it appropriate to deal with the *Todović* and *Rašević* Motions for Referral simultaneously, as the two Accused were originally indicted together for acts allegedly committed under the same factual circumstances, as mentioned previously. All responses were filed on 28 April 2005.[18]

10. On 9 May 2005, the Government of Serbia and Montenegro, at the instigation of the Defence, filed a submission requesting referral of the case to its authorities and that it be invited to participate in the hearing scheduled for 12 May 2005.[19] On 10 May 2005, the Prosecution responded in opposition to the notices of the Defence[20] and also filed a motion to strike out the submission of Serbia and Montenegro.[21]

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[17] IT-97-25/1-PT, Decision for Further Information in the Context of the Prosecutor's Motions under Rule 11 *bis*, 14 Apr 2005.

[18] IT-97-25/1-PT, Prosecution's Further Submissions Pursuant to Chamber's Decision of 14 April 2005, 28 Apr 2005. ("Prosecution Further Submissions"). IT-97-25/1-PT, Mitar Rašević's Defence Response to Prosecution's 11 *bis* Motion and Defence's Submission of Further Information in Accordance with the Referral Bench's Decision of 14 April and in the Context of the Prosecutor's Motion under Rule 11 *bis*, 28 Apr 2005. ("*Rašević* Defence Submissions"). IT-97-25/1-PT, Savo Todović's Defence Response to Prosecution's 11 *bis* Motion and Defence's Submission of Further Information in Accordance with the Referral Bench's Decision of 14 April and in the Context of the Prosecutor's Motion under Rule 11 *bis*, 28 Apr 2005. ("*Todović* Defence Submissions"). IT-97-25/1-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Referral Bench in its Decision of 14 April 2005, 28 Apr 2005. ("BiH Submissions").

[19] IT-97-25/1-PT, Serbia and Montenegro's Submission in the Proceedings under Rule 11 *bis*, 9 May 2005. ("SCG Submissions"). *See also* IT-97-25/1-PT, Savo Todović's Defence Notice on the Serbia and Montenegro Willingness to Accept the Case of Savo Todović under Rule 11 *bis*, 5 May 2005. ("*Todović* Notice"); IT-97-25/1-PT, Mitar Rašević's Defence Notice on the Serbia and Montenegro Willingness to Accept the Case of Mitar Rašević under Rule 11 *bis*, 6 May 2005. ("*Rašević* Notice").

[20] Prosecutor's Response in Opposition to Mitar Rašević's "Defence Notice on the Serbia and Montenegro Willingness to Accept the Case of Mitar Rašević under Rule 11 *bis*" and to Savo Todović's "Defence Notice on the Serbia and Montenegro Willingness to Accept the Case of Savo Todović under Rule 11 *bis*," 10 May 2005. ("Prosecutor's Response to Defence Notice").

[21] Prosecutor's Motion to Strike Serbia and Montenegro's Submission in the Proceedings under Rule 11 *bis*, 10 May 2005. ("Motion to Strike").

11. A hearing was held on 12 May 2005 with the parties present, along with representatives of the Governments of Bosnia and Herzegovina and of Serbia and Montenegro.[22]

12. Further written submissions were permitted following the hearing.[23] On 17 May 2005, the Todović Defence filed a submission concerning the translation of a citizenship document referred to during the hearing.[24] On 20 May 2005, the Government of Bosnia and Herzegovina filed a submission concerning remuneration for Defence Counsel appearing before the Court of Bosnia and Herzegovina in response to a request from the Referral Bench at the hearing.[25] On 24 May 2005, the Todović Defence filed a response to the submission of Bosnia and Herzegovina concerning remuneration.[26] On 28 June 2005, without leave of the Bench, the Todović Defence filed a further submission that, upon review, repeats matters already submitted or contains information of no assistance to the determination to be made by this Referral Bench.[27]

13. By agreement of the parties, and to avoid unnecessary repetition, the Referral Bench has extended its consideration of matters in this case to the submissions of the parties in other cases before the Bench.[28] All relevant written submissions were provided to the Defence, and the Defence observed motions hearings in the other cases considered.[29] The Prosecution was a party to the other cases.

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[22] IT-97-25/1-PT, Rule 11 *bis* Motion Hearing, 12 May 2005. ("Motion Hearing").

[23] Following the Motion Hearing, the Accused Todović mailed a handwritten letter to the Presiding Judge generally repeating matters already submitted in the *Todović* Defence Submissions, particularly paras 94-97, and at the Motion Hearing, particularly at T.121-T.124. Although uninvited, the letter was filed on 1 June 2005 with the permission of the Referral Bench.

[24] IT-97-25/1-PT, Savo Todović's Defence Submission of the Official English Translation of the Decision of the Republic of Serbia Ministry of Interior Regarding Citizenship, 17 May 2005. ("*Todović* Defence Further Submissions").

[25] IT-97-25/1-PT, Submission of Information Requested from the Government of Bosnia and Herzegovina (BiH) by the Referral Bench in the Hearing on the Referral of Cases under Rule 11 *bis* on 12 May 2005, 20 May 2005. ("BiH Further Submissions").

[26] IT-97-25/1-PT, Savo Todović's Defence Response to the BiH Government Submission of Information Requested from the Government of Bosnia and Herzegovina (BiH) by the Referral Bench in the Hearing on the Referral of Cases under Rule 11 *bis* on 12 May 2005, 24 May 2005. ("*Todović* Defence Reponse to BiH Further Submissions").

[27] IT-97-25/1-PT, Savo Todović's Defence Supplemental Response in the Context of the Prosecutor's Motion under Rule 11 *bis* with Annexes I to III, 28 Jun 2005.

[28] Motion Hearing, T.115; IT-96-23/2-PT, *Prosecutor v. Stanković*; IT-02-65-PT, *Prosecutor v. Mejakić, et al.*; and IT-95-13/1-PT, *Prosecutor v. Mrkšić, et al.*; IT-96-23/2-PT, *Prosecutor v. Janković.*

[29] Motion Hearing, T.115-T.117, T.125-T.127.

III. THE ACCUSED AND THE CHARGES

14. The Accused Todović was born in the village of Rijeka and had his permanent residence in the town and municipality of Foča in Bosnia and Herzegovina.[30] His nationality was, however, a subject of some dispute at the hearing in this case,[31] as he had also very recently obtained citizenship of Serbia and Montenegro.[32] The Prosecution contended that the Accused Todović was not a citizen of Serbia and Montenegro, but of Bosnia and Herzegovina, and produced documentation to that effect.[33] A more recent document was tendered by the Defence, however, confirming that after his arrival in The Hague, the Accused Todović sought to be granted citizenship of Serbia and Montenegro, and this was granted shortly before the hearing.[34] The Referral Bench will therefore consider the Accused Todović to be a national of both States for the purpose of this Decision.

15. The Accused Rašević was born and permanently resided in Čagušt, a village located within the municipality of Foča in Bosnia and Herzegovina. It is undisputed that he is a national of Bosnia and Herzegovina.[35]

16. The Indictment charges the Accused Todović and Accused Rašević on the basis of individual criminal responsibility under Article 7(1) of the Statute of the Tribunal, and with criminal responsibility as superiors for the acts of their subordinates pursuant to Article 7(3) of the Statute of the Tribunal.[36] The Charges allege one count of persecution as a crime against humanity in violation of Articles 5(h); four counts of torture and beatings as crimes against humanity in violation of Articles 5(f) and 5(i) of the Statute of the Tribunal, and as violations of the laws or customs of war pursuant to Article 3; two counts of wilful killings and murder as a crime against humanity in violation of Article 5(a), and as a violation of the laws or customs of war pursuant to

[30] Indictment, para. 2.
[31] Motion Hearing, T.97-T.104.
[32] Motion Hearing, T.110-T.111. The Accused Todović was shown to have been granted citizenship of the Republic of Serbia and citizenship of Serbia and Montenegro on 20 April 2005.
[33] Motion Hearing Exhibits R1-R3.
[34] Motion Hearing Exhibit R4/E.
[35] Indictment, para. 1; Motion Hearing, T.95.
[36] Indictment, paras 3-11.

Article 3; three counts of imprisonment, inhumane acts, and cruel treatment as crimes against humanity in violation of Articles 5(e) and 5(i), and as violations of the laws or customs of war in violation of Article 3; and two counts of enslavement as a crime against humanity in violation of Articles 5(c), and as a violation of the laws or customs of war pursuant to Article 3; for a total of twelve counts in the Indictment.[37]

17. The Indictment alleges that from April 1992 until August 1993, the Accused Todović was the deputy commander of the Foča KP Dom prison facility, and that from April 1992 until October 1994, the Accused Rašević was the commander of the guards at the same prison facility. Among other acts, both Accused are alleged to have participated in a joint criminal enterprise which included Milorad Krnojelac, the purpose of which was to imprison Muslim and other non-Serb civilians from Foča and the surrounding areas in inhumane conditions and subject them to beatings, torture, enslavement, deportations and forcible transfers. It is also alleged that for a three-month period during the time relevant to the Indictment, the joint criminal enterprise included the systematic killing of detainees.[38]

IV. GRAVITY OF CRIMES CHARGED AND LEVEL OF RESPONSIBILITY OF ACCUSED

A. Submissions of Parties

18. With regard to Rule 11 *bis* (C), the Prosecution submits that the gravity of the crimes charged against the Accused and their level of responsibility are compatible with referral of the case to the authorities of Bosnia and Herzegovina.[39] Insofar as the gravity of the crimes charged, the Prosecution submits that while the crimes are sufficiently grave and indeed were tried before the Tribunal in *Prosecutor v. Krnojelac*,[40] they cannot be characterised as grave to the extent that demands trial before the Tribunal in light of the completion strategy referred to in Security Council

[37] Indictment, paras 12-57.
[38] Indictment, para. 4.
[39] Prosecution Further Submissions, paras 1 and 4.
[40] *Supra* notes 8 and 9.

Resolutions.[41] As to the level of responsibility of the two Accused, the Prosecution characterises them as intermediary perpetrators.[42]

19. The Todović Defence submits that neither the gravity of the crimes charged against the Accused nor his level of responsibility are compatible with referral of the case to national authorities.[43] As to the gravity of the crimes charged, the Todović Defence characterises them as "quite serious" and "more grave" than the offences charged in other trials which began at the Tribunal after the relevant Security Council Resolutions endorsing the Tribunal's completion strategy.[44] With regard to the level of responsibility of the Accused, the Defence submits, *inter alia*, that Savo Todović is alleged to have been the "second in command" of the KP Dom prison facility, a position with similar powers and duties as the first in command, Milorad Krnojelac, who has been tried and convicted by the Tribunal.[45] Thus, the argument is made that the Accused Todović should likewise be tried by the Tribunal. The Rašević Defence likewise submits that the gravity of the crimes charged against the Accused and his level of responsibility are incompatible with referral of the case to national authorities. In this regard, the Defence submits that while the Accused cannot be considered to have been at the apex of either civilian or military authority, the fact that he is charged as a co-perpetrator in a joint criminal enterprise shows his alleged level of responsibility.[46] The crimes charged against the Accused Rašević are termed "rather serious."[47]

20. The Government of Bosnia and Herzegovina, relying only upon the allegations as set forth in the Indictment, submits that the crimes charged against both Accused, while grave, are suitable for referral because they are alleged to have occurred within a limited geographic area by those who fall within an intermediary to lower level of responsibility.[48]

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[41] Prosecution Further Submissions, paras 2-3.
[42] *Id.* at para. 8.
[43] *Todović* Defence Submissions, paras 26 and 32.
[44] *Id.* at paras 22-23. The Defence cites the cases of *Prosecutor v. Naser Orić* (IT-03-68-T) which began trial on 6 Oct 2004 and *Prosecutor v. Sefer Halilović* (IT-01-68-T) which began on 31 Jan 2005.
[45] *Id.* at para. 28.
[46] *Rašević* Defence Submissions, para. 11.
[47] *Id.* at para. 10.
[48] BiH Submissions, p. 2-3.

21. The Government of Serbia of Montenegro sought to participate in the case only after the Referral Bench had already received the submissions of the parties and of the Government of Bosnia and Herzegovina, addressing the issues raised by the Referral Bench.[49] Nonetheless, in seeking to participate, the Government of Serbia and Montenegro submits that it is willing and able to receive referral of the case, which suggests that the Government views the level of the Accused's responsibility and the gravity of the crimes charged against them as compatible with referral.[50]

B. Discussion

22. In evaluating the gravity of the crimes charged and the level of responsibility of the Accused, the Referral Bench will consider only those facts alleged in the Indictment – they being the essential case raised by the Prosecution for trial – in arriving at a determination whether referral of the case is appropriate. The Bench will not consider facts put forth by the parties or the Governments of Bosnia and Herzegovina and of Serbia and Montenegro in their submissions which differ from those alleged in the Indictment.

23. According to the Indictment, the Accused Todović and Accused Rašević are alleged to have been in positions of authority at the KP Dom prison facility, and responsible for the persecution, torture and beating, wilful killing and murder, imprisonment, inhumane acts, cruel treatment, and enslavement of a large number of detainees over a significant length of time.[51] The crimes alleged, however, were limited in geographic scope to the region of Foča and committed in the context of a joint criminal enterprise in which Milorad Krnojelac is named as a co-perpetrator in the Indictment. In light of the positions of the Accused within the overall chain of responsible actors, and the relative gravity of their alleged crimes when compared to other pending cases before the Tribunal, it is apparent that neither Accused in the present case may be appropriately regarded as among the "most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction."

[49] *Supra* note 19.
[50] *See* SCG Submissions, para. 3; Motion Hearing, T.93, T.142-T.143.
[51] *See* Schedules A-E attached to the Indictment for a listing of the identified alleged victims.

C. Conclusion

24. The Referral Bench is satisfied that the level of responsibility of both Accused and the gravity of the crimes charged against them are not *ipso facto* incompatible with referral of the case to the authorities of a State meeting the requirements of Rule 11 *bis* (A).

V. CONSIDERATION OF REFERRAL TO BOSNIA AND HERZEGOVINA

A. Introduction

25. Principle issues raised in the course of the proceedings include 1) to the authorities of which State referral should be made, in the event referral is warranted (Rule 11 *bis* (A)); 2) whether the acts charged are criminalised under the applicable substantive national law (Rule 11 *bis* (A)); 3) whether the death penalty could be imposed or carried out (Rule 11 *bis* (B)); and 4) whether the Accused will receive a fair trial (Rule 11 *bis* (B)).

B. Determination of the State for Referral

1. Submissions of the Parties

26. The Prosecution submits that the case should be referred to the authorities of Bosnia and Herzegovina, and not to Serbia and Montenegro.[52] Foremost, the Prosecution contends that the criteria in Rule 11 *bis* (A) reflect a preferential ordering among competing States which gives the greatest weight to the State in whose territory the crime was committed under Rule 11 *bis* (A)(i), that being Bosnia and Herzegovina.[53] The Prosecution submits that neither case can be referred to Serbia and Montenegro pursuant to Rule 11 *bis* (A), as the crimes were not committed in Serbia and Montenegro and neither Accused was arrested in Serbia and Montenegro or is a national of Serbia and Montenegro.[54] To the extent that Serbia and Montenegro may have granted citizenship very

[52] *See generally* Prosecutor's Response to Defence Notice and Motion to Strike. *See also* Motion Hearing, T. 97-T.100, T.105, T.111-T.115, T.153-T.154.
[53] Motion Hearing, T.114; *Todović* Motion for Referral, para.6; *Rašević* Motion for Referral, para. 6; Prosecutor's Response to Defence Notice, para. 8.
[54] Motion Hearing Exhibits R1-R2.

recently to the Accused Todović, the Prosecution characterizes this as merely "engineered to try to assert some basis for an attempted claim to having an interest."[55]

27. The Rašević Defence does not dispute that the Accused is a national of Bosnia and Herzegovina and not a national of Serbia and Montenegro.[56] It also accepts that the crimes are alleged to have occurred in Bosnia and Herzegovina.[57] It does submit, however, that as the Accused Rašević voluntarily surrendered to the Tribunal from Serbia and Montenegro, its should be accepted that Serbia and Montenegro is a "State in which an accused was arrested" within the meaning of Rule 11 *bis* (A)(ii).[58] Otherwise, it is submitted, the Accused Rašević "does not have anything against being tried in Bosnia and Herzegovina," so long as the trial would be fair and would both start and complete within a reasonable amount of time.[59]

28. The Todović Defence submits that while the Accused is a citizen of Bosnia and Herzegovina, he is also a citizen of Serbia and Montenegro, the latter State by virtue of citizenship sought and granted since the Accused's arrival at the United Nations Detention Unit in The Netherlands. Thus, it is contended, in regard to the Accused Todović, that Serbia and Montenegro satisfies Rule 11 *bis* (A)(iii), being a "State having jurisdiction [by virtue of citizenship] and being willing and adequately prepared to accept such a case."[60] Finally, the Defence submits that trial in Bosnia and Herzegovina – as opposed to Serbia and Montenegro – would raise fair trial concerns, as well as personal concerns on the part of the Accused.[61]

29. The Government of Bosnia and Herzegovina submits that it is willing and adequately prepared to accept referral of the case, the crimes of which are alleged to have occurred on its territory and by its nationals.[62]

30. The Government of Serbia and Montenegro also submits that the voluntary surrender of the Accused Rašević in Serbia and Montenegro should be equated with an "arrest" for the purposes of

[55] Motion Hearing, T.99.
[56] *Id.*, at T.95.
[57] *Id.*, at T.131.
[58] *Id.*, at T.130; *Rašević* Notice, paras 2-3.
[59] Motion Hearing, T.128.
[60] *Id.* at T.97, T.100; *Todović* Notice, paras 2-3; *Todović* Defence Further Submissions; Motion Hearing Exhibit R4/E.
[61] Motion Hearing, T.117-T.125.

Rule 11 *bis* (A)(ii).[63] Otherwise, the Government concedes that although it is willing and adequately prepared to accept the Accused Rašević's case for trial, it would have no basis for asserting jurisdiction apart from application of "universal jurisdiction" if the Accused Rašević were present in the State, and that it would not "actually push for our standing because it's much weaker than for […] accused who are our nationals."[64] Regarding the Accused Todović, the Government argues that as he is now a citizen of Serbia and Montenegro, as *parens patriae*, it has special rights and responsibilities towards him under the general international law of diplomatic protection.[65] Having jurisdiction over him by virtue of his citizenship, the Government of Serbia and Montenegro submits that it is willing and adequately prepared to accept for trial the case against the Accused Todović.[66]

2. Discussion

31. The only formal requests before the Referral Bench are the Prosecution Motions for Referral to Bosnia and Herzegovina. The Defence and Serbia and Montenegro are not in a position to file a formal request for referral to Serbia and Montenegro. Having received the submissions of Serbia and Montenegro, the Referral Bench has become aware that both the Defence and Serbia and Montenegro consider that it would be appropriate for the case to be referred for trial before its courts, especially with regard to the Accused Todović. The Referral Bench is urged to act *proprio motu* to so refer the case. While the Referral Bench may order referral to a State *proprio motu* pursuant to Rule 11 *bis* (B), it would normally be appropriate to do so only in an obvious case.

32. The crimes in the Indictment are alleged to have been committed by the two Accused who, both at the time of the alleged crimes and now, are citizens of Bosnia and Herzegovina. The crimes are alleged to have been committed against nationals of Bosnia and Herzegovina and in the territory of Bosnia and Herzegovina. By contrast, the only apparent nexus between the Accused Rašević or

[62] *See generally* BiH Submissions; Motion Hearing, T.140-T.141.
[63] SCG Submissions, para. 4.
[64] Motion Hearing, T.109-T.110.
[65] SCG Submissions, para. 6; Motion Hearing, T.93.
[66] SCG Submissions, para. 3; Motion Hearing, T.93, T.143-T.144.

his alleged crimes and Serbia and Montenegro is that he voluntarily surrendered to the Tribunal from that State. For present purposes, but without deciding the issue, the Bench will proceed on the basis that this constitutes "arrested" for the purposes of Rule 11 *bis* (A)(ii). For the Accused Todović, the only apparent connecting factor of his case to Serbia and Montenegro is that he was recently granted citizenship of that State. The weight to be given this and the State's consequential claim of *parens patriae* must be considered in the context of the timing of the grant of citizenship. The Accused remains also a citizen of Bosnia and Herzegovina. He is alleged to have committed crimes in Bosnia and Herzegovina from 1992 to 1994, for which he was indicted in 1997, and which led to his surrender to the Tribunal from Bosnia and Herzegovina in 2005. Only after his surrender, while in detention in The Hague, did the Accused seek and acquire citizenship of Serbia and Montenegro, which was granted only a few weeks before the hearing of this Motion for Referral. In the view of the Referral Bench, the nexus with Serbia and Montenegro is much weaker with respect to the individual case of each Accused than the nexus with Bosnia and Herzegovina. Having regard to the circumstances of the case, the arguments in favour of referral *proprio motu* to Serbia and Montenegro are comparatively of little weight.

3. Conclusion

33. The Referral Bench is persuaded for the reasons indicated that Bosnia and Herzegovina has a significantly greater nexus with trial of each of these Accused for the offences alleged against them than Serbia and Montenegro. The Bench will therefore turn to consider whether, in light of all relevant factors, referral for trial of the case to the authorities of Bosnia and Herzegovina would be appropriate. Only if there are significant problems with this will the Bench come to consider whether it should act *proprio motu* to refer the case to Serbia and Montenegro.

C. Applicable Substantive Law

34. The Referral Bench stresses 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 Bosnia and Herzegovina. That is a matter which would be within the competence of the State Court of Bosnia and Herzegovina if

referral is ordered.[67] The Bench must be satisfied, however, that if the case against either or both Accused were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which not only criminalises the alleged conduct of the two 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 State 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 of the Parties

35. The Prosecution submits that there are two avenues open to the State Court of Bosnia and Herzegovina in determining the law applicable to each of the alleged criminal acts of the Accused.[68] The first option is to apply the Criminal Code of Bosnia and Herzegovina (hereinafter "BiH CC"),[69] first enacted after the alleged conduct in 2003. The second option is to apply the law which was in force at the time of the alleged conduct, that being penal acts of the former Socialist Federal Republic of Yugoslavia, such as the Criminal Code of the Socialist Federal Republic of Yugoslavia (hereinafter "SFRY CC"),[70] enacted in 1977, perhaps together with national acts implementing international treaty provisions. The Prosecution submits that if the BiH CC is applied, jurisdictional challenges might exist based upon the principles reflected in Article 7 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "ECHR").[71] Were the penal law of the

[67] Pursuant to the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH ("BiH Law on the Transfer of Cases"), Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04, a case which is referred from the Tribunal to Bosnia and Herzegovina must be transferred from the authorities of the State to the State Prosecutor's Office and the State Court for disposition. While it is not for the Referral Bench to decide the competency of a national court, it will be presumed that the State Court of Bosnia and Herzegovina is intended to be the forum for trial of the case against the Accused, if referred.

[68] Prosecution Further Submissions, para. 11.

[69] Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04.

[70] Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 44/76.

[71] Prosecution Further Submissions, paras 11-13. The Prosecution cites to Arts. 7(1) and 7(2) of the ECHR (1950). Specifically to the challenge regarding the principles of *nullum crimen sine lege* or prohibiting retroactive application of law, the Prosecution cites Article 15(2) of the International Covenant on Civil and Political Rights (1966) for the proposition that these principles are not violated where the new penal Act is based upon previously existing general principles of international law.

former SFRY applied, the Prosecution submits that jurisdictional challenges could be raised if non-self-executing provisions of international treaties were relied upon without implementation.[72] However, the Prosecution notes that some criminal offences proscribed by international treaties had been implemented in the SFRY CC before the date of the alleged conduct (Articles 142 and 143, proscribing war crimes against the civilian population and against the sick and wounded) and in a 1978 law implementing the two Additional Protocols to the Geneva Conventions.[73]

36. The Defence for both Accused submits that insofar as the charged crimes are concerned, only the provisions of the SFRY CC could have been applied in Bosnia and Herzegovina until adoption of the BiH CC in 2003.[74] The Defence further submits that the SFRY CC did not include the crimes set out in Articles 3 and 5 of the Statute of the Tribunal,[75] but that in practice these crimes could have been subsumed under Article 142 of the SFRY CC. Nor, it is submitted, did the SFRY CC contain provisions equivalent to Article 7(3) of the Statute of the Tribunal relating to command responsibility. The BiH CC, in force since 2003, on the other hand, envisages all the crimes encompassed by the Statute of the Tribunal, as well as Article 7(3) of the Statute of the Tribunal.[76] The Defence further submits that Article 4 of both the SFRY CC and the BiH CC provides that the law which is in force at the time a crime is allegedly committed is to be applied (Article 4(1)) – that being the SFRY CC in this case – and that a later law which is in force at the time of trial may only be applied if it is more favourable to an accused (Article 4(2)). In this regard, the Defence submits that the maximum authorized imprisonment for the conduct with which the Accused are charged is less under the SFRY CC than under the BiH CC, and therefore the SFRY CC should be applied as the later BiH CC is less favourable to the Accused.[77] Finally, the Defence

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[72] Prosecution Further Submissions, paras 14-16.

[73] *Id.* at fn. 14, citing IT-94-1, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 132 and 135.

[74] *Todović* Defence Submissions, para. 36; *Rašević* Defence Submissions, para. 15.

[75] The Defence also submits that the SFRY CC did not include the crimes set out in Article 2 of the Statute of the Tribunal, but as the proposed Joint Amended Indictment contains no Article 2 offences, the Referral Bench need not consider the submission with respect to such offences. *Supra* para. 8.

[76] *Todović* Defence Submissions, paras 36-37; *Rašević* Defence Submissions, para. 15.

[77] *Todović* Defence Submissions, paras 38-41; *Rašević* Defence Submissions, paras 16-17, 19. The Defence in *Todović* also contends that the Bench should not take into account the potential for a sentence to the death penalty under the SFRY CC when comparing which code is the more lenient, since Article 11(2) of the Republika Srpska Constitution prohibited the death penalty prior to the time of the charged offences.

contends that a 2004 amendment to the BiH CC (Article 4a) should not be interpreted to derogate from the principle of applying the law most lenient to an accused and of legality (*nullum crimen nulla poena sine lege*) in order to allow prosecution under the BiH CC of an act or omission which at the time it was committed was recognised as a crime by general principles of international law.[78]

37. The Government of Bosnia and Herzegovina had provided submissions in the case of *Prosecutor v. Stankovic*[79] regarding the law to be applied if that case were to be referred. Those submissions were relied on at the hearing of the present case and the parties proceeded on the basis that they will be considered in the present case as well.[80] The Government submits that the BiH CC, rather than the SFRY CC, would apply to the case of the Accused. The submission assumes that by virtue of Article 4(2) of the BiH CC, it is that code (the BiH CC) which would apply since it is "more lenient" than the SFRY CC and provides a "more complete exposition of the law."[81] The Government also contends that where the BiH CC differs from the SFRY CC, it is merely a result of the BiH CC codifying crimes which were recognised by the general principles of international law at the time of the charged offences. Furthermore, by operation of Article 4a of the BiH CC, the principles articulated in Article 4 (of applying the law more lenient to an accused and of legality) should not prejudice the trial and punishment of an accused for acts or omissions which were criminal according to the general principles of international law at the time of their commission.[82] With respect to sentencing, the Government notes that the maximum penalty under the SFRY CC was death, whereas the maximum penalty under the BiH CC is long-term imprisonment, defined as

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[78] *Todović* Defence Submissions, paras 42-44; Rašević Defence Submissions, para. 18.

[79] IT-96-23/2-PT, *Prosecutor v. Stanković*, Decsision on Referral of Case under Rule 11 *bis*, Referral Bench, 17 May 2005.

[80] IT-96-23/2-PT, *Prosecutor v. Stanković,* Response of Government of Bosnia and Herzegovina to the Questions of Specially Appointed Chamber of ICTY, 25 Feb 2005. ("BiH First Submissions/*Stankovic*"); IT-96-23/2-PT, *Prosecutor v. Stanković,* Government of Bosnia and Herzegovina Response to the Additional Questions Requested by the Referral Bench in Letter dated 11 March, 22 Mar 2005. ("BiH Second Submissions/*Stankovic*").

[81] BiH Second Submissions/*Stanković*, pp. 5-6.

[82] *Ibid. See also* BiH Submissions, pp. 3-8. The Government of Bosnia and Herzegovina submits that its courts are constitutionally empowered to apply international conventional and customary law, and that such application in the context of this case would be consistent with Art. 7 of the ECHR (1950) and with judgements of the European Court of Human Rights, e.g., *S.W. v. The United Kingdom*, 22 Nov 1995, paras 35-36; *C.R. v. The United Kingdom*, 22 Nov 1995, paras 33-34; *K.H.W. v. Germany*, para. 45, 22 Mar 2001; and *Streletz, Kessler and Krenz v. Germany*, para. 50, 22 Mar 2001.

a term of twenty to forty-five years.[83] In the course of the oral submissions at the hearing, however, the Government accepted that some issues on which its submissions were founded had not yet been resolved by the courts of Bosnia and Herzegovina; in particular that no national test had been judicially established for determining which of two or more laws is the more lenient. It is accepted that it will be for the State Court to determine issues such as these should this case be referred.[84]

2. Discussion

38. Given the legislation in place at the time of the charged offences alleged to have been committed by the Accused, and the more recent legislative changes, there is a need to resolve some rather basic issues relating to the trial by the State Court of alleged crimes stemming from the period to which the Indictment relates. While the submissions of the parties differ, it will be for the State Court to resolve any of these issues which may arise should this case be referred.

39. For the purposes of determining the present Motion, 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 Bosnia and Herzegovina. Rather than attempting to do so, the Referral Bench will consider what will be the apparent position under 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, the punishment of either or both Accused for the alleged criminal conduct which is charged in the present Indictment.

(a) SFRY Criminal Code

40. The offences in the Indictment are alleged to have occurred between April 1992 and October 1994. Under the federal constitutional structure of the former Yugoslavia, the SFRY CC, having been enacted in 1977, was in force at the time of the alleged conduct of the Accused which

[83] BiH Second Submissions/*Stanković*, at p. 6, *citing* BiH CC, Art. 42(2).
[84] *Id.* at pp. 5-6.

is the subject of the charges in the present Indictment.[85] The SFRY CC included a provision – as accepted by the Defence – which proscribed war crimes against the civilian population. Article 142(1) provides the following:

> Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against the civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health; an indiscriminate attack without selecting a target, by which the civilian population is injured; that the civilian population be subject to killings, torture, inhuman treatment, biological or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of an enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal or disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

Although the whole of Chapter 16 of the SFRY CC, of which Article 142(1) is included, is entitled "Criminal Acts against Humanity and International Law," the SFRY CC did not expressly specify any particular offence therein to be a crime against humanity.[86]

41. Thus, at the time of the alleged conduct of the Accused, Article 142(1) made it a crime to order or commit against the civilian population, in violation of the rules of international law effective at a time of war, armed conflict, or occupations, the following acts which appear to apply to the allegations against the Accused as set forth in the Indictment: killings, torture, inhuman treatment; dislocation or displacement; illegal detention; and forcible labour.

42. In the Indictment, the acts of torture (Count 3), cruel treatment (Counts 5 and 10), murder (Count 7), and slavery (Count 12) are alleged as violations of the laws or customs of war. The acts of persecution (Count 1), torture (Count 2), inhumane acts (Counts 4 and 9), murder (Count 6), imprisonment (Count 8), and enslavement (Count 11), are alleged as crimes against humanity.

[85] The Criminal Code of the Socialist Republic of Bosnia and Herzegovina was also in force, but as it did not contain any provisions criminalising either violations of the laws or customs of war or crimes against humanity, it may be eliminated from further assessment.

[86] Whether or not any of the crimes under Chapter 16 qualify as a species of crimes against humanity is a matter for the State Court of Bosnia and Herzegovina to determine.

43. Thus, Article 142(1) of the SFRY CC would appear to apply to the acts of torture alleged against the two Accused as violations of the laws or customs of war, and would also appear applicable to the acts of torture cumulatively charged against both as crimes against humanity. Although the word "killings" is used in Article 142(1) to describe the criminal behavior, the provision would also appear to apply to the acts of murder alleged against the two Accused as violations of the laws or customs of war, and to the acts of murder cumulatively charged against both as crimes against humanity. The acts of the Accused charged variously in the Indictment as slavery, imprisonment, and enslavement would also appear to be within the scope of the provisions of Article 142(1) which make "illegal detention" and "forcible labour" war crimes.[87] Again, the provision of Article 142(1) which makes "inhuman treatment" a war crime would appear to apply to the acts in the Indictment charged as cruel treatment and inhumane acts. The SFRY CC did not expressly specify any particular offence of persecution.[88] However, as agreed by the Defence for both Accused, the acts in the Indictment alleging persecution apparently could have been characterized as and subsumed under multiple provisions of Article 142(1), such as "inhuman treatment" and "dislocation or displacement."[89]

44. Although the maximum authorised punishment for acts in violation of Article 142(1) was the death penalty, which is now abolished in Bosnia and Herzegovina,[90] 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. It provides, *inter alia*, that where a court has decided upon a punishment of 20 years imprisonment for one of the combined criminal acts, then it shall impose that punishment only.[91]

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[87] Article 155(1) of the SFRY CC made criminal the act of establishing slavery relations. Even if applicable, prosecution of such an offence might be barred in this case by the statute of limitations found in Article 95 of the SFRY CC, since the maximum authorised period of imprisonment for the offence could not exceed ten years. *See infra* para. 47.

[88] BiH Submissions, p. 9.

[89] *Todović* Defence Submissions, para. 51; *Raševi*ć Defence Submissions, para. 23.

[90] Discussed *infra* at para. 55.

[91] SFRY CC, Art. 48(2)(2).

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.

45. It should also be noted that the SFRY CC contained a statute of limitations. Article 95(1)(1) provided for a bar to prosecution by lapse of twenty-five years from the commission of a criminal act for which the law provides the capital punishment or the punishment of imprisonment of 20 years. Offences committed in 1992 in violation of Article 142(1), for example, would not be barred until 2017.

(b) BiH Criminal Code

46. The BiH CC entered into force on 1 March 2003 and proscribes crimes against humanity under Article 172 and war crimes against civilians under Article 173. If the BiH CC were to apply, as has been submitted, it would provide apparent coverage of all the acts alleged in the Indictment. In pertinent part, Articles 172 and 173 provide:

> Article 172 (Crimes against Humanity)
>
> (1) Whoever, as part of a widespread or systematic attack directed against a civilian population, with knowledge of such an attack perpetrates any of the following acts:
>
> (a) Depriving another person of his life (murder);
>
> […]
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture
>
> (g) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;
>
> […]
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,
>
> shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.
>
> Article 173 (War Crimes against Civilians)

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

[…]

(c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture) […] immense suffering or violation of bodily integrity or health;

(d) Dislocation or displacement […]

[…]

(f) Forced labour […]

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

47. Long-term imprisonment is defined under Article 42(2) as being a term of twenty to forty-five years. This would constitute the maximum authorised punishment if the BiH CC were applicable. If less than long-term imprisonment were adjudged, then under a system of compounding punishment for concurrent offences, the maximum penalty could not exceed imprisonment for twenty years.[92] The statute of limitations for an offence for which a punishment of long-term imprisonment is authorised is thirty-five years.[93]

48. The principle of legality, and specifically with respect to the applicability of criminal law in relation to the time an offence is committed, is found in the following provisions of the BiH CC:

Article 3

(1) Criminal offences and criminal sanctions shall be prescribed only by law.

(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.

Article 4

(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

Article 4a

Articles 3 and 4 of this code shall not prejudice the trial and punishment of any person for any act or omission, which at the time when it was committed, was criminal according to the general principles of international law.

[92] BiH CC, Art. 53(2)(b).

49. Article 4a was enacted in 2004 and had no comparable counterpart in the SFRY CC. Whether it would apply retroactively, and if so, how it should be interpreted and applied would be matters for the State Court of Bosnia and Herzegovina to determine if the case is referred. If Article 4a is applied retroactively, consideration would need to be given to whether the acts alleged in the Indictment were criminal at the time of commission according to general principles of international law. The State Court may be assisted in this regard by relevant case-law of this Tribunal which has found persecution,[94] torture,[95] wilful killing and murder,[96] unlawful imprisonment,[97] inhumane acts and cruel treatment,[98] and enslavement[99] to be crimes under international law, whether committed in international or non-international armed conflict, at the time relevant to the Indictment.

50. With respect to the Defence submission that the SFRY CC did not contain any provisions relating to individual criminal responsibility as defined in Article 7(3) of the Statute of the Tribunal, if this case is referred, it will ultimately be for the State Court of Bosnia and Herzegovina to determine whether or not the concept of command responsibility applies, and if so, whether by provisions of the SFRY CC, the BiH CC or as a norm of customary international law.[100] The submissions with respect to this issue simply raised the matter with minimal analysis. The Referral Bench observes that provisions of the SFRY CC existed which appear to address almost all of the field covered by Articles 7(1) and 7(3) of the Statute concerning responsibility of a commander. 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 organize a group for the purpose of committing war crimes against the civilian population, or to call on or

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[93] BiH CC, Art. 14(1)(a).
[94] *See, e.g., Prosecutor v. Blaskić*, Trial Chamber Judgement, 3 Mar 2000, paras 218-233; Appeals Chamber Judgement, 29 Jul 2004, paras 129-160.
[95] *See, e.g., Prosecutor v Kunarac, et al.,* Trial Chamber Judgement, 22 Feb 2001, paras 465-497; Appeals Chamber Judgement, 12 Jun 2002, paras 142-148.
[96] *See, e.g., Prosecutor v. Delalić, et al.,* Trial Chamber Judgement, 16 Nov 1998, paras 420-425, 431-439; Appeals Chamber Judgement, 20 Feb 2001, paras 419-426.
[97] *See, e.g., Prosecutor v. Kordić and Kerkez*, Trial Chamber Judgement, 26 Feb 2001, paras 302-303; Appeals Chamber Judgement, 17 Dec 2004, paras 69-73.
[98] *See, e.g., Prosecutor v. Delalić, et al.*, Appeals Chamber Judgement, 20 Feb 2001, paras 419-426.
[99] *See, e.g., Prosecutor v Kunarac, et al.,* Trial Chamber Judgement, 22 Feb 2001, paras 519-543*;* Appeals Chamber Judgement, 12 Jun 2002, paras 116-124.
[100] BiH CC, Art. 180; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, 1st Edition, (Cambridge: ICRC, 2005), Rule 153, pp. 558-563.

instigate the commission of such crimes. Further, Articles 25 and 26 concerned the limits of responsibility and punishment of accomplices, inciters and aiders, and those who organise criminal associations. Finally, Article 30 provided for the criminalisation of an act committed by omission if the offender abstained from performing an act in which he or she was obligated to perform.

51. Whether these provisions would permit liability to be established where 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 or punish the offence, is uncertain. The Bench considers that it is preferable for the purpose of these motions to proceed on the basis that the law of Bosnia and Herzegovina may not recognise this mode of liability as applicable during the time relevant to the Indictment. The Bench is conscious that an acquittal on this basis cannot be excluded if the Prosecution fails to establish any subjective intent. Given that all current charges against the Accused are based upon individual criminal responsibility under Article 7(1) of the Statute of the Tribunal, with criminal responsibility pursuant to Article 7(3) charged in the alternative, the Referral Bench does not regard this limitation as an obstacle to the referral proposed by the Motion. Given the factual circumstances alleged in the present case, the Chamber does not regard this possible and marginal difference between the law applied by the Tribunal and the law of Bosnia and Herzegovina as an obstacle to the referral proposed by the Motion.

3. Conclusion

52. In summary, Article 4(1) of the BiH CC would suggest that the SFRY CC, as it was in force in the charged timeframe of 1992 to 1994, would be applied to each of the alleged criminal acts of the Accused should this case be referred. The submissions this Bench has received canvass the possibilities, however, that in respect of some or all of the alleged criminal acts of the Accused, other provisions of the BiH CC or general principles of international law might be applied pursuant to Articles 4(2) and 4a respectively of the BiH CC. Should this case be referred, it will be for the State Court of Bosnia and Herzegovina to determine the law applicable to each of the alleged criminal acts of the Accused. Nevertheless, this Referral Bench has been able to satisfy itself, for

reasons already discussed, that whichever of the possible alternatives is held by the State Court to apply, there are appropriate provisions to address most, if not all, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure.[101]

D. Non-Imposition of the Death Penalty

53. Rule 11 *bis* (B) requires that the Referral Bench be satisfied that the death penalty will not be imposed or carried out if a case is to be referred.

1. Submissions of the Parties

54. Neither party submits that the death penalty would be imposed or carried out if the case were referred.

2. Discussion

55. 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, on 7 July 2003, Bosnia and Herzegovina ratified Protocol 13 to the ECHR, abolishing the death penalty in all circumstances. The Protocol entered into force for Bosnia and Herzegovina on 29 July 2003.

3. Conclusion

56. The Referral Bench is satisfied that if the law in effect at the time of the offences is applicable, imposition of the death penalty would nonetheless be precluded as contrary to Protocol 13 to the ECHR.

E. Fair Trial

57. Rule 11 *bis* (B) requires that the Referral Bench be satisfied that an accused will receive a fair trial if a case is to be referred.

[101] *See infra* para. 55, the discussion regarding non-imposition of the death penalty.

1. Submissions of the Parties

58. The Prosecution submits that it appears Bosnia and Herzegovina will provide all necessary legal and technical requirements for a fair trial, and that the Government has continued to make efforts to address matters raised at earlier motion hearings under Rule 11 *bis* in order to ensure a fair trial for those accused whose cases are referred by the Bench.[102]

59. The Todović and Rasević Defence both raised issues with regard to whether the Accused would receive a fair trial in Bosnia and Herzegovina if the case is referred. The identified areas of concern involve the right of the Accused to have adequate time and facilities for the preparation of his defence, detention, the right to counsel of his own choosing, the right to be present and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, and the right to be tried without undue delay.[103] As these matters are given some prominence in the submissions of the Defence, they will be addressed separately below. Where submissions were made by either the Prosecution or the Government of Bosnia and Herzegovina related to one of these areas of concern, they will be referred to immediately following the Defence submissions.

60. The submissions of Bosnia and Herzegovina in their entirety in both this case and the case of *Prosecutor v. Stanković*[104] will be considered. Their effect is that legislative and administrative measures now in place would ensure a fair trial if the case is referred.

[102] *Todović* Motion for Referral, para. 26; *Rašević* Motion for Referral, para. 26; Motion Hearing, T.153-T.154.
[103] *Todović* Defence Submissions, paras 78-93; Motion Hearing, T.117-T.131. No issue was raised by the Defence,, either within the context of a fair trial or otherwise, challenging the authority of the Referral Bench to order referral to a State other than that from which the Accused was arrested or surrendered. This would seem to concern only the Accused Rašević, as he surrendered from Serbia and Montenegro. The Todović Defence, however, requested the Referral Bench consider the Accused's expectations that he would be tried at the Tribunal when he surrendered from Republika Srpska. The Referral Bench need not elaborate on the issue, but is satisfied that it has the authority to refer a case to a State, other than the one from which an accused surrendered to the Tribunal, which meets the Rule 11 *bis* criteria.
[104] *Supra* note 80.

(a) Adequate Time and Facilities for Preparation a Defence

61. The Defence submits that the time and facilities for preparation of a Defence, as envisaged by the current legislation in Bosnia and Herzegovina, are inadequate.[105] Specifically, Article 229(4) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter "BiH CPC"),[106] which is to be applied by the State Court of Bosnia and Herzegovina, is cited as the basis for the submission that inadequate preparation time would be allowed. The Defence contends that this provision allows for only 60 days or, exceptionally, 90 days to prepare for trial. It is argued that such time is inadequate in light of the allegations against the Accused and the fact that the Defence at the time of the submissions has either not received or not reviewed all the material deemed relevant to the defence. It is further argued that the Defence is unaware what means will be at its disposal for communication with the Accused during detention awaiting trial in Bosnia and Herzegovina. The additional point is raised that uncertainties in the legislation of Bosnia and Herzegovina regarding composition and funding of the Defence team may adversely affect the ability of the Defence to prepare for trial.

62. The Government of Bosnia and Herzegovina was not requested to make specific submissions in regard to this matter, since the issues first arose in the Todović Defence submissions, filed simultaneously. However, in regard to Defence Counsel communication with the Accused during detention awaiting trial, the Government of Bosnia and Herzegovina had previously noted that the Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention, and other Measures (hereinafter "BIH Law on Detention")[107] regulates the operation of the detention facility in accordance with State, European, and international standards, to include providing detainees with the means of having confidential communications with counsel.[108]

[105] *Todović* Defence Submissions, paras 82-86.
[106] Official Gazette of Bosnia and Herzegovina, No. 36/03, 26/04, 63/04, 13/05.
[107] Official Gazette of Bosnia and Herzegovina, No. 13/05.
[108] BiH First Submissions/*Stanković*, p. 4.

(b) Detention

63. Somewhat related, but on the periphery of any fair trial issue, is the concern expressed by the Todović Defence in a private session in the Motion Hearing that individuals who may be employed or imprisoned at the detention facility might wish to retaliate against the Accused if he is detained there awaiting trial.[109]

(c) Right to Counsel of Accused's Own Choosing

64. The Defence submits that the present counsel may not be allowed to continue representation of the Accused if the case is referred to the authorities of Bosnia and Herzegovina.[110] The basis for the submission is that legislation of Bosnia and Herzegovina only permits counsel licensed to practice in the State to appear before the State Court, unless the State Court allows otherwise in its discretion. Present counsel are not licensed to practice in Bosnia and Herzegovina, but rather in Serbia and Montenegro. If the Accused have not retained their own defence counsel, they are entitled to choose one from a list provided by the State Court, and if they do not, then the State Court will appoint counsel for them. The present counsel are also not on the State Court's list of counsel. Finally, the Defence submits that the State Court of Bosnia and Herzegovina does not have in place a system for remuneration of counsel, and thus referral of the case would prevent the Accused from having effective use of appointed counsel.

65. The Government of Bosnia and Herzegovina submits that whether counsel presently retained may continue to represent the Accused if the case is referred rests in the discretion of the State Court. Although Article 12(1) of the Law on the Court of Bosnia and Herzegovina (hereinafter "BiH Law on the State Court")[111] provides that "to appear or practice before the Court, an attorney must be licensed to practice by an authority in Bosnia and Herzegovina which has been

[109] Motion Hearing, T.122-T.123.
[110] *Todović* Defence Submissions, paras 69-74; *Rašević* Defence Submissions, paras 27-29; Motion Hearing T.128-T.129. *See also* IT-02-65-PT, *Prosecutor v. Mejakić et al.*, Joint Supplemental Submission by the Defense Teams of All the Named Accused in Opposition of the Prosecution's Motions under Rule 11 *bis*, 18 Mar 2005, paras 7-17; and Further Supplemental Response Made Jointly on Behalf of All Accused in Opposition to the Prosecution's Submission Pursuant to Rule 11 *bis*, 31 Mar 2005, paras 35-40.

recognised by the Court," Article 12(2) allows the Court to specially admit attorneys who do not fulfil this requirement.[112] Further, Bosnia and Herzegovina submits that it has a system in place guaranteeing legal representation to indigent defendants. The BiH CPC provides that an accused must have counsel, for example, after an indictment has been brought for a criminal offence for which a prison sentence of ten years or more may be pronounced. If an accused does not retain defence counsel, he is entitled to choose one from a list provided by the State Court.[113] The Government also submits that the Registry of the State Court has in place a unit designed to support defence counsel in the area of legal research and training, and a budget has been reserved for remuneration of defence counsel.[114] Finally, the Government submits a Council of Ministers Decision on Compensation of the Costs of Criminal Proceedings[115] which regulates the manner of reimbursement of the costs of criminal proceedings, including remuneration of assigned counsel, before the State Court.[116]

(d) Right to Attend Trial and Examine Witnesses

66. The Defence submits that the legislation of Bosnia and Herzegovina provides "limitations to the Accused's presence in the courtroom during the trial, exceptions from the imminent presentation of evidence, the possibility of retaining personal details of a witness as confidential for as long as thirty years after the decision has become final, and various limitations surrounding the witness protection hearing […] in direct contravention of the Accused's basic rights to attend his trial and to examine or have examined the witnesses against them."[117]

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[111] Official Gazette of Bosnia and Herzegovina, No. 16/02, 42.03, 9/04, 4/04, 35/04, 61/04.
[112] BiH First Submissions/*Stanković*, p. 13.
[113] BiH CPC, Art. 45.
[114] BiH First Submissions/*Stanković*, Annex D4627-D4619.
[115] Council of Ministers of Bosnia and Herzegovina Decision on Compensation of the Costs of Criminal Proceedings, 15 Feb 2005, in BiH Further Submissions. The Todović Defence responded to this submission (*Todović* Defence Reponse to BiH Further Submissions) contending that the Decision was in fact only a proposal, and that it does provide for a fair trial because it relates to remuneration of one counsel only, does not provide for remuneration for case preparation, and does not provide for a daily subsistence allowance for defence counsel.
[116] *Id*. at Arts. 1 and 2.
[117] *Todović* Defence Submissions, paras 88-90. The Defence invites the Bench's attention to Arts. 10, 11, 13, 14, 15, and 19-23 of the Law on Protection of Vulnerable Witnesses and Witnesses under Threat, Official Gazette of Bosnia and Herzegovina, no. 21/03, 61/04. *See infra* para. 90.

(e) Witness Availability

67. The Defence submits that potential witnesses from within Bosnia and Herzegovina would be reluctant to testify before the State Court of Bosnia and Herzegovina out of a fear of arrest or prosecution, as they are individuals from the structures of the KP Dom, the Ministry of Justice, and from the military and police resident in Republika Srpska.[118] The Defence further submits that the present level of mutual assistance in criminal matters, or claimed lack thereof, between Bosnia and Herzegovina and Serbia and Montenegro (where, according to the Defence, a considerable number of potential Defence witnesses are presumed to reside) does not facilitate a fair trial. The expressed concern is that the authorities of Serbia and Montenegro have no legal means of compelling a witness residing in its State to cooperate with the State Court of Bosnia and Herzegovina.[119]

68. The Government of Bosnia and Herzegovina submits that the arrest warrants issued by the State Court may be executed anywhere in the territory of Bosnia and Herzegovina, whether in the Federation of Bosnia and Herzegovina, Republika Srpska, or the District of Brčko. A defence witness from Republika Srpska, for example, would not be exempt from arrest should a lawful warrant exist.[120] Further, witness testimony is obligatory when summoned by the Court, and refusal to appear or justify one's absence may result in apprehension.[121] As to potential witnesses who reside outside of Bosnia and Herzegovina, the Government submits that it has ratified the European Convention on Mutual Assistance in Criminal Matters (hereinafter "ECMACM") and intends to fully comply with it.[122]

(f) Trial Without Undue Delay

69. The Defence submits that the case will inevitably be delayed if it is referred, and specifically, that voluminous material from the *Prosecutor v. Krnojelac* case will in all likelihood

[118] *Todović* Defence Submissions, para. 54; Motion Hearing, T.118-T.121, T.130.
[119] *Todović* Defence Submissions, paras 57-64; *Rašević* Defence Submissions, para. 25; Motion Hearing, T.118-T.121, T.130.
[120] BiH Second Submissions/*Stanković*, paras 1-5.
[121] *Id*. at para. 9.
[122] Motion Hearing, T.148-T.149.

be relevant to proceedings against the Accused, and review of that material will be time-consuming, especially as it is in the English language which the Accused do not speak.[123]

70. Insofar as trial without undue delay is concerned, the Prosecution submits that it has specific administrative arrangements in place which are directed to ensuring the transition of a referred case in a smooth and efficient manner. Should a referral order be made in this case, all appropriate material (background material, pre-trial brief, witness and exhibit lists, and documentary and demonstrable exhibits) will be provided to the authorities of Bosnia and Herzegovina.[124]

71. The Government of Bosnia and Herzegovina submits that the right to trial without undue delay is guaranteed by Article 13 of the BiH CPC, thus binding the State Prosecutor to adapt, and the State Court to review, the Indictment as soon as reasonably practicable. In addition, under BiH law, the Accused must be released from custody if no indictment is brought or confirmed within six months. Following confirmation of the Indictment, the Accused may only be kept in custody for one year before a first instance verdict is pronounced. If the first instance trial does not result in a verdict during that period, the Accused must be released from custody.[125]

2. Discussion

(a) Fair Trial -- Generally

72. The Referral Bench considers that, for present purposes, it can be accepted that the requirement of a fair criminal trial includes the following[126]:

> 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.

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[123] *Todović* Defence Submissions, paras 91-93; Motion Hearing, T.127-T.128.
[124] Prosecution's Second Submissions, para. 23.
[125] BiH First Submissions/*Stanković*, p. 14, *citing* BiH CPC, Arts. 135 and 137(2); Motion Hearing/ *Stanković*, T.241.
[126] *See, e.g.*, Statute of the Tribunal, Art. 21; International Covenant on Civil and Political Rights (1966), Art. 14; ECHR (1950), Art. 6.

> 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 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.

73. In comparing these requirements of a fair trial with those provided under the laws of Bosnia and Herzegovina, the Constitution of Bosnia and Herzegovina (hereinafter "BiH Constitution") provides a foundation. Article II in particular guarantees the right to a fair hearing in criminal matters, and other rights relating to criminal proceedings.[127] The enjoyment of these rights are secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[128]

74. In furtherance of the guarantees provided in the BiH Constitution, the BiH CPC makes the following more detailed provisions.

75. Article 234(1) of the BiH CPC provides the right of an accused to a public hearing.

76. Article 3(1) of the BiH CPC and Article 33 of the BiH Law on the State Court codify the presumption of innocence of an accused.

77. Articles 5(1), 6(1), 8, and 78(2)(e) of the BiH CPC and Articles 9 and 34(3) of the BiH Law on the State Court provide that a suspect, on first questioning, must be informed about the charged offences and grounds for suspicion. This includes the right to use one's own language and have assistance with interpretation at no cost.

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[127] BiH Constitution, Art. II.3(e).
[128] *Id.* at Art. II.4.

78. Articles 7, 39(1), 46, 48(1), and 78(2)(b) of the BiH CPC and Articles 34(2),(3) of the BiH Law on the State Court provide the right to a defence attorney of one's own choosing and require that an accused be given sufficient time to prepare a defence. If deprived of liberty, a suspect has the right to request appointment of defence counsel if unable to bear the costs due to financial circumstances. Law enforcement officials have a duty to inform a suspect of these rights to counsel.

79. Article 13 of the BiH CPC guarantees the right to be brought before the Court in the shortest reasonable time period and to be tried without delay.

80. Articles 7, 236(1) and 242(2) of the BiH CPC provide for the right of an accused to present his own defence and be tried in his presence.

81. Article 78(2)(a) of the BiH CPC and Article 34(4) and of the BiH Law on the State Court forbid a compelled confession or any other compelled statement from a suspect or accused.

82. Articles 78(2)(d), 259, and 261(1) of the BiH CC provide that an accused has a right to present favourable witnesses and evidence, and examine or have examined witnesses against him.

83. Furthermore, Bosnia and Herzegovina is bound as a party by the ECHR, of which Article 6 in particular guarantees a fair trial and independent and impartial tribunal established by law.

84. 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, [129] a provision which may be given enhanced effectiveness by conditions imposed on the Prosecutor 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 of Procedure and Evidence.[130] This monitoring mechanism enables a measure of continuing oversight over trial proceedings should a case be referred.[131]

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[129] Rule 11 *bis* (D)(iv).
[130] Rule 11 *bis* (F).
[131] The monitoring mechanism is discussed in more detail, *infra* paras. 107-111.

(b) Adequate Time and Facilities for Preparation of a Defence

85. The Defence submission that the legislation in Bosnia and Herzegovina does not allow adequate time to prepare for trial must be evaluated beyond the mere recitation of Article 229(4) of the BiH CPC, which the Defence contends allows for only 60 days or, exceptionally, 90 days to prepare for trial. First, it must be noted that Article 229(4) concerns referral of a case from the preliminary hearing judge in the State Court to the Panel assigned to try the case so that trial can be scheduled no later than sixty days from the day when a plea is entered by an accused. Preparation for trial need not wait until the day a plea is entered; it can and should begin earlier. Secondly, and more importantly, the timelines referenced in Article 229(4), must be considered within the context of the guarantee in Article 7 of the BiH CPC that an accused must be given sufficient time to prepare a defence. It is not for the Referral Bench to determine how these provisions will be applied, as this is a matter for the State Court if the case is referred. However, the guarantee of Article 7 fully addresses the contention that the time for preparation of a Defence, as envisaged by the current legislation in Bosnia and Herzegovina, is inadequate.

86. As to the Defence concern with the ability of counsel to communicate with the Accused during detention while awaiting trial in Bosnia and Herzegovina, the legislation of Bosnia and Herzegovina also addresses this. Article 3 of the Law on Detention[132] provides that detainees "shall retain all rights other than those necessarily restricted for the purpose for which they were ordered and in accordance with this Law and international agreements." Article 68(1) specifically permits detainees and prisoners to communicate confidentially with a lawyer of their choice.

(c) Detention

87. With respect to the concern expressed by the Todović Defence that the Accused might be the subject of retaliation if detained in Bosnia and Herzegovina due to his prior position as a prison official, the Referral Bench makes two observations. First, a similar concern no doubt exists

[132] BiH Law on Detention, Art. 3.

whenever a former prison official is to be detained within a State in which he or she has acted in that capacity; however, this does not give rise to some kind of occupational entitlement to be excepted from detention and the other routine elements of the administration of justice. Secondly, the Defence provides no specific details concerning threatened retaliation, but only speculation. This is a matter best left to the authorities of Bosnia and Herzegovina if the case is referred. The Bench is satisfied that Bosnia and Herzegovina has a legal structure in place to ensure that operation of the detention facility is in accordance with international standards.

(d) Right to Counsel of Accused's Own Choosing

88. The right of an Accused to counsel of his or her own choosing is not without limitation, even before this Tribunal.[133] The right to counsel of one's own choosing extends only to counsel who are entitled to appear before the court of trial; the accused must confine his or her choice accordingly. This is so even where an accused engages his or her own counsel. The right to publicly paid counsel of one's own choice is also limited.[134] This does not, however, mean that an indigent accused is without effective representation by counsel. Both the Statute of the ICTY and the BiH CPC provide for assignment of counsel where an accused has insufficient means to pay. Article 7(1) of the BiH CPC provides than an accused "has a right to present his own defence or to defend himself with the professional aid of a defence attorney of his own choice," a right which is reiterated in Article 36(3) of the Law on the State Court. If an accused is charged with a criminal offence for which a prison sentence of ten years or more may be adjudged, then representation by counsel is mandatory in accordance with Article 45(3) of the BiH CPC. If an accused cannot pay for counsel, he or she will be asked to select counsel from a list maintained by the State Court. If

[133] *See* Statute of the Tribunal, Art. 21; and Rules of Procedure and Evidence, Rules 44-46.
[134] IT-95-13/1-PT, *Prosecutor v. Šljivančanin*, President of the Tribunal Decision on Assignment of Defence Counsel, 13 Aug 2003, para. 20; IT-95-4-PT & IT-95-8/1-PT, *Prosecutor v. Knežević et al.*, Trial Chamber Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 Sep 2002, p. 3; IT-02-60-T, *Prosecutor v. Blagojević and Jokić*, Trial Chamber Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-counsel, 3 Jul 2003, paras 74-75; IT-04-74-AR73.1, *Prosecutor v. Prlić et al.*, Appeals Chamber Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 Nov 2004, para. 19; IT-02-65-AR73.1, *Prosecutor v. Mejakić et al.*, Appeals Chamber Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 Oct 2004, para. 8.

no selection is made, one will be appointed by the State Court. [135] This system is similar to the one applied at this Tribunal.

89. The Defence concern that present counsel are not on the list maintained by the State Court, and thus may not be able to continue representation of the Accused if the case is referred is premature, given the provision under the BiH Law on the State Court which permits the special admission of attorneys to appear before it even though not licensed to practice in Bosnia and Herzegovina.[136] It is clear that an avenue exists for the present counsel to continue representation and receive remuneration for their efforts. Even if the present counsel did not continue to represent the Accused in Bosnia and Herzegovina, the Accused would not be denied counsel. Further, if fresh counsel took over the defence, this would not preclude the transfer of case preparation materials from the present counsel to the fresh counsel. A decision by the State Court to deny special admission to the present counsel to appear and practice before it on behalf of the Accused would, of course, be a matter within its discretion, and it is not for the Referral Bench to speculate on the likelihood of such occurrence or to attempt to establish parameters on the lawful exercise of that discretion. The Bench does not expect, however, that the State Court would be unaware of the legal and practical advantages of permitting the present counsel to continue representation if this case is referred and should counsel wish to continue to act for the Accused.

(e) Right to Attend Trial and Examine Witnesses

90. It is submitted that the Accused's right to attend their trial and examine witnesses against them is limited by provisions of the Bosnia and Herzegovina Law on Protection of Vulnerable Witnesses and Witnesses under Threat (hereinafter "BiH Law on Protection of Certain Witnesses").[137] The Referral Bench interprets the Defence submissions as referring to the right of an accused to be tried in his or her presence, rather than a right to attend trial. The Bench has considered the specific provisions to which the Defence, without elaboration, invited attention:

[135] BiH CPC, Art. 45(6).
[136] BiH Law on the State Court, Art. 12(2).

Articles 10-11, 13-15, and 19-23. These provisions concern specific protective measures which may be ordered by the State Court for 1) witnesses whose personal security or the security of their family is endangered through the witnesses' participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to the witnesses' testimony, and 2) witnesses who have been severely physically or mentally traumatised by the events of the offences or who otherwise suffer from a serious mental condition rendering them unusually sensitive, as well as child witnesses.[138] The measures may include, *inter alia*, removal of an accused from the courtroom and measures to provide for anonymity of a witness.[139] Removal of an accused from the courtroom may only occur following a hearing attended by the Defence, and an appeal may be taken from such an order. If ordered, defence counsel remain in the courtroom and the accused is to be enabled to follow the testimony through technical means for transferring images and sounds, or the testimony must be recorded and presented to the accused.[140] For this or any protective measure, as a safeguard, Article 5 of the BiH Law on Protection of Certain Witnesses provides that the State Court shall not order the application of a more severe measure when the same effect can be achieved by application of a less severe measure.

91. The witness protection measures provided by the law of Bosnia and Herzegovina need not be identical to those provided in Rules 69, 75, and 79 of the Rules of Procedure and Evidence of the Tribunal in order to ensure that they do not unfairly impinge upon the rights of an accused to a fair trial. In this case, the safeguards referred to above are in place to ensure that the application of protective measures are carefully considered beforehand and are only ordered after taking into account the views of the defence. This provides a reasonable assurance that a proper balance will be struck between the rights of an accused and the need to protect vulnerable witnesses and witnesses under threat.

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[137] *Supra* note 117.
[138] BiH Law on Protection of Certain Witnesses, Art. 3.
[139] *Id.*, at Arts. 10 and 13.
[140] *Id.* at Art 10.

(f) Witness Availability

92. The issue of witness availability at trial is discussed within the context of an accused's fair trial right 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. Witness availability issues may be resolved by mutual assistance arrangements.

93. Interstate mutual assistance issues arise with respect to promoting the attendance of witnesses or evidence from outside Bosnia and Herzegovina. As the Defence expects that a number of its witnesses reside in Serbia and Montenegro, it is significant that Bosnia and Herzegovina ratified the ECMACM in March 2005.[141] Serbia and Montenegro is also a party to the Convention, so the legal means now exist to facilitate the appearance of witnesses residing in Serbia and Montenegro for trial in Bosnia and Herzegovina, either through travel or by other means such as letters rogatory.

94. For witnesses residing in Bosnia and Herzegovina, including Republika Srpska, attendance to give trial testimony when summoned is obligatory. Efforts to secure the testimony of witnesses by either party may be enforceable by an order of the State Court for compulsory apprehension of a witness, pursuant to Article 81(5) of the BiH CPC and Article 5(1) of the Law on the Judicial Police of Bosnia and Herzegovina.[142] This national direct enforcement mechanism exists without regard to whether the witness is at risk of arrest for personal criminal activity. To the extent that Defence witnesses residing in Bosnia and Herzegovina may fail to appear because of a (perceived) risk of arrest, the issue may be entirely hypothetical. The Defence merely contends that potential witnesses may be reluctant to give evidence if called. In any event, any disadvantage to the Accused by virtue of this national procedure which reflects the generally accepted direct enforcement mechanism for ensuring witness presence cannot be properly regarded as prejudicial to the right to a fair trial.

[141] Official Gazette of Bosnia and Herzegovina, International Agreements, No. 3/05.
[142] Official Gazette of Bosnia and Herzegovina, No. 3/03.

95. The Defence claims a need for safe conduct of witnesses. The claim was made in regard to witnesses from Serbia and Montenegro at a time when the Defence was under the impression that Bosnia and Herzegovina had not ratified the ECMACM.[143] That ratification has removed the basis for this concern. With respect to safe conduct for witnesses from within Bosnia and Herzegovina, the Referral Bench has considered this issue in the *Prosecutor v. Stanković* Decision. It is submitted by the Defence that without safe conduct, a witness could be at risk of arrest. The submission, however, wrongly presumes the applicability of the safe conduct mechanism in the context of witness production within the territorial jurisdiction of a State. Safe conduct is an instrument of international law to secure the presence at trial of a witness who, in order to avoid the risk of arrest for involvement in criminal activity, is reluctant or refuses to appear before a court in a foreign jurisdiction. The foreign court's lack of authority to compel the production of such a witness creates the need for cooperation between the two States concerned, and it is within this context that the safe conduct mechanism contributes to securing the attendance of witnesses at trial. A witness who resides within the jurisdiction of a State, however, is subject to domestic law which may authorise both compulsory witness production and apprehension for failure to appear. An accused may prefer trial in an international forum for the perceived advantage offered in promoting the presence of reluctant witnesses by virtue of the safe conduct mechanism.[144] On the other hand, an accused may prefer trial in a national court where a direct means of enforcing the presence of witnesses is available. No general assessment can be made as to whether one mechanism is more effective than the other. In either situation, the right of an accused to call witnesses on his or her behalf is given effect.

(g) Trial Without Undue Delay

96. First and foremost, statutory safeguards exist under Bosnia and Herzegovina law to protect an accused's right to trial without undue delay. Article 13 of the BiH CC grants an accused the right to be brought before the Court in the shortest reasonable time period and to be tried without

[143] *Todović* Defence Submissions, paras 59-65; Motion Hearing, T.145-T.148.

delay, and requires the duration of custody to be reduced to the shortest time necessary. Furthermore, incentives exist under the law to proceed without undue delay. Article 135 of the BiH CPC provides for release from custody where an indictment has not been brought or confirmed within a maximum of six months after an accused enters into custody. Article 137(2) provides that after confirmation of the indictment, custody may last no longer than one year. If during that period, no first instance verdict is pronounced, the custody shall be terminated and the accused released. Release from custody, however, does not terminate the proceedings against an accused.

97. Secondly, if the case is referred, the proceedings could be continued before the State Court from their current stage, subject only to the potential for some limited delay as the Indictment is adapted. The adaptation of the Indictment is required by the procedure in the BiH Law on the Transfer of Cases.[145] Article 2(1) provides that:

> If the ICTY transfers a case with a confirmed indictment according to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY. The BiH Prosecutor shall adapt the ICTY indictment in order to make it compliant with the BiH Criminal Procedure Code, following which the indictment shall be forwarded to the Court of the BiH. The Court of BiH shall accept the indictment if it ensured that the ICTY indictment has been adequately adapted and that the indictment fulfills the formal requirements of the BiH CPC.

The nature of what is contemplated by this provision suggests that the procedure should not be lengthy.

98. Third, Rule 11 bis (D)(iii) requires the Prosecutor, upon issuance of a referral order by the Bench, to provide to Bosnia and Herzegovina authorities all information relating to the case which the Prosecutor considers appropriate, particularly the material which supports the indictment. Compliance with this rule will require the provision in this case of such information as background material, pre-trial brief, witness and exhibit lists, witness statements, and documentary and demonstrable exhibits. The Referral Bench is aware from proceedings before this Tribunal that this material is to a large extent already disclosed to the Accused. To the extent that any material is in a language which the Accused does not understand – a concern which is raised in connection with the

[144] Even before this Tribunal, the safe conduct mechanism may not eliminate the reluctance of witnesses to appear who fear exposure to risk of prosecution.

issue of adequate time to prepare a defence – then it may result in delay. Such delay, however, could hardly be characterized as undue, and the position would be the same whether or not referral was ordered. It would be for the State Court, if the case is referred, to achieve a balance among any potentially conflicting rights of the Accused asserted by the Defence, such as the right to have adequate time to prepare a defence, the right to be informed of the nature and cause of the charges against him in a language which he understands, and the right to trial without delay.

99. Fourthly, the Defence submission that there may be delay due to a need to review voluminous material from the *Prosecutor v. Krnojelac* case is based on speculation at this point in time. Even if the Defence ultimately determines there is a need to review such materials, the focus of Defence attention would undoubtedly remain on the materials and evidence in the present case against the Accused. In any event, the same concern would arise, if at all, whether the Accused were tried in the Tribunal or in the State Court of Bosnia and Herzegovina.

100. Finally, once proceedings are underway, Article 4 of the BiH Law on the Transfer of Cases provides the Court with discretionary means to expedite the form of the evidence, either, by accepting as proven facts which have been established by legally binding decisions of the Tribunal, or, by accepting relevant documentary evidence from proceedings before this Tribunal.

101. It has not been shown that any possible delay as a consequence of referral would be of such nature or extent as to outweigh the propriety of referral action. Any delay resulting from referral cannot properly be viewed as undue, unreasonable, or unnecessary. Indeed, referral may well result in the case being brought to trial sooner than would have been possible if the case were to remain with the Tribunal.

3. Conclusion

102. The Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirement

[145] *Supra* note 67.

for a fair trial. As to the specific areas of concern raised by the Defence, the Referral Bench is not persuaded that any of the matters contained therein would result in the denial of a fair trial to the Accused if this case is to be referred. The Bench also observes that provision is made in Rule 11 *bis* for a system to allow 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 not, a referral order may be revoked by this Tribunal.

F. Witness Protection

1. Submissions of the Parties

103. In the event that referral is ordered, the Prosecution requests the Referral Bench to order that the protective measures granted to victims and witnesses as set forth in the confidential Annex VI of the *Todović* Motion for Referral and confidential Annex IV of the *Rašević* Motion for Referral apply and remain in force, pursuant to Rule 11 *bis* (D)(ii).[146]

104. As to protective measures expected to be needed for Defence witnesses, none are specifically identified. The Rašević Defence requests that the measures be the same as those before the Tribunal if possible, but no individuals are identified.[147] The Todović Defence refers to "individuals from the structures of the Foča KP Dom, the Ministry of Justice and from the police and military structures," but within the context of witness availability and fair trial already discussed, in other words, that such individuals would be reluctant to testify for fear of arrest or prosecution.[148] Neither Defence opposes the Prosecution request.

2. Discussion

105. The issue of witness protection, unlike that of witness availability, does not arise directly within the context of an accused's right to a fair trial. It may, however, be viewed as having an indirect relevance by promoting the presence of witnesses at trial through assurances that legal

[146] *Todović* Motion for Referral, paras 35-37; *Rašević* Motion for Referral, paras 32-34.
[147] *Rašević* Defence Submissions, para 24.
[148] *Todović* Defence Submissions, paras 53-56.

measures exist for their protection. Rule 11 *bis* (D)(ii) provides that the Referral Bench may order existing protective measures for certain witnesses or victims to remain in force. Bosnia and Herzegovina law has provision for witness protection, as discussed earlier,[149] and pursuant to Article 267(4) of the BiH CPC, either party may request an order for such protective measures. The issue of protective measures for Defence witnesses is raised prematurely and on a conjectural basis. It is a matter within the competence of the State Court, if referral is ordered, as there are adequate powers available to that court to deal with such issues.

3. Conclusion

106. The Referral Bench has no grounds to believe that the need for protection of those witnesses in respect of whom orders were already issued has been subject to any change, and therefore finds it appropriate to order the continuation of the protective orders which are the subject of the Prosecution's request. The Referral Bench further concludes that no matters of witness protection have been identified or submitted which preclude referral of this case.

G. Monitoring of Proceedings

1. Submissions of the Parties

107. The Defence submits that, if the case is referred, observers sent by the Prosecutor to monitor the proceedings in the State Court of Bosnia and Herzegovina would not be an appropriate and sufficient means of monitoring the fairness of those proceedings.[150]

108. The Prosecutor made no further submissions as to this matter in the present case, but at the time of submissions in the *Stankovic* case, was in the course of negotiating an agreement with the

[149] *Supra* paras 90-91. *See also* the Witness Protection Programme Law of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina 29/04, which provides for protective measures outside the courtroom, such as change of identity or issuance of cover documents.
[150] *Todović* Defence Submissions, paras 75-77; *Rašević* Defence Submissions, para 30.

Organization for Security and Cooperation in Europe (hereinafter "OSCE") for the monitoring of and reporting on the trial proceedings of a referred case.[151]

109. It is the understanding of the Referral Bench that following the hearing in this case, the Prosecution entered into an arrangement with the OSCE with respect to the monitoring and reporting function, and the Bench will proceed upon that assumption.[152]

2. Discussion

110. 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. 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 Prosecutor may send observers to monitor the proceedings in the national courts on her behalf. Further, Rule 11 *bis* (F) enables the Referral Bench, at the request of the Prosecutor, 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 provision to enable the re-transfer of an accused to the seat of this Tribunal in The Hague.

111. It is submitted that monitoring by the Prosecutor may be inadequate to ensure that difficulties experienced by the Defence following the referral of the case are properly appreciated for the purposes of these Rules. There is some apparent force in this submission. It appears to be met by the proposal which the Prosecutor has put to the Referral Bench, namely for the monitoring of and reporting on the trial proceedings of a referred case by OSCE, as the Referral Bench understands that arrangements have been made with between the Prosecution and the OSCE for these purposes. The standing of the OSCE and the neutrality of its approach ought to ensure that

[151] Prosecution's Second Submissions/*Stankovic*, para. 24.
[152] PC.DEC/673, *Co-operation Between the Organization for Security and Co-operation in Europe and the International Criminal Tribunal for the Former Yugoslavia*, OSCE, 556th Plenary Meeting, 19 May 2005.

reports it provides will adequately reflect Defence as well as Prosecution issues. Attention to the procedures for monitoring and reporting is a means by which the Referral Bench may be better assured that the Accused will receive a fair trial.

3. Conclusion

112. On the assumption that monitoring of the trial of this case, if referred, would be undertaken by the OSCE or a similar organisation by arrangement with the Prosecutor, the Referral Bench has no need at this stage to further consider the aspect of the submission concerning impartial and adequate monitoring of this case.

VI. CONCLUSION

113. 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 on the information presently available that the Accused should receive a fair trial and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of the case of *Prosecutor v. Savo Todović and Mitar Rašević* to the authorities of Bosnia and Herzegovina should be ordered.

VII. DISPOSITION

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

PURSUANT to Rules 11 *bis* of the Rules;

ORDERS the case of *Prosecutor v. Savo Todović and Mitar Rašević* to 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 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 the case. It will be for the State Court or the competent national authorities of Bosnia and Herzegovina to determine whether different provision should be made for the purposes of the trial of this case in Bosnia and Herzegovina.

ORDERS the Registrar to arrange for transport 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 the 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 other 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 set forth in the confidential Annex I (confidential Annex VI of the *Todović* Motion for Referral) and the confidential Annex II (confidential Annex IV of the *Rašević* Motion for Referral) to remain in force.

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

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Judge Alphons Orie, Presiding

Dated this 8th day of July, 2005
At The Hague,
The Netherlands

[Seal of the Tribunal]

ANNEX I

Confidential

ANNEX II

Confidential