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RULE 11 *BIS* OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: REFERRAL OF INDICTMENTS TO NATIONAL COURTS

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Abstract: The United Nations Security Council created the International Criminal Tribunal for the Former Yugoslavia in an effort to restore peace and security to the region. The Tribunal is an *ad hoc* institution and has a limited existence. A Completion Strategy was established by the U.N. Security Council to bring the work of the Tribunal to a conclusion. An important aspect of this Completion Strategy is the use of Rule 11 *bis* to transfer certain cases from the Tribunal to national courts. This article looks at the background, process, and judicial determination of Rule 11 *bis* requests.

I. BACKGROUND TO RULE 11 *BIS*¹ PROCEEDINGS

All cases indicted by the International Criminal Tribunal for the Former Yugoslavia (ICTY) are by definition serious violations of international humanitarian law.² The Tribunal's status as an *ad hoc* institution established by the U.N. Security Council³ pursuant to Chapter VII,⁴ as a measure aimed at the restoration of peace and security to

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¹ Int'l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Rules of Procedure and Evidence*, at 8-9, ICTY Doc. II/32/Rev. 39 (Sept. 22, 2006), available at <http://www.un.org/icty/legaldoc-e/index.htm> (Rule 11 *bis*, Referral of the Indictment to Another Court) [hereinafter R. P. & EVID.].

² As reflected in the official title of the Tribunal, as set forth in footnote 1, and established by authorizing resolution. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

³ *Id.*

⁴ *Id.*; see Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 40 (Oct. 2, 1995) ("[T]he Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under

the region, therefore has a finite existence. A Completion Strategy—a schedule—was put in place with targeted deadlines for the discharge of the various stages of the Tribunal’s mandate.⁵ Requests under Rule 11 *bis* to transfer certain cases indicted at the Tribunal to national courts offer one means of furthering implementation of the Completion Strategy.

A. *The Process of Winding Down*

Security Council Resolutions 1503 and 1534 direct the ICTY to concentrate on the prosecution of the senior leaders under indictment⁶ and to refer the indictments of lower and intermediate level accused to national courts.⁷

The selection by the Prosecutor for referral of cases does not minimize the seriousness of the crimes, but rather reflects the reality of the time limits. This requires determination of cases in which the level of the accused, i.e. lower or intermediate, and the gravity of the crimes alleged do not *demand* that the case be tried before the Tribunal.⁸

B. *A Retreat from Primacy*

Referral under Rule 11 *bis* represents a retreat from the Tribunal’s exercise of primacy as to certain cases for which it had already confir-

Chapter VII of the Charter.”); *see also id.* ¶ 36 (“In sum, the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”).

⁵ *See* S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (“Calls on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies)”); *see also* S.C. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000) (initiating steps toward determining the temporal existence of the ICTY).

⁶ *See* S.C. Res. 1503, *supra* note 5, pmb. (“Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial 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, as well as the strengthening of the capacity of such jurisdictions”).

⁷ S.C. Res. 1534, ¶ 6, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

⁸ Prosecutor v. Rajic, Case No. IT-95-12-PT, Prosecutor’s Further Submissions Pursuant to Referral Bench’s Decision of 8 September 2005, ¶ 4 (filed on Sept. 14, 2005) (“While these crimes are serious, the Prosecutor submits that they do not *demand* to be tried at the International Tribunal, and that the gravity is compatible with referral.”).

med an indictment.⁹ The Appeals Chamber stated, “It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region.”¹⁰

At this stage of the Tribunal’s existence, the decision by the ICTY not to assert primacy with respect to indictments meeting the criteria of Rule 11 *bis*, but rather to affirmatively allow for the exercise of concurrent jurisdiction through referral to national courts, is key to meeting the Completion Strategy. This helps to ensure that those persons indicted by the ICTY for serious violations of international humanitarian law whose cases are not incompatible with referral will be brought to justice before the appropriate national court, notwithstanding the time constraints of the Completion Strategy.

II. RULE 11 *BIS* PROCEEDINGS

Rule 11 *bis* (A) provides that case referrals must be made after an indictment has been confirmed, but prior to the commencement of trial. Even accused whose cases have been before the Tribunal and have already progressed into the pre-trial stage may be the subject of a referral. The panel of Judges who decide whether to refer under Rule 11 *bis* is called the Referral Bench, consisting of three Permanent Judges from the Trial Chambers.¹¹ The Referral Bench exclusively determines Rule 11 *bis* requests, which may be pending simultaneously with proceedings in a Trial Chamber.¹² The Trial Chambers, however, have tended to continue to adjudicate certain issues, such as amendment of the indictment¹³ or provisional release.¹⁴

⁹ Article 9 of the Statute of the Tribunal confirms concurrent subject matter jurisdiction with national courts, however, paragraph 2 expressly states that the Tribunal “shall have primacy over national courts . . . and may formally request national courts to defer to the competence of the International Tribunal . . .” Int’l Criminal Trib. for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, art. 9, available at <http://www.un.org/icty/legaldoc-e/index.htm>. Requests for deferral are found in Rules 9 and 10. See R. P. & EVID., *supra* note 1, at 6–7.

¹⁰ Prosecutor v. Stankovic, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11 *bis* Referral, ¶ 14 (Sept. 1, 2005).

¹¹ R. P. & EVID., *supra* note 1, at 8 (Rule 11 *bis* (A)).

¹² See *id.*

¹³ See Prosecutor v. Todovic, Case No. 97–25/1-AR11*bis*.1, Decision on Rule 11 *bis* Referral (Feb. 23, 2006) (co-accused Rasevic did not appeal).

¹⁴ Prosecutor v. Mrksic et al., Case No. IT-95-13/1-PT, Decision on Defence Motion for Provisional Release (Mar. 9, 2005). In paragraph 15 the Trial Chamber discussed the relevance of the pending request for referral with respect to provisional release, stating that

Rule 11 *bis* (B) provides that referral may be initiated either *proprio motu* by the Referral Bench, or at the request of the Prosecutor.¹⁵ Neither an accused nor a state has the *locus standi* to file a formal request to refer a case to that state.¹⁶ The cases which have been the subject of requests for referral are: *Prosecutor v. Radovan Stankovic* (to Bosnia and Herzegovina [BiH]);¹⁷ *Prosecutor v. Mitar Rasevic and Savo Todovic* (to BiH);¹⁸ *Prosecutor v. Zeljko Mejacic et al.*, (to BiH);¹⁹ *Prosecutor v. Mile Mrksic et al.*, (to Serbia and Montenegro or Croatia);²⁰ *Prosecutor v. Rahim Ademi and Mirko Norac* (to Croatia);²¹ *Prosecutor v. Ivica Rajic* (to BiH);²² *Prosecutor v. Dragomir Milosevic* (to BiH);²³ *Prosecutor v. Gojko Jankovic* (to BiH);²⁴ *Prosecutor v. Pasko Ljubicic* (to BiH);²⁵ *Prosecutor v. Milan Lukic and Sredoje Lukic* (to BiH);²⁶ *Prosecutor v. Vladimir Kovacevic* (to

while not a new factor, “its relevance may well be to aggravate the risk that the Accused will not appear for trial.” *Id.*

¹⁵ R. P. & EVID., *supra* note 1, at 8. There is no provision in the Rule for an accused to initiate referral.

¹⁶ *Prosecutor v. Jankovic*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11 *bis* Referral, ¶ 32 (Nov. 15, 2005).

¹⁷ Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11 *bis* Referral (Sept. 1, 2005) (referral to BiH was ordered).

¹⁸ Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 9 (July 22, 2005).

¹⁹ Case No. IT-02-65-PT, Decision on Prosecutor’s Motion For Referral of Case Pursuant to Rule 11 *bis*, ¶ 137 (July 20, 2005) (referral to BiH was ordered).

²⁰ Case No. IT-95-13/1-PT, Decision on Prosecutor’s Motion To Withdraw Motion and Request for Referral of Indictment Under Rule 11 *bis* (June 30, 2005). The Prosecutor’s Motion to Withdraw Motion and Request for Referral of Indictment Under Rule 11 *bis* was granted. The case remained before the Tribunal.

²¹ Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis* (Sept. 14, 2005) (referral to Croatia ordered).

²² The accused pleaded guilty before the Trial Chamber and the Rule 11 *bis* request was withdrawn once sentencing occurred. *See* Case No. IT-95-12-S, Sentencing Judgement (May 8, 2006); Case No. IT-95-12-PT, Decision for Further Information in the Context of the Prosecutor’s Motion for Referral of the Case Under Rule 11 *bis* (Sept. 8, 2005).

²³ Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 24 (July 8, 2005) (referral was denied and the case remained before the Tribunal).

²⁴ Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis* (July 22, 2005).

²⁵ Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 53 (Apr. 12, 2006) (referral to BiH ordered).

²⁶ Case No. IT-98-32-I, Decision on Prosecutor’s Motion to Suspend Consideration of Rule 11 *bis* Request (Dec. 15, 2005) (suspending consideration of the request until Milan Lukic has been transferred to the seat of the Tribunal).

Serbia and Montenegro);²⁷ *Prosecutor v. Dragan Zelenovic* (to BiH) (co-accused with *Jankovic*);²⁸ and *Prosecutor v. Milorad Trbic* (to BiH).²⁹

Pursuant to Rule 11 *bis* (I), an appeal by the accused or the Prosecutor lies as a matter of right from a decision granting or denying referral. Rule 11 *bis* proceedings form a unique aspect of the practice before the Tribunal. Consequently, it was necessary to establish time limits for appeals, which the Appeals Chamber proceeded to do in the *Stankovic* case.³⁰ The Appeals Chamber described an appeal from a Rule 11 *bis* decision as “more akin to an interlocutory appeal.”³¹ Accordingly, the relevant time limits for appeals under Rule 11 *bis* (I) require that notice of appeal must be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced. Fifteen days after filing the notice of appeal, the appellant must file his brief. A party will have ten days to respond to the appeal brief and four days in which to reply to the response briefs.³² Appeals of Rule 11 *bis* decisions come under the Expedited Appeals Procedure.

A. *Judicial Determination of Rule 11 bis Requests*

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

Under Rule 11 *bis* (C), the Referral Bench shall consider both the gravity of the crimes charged and the level of the responsibility of the accused. This assessment must be made along with a determination that there are sufficient indicators to satisfy the Referral Bench that the accused will receive a fair trial in the state designated for referral and that the death penalty will not be imposed or carried out, in accordance with Rule 11 *bis* (B). The Referral Bench “will consider only

²⁷ Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 92 (Nov. 17, 2006). Following the recent independence of Montenegro, the case has been referred solely to Serbia.

²⁸ As of publication, the accused has plead guilty before the Tribunal. Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 105 (July 22, 2005).

²⁹ Case Information Sheet, Milorad Trbic, at 3, available at <http://www.un.org/icty/cases-e/cis/trbic/cis-trbic.pdf> (decision by Referral Bench pending).

³⁰ *Prosecutor v. Stankovic*, Case No. IT-96-23/2-AR11*bis*.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, ¶ 12 (June 9, 2005) (“Because this is the first appeal from a decision by the Referral Bench, it necessarily involves some novel procedural issues with regard to the appropriate briefing schedule to be followed.”).

³¹ *Id.* ¶ 16.

³² *Id.* ¶ 18.

those facts alleged in the Indictment”³³ and no additional factual determinations are made as to the allegations in the Indictment.

Referral is aimed at lower and intermediate level accused. A determination of the characterization of the level, however, is made in the context of a particular case and set of facts. For example, while the *Ademi-Norac* case involved two generals, the Referral Bench stated that “the level of responsibility should be interpreted to include both the *military rank* of the Accused and their *actual role* in the commission of the crimes.”³⁴ The Referral Bench further stated that “[w]hether or not the gravity of these particular crimes is so serious as to demand trial before the Tribunal, however, depends on the circumstances and context in which the crimes were committed and must also be viewed in the context of the other cases tried by this Tribunal.”³⁵ The Appeals Chamber has stated that, “Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it.”³⁶ Further:

The Referral Bench . . . considers that individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the “most senior”, rather than “intermediate”.³⁷

Following a determination by the Referral Bench that the gravity of the crimes alleged and the level of responsibility of the accused are compatible with referral, it must then determine the state to which the case should be referred. In determining the appropriate state for refer-

³³ Prosecutor v. Stankovic, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 18 (May 17, 2005); *see also* Prosecutor v. Mejjakic et al., Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 20 (July 20, 2005).

³⁴ Prosecutor v. Ademi and Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 29 (Sept. 14, 2005).

³⁵ *Id.* ¶ 28.

³⁶ Prosecutor v. Mejjakic, Case No. IT-02-65-AR11*bis*, Decision on Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 24 (Apr. 7, 2006).

³⁷ Prosecutor v. Milosevic, Case No. IT-98-29/1-PT, Decision on Referral of a Case Pursuant to Rule 11 *bis*, ¶ 22 (July 8, 2005). The Referral Bench denied referral in this case, involving a commander with the rank of general, who was charged with crimes occurring in the course of his 15-month command during the siege of Sarajevo.

ral, the Referral Bench relies on the greater nexus analysis.³⁸ Rule 11 *bis* (A) provides for referral to the authorities of a State: (i) in whose territory the crime was committed; (ii) in which the accused was arrested; or (iii) which has jurisdiction and is willing and adequately prepared to accept such a case.³⁹ The Referral Bench has rejected the notion that the options for referral listed in Rule 11 *bis* (A) reflect a hierarchy.⁴⁰

The Referral Bench is not bound by the state designated by the Prosecutor; it may *proprio motu* decide to refer to other states.⁴¹ Further, citizenship has not been deemed to have a “significant relevance to the determination of the issue to which State should referral be ordered.”⁴²

2. Referral Is Not Extradition

Challenges to referral suggesting that it is “extradition” have been rejected:

The Referral Bench properly concluded that the treaty or national law governing extradition does not apply to prevent the referral of the Appellants’ case pursuant to Rule 11 *bis* of the Rules because, as with the initial transfer of the Appellants to the International Tribunal, their transfer to the State authorities under Rule 11 *bis* is not the result of an agreement between the State and the International Tribunal. The Appeals Chamber recalls that the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter. Accordingly, a State cannot impose conditions on the transfer of an accused, or invoke the rule of specialty or non-transfer concerning its nationals. The referral procedure envisaged in Rule 11 *bis* is implemented pursuant to a Security Council resolution, which, under the United Nations Charter, over-

³⁸ *Mejacic*, Case No. IT-02-65-AR11 *bis*, Decision on Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 43.

³⁹ R. P. & EVID., *supra* note 1, at 8.

⁴⁰ *Mejacic*, Case No. IT-02-65-AR11 *bis*, Decision on Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 43.

⁴¹ *Id.* ¶ 41.

⁴² Prosecutor v. *Mejacic et al.*, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 38 (July 20, 2005).

rides any State's extradition requirements under treaty or national law.⁴³

3. Fair Trial Considerations

Rule 11 *bis* (B) requires that the Bench must be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. General fair trial considerations include, but are not limited to, those listed in paragraph 68 and footnote 89 of the *Mejakic* Referral Bench Decision.⁴⁴

4. Substantive Law to Be Applied

The Referral Bench in the *Mejakic* decision held that it is not the "competent authority to decide in any binding way which law is to be applied. . . . That is a matter which would be within the competence of the State Court of Bosnia and Herzegovina"⁴⁵ It is for the state court to determine the law applicable to each of the alleged criminal acts of the accused.⁴⁶ The Referral Bench must be satisfied that "if the case were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework⁴⁷ which not only criminalizes the alleged conduct of the Accused, but which also provides for appropriate punishment."⁴⁸

III. MONITORING THE PROCEEDINGS OF REFERRED CASES

Rule 11 *bis* (D) (iv) provides for the Prosecutor to send observers to monitor the proceedings in national courts. Although the language appears to be permissive, the Appeals Chamber has found that "the Referral Bench acted within its authority when it ordered the Prosecution to report back in six months concerning developments in the

⁴³ *Id.* ¶ 31.

⁴⁴ *Id.* ¶ 68 (citing Article 21 of the Statute of the Tribunal and Article 14 of the International Covenant on Civil and Political Rights).

⁴⁵ *Id.* ¶ 43.

⁴⁶ *Id.* ¶ 63.

⁴⁷ Protective measures for witnesses are an important aspect of the legal framework. Measures such as pseudonyms or facial or voice distortion, which may already be in place at the time referral is ordered, may also be included in the order granting referral as provided for in Rule 11 *bis* (D) (ii). R. P. & EVID., *supra* note 1, at 9.

⁴⁸ Prosecutor v. *Mejakic* et al., Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 43 (July 20, 2005).

case following transfer.”⁴⁹ The Referral Bench described the monitoring mechanism as one which:

enables a measure of continuing oversight over trial proceedings should a case be referred. Although the monitoring mechanism serves also to guarantee the fairness of the trial to the Accused, as repeatedly expressed by the Referral Bench and accepted by the Appeals Chamber, it was primarily created to ensure that a case would be diligently prosecuted once it had been referred.⁵⁰

Rule 11 *bis* (F) provides that “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.”⁵¹

CONCLUSION

The challenge of meeting the projected dates of the Completion Strategy requires that the ICTY concentrate on those cases involving the most senior level accused charged with the most grave offences. The ICTY must equally ensure that the lower and intermediate level accused are brought to justice in the appropriate state courts. To that end, Referral under Rule 11 *bis* has been and continues to be a significant tool.

⁴⁹ Prosecutor v. Stankovic, Case No. IT-96-23/2-AR11 *bis*.1, Decision on Rule 11 *bis* Referral, ¶ 55 (Sept. 1, 2005).

⁵⁰ Prosecutor v. Ademi and Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 57 (Sept. 14, 2005).

⁵¹ Rule 10 is entitled “Formal Request for Deferral.” This rule refers to grounds specified in Rule 9 and provides for deferral of investigations or proceedings where, *inter alia*, a crime over which the ICTY has jurisdiction has been characterized in the courts of a potential referral State as an ordinary crime or where there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted. R. P. & EVID., *supra* note 1, at 7.