

Fordham International Law Journal

Volume 33, Issue 3

2009

Article 2

Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence

Olympia Bekou*

*

Copyright ©2009 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence

Olympia Bekou

Abstract

Rule 11 bis forms a cornerstone of the ICTY's completion strategy. Part I of this Article provides an analysis of the elements of the rule. This Part will highlight the purpose of Rule 11 bis, offer an overview of the legal basis through which the transfer of jurisdiction has taken place in the ICTY, discuss the referral process and the elements necessary for a successful referral, and, finally, round out the discussion with an overview of the decision making process of the referral bench in identifying which state is suitable to proceed with a trial once it is determined that the indictment is compatible with the referral. Part II discusses the relevance of applicable substantive law and its importance to the decisions of the referral bench, particularly in the determination of a state's ability to meet fair trial standards and to provide appropriate punishments. This Part also points out the potential problems that national courts will face when examining applicable substantive law. Part III highlights the tensions that could arise between Rule 11 bis and the right to a fair trial, quality of prisons, and other issues that surround sentencing. Finally, Part IV draws attention to the discretionary powers of the prosecutor to monitor the proceedings before the national courts.

RULE 11 *BIS*: AN EXAMINATION OF THE PROCESS OF REFERRALS TO NATIONAL COURTS IN ICTY JURISPRUDENCE

*Olympia Bekou**

INTRODUCTION

On May 25, 2007, Radovan Stanković escaped from the state police van transferring him to Sarajevo for dental treatment at a local hospital.¹ He was the first indictee to have been transferred by the International Criminal Tribunal for the former Yugoslavia (“ICTY” or “Tribunal”) to Bosnia and Herzegovina for trial by a national court.² This transfer was made possible by virtue of Rule 11 *bis* of the Tribunal’s Rules of Procedure and Evidence (“RPE”) (“Rule 11 *bis*”), which allows for the transfers of indictments to the national level.³ As the end of the Tribunal’s life looms in the distance, the use of Rule 11 *bis* forms an important part of its “completion strategy.”⁴ A number of

* School of Law, University of Nottingham, United Kingdom; Head, International Criminal Justice Unit, Human Rights Law Centre. I would like to thank David Krivanek, Vidan Hadzi-Vidanovic, and David Hayes for their research assistance. All errors and omissions are attributed to the Author alone.

1. See Mission to Bosnia and Herzegovina, Org. for Sec. and Co-operation in Eur. [OSCE], *Sixth Report in the Case of Convicted Person Radovan Stankovic Transferred to the State Court Pursuant to Rule 11bis* at 2 (2007), available at <http://www.oscebih.org/documents/14067-eng.pdf>.

2. See Press Release, Int’l Criminal Tribunal for the Former Yugo. [ICTY], Court of Bosnia and Herzegovina Renders First Judgment in a Case Transferred by the Tribunal, No. JP/MOW/1126e (Nov. 14, 2006).

3. See ICTY, *Rules of Procedure and Evidence*, R. 11 *bis*, U.N. Doc. IT/32/Rev.44 (Dec. 10, 2009) [hereinafter *ICTY Rules*] (providing guidelines for the transfer of cases from the International Criminal Tribunal for the Former Yugoslavia (“ICTY” or “Tribunal”) to domestic courts). Rule 11 *bis*, which was adopted in 1997 and amended several times thereafter, is found in the Rules of Procedure and Evidence (“RPE”) for both the ICTY and the International Criminal Tribunal for Rwanda’s (“ICTR”). The language of 11 *bis* in the RPE of the ICTR, however, is different from that of the ICTY. Compare *id.*, with Int’l Criminal Tribunal for Rwanda [ICTR], *Rules of Procedure and Evidence*, R. 11 *bis* (Mar. 14, 2008), available at <http://www.icttr.org/ENGLISH/rules/080314/080314.pdf> [hereinafter *ICTR Rules*].

4. E.g., S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (setting deadlines for the ICTY to conclude investigations, trial, and work, respectively); see also S.C. Res. 1534, ¶ 6, U.N. Doc. S/RES/1534 (Mar. 26, 2004) (requiring periodic updates

referrals to courts in the former Yugoslavia have already taken place.⁵ Referrals from the International Criminal Tribunal for Rwanda (“ICTR”) are also underway.⁶

While Stanković’s escape is by no means unique, it has sparked debate as to the suitability of national courts to deal with cases originating at the ICTY.⁷ Stanković’s escape, the acquittal of

from the ICTR and ICTY on the implementation of the completion strategy). For an analysis of the completion strategy, see Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 158 (2005) (concluding that the tribunal needs the full support of the international community before the completion strategy can be fully implemented). See also Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT’L L. 158, 158–59 (2005) (arguing that concerns over inadequate due process and prosecutorial independence resulting from the completion strategy are unfounded); Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?*, 28 *FORDHAM INT’L L.J.* 591, 591–92 (2005) (suggesting that the closing of the Nuremberg trials may offer useful guidance for executing the completion strategy); Dominic Raab, *Evaluating the ICTY and Its Completion Strategy - Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT’L CRIM. JUST. 82 (2005) (concluding that the completion strategy of the ICTY “may not be perfect from any single perspective, but it represents a reasonable compromise between the competing interests and values at stake”). For a brief overview of the implementation of the completion strategy, see ICTY: Completion Strategy, <http://www.icty.org/sid/10016> (last visited Feb. 20, 2010).

5. See Key Figures of ICTY Cases (Feb. 1, 2010), <http://www.icty.org/sid/24>. The indictments of the following individuals have been referred: Rahim Ademi, Gojko Janković, Dušan Fuštar, Momčilo Gruban, Duško Knežević, Vladimir Kovačević (Serbia), Paško Ljubičić, Željko Mejakić, Mirko Norac (Croatia), Mitar Rašević, Radovan Stanković, Savo Todović (Bosnia and Herzegovina), and Milorad Trbić. *Id.*

6. See, e.g., *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 bis, Appeal, ¶ 1 (Aug. 30, 2006) (denying the prosecutor’s request for the transfer of Michel Bagaragaza to Norway for trial); see also Alhagi Marong, *The ICTR Appeals Chamber Dismisses the Prosecutor’s Appeal to Transfer Michel Bagaragaza for Trial to Norway*, ASIL INSIGHTS, Oct. 3, 2006, <http://www.asil.org/insights061003.cfm>. An amended indictment and a different chamber composition have since ordered transfer of Bagaragaza to the Netherlands for trial. See *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11bis, Decision on Prosecutor’s Request for Referral of the Indictment to the Kingdom of the Netherlands (Apr. 13, 2007); see also Alhagi Marong, *The ICTR Transfers Michel Bagaragaza to the Netherlands for Trial*, ASIL INSIGHTS, June 18, 2007, <http://www.asil.org/insights070618.cfm>. On June 11, 2007, the ICTR Prosecutor requested the transfer of Flugence Kayishema for trial in Rwanda. See Press Release, ICTR, ICTR Prosecutor Requests Transfer of First Case to Rwanda, No. ICTR/INFO-9-2-525.EN (June 12, 2007).

7. See, e.g., Press Briefing, ICTY, ICTY Weekly Press Briefing – 31st May 2007, available at <http://www.icty.org/sid/9772> (noting that the escape of Radovan Stankovic would be a factor for the judges making decisions on future cases involving transfers pursuant to Rule 11 bis). Subsequent requests by the ICTR prosecutor for referral in the cases of Hategekimana, Kanyarukiga, and Munyakazi were also denied. See *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11bis, Decision on the Prosecutor’s Request for

Ademi,⁸ the lenient sentencing of Norac,⁹ and the indictment of Vladimir Kovačević,¹⁰ a defendant with clear mental health problems,¹¹ all at the domestic level are just some of the matters deserving of critical attention.

Neither the legal construction of Rule 11 *bis* nor its practical application is without problems. The emerging case law constitutes a good source for understanding the rule's function and utility. This Article analyzes the constituting elements of Rule 11 *bis* and aims to highlight its merits and expose its limitations. While recognizing that Rule 11 *bis* constitutes a necessary process, it is argued that the ICTY has been constrained in its determinations by the very nature of referrals and the specific application of the rule.

Rule 11 *bis* forms a cornerstone of the ICTY's completion strategy. Part I of this Article provides an analysis of the elements of the rule. This Part will highlight the purpose of Rule 11 *bis*, offer an overview of the legal basis through which the transfer of jurisdiction has taken place in the ICTY, discuss the referral

the Referral of the Case of Ildephonse Hategekimana to Rwanda, ¶ 78 (June 19, 2008); Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ¶ 78 (June 6, 2008); Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, ¶ 67 (May 28, 2008).

8. See ICTY, *Case Information Sheet: "Medak Pocket" (IT-04-78) Ademi & Norac*, <http://www.icty.org/x/cases/norac/cis/en/cis-ademinorac.pdf> [hereinafter *Ademi & Norac Case Information Sheet*] (noting that Rahim Ademi was acquitted after trial in the Zagreb District Court in Croatia); see also Presuda Županijski sud Zarebu [Zagreb District Court], br. II K-rz-1/06, May 30, 2008 (Republike Hrvatske v. Ademi & Norac) (Croat.), available at http://www.centar-za-mir.hr/uploads/PRESUDA_Ademi_i_Norac.pdf.

9. See *Ademi & Norac Case Information Sheet*, *supra* note 8 (noting that Mirko Norac was sentenced to seven years of imprisonment after trial in the Zagreb District Court in Croatia); see also Presuda Županijski sud Zarebu [Zagreb District Court], br. II K-rz-1/06 (Croat.). For more information on the trial of Ademi and Norac in the Croatian court system, see Office in Zagreb, OSCE, *Ademi-Norac Trial Concluded, Appeal Process Underway*, COURIER, May–Sept. 2008, at 4, available at http://www.osce.org/publications/mc/2008/10/33920_1197_en.pdf.

10. See Okružni sud Beograd [Belgrade District Court], Indictment Against Vladimir Kovačević, No. KTZR 5/07 (July 26, 2007) (Serb.), available at http://www.tuzilastvorz.org.rs/html_trz/optuznice/o_2007_07_26_eng.pdf. Kovačević's case was subsequently adjourned due to his mental state. See Okružni sud Beograd, Resenje o odbecivanju optuznice [Resolution of the Indictment Decision], No. KTZR 5/07, Dec. 5, 2007 (Serb.), available at http://okruznisudbg.rs/content/2007godina/kovacevicvladimir/indictment3/at_download.

11. See Prosecutor v. Kovačević, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, ¶ 50 (Apr. 12, 2006) (concluding that Kovačević lacks capacity to stand trial before the ICTY).

process and the elements necessary for a successful referral, and, finally, round out the discussion with an overview of the decision making process of the referral bench in identifying which state is suitable to proceed with a trial once it is determined that the indictment is compatible with the referral. Part II discusses the relevance of applicable substantive law and its importance to the decisions of the referral bench, particularly in the determination of a state's ability to meet fair trial standards and to provide appropriate punishments. This Part also points out the potential problems that national courts will face when examining applicable substantive law. Part III highlights the tensions that could arise between Rule 11 *bis* and the right to a fair trial, quality of prisons, and other issues that surround sentencing. Finally, Part IV draws attention to the discretionary powers of the prosecutor to monitor the proceedings before the national courts.

I. *STRUCTURE AND NATURE OF RULE 11 BIS*

A. *Purpose of Rule 11 bis*

The rationale behind the adoption of Rule 11 *bis* can be seen primarily in the Tribunal's limited life-span. Although its subsidiary role and practical consequence is involvement of the national courts in prosecuting and trying persons responsible for blatant violations of humanitarian and human rights law, its primary function is freeing up precious Tribunal time.¹² With the ICTY firmly in the final stages of its operation, there is a pressing need to complete more cases.¹³ Several other steps have been taken to enhance the Tribunal's efficiency, including the appointment of ad litem judges¹⁴ and other internal and external reforms,¹⁵ that aim to meet the 2008–2010 completion

12. See Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 3 J. INT'L CRIM. JUST. 1134, 1155–57 (2005).

13. *Id.*

14. See S.C. Res. 1329, ¶ 1, U.N. Doc S/RES/1329 (Nov. 30, 2000).

15. See President of the ICTY, *Twelfth Annual Report 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*, ¶¶ 7–10, delivered to the Security Council and the General Assembly, U.N. Doc. S/2005/532, A/60/267 (Aug. 17, 2005) (citing to the amendment of rules 98 *bis* and 73(D), the introduction of the eCourt system, the increased communication between the Association of Defence

deadlines,¹⁶ although reports from the Tribunal's president and prosecutor suggest that the ICTY is three to six years behind

Counsel and the Tribunal as well as the Special War Crimes Chamber in Bosnia and Herzegovina, and the training of local judges as reforms designed to meet the completion goals of the ICTY).

16. For the most recent assessment of the status of the completion strategy, see President, ICTY, *Assessment and Report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009*, Letter dated 12 November 2009 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, Addressed to the President of the Security Council [hereinafter Letter dated 12 November 2009], Annex I, U.N. Doc. S/2009/589 (Nov. 13, 2009). The letter is part of a semiannual series required under Security Council Resolution 1534 that contains reports from both the president and the prosecutor of the Tribunal. See S.C. Res. 1534, *supra* note 4, ¶ 6. A number of past reports were issued pursuant to this authority as well. See Letter dated 14 May 2009 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2009/252 (May 18, 2009); Letter dated 21 November 2008 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2008/729 (Nov. 24, 2008); Letter dated 13 May 2008 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2008/326 (May 14, 2008); Letter dated 12 November 2007 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2007/663 (Nov. 12, 2007); Letter Dated 15 May 2007 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2007/283 (May 16, 2007); Letter dated 15 November 2006 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2006/898 (Nov. 16, 2006); Letter dated 29 May 2006 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2006/353 (May 31, 2006); Letter dated 30 November 2005 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2005/781 (Dec. 14, 2005); Letter dated 25 May 2009 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc.

schedule.¹⁷ Nevertheless, the impending termination of the Tribunal's operation, combined with a presumed "donor fatigue,"¹⁸ have fostered a shift towards national adjudication of cases originally intended to be tried internationally.

Lifting some of the burden of the Tribunal's workload is not the only function of Rule 11 *bis*. While the possibility of referrals is a consequence of the evolving capacity of national courts within the territory of the former Yugoslavia to deal with complex cases involving international crimes, referrals are also aimed at enhancing the national capacity to prosecute the most serious international crimes. Indeed article 9 of the ICTY Statute indicates that the Tribunal was not intended to replace or displace national courts; rather, the Tribunal coexists with national courts under a system of concurrent jurisdiction.¹⁹

S/2005/343 (May 25, 2005); Letter dated 23 November 2004 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2004/897 (Nov. 23, 2004); Letter dated 21 May 2004 from the President of the Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. Since 1991, addressed to the President of the Security Council, Annexes I-II, U.N. Doc. S/2004/420 (May 24, 2004). These reports are collected at ICTY, Reports and Publications: Completion Strategy, <http://www.icty.org/tabs/14/2> (last visited Feb. 20, 2010).

17. See Raab, *supra* note 4, at 86 (reaching conclusion on the basis of October 2003 reports). This prediction continues to be borne out by the latest assessments of the president and prosecutor. See Report of Serge Brammertz, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council Under Paragraph 6 of Security Council Resolution 1534 (2004), ¶ 7, Letter Dated 12 November 2009, *supra* note 16, Annex II (predicting that appeals would continue to be processed through 2013).

18. STEVEN D. ROPER & LILIAN A. BARRIA, DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS 71-72 (2006).

19. Statute of the International Tribunal art. 9, May 25, 1993, 32 I.L.M. 1192 (qualifying the concept of concurrent jurisdiction with the Tribunal's primacy); see also The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 64, delivered to the Security Council and the General Assembly, U.N. Doc. S/25704 (May 3, 1993) ("[N]ational courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures"); Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations, addressed to the Secretary-General, ¶¶ 134-36, U.N. Doc. S/25266 (Feb. 10, 1993) (report of the Commission of the French Jurists entrusted to study the creation of a criminal Tribunal for the adjudication of the crimes committed in the territory of the Former Yugoslavia and reproduced as a document of the Security Council). For an updated copy of the statute that consolidates all subsequent amendments, none of which affect article 9, see ICTY, *Updated Statute of the International*

Strengthening national legal orders should have been key to the operation of the ICTY from the beginning.²⁰

Rule 11 *bis* proceedings are the latest in a range of actions aiming to bolster national fora. Previous attempts included the “Outreach Programme” established by Judge McDonald in 1999²¹ and the “Rules of the Road” initiative.²² These initiatives, although not hugely successful,²³ paved the way for the adoption of Rule 11 *bis*. Rule 11 *bis* was formally adopted by the Tribunal on November 12, 1997.²⁴

Criminal Tribunal for the Former Yugoslavia (Sept. 2009), available at http://www.icty.org/x/file/legal%20library/statute/statute_sept09_en.pdf [hereinafter *ICTY Statute*].

20. Rule 11 *bis* has been particularly helpful not only in rehabilitating and improving national judicial systems in the former Yugoslavia, particularly in Bosnia and Herzegovina, but also by encouraging the flow of evidence and other materials from an international to a national level, which has in turn stimulated the development of these legal systems to a point where the Tribunal is no longer necessary. See David Tolbert & Aleksander Kontić, *The International Criminal Tribunal for the Former Yugoslavia: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 135, 136–37 (Carsten Stahn & Göran Sluiter eds., 2009).

21. See Lal C. Vohrah & Jon Cina, *The Outreach Programme*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 547 (Richard May et al., eds, 2001) (analyzing the Outreach Programme).

22. The parties to the Dayton Agreement resolved in Rome on February 18, 1996 that “persons other than those already indicted by the Tribunal may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant of indictment that had been reviewed and deemed consistent with international legal standards by the Tribunal.” President of the ICTY, *Sixth Annual Report 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*, ¶ 135, delivered to the Security Council and the General Assembly, U.N. Doc. S/1999/846, A/54/187 (Aug. 2, 1999); see also Graham T. Blewitt, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*, in *JUSTICE FOR CRIMES AGAINST HUMANITY* 145, 150–51 (Mark Lattimer & Philippe Sands eds., 2003).

23. See David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 *FLETCHER F. WORLD AFF.* 7, 14–15 (2002).

24. See Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis*, ¶ 2 (May 17, 2005); see also President of the ICTY, *Fifth Annual Report 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*, ¶ 105, delivered to the Security Council and the General Assembly, U.N. Doc. S/1998/737, A/53/219 (Aug. 10, 1998) [hereinafter *Fifth Annual Report of the ICTY*] (noting the adoption of Rule 11 *bis* on November 12, 1997, at the conclusion of the fourteenth plenary session of the Tribunal).

B. *Introduction to Rule 11 bis*

“Referral” and “deferral” are terms used extensively in international criminal law. They both denote the transfer of jurisdiction from one level to another.²⁵ More specifically, deferrals refer to the transfer of a case from national courts for the purposes of trial at the international level, whereas referrals describe the reverse.²⁶ Deferrals are explicitly mentioned in the ICTY Statute and the RPE,²⁷ but the term referral is only found in Rule 11 *bis* of the RPE.²⁸ Another type of referral constitutes a trigger mechanism for the jurisdiction of the International Criminal Court (“ICC”) under the ICC’s Rome Statute.²⁹ Despite the common spelling, ICC referrals draw a sharp contrast to ICTY referrals in that they do not bestow competence on the Tribunal and more broadly cover a “situation,” rather than a specific indictee.³⁰

The body entrusted with ICTY referrals is the referral bench. This quasi chamber within the tribunal is responsible for

25. Referral is defined as the act of sending to another for consideration or decision. BLACK’S LAW DICTIONARY 1394 (9th ed. 2009); *see also* OXFORD ENCYCLOPEDIA ENGLISH DICTIONARY 1213 (Joyce M. Hawkins & Robert Allen eds., 1991) (defining “refer” as to send or direct a person or question for decision). Defer, on the other hand, is defined as the act of yielding to another authority. BLACK’S LAW DICTIONARY, *supra*, at 486; *see also* OXFORD ENCYCLOPEDIA ENGLISH DICTIONARY, *supra*, at 378 (defining “defer” as to yield or make concessions in opinion or action).

26. *See ICTY Statute, supra* note 19, art. 9; *ICTY Rules, supra* note 3, R. 11 *bis*; *see also* Request by the Prosecutor Under Rule 11 *bis*: Partly Confidential (Attached Schedules to Annex I Filed Confidential), ¶ 7, Prosecutor v. Ademi, Case No. IT-04-78-PT (Sept. 2, 2004) (discussing the purpose of a referral).

27. *E.g., ICTY Statute, supra* note 19, art. 9(2); *ICTY Rules, supra* note 3, R. 9–11.

28. *ICTY Rules, supra* note 3, R. 11 *bis*.

29. *See* Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. The Security Council, for instance, referred the situation in Darfur, Sudan, to the International Criminal Court following this trigger mechanism. *See* S.C. Res. 1593, ¶ 1, U.N. Doc. A/RES/1593 (Mar. 31, 2005). Other trigger mechanisms include the *proprio motu* initiation of investigations by the prosecutor or state parties referrals, such as the situation in the Central African Republic, Press Release, Int’l Criminal Court [ICC], Prosecutor Receives Referral Concerning Central African Republic, No. ICC-OTP 20050107-86 (Jan. 7, 2005), the situation Democratic Republic of Congo, Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, No. ICC-OTP-20040419-50 (Apr. 19, 2004), and the situation in the Republic of Uganda, Press Release, ICC, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC, No. ICC-20040129-44 (Jan. 29, 2004), the three other situations currently under investigation. *See* Rome Statute, *supra*, arts. 13, 15.

30. *See* Rome Statute, *supra* note 29, art. 13(b).

determining the suitability of an indictment for referral.³¹ It consists of three judges specially appointed by the Tribunal's president and has the power to order referrals either on its own accord or on the basis of a request by the prosecutor.³²

The referral bench shares many of the characteristics of a chamber. It too consists of three judges that have, to date, always been the same³³ and operates with reference to the ICTY Statute and the RPE.³⁴ Unlike a chamber, the three judges are not assigned to the bench at all times; instead, membership is determined by the Tribunal's president on the basis of the cases to be heard.³⁵ Importantly, the bench also differs from a chamber in that it does not decide cases in their substance.³⁶ The bench is limited to deciding whether certain indictments will be transferred to national courts for trial without instructing the latter on how to proceed with the case.³⁷

Despite the fact that the bench may only review certain aspects of the indictment in its referral decision, such decisions are not administrative in nature. Finding a suitable forum for trial is an important judicial function. Its equivalent in the ICC would be the determination on complementarity, and the pretrial chamber's decision on whether the case will remain with a national court or whether it will be tried in The Hague.³⁸ In Rule 11 *bis*, the Tribunal seeks to establish whether to send an indictment back to national courts rather than continue with the trial internationally, rendering Rule 11 *bis* the reverse process of ICC complementarity.

31. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(A).

32. See *id.* R. 11 *bis*(B).

33. See William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 326–27 (2008) (identifying the three judges as Alphons Orie, O-Gon Kwon, and Kevin Parker).

34. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(H) (equating the bench with a chamber in terms of its powers and obligation to follow procedures under the RPE, “insofar as applicable”).

35. See *id.* R. 11 *bis*(A).

36. See *id.*

37. See *id.*

38. See Rome Statute, *supra* note 29, art. 18; see also Mahnouch H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, ESSAYS IN HONOUR OF ADRIAAN BOS 57, 70–71 (Herman von Hebel et al. eds., 1999).

The ICTY Statute³⁹ makes no reference to a referral bench. As the bench is only envisaged in Rule 11 *bis* of the RPE⁴⁰ its legality has been challenged.⁴¹ In the *Stanković* appeals decision, the defense, on its first ground of appeal, questioned the power of the bench to refer a case on the basis that “Rule 11 *bis* lacks a legal basis in the statute and in any implied or inherent powers that the Tribunal may have.”⁴² The defense argued further that “[t]he [United Nations (“U.N.”)] Security Council’s stated support for the completion strategy is not enough . . . to create a legal basis for transferring cases out of the Tribunal’s jurisdiction,”⁴³ nor does any provision of the statute provide a legal basis for the adoption of Rule 11 *bis*.⁴⁴ The establishment of the ICTY by Security Council resolutions means that certain aspects of its existence depend on the political will of its parent body. The Tribunal enjoys significant autonomy in its everyday operation.⁴⁵ Security Council resolutions, nevertheless,

39. See *ICTY Statute*, *supra* note 19. The statute may only be amended by Security Council resolution. Since its adoption in 1993, the Statute for the International Tribunal (“ICTY Statute”) has been amended ten times, most recently on the July 7, 2009. See S.C. Res. 1877, U.N. Doc. S/RES/1877 (July 7, 2009). Amendments included, among others, the creation of an additional trial chamber and the appointment of *ad litem* judges. See S.C. Res. 1660, U.N. Doc. S/RES/1660 (Feb. 28, 2006); S.C. Res. 1329, U.N. Doc. S/RES/1329 (Dec. 5, 2000).

40. The text of the original ICTY Statute empowered the judges of the Tribunal to adopt a set of rules of procedure and evidence. Statute of the International Tribunal, *supra* note 19, art. 15. Implicit in the power to create these rules is the power to amend them. See Gideon Boas, *A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 1, 4 (Gideon Boas & William Schabas eds., 2003). When the rules were first adopted they contained a provision that governed their subsequent amendment. See *ICTY Rules*, *supra* note 3, R. 6. Thus, the RPE are judge-made and subject to frequent amendments to meet the Tribunal’s changing needs. The RPE have been revised forty-four times since they were first adopted. See ICTY, *Rules of Procedure and Evidence*, <http://www.icty.org/sid/136> (last visited Feb. 20, 2010).

41. See, e.g., *Prosecutor v. Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral, ¶¶ 10–17 (Sept. 1, 2005) (denying a Rule 11 *bis* appeal and allowing, in part, the prosecutor’s appeal).

42. *Id.* ¶ 10.

43. *Id.* ¶ 11.

44. *Id.*

45. Perhaps the most disputable incident, which is viewed by some as the product of Security Council intervention, is the decision to refrain from prosecution in the case of the North Atlantic Treaty Organization bombing. For an analysis of the decision, see generally Michael Cottier, *What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide*, in *INTERNATIONAL AND*

determine the Tribunal's life span, as well as the strategy leading to the termination of its function.⁴⁶ The ICTY has therefore enjoyed the freedom of undertaking those actions necessary for its effective functioning.⁴⁷ Whether the establishment and operation of a referral bench falls within these so called inherent powers of the Tribunal is debatable.

The referral bench rejected the appellant's arguments in *Stanković* and based its analysis on the Tribunal's concurrent jurisdiction, thereby opting not to elaborate on the inherent powers doctrine.⁴⁸ The concurrent, as opposed to exclusive, jurisdiction is good enough indication for the bench that a certain role is envisaged for *alternative* national jurisdictions.⁴⁹ Notwithstanding the concurrent nature of the Tribunal's jurisdiction, the preceding argument is not entirely convincing. Although the role reserved for national courts should not be disregarded, concurrent jurisdiction, as found in article 9(1) of the ICTY Statute, does not provide the requisite authority for setting up a system to *transfer* cases to domestic courts. Rather, concurrent jurisdiction was chosen to highlight that the Tribunal is not intended to replace or displace national courts⁵⁰ and, through deferral, enable trial of the most important cases at the international level. Rule 11 *bis* does not facially negate the Tribunal's concurrent jurisdiction because it does not remove each and every case from the Tribunal for trial by a national court. Together with deferrals, Rule 11 *bis* constitutes a further mechanism for allocating cases between the national and the

NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW; CURRENT DEVELOPMENTS 843 (Horst Fischer et al. eds., 2001).

46. See JEAN-PIERRE COT & ALAIN PELLET, *LA CHARTRE DES NATIONS UNIES* 216 (2d ed. 1991) (Fr.) (“*Les conditions de suppression d'un organe subsidiaire sont symétriques des conditions de création: la suppression résulte d'une manifestation de volonté de l'organe principal créateur.*”).

47. See generally Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, in *MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 353 (Lal C. Vohrah et al. eds., 2003) (discussing the Tribunal's inherent powers).

48. *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 14; cf. Rocío Digón, Recent Developments, *The Stanković Decisions of the International Criminal Tribunal for the Former Yugoslavia*, 31 YALE J. INT'L L. 281, 283–84 (2006) (noting the impact of the *Tadić* decision on the *Stanković* appeal).

49. *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 14 (“[I]t is clear that alternative national jurisdictions have consistently been contemplated for ‘transfer’ of accused.”).

50. See *supra* note 19.

international spheres. Be that as it may, reference to the latter as the sole legal basis for referrals is misconstrued, given that they are not explicitly mentioned in article 9 of the ICTY Statute, which revolves solely around deferrals.⁵¹

Additional legal basis for referrals may be found in Security Council Resolution 1503, which explicitly endorses the completion strategy adopted by the Tribunal, an integral part of which is the transfer of indictments to national courts.⁵² This resolution, though not explicitly referring to Rule 11 *bis*, indirectly approves of the chosen method. Nevertheless, it fails to explain why the Security Council declined a statute amendment to explicitly provide for referrals.⁵³ Given that the Tribunal had to find a way to lighten its workload and that no amendment of the statute was forthcoming, the only other available method to achieve this was by amending the RPE, which can be accomplished by the judges alone.⁵⁴ This approach is partially successful. Although no other option was practical, an RPE amendment of this kind stumbles upon the statute itself.⁵⁵ Article 15 of the ICTY Statute lists the specific reasons for which rules may only be adopted.⁵⁶ To benefit from this provision, referrals would have to be construed as “conduct of the pre-trial phase of the proceedings.”⁵⁷ The decision as to the appropriate forum for subsequent trial may technically belong to a phase prior to trial, but it does not cover the pretrial phase *stricto sensu*, which in the ICTY is concluded with the review of the indictment⁵⁸ and which, has yet to take place before national courts. Given that article 15 does not contain a definition of what acts would fall within the pretrial phase, a literal interpretation of this provision may be

51. See Susan Somers, *Rule 11bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 B.C. INT'L & COMP. L. REV. 175, 176 (2007) (arguing that referrals are a “[r]etreat from [p]rimacy”).

52. S.C. Res. 1503, *supra* note 4, ¶¶ 1, 7.

53. See *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 11.

54. See *supra* text accompanying note 40.

55. *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 11 (referring to article 9 and 29 in the context of Tribunal jurisdiction).

56. See *ICTY Statute*, *supra* note 19, art. 15 (“The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”).

57. *Id.*

58. *Id.* art. 19.

accepted. In practice, had the Security Council's objected to the inclusion of Rule 11 *bis* in the RPE, it could have intervened by specifically adopting a resolution amending the statute to the opposite effect or by prohibiting such transfers. Given the Security Council's acquiescence, it is beyond doubt that the Security Council agrees with the path chosen by the Tribunal's judges. Nevertheless, a statute amendment explicitly providing for referrals would have been preferable to the *ad hoc* solution reached and would have eliminated challenges to its legality by putative transferees.

By referring to the resolution outlining the Tribunal's completion strategy, ample authority may be discerned for the creation of the referral bench, justification of its operation, and subsequent analysis of its practice.

C. *The Referral Process*

The bench is not obliged to, but "may," order a referral.⁵⁹ More specifically, the bench may refer cases only after being satisfied that "the accused with receive a fair trial and that the death penalty will not be imposed or carried out."⁶⁰ Referral decisions are therefore evaluated on the basis of whether the bench exercised its discretion correctly based on the criteria set out in Rule 11 *bis*.⁶¹

Of the possible cases that may be considered for referral, there are those that have been investigated to different degrees by the prosecutor but did not result in an indictment⁶² and those that, although they have been investigated and indictments against named suspects have been issued, may be subsequently referred to national courts for trial. It is the latter category that is the focus of this Article.

59. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(A); see also Prosecutor v. Međakić, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 10 (Apr. 7, 2006) (discussing the discretion of the referral bench in issuing orders).

60. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B).

61. *Međakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 10.

62. See *id.* art. 18 (governing indictments). In the context of referrals, see Press Release, ICTY, Radovan Stanković Transferred to Bosnia and Herzegovina, CT/MO/1008e (Sept. 29, 2005).

Despite the reference to “authorities of a State,”⁶³ national jurisdictions have generally played a limited role. In Rule 11 *bis*, state involvement in the decision to refer is limited to representations states are invited to make before the referral bench.⁶⁴ These are mainly for the purpose of satisfying the bench that the accused will receive a fair trial before the national courts considered for referral and that the death penalty will not be imposed.⁶⁵ However, once the referral is upheld, the trial itself will be conducted exclusively before national courts, which have sole responsibility for determining the innocence or guilt of the accused.⁶⁶

Rule 11 *bis* contains a series of hurdles that must be overcome in order for trial to take place at the national level. The most important of those is gravity: unless the crimes and the responsibility of the accused involve lower or intermediate indictees, the Tribunal cannot seek an appropriate state to receive the indictment. Subsequently, the referral bench examines the applicable substantive law likely to be used by a state upon referral, as well as issues relating to sentencing and fair trial.⁶⁷

1. Gravity

A judicial examination into the gravity of a case has become increasingly important in international criminal law. The concept finds express use in the ICC Statute with regard to the admissibility of a case.⁶⁸ In the ICTY, however, the emphasis on

63. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(A); see also *Mejakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 10 (Apr. 7, 2006) (discussing the discretion of the referral bench in issuing orders).

64. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B).

65. See *id.*

66. See *id.* R. 11 *bis*(D).

67. See generally ICTY & the U.N. Interregional Crime & Justice Research Inst., *ICTY Manual on Developed Practices*, at 168–70 (May 28, 2009), available at http://www.icty.org/x/file/about/reports%20and%20publications/manual_developed_practices/icty_manual_on_developed_practices.pdf (discussing criteria for referral, monitoring, and other post-referral issues).

68. See Rome Statute, *supra* note 29, art. 17(1)(d) (providing that the case shall be determined inadmissible where “the case is not of sufficient gravity to justify further action by the Court”); see also *Prosecutor v. Dyilo*, Case No. ICC-01-04-01/06-8-Corr, Decision Concerning Pre-Trial Chamber Is Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ¶¶ 42–75 (Feb. 24, 2006).

gravity is rather recent.⁶⁹ The focus of the Tribunal was not necessarily on more senior perpetrators from the outset. Even if a “pyramidal strategy”⁷⁰ were followed, perpetrators like Duško Tadić, the Tribunal’s first accused,⁷¹ were tried in The Hague largely because the ICTY did not have many persons present for trial at the time.⁷² The Tribunal also dealt with accused who would now be classified as “small fr[ies]” later in its operation due to many North Atlantic Treaty Organization (“NATO”) Stabilisation Force in Bosnia and Herzegovina (“SFOR”) arrests.⁷³

Gravity is an integral part of referral determinations under Rule 11 *bis*. As a result, it has been contested by both the defense and the prosecutorial sides trying to either prevent or achieve a referral.⁷⁴ Unlike domestic criminal proceedings where the accused tend to downplay higher gravity, indictees facing a Rule

69. Despite various references to gravity, the Tribunal established its criteria for its adjudication in Rule 11 *bis* case law. See The Secretary-General, *Report of the Secretary-General, Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, ¶¶ 64–65, U.N. Doc. S/25704, ¶ 28 (May 3, 1993). Moreover, the President of the Security Council stated on July 23, 2002, that the Council “recognized” that the ICTY should be concentrating on those leaders most responsible in the war and “endorse[d] the . . . broad strategy for the transfer of cases involving intermediary and lower-level accused to competent national jurisdictions.” See Press Release, Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/21 (July 23, 2002); see also Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L.F. 281, 296 (2006); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CT. JUST. 731, 746 (2008).

70. Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT’L CRIM. JUST. 585, 586–88 (2004); see also Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy*, 2 J. INT’L CRIM. JUST. 446, 447–48 (2004).

71. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 6, 9 (May 7, 1997) (noting that Tadić was arrested by the German police in Munich on February 13, 1994, and transferred to the ICTY on April 24, 1995).

72. See José E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2093 (1998) (agreeing with the piecemeal approach on the basis that the prosecutor is able to “work out kinks while the stakes [were] not perceived to be as high,” and to “build a pyramid of factual evidence that ultimately leads upward to higher-level officials”).

73. At one time, accused were arriving in the Hague at the rate of one per month. See Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87, 87 (2001).

74. See, e.g., Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 15–16 (July 25, 2005); Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 16–17 (July 20, 2005); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 15–16 (May 17, 2005).

11 *bis* referral have in practice mostly argued in favour of higher gravity so as to receive trial internationally.⁷⁵ There are a number of potential explanations for this, ranging from trust in the international criminal Tribunal (or rather distrust in national courts by certain indictees),⁷⁶ a sense of pride, but more likely, the possibility of receiving more lenient sentences, if tried in The Hague.

Rule 11 *bis*(C), which covers gravity, expressly refers to Security Council Resolution 1534.⁷⁷ The rule endorses the obligation found in operative paragraph five of the resolution to “concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal” and provides the mechanism for its implementation.⁷⁸ The rule is not the only safeguard against trying lower level perpetrators in The Hague. A more potent provision is rule 28(A) of the RPE which subjects the prosecutorial efforts to a form of judicial trusteeship.⁷⁹

75. See *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 16; *Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 17; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 16.

76. These objections were put forward mainly by Bosnian Serbs whose indictments were referred to the Bosnian State Court. See, e.g., *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 50, 52, 54, 56–57, 59; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 23, 53, 79. It is doubtful whether they would have had the same reaction if they were referred to Serbian courts instead. See, e.g., *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 23; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 23, 53, 79. This may be seen from the written motions of Serbian nations before the Bosnian State Court. They all displayed varying degrees of disrespect to the court, ranging from references to “Jamahiriya Bosnia and Herzegovina” the “so called Court of Bosnia and Herzegovina,” to claiming no understanding of the language of the court, and refusing to be present during hearings. See, e.g., Fonz za humanitarno pravo [Humanitarian Law Center], Slučaj “Kravica” Mitrović i dr. [Case of “Kravitz” Mitrović et al.], <http://www.hlc-rdc.org/PravdaIReforma/Sudjenja-za-ratne-zlocine/SudjenjaZaRatne-Nacionalna-sudjenja-za-ratne-zlocine/Sudjenje-za-ratne-nacionalna-BiH/149.sr.html> (Serb.). It may not be that these indictees placed any trust in the ICTY, but they definitely objected to being tried by Bosnian authorities. Cf. Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 20, (Sept. 14, 2005) (recognizing that Norac and Ademi were perceived by a great number of Croats as national heroes and did not object to the referral).

77. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(C).

78. See S.C. Res. 1534, *supra* note 4, ¶ 5; see also S.C. Res. 1503, *supra* note 4, ¶ 8.

79. See Raab, *supra* note 4, at 90; Johnson, *supra* note 4, at 164–66; Mundis, *supra* note 4, at 606, 612. A discussion of this provision is, however, beyond the scope of this Article.

Pursuant to Rule 11 *bis* the bench seeks to refer indictments that are “not *ipso facto* incompatible with referral[s].”⁸⁰ If the alleged crimes are not so grave as to *demand* international trial,⁸¹ they would be equally suitable for trial by either the Tribunal or national courts.⁸² The threshold is consistent with the bench’s view on concurrent jurisdiction, where Rule 11 *bis* is seen as a mechanism for distinguishing amongst “alternative” jurisdictions.⁸³ At no point is it indicated that the indictments selected for referral should not have been prepared at the international level in the first place. Cases examined for referral differ from those that would be tried *ab initio* before national courts, or those which, despite having been investigated internationally, did not result in indictments at the Tribunal. The seriousness of referral cases, although acknowledged, does not suffice to retain them for trial at the Tribunal.

2. The Elements: Gravity of Crimes and Level of Responsibility

Rule 11 *bis*(C) specifically directs a court to consider gravity in determining whether to refer an indictment to a national court.⁸⁴ Provided that the gravity of the crimes is low and the accused holds limited responsibility, the indictment is suitable for referral.⁸⁵

The first element contained in Rule 11 *bis*(C) requires that the charged crimes be of sufficient gravity in order to warrant referral.⁸⁶ However, the rule is silent on how gravity is

80. *See, e.g.*, Prosecutor v. Stanković, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral, at 7 n.14 (May 17, 2005); *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 20.

81. *See* Prosecution’s Further Submission Pursuant to Chamber’s Decision of 14 April 2005, ¶ 2, Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT (Apr. 28, 2005); *see also* *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 15.

82. *See* Prosecutor v. Milošević, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 18 (July 8, 2005) (acknowledging that certain cases are better placed before an international forum whereas others “would also be suitable for prosecution before a competent national court”). The case is therefore suitable for trial either by the Tribunal or by national courts. *Id.*

83. *See id.*

84. *See ICTY Rules, supra* note 3, R. 11 *bis*(C) (citing S.C. Res. 1534, *supra* note 4).

85. *Id.* Interestingly, the prosecutor in the trial of Norac and Ademi requested referral on the basis of a single criterion. *See* Request by the Prosecutor Under Rule 11 *bis*, ¶ 9, Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT (Sept. 2, 2004).

86. *See ICTY Rules, supra* note 3, R. 11 *bis*(C).

determined so the threshold applicable to this inquiry is left to the determination of the bench.⁸⁷

Despite lacking an established hierarchy of crimes in the statute or rules, the Tribunal's case law has long accepted that certain crimes are graver than others.⁸⁸ Each of the crimes falling within the jurisdiction of the ICTY has the potential to be grave, depending on the circumstances. Indeed, the sentencing scheme contained in the statute does not carry different sentences for different crimes.⁸⁹ The specific crimes committed are of interest, not necessarily the *type* of crimes. Even though gravity is examined on an individualized basis, the submission of evidence is not contemplated in the course of the referral hearing.⁹⁰ This may be explained by the nature of the process and the fact that the trial will follow. However, failing to examine evidence can be detrimental to the defense, which may be less able to rebut the prosecutorial assessment on gravity. A detailed examination into the commission of the alleged crimes would guarantee a better insight into their gravity and therefore facilitate the bench's determination. While the current approach may be efficient, it is by no means thorough. On the other hand, entering deeper into the presentation of evidence that by no means enters into the merits of the case could infringe the accused's presumption of innocence, because determinations of the international tribunal would presumably have significant weight during the trial before national courts.

In setting the standards for gravity, other cases may be of assistance to ensure that the right indictments are referred to national courts. Previous judgments pronounced by the Tribunal

87. See *ICTY Rules*, *supra* note 3, R. 11 *bis*.

88. See, e.g., Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment, ¶ 16 (Sept. 4, 1998) (describing genocide as "the crime of crimes"); see also *Ademi & Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 21 (Sept. 14, 2005) (paraphrasing the government of Croatia as stating that crimes against humanity and war crimes "form the lower levels of the hierarchy of the crimes within the Tribunal's jurisdiction").

89. See *Ademi & Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 20 (referring to the argument advanced by defense counsel that there is no "differentiated span of sentences" in the Statute); see also Olaoluwa Olusanya, *Do Crimes Against Humanity Deserve a Higher Sentence than War Crimes?*, 4 INT'L CRIM. L. REV. 431, 431 (2004) (discussing the need to apply differentiated sentences for different crimes).

90. See, e.g., *Ademi & Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 20.

are not precedents as sources of law, but do serve as tools of interpretation.⁹¹ Even so, should the bench consider cases already tried by the Tribunal? Should the bench consider cases relating to indictments already referred or those which are being considered for referral? Or, should cases be selected using some temporal element? For instance, are 1997, when Rule 11 *bis* was inserted into the RPE,⁹² or even 2003–2004, when the completion strategy was adopted,⁹³ critical dates?

In the *Norac* case, the bench accepted that it is “impossible to measure the gravity of any crime in isolation” and, apart from the circumstances of a crime, gravity “must also be viewed in the context of other cases tried by [the] Tribunal.”⁹⁴ The bench did not, however, specify which other cases it was prepared to consider. Several attempts have been lodged by defense counsel in order to compare their position with previous cases tried before the ICTY and, more specifically, other referral cases. In the *Stanković* referral, for instance, the defense argued that Vuković in the *Kunarac* case was tried by the ICTY despite being charged with crimes of “much lesser scope” than the case at hand.⁹⁵ The defense for Todović argued that the crimes charged are “quite serious” and “more grave” than the offenses charged in other trials that commenced *after the relevant Security Council resolutions endorsing the Tribunal’s completion strategy*.⁹⁶ In the *Janković* appeal the appellant cited both cases tried by the ICTY and cases where referral was considered in an effort to convince the panel to retain the case.⁹⁷ The appeals chamber correctly rejected the submission that it was obliged to consider other

91. See Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 26 (Nov. 15, 2005).

92. See *supra* note 24 and accompanying text.

93. See *supra* note 4.

94. *Ademi & Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 28.

95. Transcript of Record at 212, Prosecutor v. Stanković, Case No. IT-96-23/2-PT (Mar. 4, 2005).

96. Savo Todović’s Defence Response to the Prosecution’s 11 *bis* Motion and Defence’s Submission of Further Information in Accordance with the Referral Bench’s Decision of 14 April 2005 and in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, ¶ 23, Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT (Apr. 28, 2005).

97. Defence Appellant’s Brief, ¶¶ 33–35, Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2 (Aug. 23, 2005) (referring to the cases of *Halilović*, *Knezević*, *Kovačević*, *Stakić*, and *Stanković*).

cases as a matter of law.⁹⁸ The possibility, however, that the bench should be “guided by a comparison with an indictment in another case” was not dismissed.⁹⁹ Nevertheless, the bench did not clarify which other cases were eligible.

The prosecution has also tried using other cases in support of their position. In the case of Dragomir Milošević the prosecutor conceded the gravity of the alleged crimes but unsuccessfully argued that the alleged crimes, albeit serious, were already tried before the ICTY in another case and the “contribution to the historical record of the events would be reduced in importance.”¹⁰⁰ Even though Rule 11 *bis* did not include whether a conduct had been “sufficiently tried” in another case—or even whether the historical facts surrounding the conduct were well documented—among its criteria,¹⁰¹ reliance on other cases in the future was left open. First, the bench mentioned that the *Galić* case, to which the prosecutor referred, was on appeal.¹⁰² The relevance of this fact was not discussed any further but it was indicative that the bench would probably have considered the outcome of the appeal if a decision were rendered. Second, the judges moved on to state that the conduct in *Milošević*, relative to *Galić*, covered two distinct periods

98. See *Janković*, Decision on Rule 11 *bis* Referral, ¶ 26 (Nov. 15, 2005).

99. *Id.*

100. See Motion by the Prosecutor Under Rule 11 *bis* with Annexes I, II, and III, ¶ 22, Prosecutor v. Milošević, Case No. IT-98-29/1-PT (Jan. 31, 2005) (citing Prosecutor v. Galić, Case No. IT-98-29-T, Judgment (Dec. 5, 2003)). This argument might have some merit had the sole purpose of the ICTY were the establishment of an accurate historical record. As is, for instance, the general purpose of a truth and reconciliation commission. See, e.g., Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor*, 95 AM. J. INT’L L. 952, 954 (2001); G. G. J. Knoops, Truth and Reconciliation Commission Models and International Tribunals: a Comparison (Sept. 29–Oct. 1, 2006), available at <http://www.unpo.org/downloads/ProfKnoops.pdf>. For a more elaborate description on the function served by a truth and reconciliation commission, see Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL’Y & L. 195, 204–207 (2000). While international trial may contribute to that cause, their function extends beyond compiling a record of crimes, not least because they determine a person’s guilt or innocence. See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 375, 382 (1999); Minna Schrag, *Lessons Learned From ICTY Experience*, 2 J. INT’L CRIM. JUST. 427, 428 (2004).

101. See *Milošević*, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 20 (July 8, 2005).

102. See *id.*

in time and were therefore not “fully addressed.”¹⁰³ The decision stressed how the case at hand differed from *Galić* rather than emphasise that the latter would not have had an impact on the former’s outcome anyway.¹⁰⁴ This is due to the higher gravity, which was also conceded by the prosecutor and not dependent upon whether the facts surrounding conduct were fully addressed in another case. The confusing approach adopted by the bench is unfortunate because it will not preclude similar arguments from being raised in other cases.

There is yet another reason why the inclusion of the criterion whether a conduct was sufficiently tried is unacceptable. As noted above, once the indictment is referred to the national courts, they have sole responsibility and freedom to determine all the facts surrounding the case, thus establishing its own “historical record.”¹⁰⁵ If the case would be referred on the grounds that these findings were already well established by the Tribunal in previous cases, national courts would be practically bound to implement those findings in their prospective judgments. Although national courts certainly can rely on these findings, their obligation to do so would seriously impact their independence.

The discussion illustrates that the referral bench does not have a clear view on the input that other cases may have on referral decisions. Although each indictment is examined within the context of its own facts, the chamber should set the criteria that it is willing to apply more concretely. Parity among indictments selected for referral would help create a level playing field and assist the Tribunal in setting the threshold at the desired level so that indictments eligible for referral are identified and dealt with at the appropriate jurisdictional level. Previous cases tried by the Tribunal are useful to the extent that

103. *Id.*

104. *See id.*

105. Besides the fact that any other solution would infringe the principle of independence of national judiciary this position can be inferred from the fact that the chamber did not want to discuss any issues that could irrevocably determine the conduct of the national courts. *See, e.g.*, Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 46 (May 17, 2005) (discussing the applicable law). However, it could be argued that the freedom and responsibility to determine facts are to some extent infringed by the provisions of the Rule 11 *bis*(D) (iii), (iv) and (F).

they highlight higher gravity in order to make the distinction with “lower” indictees clearer. Inserting a temporal element to distinguish amongst cases would not have assisted much, as neither the adoption of Rule 11 *bis* nor the completion strategy impact the jurisdictional question. What changes is the forum for trial for a certain number of cases, which is in line with the Tribunal’s view on concurrent jurisdiction.

Besides considering other cases, the bench has employed two quantitative standards to determine gravity.¹⁰⁶ If the alleged crimes do not cover a wide area and are limited in duration, then an indictment is likely to be suitable for referral.¹⁰⁷ When contrasted with *Galić*, which the prosecution argued involved “a pervasive and continuous campaign of shelling and sniping conducted at a large scale on an almost daily basis over many months,”¹⁰⁸ it becomes evident why the case against Dragomir Milošević was tried by the ICTY. The bench’s approach does not take account of the particular facts and participation of the alleged perpetrator in the commission of the crimes in question.¹⁰⁹ Although this is in line with examining the conflict as a whole, it does not necessarily assist in defining the gravity of the specific crimes. Gravity of the crimes is examined almost mechanically, based on the factual situation on the ground. To add to this surgical approach, the number of victims is taken into account: the larger the number, the higher the gravity of the crime.¹¹⁰ Conversely, a small or limited number of victims is

106. See Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 22, (Sept. 14, 2005); see also Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (July 22, 2005); Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 21 (July 20, 2005); Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 23 (July 8, 2005) (mentioning that the defendants were committed as part of a joint criminal enterprise but failing to elaborate); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (May 17, 2005).

107. See *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19; *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19.

108. Motion by the Prosecutor Under Rule 11 *bis* with Annexes I, II, and III, ¶ 20, Prosecutor v. Milošević, Case No. IT-98-29/1-PT (Jan. 31, 2005) (citing Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 764 (Dec. 5, 2003)).

109. To a certain extent, this aspect can be covered by examining the role of the accused.

110. Compare *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 23 (noting that the number of victims was large),

indicative of lower gravity.¹¹¹ The bench has never proceeded with an evaluation of defense arguments when the numbers of victims was contested.¹¹² Nor has it proactively determined these numbers through a fact-finding process;¹¹³ in effect, displaying “blind trust” towards the prosecutorial assessments. Similarly, attempts to consider some qualitative elements in the assessment of gravity, such as the civilian status of the victims or the close range of killing and destruction, have left the bench unperturbed.¹¹⁴

The consideration of geographic, temporal, or numerical factors reveals an attempt to insert some objectivity in the decision-making process. This attempt is only partially successful. Undoubtedly, these factors assist in quantifying the gravity of the crimes. However, a strict application of the above elements is bereft of an evaluative approach. A case, despite its limited geographic scope, temporal duration, or low number of victims, may still fulfill the criteria for deferral under Rule 9(iii), if it serves the interests of justice.¹¹⁵ This, in turn, would render the case unsuitable for referral, and would call for trial at the Tribunal.¹¹⁶ However unlikely this may be at this late stage of the Tribunal’s operation, the ICTY should be open to consider such cases, in line with the statute and RPE. While the use of set

with Janković, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (characterizing offenses committed against sixteen victims as “limited in scope”).

111. *See Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19. This precise argument was advanced by the government of Bosnia and Herzegovina in the *Stanković* referral. *See* Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in Its Decision for Further Information in the Context of the Prosecutor’s Request Under Rule 11 *bis* of 9 February 2005 at 1, *Stanković*, Case No. IT-96-23/2-PT (Feb. 24, 2005).

112. *See, e.g.*, Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 17 (Nov. 15, 2005) (arguing on appeal that the Bench only considered the crimes alleged in the indictment to the exclusion of “thousands” of others).

113. *See, e.g.*, *Janković*, Decision on Rule 11 *bis* Referral, ¶ 18 (considering only the facts alleged in the indictment); *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 22 (same); *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 18 (May 17, 2005) (same).

114. *See, e.g.*, Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 19 (Sept. 14, 2005).

115. *See ICTY Rules*, *supra* note 3, R. 9(iii) (allowing deferral if “what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal”).

116. *See ICTY Rules*, *supra* note 3, R. 10(C).

criteria is welcome, a more inquisitive evaluation of the gravity of crimes should be encouraged.

The second element in Rule 11 *bis*(C) covers the level of responsibility of the accused.¹¹⁷ This is determined by reference to the role of the defendant in the commission of the alleged offenses in tandem with their position in the civil or military hierarchy.¹¹⁸ In numerous court orders by the referral bench, the bench invited briefing on whether the role of the accused and his position and rank were to be taken conjunctively or whether they were alternatives.¹¹⁹ If taken together, the threshold would be higher than if the two factors were deemed to be alternatives. The bench in *Norac* determined that both elements should be examined together.¹²⁰ Albeit stricter, this approach allows for a clearer determination of the role and position of the accused, providing a more accurate picture on gravity.

Drawing the outer limits of senior responsibility is not an easy task. Nor is distinguishing between the “most senior leaders” and their “lower” counterparts. Although most would agree that persons beyond the architects of an “overall policy”¹²¹ would also be classed as leaders, it is difficult to decide where to precisely draw the circle of leadership. When determining whether their

117. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(C) (requiring consideration of “the level of responsibility of the accused”).

118. See *Janković*, Decision on Rule 11 *bis* Referral, ¶ 19; Prosecutor v. Ljubičić, Case No. IT-00-41-PT, Decision for Further Information in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, ¶ 19 (Sept. 5, 2005); *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes 1 and II, ¶ 23; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19.

119. *E.g.*, *Ljubičić*, Decision for Further Information in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, at 2; *Janković*, Decision for Further Information in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, at 4 (Apr. 15, 2005); Prosecutor v. Mejakić, Case No. IT-OR-65-PT, Decision for Further Information in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, at 3 (Feb. 9, 2005); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision for Further Information in the Context of the Prosecutor’s Request Under Rule 11 *bis*, at 3 (Feb. 9, 2005).

120. Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 31 (Sept. 14, 2005) (concluding that despite their status as commanding officers, referral of the accused was “not *ipso facto* incompatible with . . . Rule 11bis(A)”; see also Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-AR11bis.1, Decision on Milan Lukić’s Appeal Regarding Referral, ¶¶ 25–26 (July 11, 2007) (emphasizing the more subjective element of actual role over the accused’s relatively low military rank given his active role in organising especially deadly paramilitary attacks).

121. See Prosecutor v. Milošević, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 22 (July 8, 2005).

actual role and formal position merits international attention, each accused is considered separately by the bench. Some cases have been harder than others to decide. For instance, the position of Radovan Stanković as an infantry soldier facilitated the finding that he was not a leader in the context of Security Council Resolution 1503.¹²² By contrast, the bench in the *Rašević and Todović* referral refused to classify the two accused as leaders,¹²³ and rejected the argument that the second-in-command should be tried by the ICTY if the first-in-command is as well.¹²⁴ The bench's rationale in reaching this conclusion is not evidently clear given the brevity of the court on this point.

Due emphasis is placed on the political role the accused possessed.¹²⁵ The political role of an accused can distinguish a leader from other indictees.¹²⁶ The Tribunal differentiates between planners and actors that execute the will of the planners.¹²⁷ For a person to be considered a leader, they must hold some political role that elevates them above the other perpetrators.¹²⁸ This informal element gains importance and establishes a safer mechanism for measuring individual responsibility because increased planning capability constitutes evidence of greater gravity. This element is well-thought-out and satisfactorily applied.

The responsibility of the accused is judged *ratione loci* within the context of a specific territory, but the bench has not been consistent in its approach on locality. For instance, in *Janković* the bench did not render the accused a leader under Rule 11 *bis*

122. See *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 15,19.

123. See *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 23.

124. See *id.* ¶ 19.

125. See Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 19 (Nov. 15, 2005) (emphasizing that “[n]othing in the wording of 11 *bis*(C) indicates that the ‘level of responsibility’ is restricted to *military* responsibility to the exclusion of *political* responsibility” (emphasis added)). The appeals chamber went on to support this conclusion with reference to Security Council Resolution 1534, *supra* note 4. See *Janković*, Decision on Rule 11 *bis* Referral, ¶ 19.

126. See *Janković*, Decision on Rule 11 *bis* Referral, ¶ 19 (ordering referral, despite the sub-commander position held by Janković, because he lacked a political role).

127. See Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶¶ 26, 31 (Dec. 17, 2004).

128. See Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (May 17, 2005).

even though he held local command.¹²⁹ But in the *Milošević* referral it resisted the prosecutor's argument that Milošević was an "intermediate and lower-level accused"¹³⁰ given his subservience to Mladić and Karadžić within the Army of the Republika Srpska.¹³¹ Instead, the bench relied on Milošević's very senior role within the Sarajevo-Romanija Corps, a specialized unit of the Bosnian Serb Army.¹³² Unfortunatley, the Tribunal again did not take this opportunity to explain whether criminal responsibility should be measured against a particular area where the accused operated or whether the territory of the former Yugoslavia as a whole must be examined.¹³³ The bench seems prepared to limit the inquiry to the local level, but, at the same time, did not specifically delimit the boundaries of the relevant territory.¹³⁴ This is understandable given that each case is examined on its own merits.¹³⁵ An *a priori* determination of relevant territories would provide a basis for exclusion of certain cases from the referral process. The localization of responsibility in a specific territory is a good indication of gravity and is supported by the evidence that is available to the bench.

The nature of a particular activity, both in terms of its duration and substance, also bears on the true role played by an accused. An activity carried out over a limited period of time entails the risk that it may not be representative of the actual level of responsibility. The performance of a given role must extend over a substantial period of time in order to classify the accused as a leader.¹³⁶ In addition, the degree of the activity weighs on the assessment of responsibility. That the accused

129. See *Janković*, Decision on Rule 11 *bis* Referral, ¶ 19.

130. Motion by the Prosecutor Under Rule 11 *bis* with Annexes I, II, and III, ¶ 22, Prosecutor v. Milošević, Case No. IT-98-29/1-PT (Jan. 31, 2005).

131. See *Milošević*, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 21, 23 (July 8, 2005).

132. See *id.* There is little doubt as to the seniority of Dragomir Milošević; the defense conceded that there were 18,000 troops under his command in the Sarajevo-Romanija Corps. See Defence's Response to the Prosecution's Motion Under Rule 11 *bis* and the Trial Chamber Decision of 09.02.2005, ¶¶ 16, 20, *Milošević* (Feb. 21, 2005).

133. *Milošević*, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 21–23.

134. See *id.* ¶ 23.

135. See *ICTY Rules*, *supra* note 3, R. 47(E); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 18 (May 17, 2005).

136. See *Milošević*, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 23 (holding that the permanent nature of the position held by the accused amounted to a "prolonged period exceeding a year").

negotiated, signed, participated in negotiations, and implemented various agreements is a determinant factor in appreciating the importance of his position.¹³⁷ The specific tasks performed by the accused are therefore examined.¹³⁸ This cautious approach, which evaluates actual authority shown over an extended period of time, ensures that the right cases will remain with the Tribunal for trial. In situations where the accused possesses the requisite authority but fails to exercise their power, it is hoped that the bench would discharge this aspect of the gravity determination.

The level of individual criminal responsibility with which the accused is charged is also a factor bearing on the level of gravity. A commander is more likely to be a leader. An indictment alleging command responsibility, however, would be insufficient for trial in The Hague on its own.¹³⁹ An examination of gravity is still necessary because the bench may dispute the prosecutor's assessment of the alleged involvement.¹⁴⁰ The latter, in any case, will be thoroughly examined at trial. Since the bench cannot conduct a judicial examination into the individual criminal responsibility, command responsibility in the indictment does not generally suffice for referral by itself. The bench, therefore, often bases its decisions on a factual interpretation of the accused's role and not on the prosecutor's assessment of command responsibility—which is a matter reserved for trial. No doubt, a more accurate determination of gravity would ensue if the bench entered into a judicial examination of individual criminal responsibility, but this would alter the fundamental character of the referral hearing.

137. *See id.*

138. *See* Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 25 (Sept. 14, 2005) (portraying Norac as holding a “lower non-strategic rank” with limited operative assignment and without any authority in the police or judicial matters).

139. *See* Milošević, Decision on Referral of Case Pursuant to Rule 11 *bis*, ¶ 21 (declaring that Milošević's position, alone, is not “determinative”).

140. *See, e.g.,* Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (July 22, 2005) (rejecting the suggestion in the indictment that the accused was a “leader” by virtue of his command power at the local level). This aspect of the holding was disputed on appeal, but the Appeals Chamber rejected the argument. *See* Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 19 (Nov. 15, 2005).

A similar question concerns the allegation of joint criminal enterprise¹⁴¹ in the indictment. The issue is whether such allegation precludes referral by being indicative of higher gravity.¹⁴² In the *Mejakić* referral the defence took the argument a step further and argued that “even though the crimes alleged directly against the accused are not the highest gravity, their connection to others through the device of the joint criminal enterprise warrants careful treatment, that can only be accomplished if the same Tribunal that has considered and is considering other aspects of this joint criminal enterprise is the Tribunal to hear and adjudicate this case.”¹⁴³ In their view, the accused formed part of joint criminal enterprise with the Serb political authorities.¹⁴⁴ The defense also maintained that the purpose of the indictment was to establish whether they are responsible for actions and crimes committed by others whose cases have been tried by the Tribunal or yet evaded arrest.¹⁴⁵

Although it seems sensible to try all co-perpetrators of joint criminal enterprise before the same court, national or international, the attempt to examine the *Mejakić* case in relation to other cases linked by joint criminal enterprise fails because the indictment alleged limited participation in the joint criminal enterprise.¹⁴⁶ The bench therefore concluded that the role of the accused should be seen only on the basis of the particular acts alleged in the indictment.¹⁴⁷ Joint criminal enterprise alone does not prove gravity.

This does not mean that it could not “forestall the referral”¹⁴⁸ in another case. The bench’s approach in *Mejakić* is also consistent with previous case law examining the precise role

141. See Steven Powles, *Joint Criminal Enterprise; Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT’L CRIM. JUST. 606 (2004) (discussing the concept of joint criminal enterprise); see also Piacente, *supra* note 70, at 446 (same).

142. See 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 2005 and in the Context of the Prosecutor’s Motion Under Rule 11 *bis*, ¶ 11, Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT (Apr. 28, 2005) (arguing that indictment as a co-perpetrator displays a high level of responsibility).

143. Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 17 (July 20, 2005).

144. See *id.* ¶ 22.

145. See *id.*

146. See *id.* ¶ 23.

147. See *id.* ¶ 24.

148. See *id.* ¶ 25.

of the accused.¹⁴⁹ The limited input of the accused is balanced against the willingness of the panel to examine the bigger picture. The outcome could be different if the role of the accused in joint criminal enterprise would meaningfully influence the outcome of other cases or as the bench put it, if other trials tried before the Tribunal “will have significant implications for [the *Mejakić*] trial.”¹⁵⁰ The fact that it did not is key to the referral decision. The bench did not dispute the existence of joint criminal enterprise nor the degree of participation alleged by the prosecutor in the indictment and did not enter a judicial finding. This is in contrast to the approach taken on superior responsibility.¹⁵¹ Despite its importance, joint criminal enterprise should be seen as another form of individual criminal responsibility.¹⁵² It is therefore hard to see why it should be treated differently from command responsibility. Insofar as all co-perpetrators equally participate in the commission of the same serious crimes, the approach would be correct. But the approach is misplaced in any other situation and the gravity requirement would be harmed as a result.

The element of gravity is central to Rule 11 *bis*. Of the two elements in Rule 11 *bis*, gravity can be determined solely on the bench’s assessment without any consideration of the situation on the ground in a given state. If lower gravity is upheld, the bench may proceed with the rest of the elements contained in the rule. If, on the other hand, the accused is determined to be a serious leader, then the case remains with the Tribunal. To facilitate this task, the bench has devised some objective tests to measure gravity. Those tests may ease the burden, but do not fully delimitate the contours of gravity. A more inquisitive approach could perhaps go a step further and allow a more in-depth examination of the issues surrounding gravity. Nevertheless, the approach chosen by the bench, curtailed by the nonexamination of evidence, emphasises the limited scope of the referral process

149. Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (May 17, 2005); Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 19 (July 22, 2005).

150. *Id.*

151. See *supra* notes 139–40 and accompanying text.

152. See Piacente, *supra* note 70, at 449. But see Shane Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 AM. U. INT’L L. REV. 153, 176 (2004).

and forms testament to the pragmatic approach assumed by the bench. Such an approach could provide useful insight for other courts, such as the ICC, which may be guided by ICTY jurisprudence when adopting their own standards on gravity.

D. *Which State?*

Once the bench determines that the indictment is suitable for a referral under Rule 11 *bis*(C), the next step is to identify an appropriate state to receive the referral in order to proceed with the trial. The ICTY prosecutor, apart from initiating the referral process by motion, is also entitled to formally request referral to a particular state.¹⁵³ The bench, however, may also act *proprio motu* and refer the indictment to a state different from the one requested by the prosecutor.¹⁵⁴

If a request for referral is upheld, the indictment is transferred to a “national” jurisdiction.¹⁵⁵ This is understood to carry the ordinary meaning of all courts pertaining to a nation.¹⁵⁶ Referrals under Rule 11 *bis* to international courts such as the ICC or the Sierra Leone Special Court are therefore not envisaged. The referral bench decides which state will receive the indictment, but not which court within that jurisdiction will

153. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B); see also *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 23 (July 22, 2005); Prosecutor v. Mejačić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 39 (July 20, 2005); Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 31 (July 8, 2005).

154. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(D)(i); see also Prosecutor v. Ljubičić, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 27 (Apr. 12, 2006) (explaining that a referral *proprio motu* may only take place if there are significant problems with referral of the case to the state requested by the prosecution); *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 26 (same). The bench in this instance unnecessarily self-restricts the discretion that it enjoys to alter the state of referral and is in contravention with the rule itself.

155. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B) (requiring the accused to be “handed over to the authorities of [a] State”).

156. Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11 *bis*, ¶ 26 (May 17, 2005). The defense in the *Stanković* referral argued that the Bosnia and Herzegovina War Crimes Chamber could not be considered a national court it is not comprised exclusively of judges who are nationals of the state. See Defence’s Motion in Accordance with Rule 11 *bis*(B), ¶¶ 26–27, *Stanković* (Dec. 22, 2002). The referral bench correctly determined that the use of international jurists on a state’s courts does not impact or affect its national character. *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 26.

ultimately hear the case, nor what law will be applied.¹⁵⁷ However, some discussion of specific courts may be inevitable in making the determination on the suitability of a state.¹⁵⁸ Rule 11 *bis*(B), for instance, directs the Tribunal to examine the possibility of receiving a fair trial under the applicable law.¹⁵⁹

Rule 11 *bis*(A) sanctions three states as potential recipients of the indictment: the state in which the crime was committed, the state of arrest, or any state “willing and adequately prepared to accept” the indictment.¹⁶⁰ The prosecutor has consistently argued that the criteria in Rule 11 *bis*(A) reflect 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).¹⁶¹ The greater importance of the territorial state suggests an underlying hierarchy embedded in Rule 11 *bis*(A).¹⁶² A textual interpretation of the relevant provision does not support this contention. The various options in Rule 11 *bis*(A) are listed in the alternative. The territorial state may be mentioned first, but there is no indication that this should be chosen to the exclusion of the other two options. The bench in the *Mejakić* referral, using somewhat unclear language, dismissed the hierarchy argument but suggested that potential states are ranked in “descending priority.”¹⁶³ This does not seem far from the prosecutor’s position. Both accept that there is an order implicit in the rule, but they differ in the significance allocated to

157. See Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶ 44 (Apr. 5, 2007); see also *Ljubičić*, Decision on Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 47 (July 4, 2006).

158. See *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 22.

159. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B).

160. *Id.* R. 11 *bis*(A).

161. See, e.g., Motion by the Prosecutor Under Rule 11 *bis* with Annexes I and II and Confidential Annexes III and IV, ¶ 6, Prosecutor v. Rašević, Case No. IT-97-25/1-PT (Nov. 4, 2005); Request by the Prosecutor Under Rule 11 *bis* for Referral of the Indictment to Another Court, ¶ 6, Prosecutor v. Ljubičić, Case No. IT-00-41-PT (July 19, 2005); Motion by the Prosecutor Under Rule 11 *bis* with Annexes I, II, III, and Confidential Annexes IV, V, and VI, ¶ 6, Prosecutor v. Todović, Case No. IT-97-25 (Nov. 1, 2004); Request by the Prosecutor Under Rule 11 *bis*: Partly Confidential (Confidential Annexes II and III), ¶ 8, Prosecutor v. Mejakić, Case No. IT-02-65-PT (Sept. 2, 2004).

162. See *Ljubičić*, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 25 (Apr. 12, 2006) (summarizing the prosecutor’s argument for establishing a hierarchy within Rule 11 *bis*(A)).

163. *Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 40 (July 20, 2005).

the state on whose territory the crime was allegedly committed. Although the bench recognized the importance of the territoriality principle, the judges concluded that there is no established priority assigned to territoriality.¹⁶⁴ However, the articulation of the bench's position was not unequivocal, leaving the door open for the prosecutor to repeat the hierarchy argument in subsequent cases.¹⁶⁵ Perhaps the clearest expression of the Tribunal's position on hierarchy came in the *Janković* appeal.¹⁶⁶ The chamber discussed the discretion that the referral bench is vested with to determine referrals "without establishing any hierarchy among [the Rule 11 *bis*(A)] three options."¹⁶⁷ The bench rejected the hierarchy argument and emphasised that the task to allocate a case to the competent state for trial is solely based on the facts of each case, examined against the criteria of Rule 11 *bis*(A).¹⁶⁸ Preference is not bestowed by the Tribunal on the territorial state. The standard is instead set at the "significantly greater nexus" that a state possesses over any other possible referral states.¹⁶⁹ When there are competing jurisdictions, the bench will refer a case to the state with the greatest nexus to the accused.¹⁷⁰

164. *See id.*

165. *See Ljubičić* Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶¶ 25, 28; *see also* Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶ 37 (Apr. 5, 2007).

166. Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 33 (Nov. 15, 2005). The Bench reaffirmed this position in the *Mejakić* and *Ljubičić* appeals as well. *Ljubičić*, Decision on Appeal Against Decision on Referral, ¶ 13 (July 4, 2006); Prosecutor v. Mejakić, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 40 (Apr. 7, 2006).

167. *See Janković*, Decision on Rule 11 *bis* Referral, ¶ 33; *see also Mejakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 44; *Lukić & Lukić*, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶ 37; *Ljubičić* Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 28; *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 40.

168. *See Janković*, Decision on Rule 11 *bis* Referral, ¶ 33; *see also Mejakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 44; *Lukić & Lukić*, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶ 37; *Ljubičić*, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 28; *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 40.

169. *Janković*, Decision on Rule 11 *bis* Referral, ¶ 37.

170. *See id.*; *see also Ljubičić*, Trial Decision, ¶ 29 (focusing on the "weaker" nexus of a requested state to deny referral to that jurisdiction).

Criminal jurisdiction on the basis of territoriality is found in Rule 11 *bis*(A) (i).¹⁷¹ This provision confers jurisdiction on a state in whose territory the crime was committed.¹⁷² There are two possible interpretations of the principle of territoriality from Rule 11 *bis*. The first is that the notion of territory would correspond to the territory of the former Yugoslavia, and referrals under this option would take place in any of the states that emerged from the break up of the Socialist Federal Republic of Yugoslavia in 1991. This would be an incorrect assertion. All of the states which emerged in the territory of the former Yugoslavia acquired international recognition before the ICTY was even established.¹⁷³ An interpretation that included the entire territory of the former Yugoslavia would infringe upon the sovereignty of these states. The other, more suitable interpretation would consider the individual territories of the emerged states. For example, if the crime occurred in Sarajevo, the relevant territory would be that of Bosnia and Herzegovina; for the crimes committed around Knin, the territorial state would be Croatia and so on.

Besides territoriality, Rule 11 *bis* also provides for referral to the state where the accused was arrested.¹⁷⁴ This state may not be identical to the territorial state. The link with the state of arrest might be tentative and limited to the fact that the person was merely present within that territory at the time of the arrest. Interestingly, Rule 11 *bis*(A) (ii) does not require an examination into whether the custodial state would be willing to try the person, nor whether its legal system would be able to accept the case.¹⁷⁵ From a practical perspective, there may not be national legislation granting jurisdiction on the basis of custody or even

171. *ICTY Rules*, *supra* note 3, R. 11 *bis*(A) (i). Rule 11 *bis*(A) (i) is widely used primarily due to the practical advantage it offers regarding easy access to evidence and witnesses.

172. *Id.* R. 11 *bis*(A) (i).

173. Croatia as well as Bosnia and Herzegovina became members of the United Nations on May 22, 1992, and Macedonia became a member on April 8, 1993. *See* U.N. Member States, List of Member States U.N. Doc. ST/SG/SER.A/295/Add.5 (Oct. 6, 2006), *available at* <http://secint50.un.org/members/list.shtml>. The ICTY Statute was subsequently adopted on May 25, 1993. *See* Statute of the International Tribunal, *supra* note 19.

174. *ICTY Rules*, *supra* note 3, R. 11 *bis*(A) (ii).

175. *See id.*

criminalizing the acts in question.¹⁷⁶ Yet, if referred, the state would have to accept the indictment and proceed with trial because the ICTY is a creation of the Security Council acting under chapter VII of the U.N. Charter, which renders its decisions binding on all U.N. member states.¹⁷⁷ Nevertheless, it is unlikely that the referral bench would transfer an indictment to an unwilling or incapable forum. Even though the “willing and adequately prepared” analysis does not form part of Rule 11 *bis*(A)(i) and (ii) inquiry, it may, however, come under the fair trial requirement of Rule 11 *bis*(B).¹⁷⁸ When discussing referral to the state of arrest, some examination of the legal system would be desirable so as to guarantee successful trial after referral. An amendment of Rule 11 *bis* to reflect this should, therefore, be considered.

An altogether different challenge is faced by voluntary surrenders. In the context of Rule 11 *bis*, it is of interest to examine whether the state that the person voluntarily surrenders within may be equated with the state of arrest for the purposes of referral. At the inception of *ad hoc* tribunals, few would have thought that voluntary surrenders would become such an effective means of bringing the alleged perpetrators to The Hague.¹⁷⁹ Fear of “detention” by the SFOR in Bosnia and Herzegovina led to a number voluntarily surrenders.¹⁸⁰ The

176. See *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, ¶¶ 40, 56, Letter dated 17 June 2002 from the Secretary-General Addressed to the President of the Security Council, Annex, U.N. Doc. S/2002/678 (June 19, 2002).

177. See U.N. Charter art. 48.

178. See *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 40 (Nov. 15, 2005) (noting that “[a]s a strictly textual matter, Rule 11 *bis*(A)[(ii)] does not require that the jurisdiction be ‘willing and adequately prepared to accept’ a transferred case,” but that the analysis is implicit in Rule 11 *bis*(B)).

179. See John B. Allock, *The International Criminal Tribunal for the Former Yugoslavia*, in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 346, 368–78 (Charles Ingrao & Thomas A. Emmert eds., 2009); VOJIN DIMITRIJEVIC, SILAZENJE S UMA [LOSING MIND] 318–19, 389 (2006) (Serb.); see also Julija Bogojeva, *Odgovornost za zlocine [Responsibility for the Crimes]*, REPUBLIKA, No. 169-170 (1997), available at http://www.yuope.com/zines/republika/arhiva/97/170/170_22.HTM. See generally VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS* (2008).

180. See *Fifth Annual Report of the ICTY*, *supra* note 24, ¶ 222; see also JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 108 (2003) (quoting a legal advisor in the prosecutor’s office as stating that the accused became aware “that there was an easy way and a hard way to come here,” particularly after the death and injury of Držlaća and Kupreškić during their arrests); RACHEL KERR, *THE*

policy of the moderate Serbian government during the period of 2004–2008 also promoted a number of voluntary surrenders in exchange for special benefits.¹⁸¹ The ten individuals indicted in the *Kordić* and *Kupsreškić* cases were the first accused to surrender voluntarily¹⁸² and many more followed. Be it the change in the scene on the ground or the exercise of political pressure, voluntary surrenders became common.¹⁸³ It was thus argued in some referral hearings, that the surrender of the accused to national authorities referral to that state suitable on the basis that it was the custodial state.¹⁸⁴ The bench is yet to address this

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA; AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 170 (2004) (quoting a Stabilization Force spokesperson as remarking that “SFOR at the door . . . may be bad for your health”).

181. The Serbian government under the leadership by Vojislav Koštunica introduced the so-called “system of voluntary surrender,” which offered significant financial benefits to those who surrendered on their own accord. See *Zakon o pravima optuženog u pritvoru Međunarodnog Krivičnog Tribunala i članova njegove porodice* [Law on the Rights of the Accused in Custody of the International Criminal Tribunal and Members of Their Families], *Službeni glasnik S.R. Srbije* [Official Gazette of the Republic of Serbia] br. 35/2004, Mar. 30, 2004 (Serb.), available at http://www.parlament.gov.rs/files/lat/pdf/zakoni/2004/pdf_015_1469-04_lat.zip. This law was challenged before the Constitutional Court of Serbia and its application was suspended only fifteen days after its adoption pursuant to an interim decision of the court on April 15, 2004. See *Odluku Ustavni sud Republike Srbije* [Constitutional Court of the Republic of Serbia], br. IU-152/2004, Apr. 15, 2004, *Službeni glasnik S.R. Srbije* br. 42/2004, Apr. 15, 2004 (Serb.). The court, however, never reached a final decision on the matter. Despite these complications, indictees who surrendered were still awarded substantial compensation from “private sources.” See N. Čaluković & N. M. Jovanović, *Za predaju do pola miliona evra* [Up to Half Million Euros for Surrender], *BLIC ONLINE* (Belgrade), Mar. 31, 2005, http://www.blic.rs/stara_arhiva/politika/81406/za-predaju-do-pola-miliona-evra. This system led to the surrender of a number of senior military and civilian officials, including Chief of Staff of the Yugoslav Army, General Pavkovic; Chief of the Third Army, General Lazarevic; Chief of Kosovo Police, General Lukic; and the Minister of Interior of the Republic of Srpska, Mico Stanisic. See VESNA PETROVIĆ, *HUMAN RIGHTS IN SERBIA AND MONTENEGRO 2005*, at 462–63 (2006). There was a previous wave of voluntary surrenders of Serbian high officials in 2002 and 2003 following the adoption of the Directive on the Assistance to ICTY Indictees. See Nenad Ij. Stefanovic, *Haski Uskrs* [Easter in the Hague], *VREME* (Belgrade), Apr. 25, 2002, at 14 (identifying the President of the Republic of Serbia, Milan Milutinovic; President of the Republic of Srpska Krajina, Milan Martić; and Deputy Prime Minister of Yugoslavia, Nikola Sainovic as individuals who recently surrendered).

182. See *Fifth Annual Report of the ICTY*, *supra* note 24, at ¶ 113.

183. The transfers of indictees to The Hague from Serbia was a highly political issue due to the animosity towards the ICTY. See PETROVIĆ, *supra* note 181, at 462–63, 473.

184. See Transcript of Record at 130, *Prosecutor v. Rašević & Todović*, Case No. IT-96-23/2-PT (Mar. 4, 2005) (arguing at a Rule 11 *bis* motion hearing that “he personally surrendered in Serbia and therefore meets the 11 *bis* criteria”); see also Serbia and

argument, but it is unlikely that this position would be tenable if the surrender was accomplished without any state involvement. This is not to say that the involvement of the state must only occur through its criminal justice system. Using Serbia as an example, political measures, such as the adoption of incentive-based laws, threats of imminent arrest, and other coercive methods, led to a wave of surrenders.¹⁸⁵ In that case, the line separating arrest from surrender is very vague, and the state of arrest is thus put on par with that of surrender. It is hard to foresee that the referral bench would in any case transfer the indictment to the state of arrest if it is not willing and able to accept it in practice. The state of arrest could therefore have been omitted altogether, as the same outcome could have been achieved through application of Rule 11 *bis*(A)(iii), which is examined next.

Of the elements in Rule 11 *bis*, subsection (A)(iii) is perhaps the most interesting. By virtue of the provision, the referral bench may refer the indictment to the authorities of the state “having jurisdiction and being willing and adequately prepared to accept such a case.”¹⁸⁶ This provision underscores the universality of international criminal justice and guarantees the involvement of more states, which, if applied consistently, would enhance uniformity. Rule 11 *bis*(A)(iii) therefore leaves open the possibility of referrals to states which have no link to either the alleged crime(s) or the accused. Nevertheless, the referral bench cannot select a state for referral under Rule 11 *bis*(A)(iii) blindly. Under this provision a state must have jurisdiction over the crimes charged and be willing and capable to receive the indictment.¹⁸⁷ The rule does not, however, specify the type of jurisdiction required.¹⁸⁸ This would theoretically encompass a system as broad as universal jurisdiction. In short, trial may occur in any state under Rule 11 *bis*(A)(iii) so long as a willing and capable forum is available, regardless of where and by whom the crime was committed.

Montenegro’s Submission in the Proceedings Under Rule 11 *bis*, ¶ 5, Prosecutor v. Međaković, Case No. IT-02-65-PT (Jan. 14, 2005) (submitting that “arrest of the accused should be equaled with voluntary surrender” for purposes of Rule 11 *bis*).

185. *See supra* notes 180–81.

186. *ICTY Rules, supra* note 3, R. 11 *bis*(A)(iii).

187. *See id.*

188. *See id.*

The rule does not elaborate upon the meaning of willingness and capacity, nor does it contain any indication as to how these requirements are measured.¹⁸⁹ Both concepts are reminiscent of the ICC complementarity regime under which national fora must be “willing and able” genuinely to deal with a case.¹⁹⁰ This provision of Rule 11 *bis* was inserted after the adoption of the Rome Statute,¹⁹¹ so the influence of the latter is evident. Nevertheless, Rule 11 *bis*(A) (iii) differs significantly from article 17 of the Rome Statute, the main provision on complementarity. On a purely textual level, Rule 11 *bis*(A) (iii) utilizes the phrase “adequately prepared” as opposed to the equivalent term “able” in the Rome Statute.¹⁹² But the distinction is not simply linguistic. In examining “willingness” the bench does not seek to determine whether there is an attempt by the state to thwart trial,¹⁹³ but whether the state has affirmatively expressed an interest in exercising jurisdiction over a case.¹⁹⁴ There is a fundamental difference in the underlying motive. When examining ability, the aim of the bench is to determine whether a state’s legal system could cope with the indictment in terms of the existing legislation, adequate procedures, and, more generally, the capacity to undertake the main trial.¹⁹⁵ Capability in Rule 11 *bis* is therefore closer to the “otherwise unavailable” concept found in article 17(3) of the Rome Statute, which covers wider issues of unavailability.¹⁹⁶ Moreover, the formulation in Rule 11 *bis*(A) differs from complementarity in its fundamental conception. Unlike complementarity, the ICTY examines a

189. *See id.*

190. *See* Rome Statute, *supra* note 29, pmbl. ¶ 10, arts. 1, 17.

191. Rule 11 *bis*(A) (iii) was adopted on June 10, 2004. *See ICTY Rules, supra* note 3, R. 11 *bis*(A) (iii).

192. *Compare* Rome Statute, *supra* note 29, art. 17, with *ICTY Rules, supra* note 3, R. 11 *bis*(A) (iii).

193. *See* Rome Statute, *supra* note 29, art. 17(2) (indicating what constitutes “unwilling”).

194. *See* Prosecutor v. Međakić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 36, 39–42 (July 20, 2005).

195. *See* Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 27, 45 (July 22, 2005); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 21 (May 17, 2005).

196. *See* Timothy L.H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELB. U. L. REV. 635, 645 (1999); *see also* Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision on Rule 11 *bis*, ¶¶ 16–17 (Aug. 30, 2006) (discussing Norway’s unavailability).

domestic legal system for purposes of Rule 11 *bis* not to decide whether a case ought to be removed from the national forum but to determine whether the indictment may be sent to that state for trial.¹⁹⁷ The rule in this instance places more trust in the national legal system at a conceptual level, notwithstanding the primacy exerted by the statute of the Tribunal itself over the crimes in question.¹⁹⁸

Within this framework, Rule 11 *bis*(A)(iii) is potentially applicable to a large number of states. Despite nationality finding a prominent place in both national and international conceptions of jurisdiction,¹⁹⁹ it is not found in Rule 11 *bis*. Nevertheless, states will sometimes invoke Rule 11 *bis*(A)(iii) in order to exercise jurisdiction over cases involving their own nationals.²⁰⁰ Curiously, these states focus their arguments on diplomatic protection.²⁰¹ Diplomatic protection, although linked,

197. See *supra* notes 25–30 (juxtaposing the terms “referral” and “deferral” as they are used in international jurisprudence).

198. See Statute of the International Tribunal, *supra* note 19, art. 9 (noting the Tribunal’s primacy within the concurrent jurisdiction structure).

199. See Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in I THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 609–10 (Antonio Cassese et al. eds., 2002) (highlighting that article 12 of the Rome Statute has been incorporated into in the criminal code of all states comprising the former Yugoslavia); S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 91–92 (Sept. 7) (Moore, J., dissenting) (discussing public international law within the context of the passive personality principle rather than a citizen’s nationality); see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303–04 (7th ed. 2008) (providing a brief overview of the nationality principle in modern public international law since the time of S.S. “*Lotus*”).

200. See Serbia and Montenegro’s Submission in the Proceedings Under Rule 11 *bis*, ¶ 7, Prosecutor v. Mejakić, Case No. IT-02-65-PT (Jan. 14, 2005) (arguing that a state holds “special rights and responsibilities” over its nationals as *parens patriae*); see also Savo Todovic’s Defence Notice on the Serbia and Montenegro Willingness to Accept the Case of Savo Todovic Under Rule 11 *bis*, ¶ 3, Prosecutor v. Rašević and Todović, Case No. IT-97-25/1-PT (May 5, 2005) (using citizenship as an additional basis for referral).

201. See Serbia and Montenegro’s Submission in the Proceedings Under Rule 11 *bis*, ¶ 7, *Mejakić*; see also Defence Further Submission Regarding Gojko Janković’s Citizenship, ¶ 2, Prosecutor v. Janković, Case No. IT-96-23/2-PT (advancing the outrageous argument that the accused is not a citizen of Serbia and Montenegro but fulfils all the preconditions to be one). The bench has so far not seriously examined the issue of nationality as it relates to jurisdiction. See Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 32 (July 8, 2005) (noting the Bench was seized of the matter but ostensibly favoring an approach that takes into account whether there is a genuine link); see also *Nottebohm* (Second Phase) (Liech. v. Guat.), 1955 I.C.J. 4, 24–26 (Apr. 6) (first case to require a genuine connection); *Report of the International Law Commission to the General Assembly*, 57 U.N. GAOR Supp. (No. 10) at 173–76, U.N. Doc. A/57/10 (2002)

is ancillary to nationality and involves taking over a national's claim against a state for a wrongful act suffered by the national before an international tribunal.²⁰² This bears no relevance to a Rule 11 *bis* procedure as there is no damage suffered by an individual that would require protection from another state. It is hard to see how diplomatic protection can fit with Rule 11 *bis* given the nature of the criminal process.

Nevertheless, the absence of nationality as a possible jurisdictional principle in Rule 11 *bis*(A) is striking. Most perpetrators originally shared common Yugoslav nationality. But since the disintegration of the Socialist Federal Republic of Yugoslavia and the emergence of separate independent states within the borders of the former Yugoslavia, the accused possess different nationalities, which may explain the absence of the principle from Rule 11 *bis*. All crimes committed in the territory of the conflict would in any case be covered under the principle of territoriality.²⁰³ The absence of jurisdiction based on nationality is not insurmountable; the bench is free to send the indictment elsewhere on the basis of Rule 11 *bis*(A) (iii).²⁰⁴ The same may be said for the passive personality principle,²⁰⁵ another important principle of jurisdiction, which is equally missing from Rule 11 *bis*.

As regards the potential state for referral, Rule 11 *bis*(A) adopts a pragmatic approach that takes into account the practical situation on the ground. That territoriality takes precedence in practice is not surprising. However, referring most indictments to a single state and potentially to the same court (usually the War Crimes Court in Bosnia and Herzegovina) is likely to overwhelm

(noting that the International Law Commission did not include a genuine link requirement and that *Nottebohm* should be limited to its facts by virtue of the changing needs of today's globalized world).

202. See *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); *Panevezys Saldutiskis Railway* (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); see also *Report of the International Law Commission to the General Assembly*, 58 U.N. GAOR Supp. (No. 10) at 81, U.N. Doc. A/58/10 (2003) ("Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a state adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another state.").

203. See *supra* notes 171–73.

204. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(A) (iii).

205. See BROWNIE, *supra* note 199, at 304; Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 14–30 (1993).

the state of referral. The latter is then required to turn around cases—which would have taken many years before the ICTY—without access to similar budget, staff, or resources.²⁰⁶ For example, the State Court of Bosnia and Herzegovina, to which the majority of the referred cases were transferred, had 275 pending cases in April of 2008.²⁰⁷ The court only has eight available courtrooms²⁰⁸ and an annual budget of just under €5.5 million,²⁰⁹ in comparison to the Tribunal's biannual budget of €347.5 million.²¹⁰

The preeminence of the state of arrest in Rule 11 *bis* adjudication over other more established principles of jurisdiction remains striking. This perhaps caters to the practical reality of dealing with international criminals who flee the territory of the former Yugoslavia. The ambit of the rule is nevertheless expanded through the operation of Rule 11 *bis*(A)(iii).²¹¹ So far, however, the bench has taken a conservative approach and referred all but one indictment to the territorial state, as requested by the prosecutor.²¹² It is understandable why the bench has not ventured out to states unrelated to the conflict. Should the bench decide that certain cases could be more appropriately dealt with elsewhere, the possibility at least

206. See Katie Zoglin, *The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?*, 27 HUM. RTS. Q. 41, 72 (2005).

207. See SUD BOSE I HERCEGOVINE [SUD BiH] [COURT OF BOSNIA AND HERZEGOVINA], BROJ PREDMETA ODJELIMA I I II KRIVIČNOG ODJELJENJA SUDA BOSNE I HERCEGOVINE DO 30. APRILA 2008 [NUMBER OF CASES BEFORE SECTIONS I AND II OF THE CRIMINAL DIVISION OF THE STATE COURT OF BOSNIA AND HERZEGOVINA AS OF APRIL 30, 2008], http://www.sudbih.gov.ba/files/docs/statistika/2008-04-30/Broj_predmeta_pred_Odjelima_I_i_II_-_april_2008.pdf.

208. See SUD BiH, ISKORIŠTENOST SUDNICA PREMA BROJU DANA U MJESECU DO 30. APRIL 2008 [UTILIZATION OF COURTROOMS BROKEN DOWN BY MONTH AS OF APRIL 30, 2008], http://www.sudbih.gov.ba/files/docs/statistika/2008-04-30/Iskoristenost_sudnica_prema_broju_dana_u_mjesecu_-_april_2008.pdf.

209. See Sud BiH, Office of Public Relations (PIOS): Frequently Asked Questions, <http://www.sudbih.gov.ba/?opcija=sadrzaj&kat=7&id=15&jezik=b> (last visited Feb. 20, 2010) (listing the court's annual budget for 2009).

210. See Fifth Comm., *Financing 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*, at 4, U.N. Doc. A/62/599 (Dec. 24, 2007).

211. See *supra* notes 186–98 (displaying the wide discretion of the bench to refer an indictment to potentially any state that meets certain criteria).

212. Vladimir Kovačević's indictment was the only one not referred on the grounds of territoriality. See *Prosecutor v. Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential and Partly Ex Parte Annexes (Nov. 17, 2006).

remains. The ICTY experience gained from this part of the process could benefit the ICC when it examines the suitability of national fora as part of its decision on complementarity. Despite its similarities with Rule 11 *bis*, the ICC process differs in the nature of the complementarity determination. Another difference lies in the presence of the nationality principle for conferring jurisdiction and the potentially larger number of states that would need to be considered when examining complementarity. Rule 11 *bis* precedent may prove useful in terms of process and methods used to make such determinations.

II. APPLICABLE SUBSTANTIVE LAW

As the purpose of the referral hearing is to examine the suitability of an indictment for referral, the bench recognizes that it does not possess the competent authority to decide in any binding way what law will be applied at the national level once a referral is upheld.²¹³ This authority rests with the courts of the state the indictment is referred to. Although the bench has refuted any suggestion that an obligation to determine the applicable substantive law exists,²¹⁴ it has nevertheless considered potentially applicable law in each of the cases it has examined to date. The bench has not felt the need to ground this in the RPE.

A discussion on substantive law is necessary primarily for two reasons. First, under Rule 11 *bis*(B), the referral bench needs to satisfy itself that the accused will receive a fair trial and that the death penalty will not be imposed.²¹⁵ Such a determination

213. See *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 31 (Apr. 12, 2006); *Prosecutor v. Mejačić*, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 45 (Apr. 7, 2006); *Prosecutor v. Ademi & Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 32, (Sept. 14, 2005); *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 27 (July 22, 2005); *Prosecutor v. Mejačić*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 43 (July 20, 2005); *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 34 (July 8, 2005); *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 32 (May 17, 2005).

214. See *Mejačić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶¶ 46, 48 (addressing arguments alleging the referral bench had erred in refraining from determining the controlling law and the bench's response).

215. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B); Somers, *supra* note 51, at 182.

cannot be made in the abstract. To the extent that fulfilment of these two criteria above may only be determined through a limited examination of applicable law, the referral bench is entitled to look into all available options.²¹⁶ However, the bench's findings are not binding on the state to which the case is referred and are, in any event, limited.²¹⁷ Second, although this has not arisen in the ICTY jurisprudence, there is an inherent need to examine the applicable substantive law when considering referrals pursuant to Rule 11 *bis*(A)(iii), particularly in order to decide whether the capability requirement is met.²¹⁸ The absence of adequate legislation would hinder or arguably preclude acceptance of the indictment. Moreover, given that Rule 11 *bis* does not provide criteria to assist the bench with its decision on capability, an examination of substantive law should not be precluded, although this is not explicitly envisaged in Rule 11 *bis*(A)(i) and (ii). It would be interesting to see whether the bench would engage in a more detailed discussion of substantive law, if it were to decide upon a referral *proprio motu*.²¹⁹ In such an instance, the bench, in lieu of the prosecutor, would have to make a case for referral to a particular state, which would in all likelihood require arguments in favour of the suitability of the forum.

The aim of the bench is to satisfy itself that an adequate legal framework would be in place enabling prosecution of the accused who, if found guilty, will be appropriately punished.²²⁰ The bench therefore limits its examination to those aspects of substantive law that would assist it in making the above determination. Accordingly, the bench does not seek to prove or disprove the prosecutorial or defense submissions. Instead, consideration is given to what seems to be the "apparent position" on substantive law to determine whether a referral order may be proceeded with.²²¹ No indication is given as to what

216. See *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 43.

217. See *id.*

218. See McCormack & Robertson, *supra* note 196, at 645–46.

219. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B).

220. See *id.*

221. See *Prosecutor v. Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶ 32 (Apr. 12, 2006); *Prosecutor v. Ademi & Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 38 (Sept. 14, 2005); *Prosecutor v.*

the bench considers to be the apparent position or how it makes this determination.

National courts to which indictments are referred bear exclusive responsibility regarding the determination of the applicable substantive law and will have to make some difficult decisions post referral. Conscious of its limited mandate, the bench does not wish to trespass on what is inherently a domestic function.²²² Had a more in-depth analysis of the conflicting provisions beyond the mere exposition of the law been undertaken, the bench would have been able to provide clearer guidance to the national courts regarding the law to be applied. Moreover, national prosecutions would benefit from such expert legal analysis by the Tribunal. However, a more substantial examination of applicable law would defy the main aim of the referral process, which is to reduce the Tribunal's burden in light of the completion strategy. Such an undertaking would have taken up precious resources, and would not have been consistent with the nature of Rule 11 *bis* as an important weapon in the battle against time. A detailed examination of applicable substantive law after the referral of the indictment would be beyond the scope of this Article, but some potential problems that national courts may face will be briefly examined.

The first question is what law would apply. The bench has adopted an almost identical approach on this issue in the indictments it has examined to date. As the law applicable at the time the crimes were committed, following the break-up of the former Yugoslavia, no longer applies, national courts will have to determine the applicable law with due regard to the principle of legality.²²³ While this principle recognizes that the applicable law

Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 23 (July 22, 2005); *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 48; Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 37 (May 17, 2005).

222. See Somers, *supra* note 51, at 182.

223. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, *amended by* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Restructuring the Control Machinery Established Thereby, 2061 A-2889 U.N.T.S. 12. A consolidated copy of the amended treaty is electronically available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>. All states of the former Yugoslavia are parties to the convention. See Council of Eur., Convention for the Protection of Human Rights and Fundamental

Freedoms CETS No.: 005, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=05/03/2010&CL=ENG> (last visited Feb. 20, 2010). The courts from the region took diverse approaches. While Serbian courts tend to apply the basic Criminal Law of Socialist Federal Republic of Yugoslavia (“SFRY”), Krivični zakon socijalističke Federativne Republike Jugoslavije [Criminal Code of the Socialist Federal Republic of Yugoslavia] [hereinafter SFRY Criminal Code], Službeni list Socijalističke Federativne Republike Jugoslavije [Official Gazette of the Socialist Federal Republic of Yugoslavia] br. 36/1977, July 15, 1977, *translated in* LAWYERS COMM. FOR HUMAN RIGHTS, PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA: THE INTERNATIONAL TRIBUNAL, NATIONAL COURTS, AND CONCURRENT JURISDICTION 22–23, 25–33 (1995), Bosnian courts did not take a firm position on this matter. *Compare* Okružni sud Beograd [Belgrade District Court], Indictment Against Mirosljub Vujović et al., No. KTZR 4/03 (Sept. 16, 2005), *available at* http://www.tuzilastvorz.org.rs/html_trz/optuznice/o_2005_09_16_eng.pdf (applying the Criminal Code of the SFRY for an offense committed prior to 1992), *with* Okružni sud Beograd, Indictment Against Slobodan Medić et al., No. KTRZ 3/05 (July 10, 2005), *available at* http://www.tuzilastvorz.org.rs/html_trz/optuznice/o_2006_10_09_eng.pdf (applying the criminal code of the Federal Republic of Yugoslavia for offenses committed after 1992). The State Court of Bosnia and Herzegovina (“BiH”) has applied the Criminal Code of BiH, Krivični zakon Bosne i Hercegovine [Criminal Code of Bosnia and Herzegovina] [hereinafter BiH Criminal Code], Službeni glasnik Bosne i Hercegovine [Official Gazette of Bosnia and Herzegovina], br. 37/2003, Nov. 22, 2003, *translated at* http://www.anti-trafficking.gov.ba/fajlovi/kazneni_zakon_bh.pdf.pdf, but other courts in the Republika Srpska and the Federation of BiH, the two political entities of BiH, have applied the basic criminal code of the SFRY, *supra*. *See, e.g.*, Humanitarian Law Cntr., Nacionalna sudenja za ratne zločine—Bosna i Hercegovina [National Trial for War Crimes—Bosnia and Herzegovina], <http://www.hlc-rdc.org/PravdaReforma/Sudjenje-za-ratne-zlocine/SudjenjaZaRatne-Nacionalna-sudjenja-za-ratne-zlocine/Sudjenje-za-ratne-nacionalna-BiH/151.sr.html> (last visited Feb. 20, 2010) (discussing indictment on January 30, 2001 of Ranko Jakovljević in the District Court of Banja Luka in accordance with the Criminal Code of the Republic of Srpska—which was renamed Criminal Code of SFRY). With the decision of the Constitutional Court of Bosnia and Herzegovina in *Abduladhim Maktouf*, by which it determined that the application of the BiH Criminal Code is consistent with the principle of legality, these discrepancies in application of the law before different courts in the same state should be resolved. *See* Odluku Ustavni sud Bosne i Hercegovine [Constitutional Court of Bosnia and Herzegovina], br. AP-1785/06, Mar. 30, 2007 (*Abduladhim Maktouf*), *available at* http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=73135. It should be noted that all cases referred to Bosnia and Herzegovina are tried in accordance with the BiH Criminal Code. *See, e.g.*, Sud Bosne i Hercegovine [Court of Bosnia and Herzegovina], br. X-KRŽ-05/70, Mar 28, 2007 (*Stanković*). Croatian courts, on the other hand, apply the Penal Code of Croatia, Kazneni zakon Republike Hrvatske [Penal Code of the Republic of Croatia], Narodne novine [Official Gazette] br. 110/2003, Nov. 20, 2003 [hereinafter Croatia Penal Code], as it existed at the time when the crimes were committed. *See, e.g.*, Županijskom Sudu u Zagrebu [County Court of Zagreb], Optužnicu protiv Rahima Ademija i Mirka Norca [hereinafter Indictment Against Rahim Ademi and Mirko Norac], br. K-DO-349/05 (Nov. 22, 2006), *available at* <http://ivojosipovic.com/knjige/odgovornost/pdf/D/4.%20OPTUZNICE/06.%20Optuznica%20Norac-Ademi.pdf>. In Serbia, the Special Prosecutor for War Crimes bases his charges on the relevant provisions of the Criminal Code of the SFRY, *supra*, in force at the time the crimes were committed. *See, e.g.*, Okružni sud Beograd

is that which was in force at the time of the commission of the crime, it also allows for retrospective application of posterior law, if the latter is more lenient. All sides to the referral hearing have presented arguments based on varying interpretations of the principle,²²⁴ but the bench has so far refrained from indicating its position on the matter. The absence of a “judicially established test” for the determination of leniency has been noted by the bench,²²⁵ which indicates that the decision on applicable law national courts are called to make cannot rely on preestablished criteria and implies that it is of considerable complexity which will burden the national court.

Other areas that the bench has touched upon include the absence of the category of crimes against humanity in the legislation of the former Yugoslavia,²²⁶ the nonequivalence of the provisions relating to command responsibility with the ICTY Statute,²²⁷ the potential for direct applicability of international

[Belgrade District Court], Indictment Against Vladimir Kovačević, No. KTZR 5/07 (July 26, 2007), *available at* http://www.tuzilastvorz.org.rs/html_trz/optuznice/o_2007_07_26_eng.pdf.

224. *See* Response of the Government of Bosnia and Herzegovina to the Request for Further Written Submissions by the Referral Bench in the Mejačić and Stanković Cases at 5–6, *Stanković* (Mar. 22, 2005) (acknowledging the legality principle but arguing that the 2003 BiH Criminal Code provides a “more complete exposition of the law” and should therefore be applied instead). Identical arguments have been made in other cases. *See, e.g., Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 30; Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 37 (July 8, 2005). Depending on whether the 2003 code is more lenient or not, the above argument may violate the legality principle, if applied purely on the basis that it provides for more detailed provisions. *See supra* note 223 (outlining the principle of legality).

225. Prosecutor v. Mejačić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 47 (July 20, 2005).

226. *See Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 33; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 38–39. Consequently, in the case of *Ademi and Norac* before the Croatian court, two counts of the ICTY indictment on crimes against humanity were excluded from the Croatian indictment and were converted to the war crime against civilian population. *See* Indictment Against Rahim Ademi and Mirko Norac, br. K-DO-349/05 (Nov. 22, 2006), *available at* <http://ivojosipovic.com/knjige/odgovornost/pdf/D/4.%20OPTUZNICE/06.%20Optuznica%20Norac-Ademi.pdf>. Crimes against humanity have been included in the adapted Bosnian indictments. *See, e.g.,* Sud BiH, Indictment Against Paško Ljubičić, No. KT-RZ-140/06 (Dec. 15, 2006), *available at* http://www.sudbih.gov.ba/files/docs/optuznice//pasko_ljubicic_-_indictment_-_eng.pdf.

227. *See* Prosecutor v. Ljubičić, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, ¶¶ 34–35 (Apr. 12, 2006); Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the

law as the basis for prosecution,²²⁸ the different set of penalties applicable then and now,²²⁹ and the existence of statute of limitations in the Socialist Federal Republic of Yugoslavia (“SFRY”) code.²³⁰

As a supplementary element, the examination of applicable law aids the determination of other elements in Rule 11 *bis*. Applicable law has not, however, been discussed in any depth in the jurisprudence, thereby limiting its usefulness. An examination of the availability of an adequate legal framework

Republic of Croatia Pursuant to Rule 11 *bis*, ¶¶ 40–42 (Sept. 14, 2005); *Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 15, 17; *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 42, 43. The question of command responsibility is particularly interesting in the case of Ademi and Norac in Croatia. The Penal Code of Croatia does not contain a provision on criminal liability for command responsibility. *See generally* Croatia Penal Code, Narodne novine br. 110/2003, Nov. 20, 2003. However, the Supreme Court of Croatia has held that criminal charges against commanders for failing to prevent subordinates from committing war crimes could possibly be based on general domestic theories of criminal liability for failure to act in conjunction with Articles 86 and 87 of Protocol 1 to the 1949 Geneva Conventions. *See Rješenje Vrhovni sud Republike Hrvatske* [Supreme Court of Croatia], br. I K-588/02-9, Oct. 17, 2002 (M.S.), available at <http://sudskapraksa.vsrh.hr/supra/>. However, the second element of command responsibility for punishing subordinates is not covered by this decision, nor is it contained in the Ademi and Norac indictment. *See* Mission to Bosn. & Herz., OSCE, *Supplementary Report: War Crime Proceedings in Croatia and Findings from Trial Monitoring* 3–4 (June 22, 2004); *see also* Indictment Against Rahim Ademi and Mirko Norac, br. K-DO-349/05 (Nov. 22, 2006), available at <http://ivojosipovic.com/knjige/odgovornost/pdf/D/4.%20OPTUZNICE/06.%20Optuznica%20Norac-Ademi.pdf>.

228. *See Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 49 (remarking that article 4a of the BiH criminal code requires consideration of international law); *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 41 (same); *Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 62 (same).

229. *See Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 30, 35; *Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 59; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 40. The twenty years sentencing cap and use of the death penalty in the former Yugoslavia were replaced with a maximum sentence of twenty to forty-five years in the BiH criminal code. *See* BiH Criminal Code art. 42(2), Službeni glasnik Bosne i Hercegovine br. 37/2003, Nov. 22, 2003, translated at http://www.anti-trafficking.gov.ba/fajlovi/kazneni_zakon_bh.pdf.

230. *See Mejakić*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 55; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 41. This would seem to be a relatively minor problem for national courts because the SFRY criminal code, even if applied, would not bar offenses committed in 1992 until 2017. *See* SFRY Criminal Code art. 95(1)(1), Službeni list Socijalističke Federativne Republike Jugoslavije br. 36/1977, July 15, 1977. The issue, of course, would be whether national courts would be overwhelmed with cases that are likely to last until then.

and penalty structure, although of some use to the bench, constitutes a missed opportunity for expert assistance to be provided to the referral state. The bench has never intervened to dictate what law is to be applied, since this is exclusively a domestic matter. At the same time, it is called on to decide referrals based on this exceedingly limited scrutiny of national systems. The bench's approach is a taster of the law that may be applied once the indictment is referred. Compared to its current secondary function, making substantive law an element of Rule 11 *bis*, would have been of greater usefulness to states and would also have delivered more accurate results for the bench. The rule, as it stands, emphasizes how distinct the two levels of adjudication are and denotes the limits of the bench's inquiry. An amendment of Rule 11 *bis* to formally include substantive law would have therefore been welcome.

III. FAIR TRIAL AND SENTENCING ISSUES

A. Fair Trial

A prime concern of any criminal process is to ensure that the accused receives a fair trial. The right to fair trial is guaranteed in the ICTY Statute, which follows international standards.²³¹ Rule 11 *bis* further requires the Tribunal to ensure that the accused will receive a fair trial after transfer to the national jurisdiction.²³² Fair trial issues therefore cannot be disregarded when deciding referrals requests.²³³ Where this element differs from other elements in Rule 11 *bis* is that the bench, at the time of the referral hearing, has very limited insight as to whether the accused will in fact receive fair trial after the

231. See *ICTY Statute*, *supra* note 19, art. 21; see also International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 223, art. 6.

232. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(B) (mandating that the accused "will" get a fair trial).

233. See *Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral, ¶¶ 27–28 (Sept. 1, 2005) (acknowledging that the referral bench's use of the word "should" was imprecise but holding that "should" in this instance meant "will"); *Ademi & Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 53 (highlighting that the fair trial condition in Rule 11 *bis* proceedings requires fairness not only with regard to the accused, but also towards all interested parties, which includes the victims and the international community).

indictment has been transferred. Although this cannot be assessed in the abstract, the hearing offers very little scope for the precise determination of this requirement. The bench is required to make a finding on a future judicial process, over which it has no control. This is an arduous task given that the bench has limited ability to anticipate. Its examination would, inevitably, lie in the hypothetical sphere. For more reliable findings, fair trial issues should also have been revisited postreferral.²³⁴ At the referral stage, the bench restricts its assessment to determining whether an adequate legal framework exists in the prospective referral state and whether this legal structure is sufficient to guarantee fair trial.²³⁵

In ICTY jurisprudence, both the bench and the appeals chamber have addressed the main concerns raised by the defendants in some detail. These decisions cover a number of issues such as the composition of the court,²³⁶ trial without undue delay, the right to choose one's counsel, adequate time and facilities for the preparation of a defence, the right to attend trial and examine witnesses, witness availability and protection, and pretrial detention on remand.²³⁷ Each of these issues will be examined below in turn.

The starting point in the bench's examination is to determine whether prompt trial is guaranteed in national law.

234. This is partly achieved through the reporting process examined *infra*.

235. The Bench has, in each case, reviewed the applicable constitutional provisions but also the provisions in the Criminal Procedure Codes as well as membership to international treaties, such as the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 223. *See, e.g.*, Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶¶ 69–74 (Apr. 5, 2007); Prosecutor v. Janković, Decision on Referral of Case Under Rule 11 *bis*, ¶ 62 (July 22, 2005); *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 68; *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 83; *Stanković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 55.

236. *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 83–86 (showing that the defense base their arguments on the lack of impartiality and independence of the state court in BiH based on the criteria on the election of judges, the composition of the court, and the provisions on disqualification).

237. *See Lukić & Lukić*, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶¶ 76–97 (providing an overview of the issues relating to fair trial).

Once it has been established that it is, review of further provisions in more detail follows.²³⁸

Temporally speaking, the transfer of indictments from the Tribunal to national courts will inevitably lead to some delay. Upon transfer to national courts, the indictment requires adaption.²³⁹ This is not usually a lengthy process. In practice, the state prosecutor of Bosnia and Herzegovina needs approximately three months to adapt an indictment.²⁴⁰ The Serbian prosecutor

238. See, e.g., *Stanković*, Decision on Referral of Case Under Rule 11 bis, ¶ 32 (explaining the general principle that the Tribunal cannot mandate the law that will be applied at a national level but must examine it to ensure that there is an adequate legal framework to try the accused). For the relevant provisions of the code of criminal procedure of BiH, see *Zakon krivičnom postupku Bosne i Hercegovine* [Criminal Procedure Code of Bosnia and Herzegovina] [hereinafter Code of Criminal Procedure for BiH] arts. 13, 135, 137(2), *Službeni glasnik Bosne i Hercegovine* br. 36/2003, Nov. 21, 2003, translated at http://www.anti-trafficking.gov.ba/fajlovi/Zakon_o_kaznenom_postupku_BH.pdf14.pdf. For the relevant provisions of the code of criminal procedure of Croatia, see *Zakon o kaznenom postupku (pročišćeni tekst)* [Code of Criminal Procedure (revised text)] [hereinafter Code of Criminal Procedure for RH] arts. 10, 110–11, 114, *Narodne Novine* br. 62, Apr. 12, 2003. For the relevant provisions of the code of criminal procedure of Serbia, see *Zakonik o krivičnom postupku* [Code of Criminal Procedure] [hereinafter Code of Criminal Procedure for RS] arts. 16, 144, 146, *Službeni glasnik S.R. Srbije* br. 46/2006, May 25, 2006, translated at http://www.osce.org/documents/srb/2007/04/24175_en.pdf.

239. See, e.g., *Zakon o ustupanju predmeta od strane Međunarodnog krivičnog suda za bivšu Jugoslaviju Tužilaštvu Bosne i Hercegovine i korištenju dokaza pribavljenih od Međunarodnog krivičnog suda za bivšu Jugoslaviju u postupcima pred sudovima u Bosni i Hercegovini* [Law on the Transfer of Cases from the International criminal court for the Former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected by the International criminal court for the Former Yugoslavia in Proceedings Before the Courts in Bosnia and Herzegovina] [hereinafter BiH Transfer Law] art. 2(1), *Službeni glasnik Bosne i Hercegovine* br. 61/2004, Dec. 29, 2004 (establishing the procedure for adapting a referred indictment). The national court adopts the indictment already prepared by the Tribunal and simply adapts it to comply with domestic law requirements. See *id.* art. 2(1). However, nothing prevents national authorities from adding new charges or defendants to the existing indictment. See *id.* art. 2(2). Although this may lead to further delays, the prospect of further amendment is not fundamentally inconsistent with the right to fair trial because the discretion to amend filings falls within the powers of the court before which the case will be heard and is no different than the procedure of the ICTY. See *ICTY Rules*, *supra* note 3, R. 50.

240. For example, the case against Radovan Stanković was referred to the Bosnian authorities on September 29, 2005, and the adapted indictment was adopted on December 7, 2005. See *Mission to Bosn. & Herz.*, OSCE, *First Report in the Case of Defendant Radovan Stanković Transferred to the State Court Pursuant to Rule 11bis*, at 1 (Feb. 2006) [hereinafter *First OSCE Report in Stanković*], available at <http://www.oscebih.org/documents/14064-eng.pdf>; see also *Sud BiH*, *Indictment Against Radovan Stanković*, No. KT-RZ-45/05 (Nov. 28, 2005), available at http://www.sudbih.gov.ba/files/docs/optuznice/STANKOVIC_INDICTMENT.pdf. Gojko Janković was transferred on December 8, 2005, and the adapted indictment was adopted on February 20, 2006. See

required eight months in the case of Vladimir Kovačević, but this was predominantly due to Kovačević's health condition.²⁴¹ The Croatian prosecutor needed an entire year to adapt the indictment in the trial of Ademi and Norac and, even then, amended the indictment in May of 2008 after almost a year of trial proceedings.²⁴²

Mission to Bosnia and Herzegovina, OSCE, *First Report in the Case of Defendant Gojko Janković Transferred to the State Court Pursuant to Rule 11bis*, at 1 (Apr. 2006) [hereinafter *First OSCE Report in Janković*], available at <http://www.oscebih.org/documents/13969-eng.pdf>; see also Sud BiH, Indictment Against Gojko Janković, No. KT-RZ-163/05 (Feb. 14, 2005), available at http://www.sudbih.gov.ba/files/optuznice/jankovic_indictment.pdf. Paško Ljubičić was transferred on September 22, 2006, and the adapted indictment was adopted on December 21, 2006. See Mission to Bosn. & Herz., OSCE, *Second Report in the Paško Ljubičić Case Transferred to the State Court Pursuant to Rule 11bis*, at 1 (Mar. 2007), available at <http://www.oscebih.org/documents/14054-eng.pdf>; see also Sud BiH, Indictment Against Paško Ljubičić, No. X-KRN-06/241 (Dec. 15, 2006) available at http://www.sudbih.gov.ba/files/docs/optuznice//pasko_ljubicic_-_indictment_-_eng.pdf. Željko Mejakić, Dušan Fuštar, Duško Knežević, and Momčilo Gruban were transferred to Bosnian authorities on May 9, 2006, and the adapted indictment was adopted on July 14, 2006. See Mission to Bosn. & Herz., OSCE, *First Report in the Željko Mejakić et al. Case Transferred to the State Court Pursuant to Rule 11bis*, at 1 (Sept. 2006) [hereinafter *First OSCE Report in Mejakić*], available at <http://www.oscebih.org/documents/14054-eng.pdf>; see also Sud BiH, Indictment Against Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević, No. KT-RZ-91/06 (July 7, 2006) available at http://www.sudbih.gov.ba/files/docs/optuznice//pasko_ljubicic_-_indictment_-_eng.pdf.

241. Kovačević's case was transferred on November 17, 2006, and the adapted indictment was released by the Serbian prosecutor for war crimes on July 30, 2007. See Prosecutor's Second Progress Report at 1 n.1, ¶4, Prosecutor v. Kovačević, Case No. IT-01-42/2-I (Sept. 5, 2007); see also Okružni sud Beograd [Belgrade District Court], Indictment Against Vladimir Kovačević, No. KTZR 5/07 (July 26, 2007), available at http://www.tuzilastvorz.org.rs/html_trz/optuznice/o_2007_07_26_eng.pdf. Kovačević's case was adjourned due to his mental state by the decision of the special chamber of the Belgrade District Court on December 5, 2007. See Okružni sud Beograd, Resenje o odbecivanju optuznice [Resolution of the Indictment Decision], No. KTZR 5/07, Dec. 5, 2007, available at http://okruznisudbg.rs/content/2007godina/kovacevicvladimir/indictment3/at_download.

242. The case was referred on September 14, 2005 and the adapted indictment was released on November 22, 2006. See Mission to Croatia, OSCE, *Background Report: Domestic War Crimes Proceedings 2006* (Aug. 3, 2007), available at http://www.osce.org/documents/mc/2007/10/27566_en.pdf. The trial was concluded on May 30, 2008, with Ademi acquitted and Norac convicted for the war crimes against civilians on the grounds of command responsibility. See Presuda Županijski sud Zarebu [Zagreb County Court], Republike Hrvatske v. Ademi & Norac, br. II K-rz-1/06, May 30, 2008, available at http://www.centar-za-mir.hr/uploads/PRESUDA_Ademi_i_Norac.pdf. For a summary of the arguments made on appeal, see Memorandum from Office in Zagreb, OSCE, to Office of the Prosecutor, ICTY (Nov. 25, 2009), in Prosecutor's Seventeenth Progress Report, Annex A, Prosecutor v. Ademi & Norac, No. IT-04-78-PT (Dec. 16, 2009),

Another issue that may cause delays involves the transfer of all material from The Hague to the relevant national court. Rule 11 *bis*(D)(iii) outlines the provision of all information that is material to the indictment by the prosecutor.²⁴³ To assist the process, the bench has reviewed existing national law and identified some problems that are likely to arise in the process. Moreover, it has suggested practical solutions on the basis of domestically available provisions. Despite the bench's optimistic disposition,²⁴⁴ delays cannot be eliminated or fully anticipated. In addition, the bench cannot decide, in lieu of a national court, how these can be tackled.

available at http://www.icty.org/x/file/outreach/11bisreports/11bis_norac_ademi_progressreport_17th.pdf.

243. See BiH Transfer Law art. 4, Službeni glasnik Bosne i Hercegovine br. 61/2004, Dec. 29, 2004 (permitting the acceptance of facts or documentary evidence already proven or admitted in a Tribunal proceeding). The issue raised by a number of accused regarding the time it will take to translate materials from English into a language they understand is of no consequence because the same problem would arise even if trial were to take place before the Tribunal. See, e.g., Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 98 (July 8, 2005). Moreover, access to any confidential material may be achieved by employing Rule 75. See Prosecutor v. Mejakić, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 75 (Apr. 7, 2006); Prosecutor v. Stanković, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral, ¶ 24 (Sept. 1, 2005). Ultimately, the efficiency of the procedure for accepting evidence and facts established by the ICTY largely depends on the conduct of the parties. To this end, the Organization for Security and Co-operation in Europe ("OSCE") issued a recommendation in its Fourth Report on the Status of the Rašević and Todović Case suggesting that "since the decision on taking judicial notice may be issued late in the proceedings, for the purposes of judicial economy and to ensure that parties are not placed at a disadvantage in the presentation of necessary evidence, . . . the parties [should] submit any motion for judicial notice and the courts to decide on such motions at the earliest stages of the proceedings possible." Mission to Bosn. & Herz., OSCE, *Fourth Report in the Mitar Rašević and Savo Todović Case Transferred to the State Court Pursuant to Rule 11bis*, at 1 (Oct. 2007), available at <http://www.oscebih.org/documents/14071-eng.pdf>; see also Mission to Bosn. & Herz., OSCE, *Second Report Case of Defendant Gojko Janković Transferred to the State Court pursuant to Rule 11bis* (July 2006), available at www.oscebih.org/documents/13970-eng.pdf; Mission to Bosn. & Herz., OSCE, *Fourth Report in the Paško Ljubičić Case Transferred to the State Court pursuant to Rule 11bis* (Sept. 2007), available at <http://www.oscebih.org/documents/14043-eng.pdf>.

244. See, e.g., Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 116 (July 20, 2005) (holding that trials before national courts "may be sooner than in the Tribunal"). The Tribunal's optimism may not seem very realistic given the amount of such serious cases referred to the national courts.

It would be wrong to suggest that delays ensuing as a result of referrals would *a priori* jeopardize international human rights standards set out in the main human rights treaties and developed through the practice of the international monitoring bodies and judicial institutions.²⁴⁵ There is ample jurisprudence of the European Court of Human Rights (“ECtHR”) on the issue of delays and its impact on the right to a hearing within reasonable time. The circumstances of each case have to be taken into account, “in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in litigation.”²⁴⁶ The ECtHR has never set any rigid time limits with regard to the length of the proceedings in criminal cases. The court has stated on many occasions that the principle of expedited hearing must be taken into consideration in conjunction with the more general principle of proper administration of justice.²⁴⁷ It is to be expected that in fact-rich cases, where complex legal issues are at stake, the proceedings will last longer than ordinary criminal or civil cases. Such cases normally involve a greater body of evidence as well as legal issues that take longer to resolve. A higher threshold on the acceptability of delays is therefore to be expected.

Another question is whether the referral bench can rely on the findings of other international human rights institutions when assessing the overall effectiveness of the national judicial system for the purposes of referral. For example, would the concluding observations of the U.N. Human Rights Committee, in which the country in question had been found to systematically violate the right to a fair hearing within a reasonable time, compel the bench to deny referral to that

245. Although article 14 of the Convention on Civil and Political Rights does not contain any explicit reference to the factor of time as a substantial part of the due process, the U.N. Human Rights Committee has established through its practice that “the concept of a fair hearing necessarily entails that justice be rendered without undue delay.” U.N. Human Rights Comm. [HRC], *Communication No. 203/1986: Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights* (Muñoz-Hermoza v. Peru), ¶ 11.3, U.N. Doc. CCPR/C/34/D/203/1986 (Nov. 4, 1988).

246. *Humen v. Poland*, 31 Eur. H.R. Rep. 1168 (2001); *see also* *Frydlander v. France*, 2000-VII Eur. Ct. H.R. 173, ¶ 43.

247. *See* *Boddaert v. Belgium*, 16 Eur. H.R. Rep. (Ser. A) 242, 257 (1993); *Coëme v. Belgium*, 2000-VII Eur. Ct. H.R. 75, 133.

country? The same question could be posed with respect to repeated findings in judgments of the ECtHR concerning the duration of national criminal proceedings in a specific country.²⁴⁸

There is no sufficiently relevant judicial precedent in any of the countries considered for referrals that indicates that the right to a hearing within reasonable time would be a significant problem. Most of the ECtHR case law on the issue of the length of proceedings concerns the judicial systems of Croatia²⁴⁹ and Serbia.²⁵⁰ However, all of these cases cover civil matters.²⁵¹ The same is true with respect to cases that have arisen before the U.N. Human Rights Committee.²⁵² In the countries that have been chosen for referrals, civil disputes are dealt with in separate chambers from criminal law cases. Moreover, war crimes and crimes against humanity are heard before chambers that are

248. There were numerous judgments in a series of unreported companion cases on length of criminal proceedings before the Turkish Martial Law Courts. *See, e.g.*, *Bürker v. Turkey*, App. No. 26480/95 (Eur. Ct. H.R. Oct. 30, 2001); *Kanbur v. Turkey*, App. No. 28291/95 (Eur. Ct. H.R. Oct. 30, 2001); *Başpınar v. Turkey*, App. No. 29280/95 (Eur. Ct. H.R. Oct. 30, 2001); *Hasan Yağız v. Turkey*, App. No. 31834/96 (Eur. Ct. H.R. Oct. 30, 2001); *Adıyaman v. Turkey*, App. No. 31880/96 (Eur. Ct. H.R. Oct. 30, 2001); *Genç v. Turkey*, App. No. 31891/96 (Eur. Ct. H.R. Oct. 30, 2001); *Pekdaş v. Turkey*, App. No. 31960/96 (Eur. Ct. H.R. Oct. 30, 2001); *Akçam v. Turkey*, App. No. 32964/96 (Eur. Ct. H.R. Oct. 30, 2001); *Keskin v. Turkey*, App. No. 32987/96 (Eur. Ct. H.R. Oct. 30, 2001); *Karademir v. Turkey*, App. No. 32990/96 (Eur. Ct. H.R. Oct. 30, 2001); *Akyazı v. Turkey*, App. No. 33362/96 (Eur. Ct. H.R. Oct. 30, 2001); *İnan v. Turkey*, App. No. 39428/98 (Eur. Ct. H.R. Oct. 30, 2001); *Erdemli v. Turkey*, App. No. 29495/95 (Eur. Ct. H.R. Oct. 30, 2001). These cases are available at <http://www.echr.coe.int/> (last visited Feb. 20, 2010).

249. *See, e.g.*, *Napijalo v. Croatia*, 40 Eur. H.R. Rep. 735 (2003); *Aćimović v. Croatia*, 2003-XI Eur. Ct. H.R. 1; *Radoš v. Croatia*, App. No. 45435/99 (Eur. Ct. H.R. Nov. 7, 2002); *Delić v. Croatia*, App. No. 48771/99 (Eur. Ct. H.R. June 27, 2002). These cases are available at <http://www.echr.coe.int/> (last visited Feb. 20, 2010).

250. *See, e.g.*, *Mikuljanac v. Serbia*, App. No. 41513/05 (Eur. Ct. H.R. Oct. 9, 2007); *Jevremović v. Serbia*, App. No. 3150/05 (Eur. Ct. H.R. July 17, 2007); *Samardžić and Plastika v. Serbia*, App. No. 28443/05 (Eur. Ct. H.R. July 17, 2007); *Tomić v. Serbia*, App. No. 25959/06 (Eur. Ct. H.R. June 26, 2007). These cases are available at <http://www.echr.coe.int/> (last visited Feb. 20, 2010).

251. There are only three cases that have originated in Bosnia and Herzegovina and concern the length of enforcement procedures in civil matters. *See Pejakočić v. Bosnia and Herzegovina*, App. No. 337/04 (Eur. Ct. H.R. Dec. 18, 2007); *Karanović v. Bosnia and Herzegovina*, App. No. 39462/03 (Eur. Ct. H.R. Nov. 20, 2007); *Jeličić v. Bosnia and Herzegovina*, 47 Eur. H.R. Rep. 355 (2006). These cases are available at <http://www.echr.coe.int/> (last visited Feb. 20, 2010).

252. *See HRC, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, ¶ 16, U.N. Doc. CCPR/CO/71/HRV (Apr. 30, 2001).

equally distinct from the ordinary criminal law chambers.²⁵³ As a result, the efficiency of the latter that should be individually assessed in order to determine whether they are able to provide fair trial within reasonable time to referred defendants.

One need only look to the actual length of proceedings in referred cases at the national level. In Bosnia and Herzegovina, six cases involving nine indictees were completed by August 2009: Dušan Fuštar, Momćilo Gruban, Gojko Janković, Duško Knežević, Paško Ljubičić, Željko Mejakić, Mitar Rašević, Radovan Stanković, and Savo Todović.²⁵⁴ Only the Trbić case is still in the trial stage.²⁵⁵ Looking at the length of procedure, each case took approximately two years from the time of referral to reaching judgment in the first instance. In Croatia, the first instance judgment in the case of Ademi and Norac was reached thirty-three months after the referral. The case of Vladimir Kovačević, which was referred to Serbia, is not representative because of the accused's health issues.²⁵⁶

Key to fair trial is the defendant's access to counsel and provision of adequate time and facilities for the preparation of a

253. See ICTY, Capacity Building, <http://www.icty.org/sid/240> (last visited Feb. 20, 2010) (stating that the chambers for war crimes were established within several county courts in Croatia, the Belgrade District Court in Serbia, and the State Court of Bosnia and Herzegovina).

254. See, e.g., Sud BiH, Cases in Trial or on Appeal Against Verdict: K-KRŽ-05/70 Stanković Radovan, <http://www.sudbih.gov.ba/?opcija=predmeti&id=20&završen=1&jezik=e> (last visited Feb. 20, 2010); Sud BiH, Cases with Second-Instance Verdicts Delivered: X-KR-06/241 – Ljubičić Paško, <http://www.sudbih.gov.ba/?opcija=predmeti&id=37&završen=1&jezik=e> (last visited Feb. 20, 2010); Sud BiH, Cases with Second-Instance Verdicts Delivered: X-KRŽ-05/161 – Janković Gojko, <http://www.sudbih.gov.ba/?opcija=predmeti&id=19&završen=1&jezik=e> (last visited Feb. 20, 2010); Sud BiH, Cases with Second-Instance Verdicts Delivered: X-KRŽ-06/200 – Mejakić Željko and Others, <http://www.sudbih.gov.ba/?opcija=predmeti&id=33&završen=1&jezik=e> (last visited Feb. 20, 2010); Sud BiH, Cases with Second-Instance Verdicts Delivered: X-KR-06/200-1 – Fuštar Duškan, <http://www.sudbih.gov.ba/?opcija=predmeti&id=140&završen=1&jezik=e> (last visited Feb. 20, 2010); Sud BiH, Cases with Second-Instance Verdicts Delivered: X-KRŽ-06/275 – Rašević and Another, <http://www.sudbih.gov.ba/?opcija=predmeti&id=43&završen=1&jezik=e> (last visited Feb. 20, 2010); The cases against Mejakić and Fuštar were separated due to Dušan Fuštar's guilty plea during the closing stages of the trial. See ICTY, Status of Transferred Cases, <http://www.icty.org/sid/8934> (last visited Feb. 20, 2010).

255. See Sud BiH, Cases in Trial or on Appeal Against Verdict: X-KR-07/386 – Trbić Milorad, <http://www.sudbih.gov.ba/?opcija=predmeti&id=47&završen=1&jezik=e> (last visited Feb. 20, 2010).

256. Press Release, ICTY, Vladimir Kovačević Case Referred to Serbia, Doc. No. CVO/MOW/1127e (Nov. 17, 2006).

defense.²⁵⁷ Having counsel of the accused's own choosing is central to the right of fair trial.²⁵⁸ The right to counsel of one's own choosing is not, however, without limitation. An accused is free to exercise this right provided that his counsel of choice is entitled to appear before the relevant court.²⁵⁹ A side effect of referrals might be that counsel who represented the accused before the ICTY may not be entitled to appear before the courts of the state in which the indictment is referred. This is due to the potentially large number of states the bench may choose from, under Rule 11 *bis*(A).²⁶⁰ Indeed, most states stipulate specific conditions that have to be fulfilled before a lawyer is admitted for practice before national courts.²⁶¹ The bench acknowledged this fact, but emphasised that the problem can be solved if special

257. See *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 75 (July 22, 2005) (rejecting the argument that the sixty-day window contained in the BiH criminal code to schedule a trial after the initial arraignment is undue because defense preparations should begin earlier); *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 85 (July 8, 2005) (same).

258. See International Covenant on Civil and Political Rights, *supra* note 231, art. 14(3)(b), 14(3)(d). But see HRC, *Communication No. 283/1988: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Little v. Jamaica), ¶ 8.4, U.N. Doc. CCPR/C/43/D/283/1988 (Nov. 1, 1991) (noting that article 14(3)(d) “does not entitle the accused to choose counsel provided to him free of charge”). But see also Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 223, art. 6(3)(c) (explaining that the European Court of Human Rights sets numerous limits to the right for legal assistance of the defendant's own choosing); *Croissant v. Germany*, 237-B Eur. Ct. H.R. (Ser. A) (1992).

“[N]otwithstanding the importance of a relationship of confidence between lawyer and client, this right is not absolute.” *Mayzit v. Russia*, 43 Eur. H.R. Rep. 805, 818 (2006). The right to choose one's counsel “is necessarily subject to certain limitations where free legal aid is concerned and also where it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them.” *Id.* Thus, a national court can override a defendant's wishes when there are sufficient grounds for doing so in the interest of justice. *Id.* (citing *Croissant*, 237-B Eur. Ct. H.R. (Ser. A)).

259. See *ICTY Statute*, *supra* note 19, art. 21 (conditioning the right to counsel on specific requirements); *ICTY Rules*, *supra* note 3, R. 44; see also *Mayzit*, 43 Eur. H.R. Rep. at 818 (holding that the right to counsel is conditional on specific requirements being met is the general practice of the European Court for Human Rights).

260. See *ICTY Rules*, *supra* note 3, R. 11 *bis*(A).

261. See, e.g., *Zakon o sudu Bosne i Hercegovine* (pročišćeni tekst) [Law on the Court of Bosnia and Herzegovina (revised text)] art. 12(2), *Službeni glasnik Bosne i Hercegovine* br. 49/2009, June 22, 2009, available at http://www.sudbih.gov.ba/files/docs/zakoni/en/law_on_court_of_bih_-_consolidated_text.pdf.

admission is provided for in the states considered for referral.²⁶² The bench also observed that the issue of counsel availability is speculative at the time of the referral hearing.²⁶³ Whether any lawyer will be allowed to appear before a given national court postreferral should be of interest to the bench, but only insofar as this will affect the ability of the accused to be represented by counsel of his own choosing. Whether the same counsel representing the accused before the ICTY will be able to represent him after the referral has taken place should be of no concern to the bench. The right to counsel is not breached by referral.

Concerns have also been raised by accused who claimed that the right to publicly paid counsel before the national courts is limited when compared to the ICTY.²⁶⁴ On the issue of counsel compensation, the bench was satisfied that a limited right to publicly paid counsel exists, when the accused is not able to bear the cost of legal representation.²⁶⁵ A potentially better legal aid

262. See *Prosecutor v. Mejakić*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 39 (July 20, 2005); see also Law on the Court of Bosnia and Herzegovina (revised text) arts. 3.4(2), 12(2), Službeni glasnik Bosne i Hercegovine br. 49/2009, June 22, 2009; ODSJEK KRIVIČNE ODBRANE [DEPARTMENT OF CRIMINAL DEFENSE], SUD BOSNE I HERCEGOVINE, DODATNA PRAVILA POSTUPANJA ZA ADVOKATE ODBRANE KOJI POSTUPAJU PRED ODJELOM I ZA RATNE ZLOČINE I ODJELOM II ZA ORGANIZOVANI KRIMINAL, PRIVREDNI KRIMINAL I KORUPCIJU SUDA BOSNE I HERCEGOVINE [ADDITIONAL RULES OF PROCEDURES FOR THE DEFENSE COUNSEL BEFORE THE DEPARTMENT I FOR WAR CRIMES AND DEPARTMENT II FOR ORGANIZED CRIME, CORPORATE CRIMES, AND CORRUPTION OF THE COURT OF BOSNIA AND HERZEGOVINA], available at http://www.okobih.ba/files/docs/Dodatna_pravila.pdf. Serbian and Croatian laws do not provide for this possibility.

263. See *Prosecutor v. Mejakić*, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 71 (Apr. 7, 2006); *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶¶ 77–78 (July 22, 2005); *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶¶ 111–12; *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶¶ 88–89 (July 8, 2005).

264. See *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 64; *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 110; *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 54.

265. See *Mejakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 71; *Rašević & Todović*, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 88; *Mejakić*, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 111.

system available at the ICTY does not impact whether the fair trial criterion is satisfied.

The issue of self-representation in referred cases is another consideration that needs to be addressed. While the ICTY accepted that a defendant accused of the most serious crimes could represent themselves,²⁶⁶ a number of jurisdictions—particularly those belonging to the civil law tradition—do not permit this arrangement.²⁶⁷ This is also true for countries that comprise the former Yugoslavia.²⁶⁸ It has been reiterated both by the ICTY²⁶⁹ and some scholars²⁷⁰ that the right of the accused to represent himself is not absolute. The inquisitorial approach to criminal procedure inherent to a civil law system enables the judges to actively participate in the proceedings.²⁷¹ Another feature of such a system is that even when counsel has been appointed, the defendant retains the right to participate in the trial proceedings.²⁷² As concluded by the ECtHR, the appointment of counsel against the defendant's will may be in the interests of justice.²⁷³ These interests may include

266. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Transcript of Record at 14574 (Dec. 18, 2002) (oral ruling of trial chamber on self-representation); see also *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, ¶ 25 (May 9, 2003).

267. See, e.g., C. PR. PÉN. [Code of Criminal Procedure] art. 274 (Fr.); Uголовно-Процессуал нй Кодекс [Criminal Procedural Code] art. 51(1) (Russ.); Strafprozeßordnung [Code of Criminal Procedure] Feb. 1, 1877, Reichsgesetzblatt [RGBl] 253, as amended, §140(1)–(2) (F.R.G.).

268. See Code of Criminal Procedure for BiH art. 45(3), Službeni glasnik Bosne i Hercegovine, br. 36/2003, Nov. 21, 2003; Code of Criminal Procedure for RH art. 65, Narodne novine br. 62, Apr. 12, 2003; Code of Criminal Procedure for RS art. 71, Službeni glasnik S.R. Srbije br. 46/2006, May 25, 2006; see also Mission to Bosn. & Herz., OSCE, *Second OSCE Report in the Case of Defendant Radovan Stanković Transferred to the State Court pursuant to Rule 11bis*, at 1 (May 2006) [hereinafter *Second OSCE Report on Stanković*], available at <http://www.oscebih.org/documents/14066-eng.pdf> (noting that Stanković's motion to represent himself during the proceedings was rejected).

269. See *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal on Assignment of Defence Counsel, ¶ 12 (Nov. 1, 2004).

270. See Nina H. B. Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711, 711–26 (2004); see also Vojin Dimitrijevic & Marko Milanovic, *Human Rights before the International Criminal Court, in HUMAN RIGHTS LAW: FROM DISSEMINATION TO APPLICATION: ESSAYS IN HONOUR OF GÖRAN MELANDER* 149, 163–65 (Jonas Grimheden & Rolf Ring eds., 2006).

271. See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, 353–76 (2d ed. 2008) (exploring the differences between the two systems).

272. See Dimitrijevic & Milanovic, *supra* note 270, at 164.

273. See, e.g., *Croissant v. Germany*, 237-B Eur. Ct. H.R. (Ser. A) at 31–32 (1992); see also Jorgensen, *supra* note 270, at 712, 715.

guaranteeing efficiency of process, prevention of misconduct of the accused, or securing competent defence in complicated cases. Hence, it cannot be said that there is a breach of the right to fair trial when the right to self-representation is restricted, as long as the defendant has an opportunity to actively participate and contribute to his defence.

The success of a trial relies upon evidence available to prove or disprove the culpability of the accused. A major role in this process is reserved for witnesses, whose availability is therefore crucial. There is no guarantee that witnesses will be willing to appear, and their availability may be influenced by perceptions of neutrality of the state, difficulties in locating them due to mobility during and after the conflict, fear of persecution by the accused, and an assessment of the perceived risk of prosecution for any of the crimes in question.²⁷⁴ Trial in the state where the crime was committed might assist in securing the presence of witnesses, because of the proximity to the territory of the commission of the crime. This is yet another reason why the selection of an appropriate state for referral is important. Compelling witnesses to testify is a matter for national law and is reserved for witnesses present within the territory of a state.²⁷⁵ For witnesses located in other states, this would be a mutual legal assistance issue. Regulated at the interstate level, witness appearance will be facilitated by recourse to the European Convention on Mutual Assistance in Criminal Matters (“ECMA”),²⁷⁶ to which all states of the former Yugoslavia are parties.²⁷⁷ The Tribunal, in its practice on the issue of witness

274. See *Prosecutor v. Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 57 (July 22, 2005); *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 79 (May 17, 2005); see also Mission to Bosn. & Herz., OSCE, *War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina – Progress and Obstacles* 23–28 (Mar. 23, 2005).

275. See Criminal Procedure Code of BiH art. 81, Službeni glasnik Bosne i Hercegovine br. 36/2003, Nov. 21, 2003 (making witness testimony compulsory when summoned); see also *Zakon o sudskoj policiji Bosne i Hercegovine* [Law on the Judicial Police of Bosnia and Herzegovina] art. 5(1), Službeni glasnik Bosne i Hercegovine br. 21/2003, July 24, 2003.

276. European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, 472 U.N.T.S. 185 [hereinafter European Assistance Convention].

277. See, e.g., *Janković*, Decision on Referral of Case Under Rule 11 *bis*, ¶ 85; *Prosecutor v. Mejakić*, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 102 (July 20, 2005); *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with

availability, has reviewed the existence of provisions in national legislation of the state concerned. The difficulties foreseen regarding witness availability are likely to be greater at the national level compared to trial before the ICTY, because as an issue of interstate cooperation, states are allowed considerable discretion to refuse the request.²⁷⁸ Such discretion is not available when executing an ICTY cooperation request.²⁷⁹ This is not to say, however, that appearance of witnesses before the Tribunal has been trouble-free, nor that cooperation in general has always been forthcoming.²⁸⁰ Regardless of the impact that the lack of an international enforcement system has had on the effective functioning and ultimate success of the Tribunal, the advantages a coercive national system generally offers when compelling witnesses to testify would not be applicable to witnesses residing abroad.²⁸¹

Another consideration relates to witness protection measures available nationally. Whereas such measures have been

Confidential Annexes I and II, ¶ 93 (July 8, 2005); *Stanković*, Decision on Referral of Case Under Rule 11 bis, ¶ 82. Serbia, Croatia, and Bosnia also maintain several bilateral agreements. *See, e.g.*, Sporazum o saradnji u krivičnom gonjenju učinilaca krivičnih dela protiv čovečnosti i drugih dobara zaštićenih međunarodnim pravom [Agreement on Cooperation in the Prosecution of Perpetrators of Crimes Against Humanity and Other Goods Protected by International Law], Monteneg.-Serb., Oct. 31, 2007, *available at* http://www.tuzilastvorz.org.rs/html_trz/saradnja/sporazum_trz_vdtrcg_lat.pdf; Sporazum o saradnji u progonu učinilaca krivičnih dela ratnih zločina, zločina protiv čovečnosti i genocida [Agreement on Cooperation in Prosecution of Perpetrators of War Crimes, Crimes Against Humanity and Genocide], Serb.-Croat., Oct. 13, 2006, *available at* http://www.tuzilastvorz.org.rs/html_trz/saradnja/sporazum_trz_dorh_lat.pdf; Memorandum o saglasnosti u ostvarivanju i unapređenju saradnje u borbi protiv svih oblika teškog kriminala [Memorandum of Understanding on the Implementation and Promotion of Cooperation in Prosecution of All Forms of Serious Crime], Bosn. & Herz.-Serb., July 1, 2005, *available at* http://www.tuzilastvorz.org.rs/html_trz/saradnja/memorandum_rjt_trz_tbih_lat.pdf.

278. *See* European Assistance Convention, *supra* note 276, art. 2. Also of interest is article 8 of the convention which does not attach any penalty to witnesses failing to answer a summons to appear. *Id.* art. 8.

279. *See ICTY Statute, supra* note 19, art. 29.

280. *See generally* PIERRE HAZAN, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004) (providing an overview of state cooperation with the ICTY).

281. *See Stanković*, Decision on Referral of Case Under Rule 11 bis, ¶ 26 (noting that the reference to cooperation in Security Council Resolution 1503 is superficial to the point that it disregards the potential lack of domestic authority to obtain witnesses and evidence).

carefully crafted at the international level,²⁸² the protection that is provided for in national systems may not always rise to a similar standard.²⁸³ The Tribunal recognised that measures aiming to protect witnesses would promote their presence, but downplayed the impact such measures (or the absence thereof) could have on fair trial.²⁸⁴ This narrow approach is formalistic and fails to assess the effect that refusal or reluctance of witnesses to appear would have on fair trials. The inexperience of some national courts in dealing with witness protection measures may lead to serious violations of some of the most important due process guaranties.²⁸⁵ A particular problem arises with regard to measures adopted in the course of proceedings before the ICTY that are no longer necessary postreferral. In the case of *Željko Mejakić* before the State Court of Bosnia and Herzegovina (“BiH”), the prosecutor required lifting of certain protective measures as requested by some witnesses. The court rejected this motion, as according to the decision of the referral bench in this particular case, protective measures granted to victims and witnesses before ICTY were to remain in force. It follows that the national court does not have the jurisdiction to decide on this matter. Consequently, protective measures had to remain in force despite their no longer being needed.²⁸⁶

282. See Florence Mumba, *Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, *supra* note 21, at 305, 359–71 (listing examples including witness testimony via video conferencing and voice or image distortion).

283. See Carla Del Ponte, *Prosecuting the Individuals bearing the Highest Level of Responsibility*, 2 *J. INT’L CRIM. JUST.* 516, 519 (2004); Mark S. Ellis, *Coming to Terms with its Past – Serbia’s New Court for the Prosecution of War Crimes*, 22 *BERKELEY J. INT’L L.* 165, 183–84 (2004); Milena Sterio, *Seeking the Best Forum to Prosecute War Crimes: Proposed Paradigms and Solutions*, 18 *FLA. J. INT’L L.* 887, 892 (2006).

284. See *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 105 (July 8, 2005); *Prosecutor v. Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 89 (May 17, 2005).

285. For example, in the case of Radovan Stanković before the State Court of BiH, the trial bench decided to exclude the public from all main trial proceedings. See *Second OSCE Report on Stanković*, *supra* note 268, at 3–11. The bench was concerned, among other issues, about the protection of witnesses. See *id.*

286. See *First OSCE Report in Mejakić*, *supra* note 240, at 3–6. Some cases also discuss the practice of the European Court for Human Rights on the issue of protection of witnesses. See *Van Mechelen v. Netherlands*, 25 *Eur. H.R. Rep.* 647 (1998); *Krasniki v. Czech Republic*, App. No. 51277/99, (*Eur. Ct. H.R.* Feb. 28, 2006).

Detention on remand, primarily a question relating to the right to liberty, also constitutes an important tool in securing the presence of the accused and preserving the integrity of evidence.²⁸⁷ Attention to the issue of detention has been paid only in respect of prison conditions, and not in terms of the duration of the pretrial detention.²⁸⁸ This is of particular relevance to the added phase encountered in referral cases, that of adaptation of an ICTY indictment by a national prosecutor. The question that arises is whether the ICTY Order on Detention remains in force after the referral has taken place and prevails over the national legislation, or whether national courts ought to review custody in accordance with nationally applicable rules.²⁸⁹ Rule 11 *bis* is silent in this regard. The ICTY Appeals Chamber pronounced itself incompetent to decide on Janković's motion for provisional release after the decision on referral of his indictment had been released.²⁹⁰ In order to avoid a situation in which a person would be deprived of any legal remedies to challenge his pretrial detention before the indictment had been confirmed, thus constituting a violation of fundamental human rights standards, the approach of the appeals chamber must be interpreted as enabling the national courts, to which the indictment had been transferred, to decide on this issue. The national courts would therefore have the authority to at least review an ICTY Order on Detention. Although it is clear that this should take place under the law of the forum where the indictment has been referred to, the possibility for a gap in the law to exist is ever present. In particular, it is not clear what law ought to be applied at the preadaptation of the indictment stage. States in such position ought to either legislate for this possibility or allow national courts to implement the rules on detention applicable to the investigative phase of the proceedings by

287. See Dimitrijević & Milanović, *supra* note 270, at 160.

288. See Prosecutor v. Međaković, Case No. IT-02-65, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 bis, ¶¶ 56–62 (Apr. 7, 2006); Janković, Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 bis Referral, ¶¶ 69–76 (Nov. 15, 2005).

289. See *First OSCE Report in Janković*, *supra* note 240, at 2–5; *First OSCE Report in Stanković*, at 3–19.

290. See Prosecutor v. Janković, Case No. IT-96-23, Decision on Appeal of the Trial Chamber's Decision on Provisional Release (Nov. 30, 2005).

analogy.²⁹¹ There is a strong argument in favor of the latter approach because nothing prevents the introduction of new counts to the indictment both in the stage of its adaptation or afterwards.²⁹²

An examination into applicable law determines at best the adequacy of the forum through an examination of the existence of legislation. However, whether this suffices to guarantee a fair trial for the accused is uncertain, particularly in the former Yugoslavia where new and generally untested legislation is in place. Such legislation has been criticised by both the Organization for Security and Co-operation in Europe (“OSCE”) and civil society.²⁹³ It is important to note that each case is to be examined *in concreto*. The bench could consider the criticisms expressed regarding the framework in place but it would be unable practically to offer any solution, as this would exceed its mandate. Some discussion on the available legal framework may prove helpful to the domestic court, which may be faced with similar issues in the future. Highlighting potential problems helps, but remains abstract and of limited use to the national system. Issues pertaining to fair trial that may have arisen in one case, may of course be of no relevance to another, unless there are systemic failures of the national courts. This is why the bench examines fair trial as part of the availability of the system and raises queries through the decisions on further information and

291. See BiH Transfer Law art. 2(2), Službeni glasnik Bosne i Hercegovine br. 61/2004, Dec. 29, 2004.

292. In practice the State Prosecutor of Bosnia and Herzegovina has added additional counts on the adapted indictment. See Sud BiH, Indictment Against Trbić Milorad, No. X-KR-07/386 (July 20 2007), available at http://www.sudbih.gov.ba/files/docs/optuznice/2007/milorad_trbic_-_indictment_-_eng.pdf; Sud BiH, Indictment Against Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević, No. KT-RZ-91/06 (July 7, 2006) available at http://www.sudbih.gov.ba/files/docs/optuznice//pasko_ljubicic_-_indictment_-_eng.pdf; Sud BiH, Indictment Against Radovan Stanković, No. KT-RZ-45/05 (Nov. 28, 2005), available at http://www.sudbih.gov.ba/files/docs/optuznice/STANKOVIC_INDICTMENT.pdf; Sud Bosne i Hercegovine, Second Indictment Against Gojko Janković, No. KT-RZ-163/05 (July 4, 2005), available at http://www.sudbih.gov.ba/files/docs/optuznice//gojko_jankovic_-_indictment_-_eng_-_04july2006.pdf.

293. See Ellis, *supra* note 283, at 168 (assessing Serbian courts before the creation of the war crimes court); see also Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice while Transferring Cases from the ICTY to Serbia’s Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT’L L. 39, 50–53 (2005) (exploring issues of legitimacy of Serbian criminal courts); Zoglin, *supra* note 206, at 44–72.

through monitoring, which is used by the bench as a means of determining that the fair trial requirement has been met.²⁹⁴

The assessment of the bench would have been more accurate and complete had a body of national jurisprudence been developed following referrals. Only a close examination of such jurisprudence would have been possible to assess the application of the existing legal framework to the referred cases to discern whether the fair trial requirement is met in practice. The early practice is not very encouraging. Of the issues discussed above, the lack of competence by national courts curtails their ability to tackle practical problems in a constructive way. Fair trial is only discussed in the broadest possible terms focusing on specific themes. Fair trial as a prerequisite for referral is pivotal, but the bench's limited remit does not allow for a detailed investigation into the specifics both in terms of scope and in terms of the timing of its determination prior to referral. This oversight of Rule 11 *bis* is partly rectified through monitoring, which this Article will return to shortly.

B. *Sentencing Issues and Quality of Prisons*

Although the requirement in Rule 11 *bis* relating to sentencing was of greater relevance at the time the rule was first adopted, it is not currently of any practical relevance, given that the death penalty has been abolished in the states of former Yugoslavia.²⁹⁵ The quality of prisons is of more importance. Steps have been taken to ameliorate prison conditions and it is therefore unlikely that such conditions will affect the decision to refer.²⁹⁶ This may explain why the ICTY's treatment of this issue is generally very brief.²⁹⁷

294. *See infra* Part IV.

295. All states of the former Yugoslavia are parties to Protocol Number 13 to the European Convention on Human Rights. *See* Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, May 3, 2002, 2246 U.N.T.S. 110; *see also* Council of Eur., Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, CETS No.: 187, <http://conventions.coe.int/treaty/commun/cherchesig.asp?nt=187&cm=&df=&cl=eng> (Mar. 9, 2010) (listing signatories to the additional protocol).

296. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has been strongly involved in monitoring prison conditions in the former Yugoslavia and posts reports regarding each state. *See* Council

A quite separate sentencing issue is the possibility that the accused, whose indictment has been referred to a national court, may receive a much higher sentence than the one he would have received had he been tried in The Hague.²⁹⁸ This is not an issue that needs to be examined at the time of deciding a referral. As long as the sentence imposed nationally is in line with the sentencing practice of that state for similar offences, this would not be a fair trial issue to be considered by the Tribunal. Inevitably, the generally lower sentences imposed by the Tribunal will not be replicated before national courts. This certainly constitutes a paradox when looked at from the perspective of indictments referred to national courts on the basis of their lower gravity, but it does not and should not affect referrals.

IV. MONITORING OF NATIONAL PROCEEDINGS²⁹⁹

Rule 11 *bis*(D) (iv) enables the prosecutor to send observers to monitor the proceedings before the national court to which the indictment is referred.³⁰⁰ The discretionary language of this rule means that the prosecutor is not under an obligation to do so and may choose to entirely forego any form of monitoring.³⁰¹

of Eur., Council for the Prevention of Torture, States: Documents and Visits, <http://www.cpt.coe.int/en/states.htm> (Last visited Aug. 28, 2009).

297. See, e.g., Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 bis, ¶¶ 72–76 (July 25, 2005).

298. Gojko Janković was sentenced to thirty-four years of imprisonment following the referral of his indictment for trial before the Bosnian War Crimes Chamber. See *Criminal Gets 34 Years*, N.Y. TIMES, Feb. 17, 2007, at A8. For a quick comparison, the different sentencing span employed by the ICTY and the Serbian courts for cases arising out of the crimes committed in Vukovar, Croatia are of interest. The ICTY trial chamber acquitted Miroslav Radić, and sentenced the commander of the Serbian forces, Mile Mrkšić, who was responsible for the murder of two hundred people in Ovčara, near Vukovar, to twenty years imprisonment. See Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Judgment, ¶ 713 (Sept. 27, 2007). Veselin Šljivančanin, another high profile Serbian military officer that took part in the Vukovar battle was sentenced to five years imprisonment. See *id.* ¶ 716. The Serbian court, for the same crime of murder of two hundred civilians in Ovčara, sentenced seven people to twenty years imprisonment, five to eighteen, and three to fifteen years, including those who were part of the shooting squad. See *Presuda Ovučaru* [Verdict for Ovčar], RADIO-TELEVIZIJA SRBIJE (Belgrade), Mar. 19, 2009, <http://www.rts.rs/page/stories/sr/story/135/Hronika/49514/Presude+za+Ovučaru+.html>.

299. *ICTY Manual on Developed Practices*, *supra* note 67, at 170–71.

300. *ICTY Rules*, *supra* note 3, R. 11 *bis*(D) (iv).

301. See *id.* (utilizing the word “may” instead of “shall”). Despite this element of discretion, the Referral Bench has in practice always imposed this extra level of scrutiny

Monitoring was envisaged as a mechanism enabling observers in domestic trials to oversee the proceedings and report back to The Hague, and thereby allowing the Office of the Prosecutor (“OTP”) to request the revocation of the referral under Rule 11 *bis*(F).³⁰² Due to the time constraints set by the Tribunal’s completion strategy, it is unrealistic to expect that any cases will be deferred back to the ICTY. The effect of monitoring is preemptive. States wishing to avoid having the case removed from their national courts and taken back to The Hague are more likely to abide by international standards.³⁰³ Moreover, depending on the quality of the observers and the efficacy of the reporting system in place, some streamlining might be achieved at the international level. It will be useful for the future to create an extensive archive of such reports so that they can be used by similar adjudicative efforts elsewhere. Moreover, an accurate snapshot of national prosecutions at any given time may assist the ICTY prosecutor in concentrating his efforts on the remainder of the trials before the Tribunal.

In most instances, this monitoring task is not undertaken by OTP directly but has been entrusted to the OSCE.³⁰⁴ This type of “outsourcing” is well within the prosecutor’s powers and given the significant experience the OSCE possesses in this field, the

from the Prosecutor’s office on a referred indictment. *See* Tolbert & Kontic, *supra* note 20, at 154.

302. *ICTY Rules*, *supra* note 3, R. 11 *bis*(F). Note that revocation will be done under the deferral provisions, so this must be accomplished prior to the conclusion of the national trial. *See id.* Even though this is not mentioned in Rule 11 *bis* (F), it would be obvious that if the ICTY wanted to try a defendant after the conclusion of his trial before a national court, it would have to invoke the exception to the *non bis in idem* provision found in article 10 ICTY Statute. *See ICTY Statute*, *supra* note 19, art. 10; *see also* Katrina Gustafson & Nicole Janisiewicz, *Current Developments at the Ad Hoc International Criminal Tribunals*, 6 J. INT’L CRIM. JUST. 1091, 1117–18 (2008).

303. Accordingly, the referral bench has charged the prosecutor to monitor every referred case allowing not just oversight of the individual case, but also encouraging fair trial guarantees and diligent prosecution in any subsequent or concurrent referrals. *See* Request by the Prosecutor Under Rule 11 *bis*: Partly Confidential (Attached Schedules to Annex I Filed Confidential), ¶ 57, Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT (Sept. 2, 2004).

304. *See* Permanent Council, *OSCE, Decision No. 673: Co-operation Between the Organization for Security and Co-operation in Europe and the International Criminal Tribunal for the Former Yugoslavia*, No. PC.DEC/673 (May 19, 2005), available at http://www.osce.org/documents/pdf_documents/2005/05/14401-1.pdf.

outcome of the monitoring process should be far superior compared to monitoring undertaken in house.³⁰⁵

Although the rule regarding monitoring only refers to the prosecutor, in practice it has been of relevance to both the defense and the bench.³⁰⁶ The latter has incorporated monitoring in the examination of the fair trial requirement. The absence of a concrete test for the assessment of fair trial prior to referral, has led the bench to adopt a more hands-on approach on the issue, which includes ordering the prosecutor to monitor national trials and to provide reports to that effect after referral has taken place.

The first issue that arises is whether the bench acted within its powers when ordering the prosecutor to monitor national proceedings.³⁰⁷ The answer to this has to be in the affirmative. As convincingly explained in the *Stanković* appeal, “a Chamber of Judges may issue orders to the prosecutor as a party to a case before it. So long as the orders are reasonably related to the Chamber’s mandate in the case before it, they fall within the Chamber’s inherent powers.”³⁰⁸

A more interesting question relates to whether the bench may rely on the monitoring in order to reach its decision in favour of referral, which renders monitoring an essential part of the fair trial test. The Tribunal has vociferously stressed that it

305. *See* S.C. Res. 827, ¶ 5, U.N. Doc./RES/827 (May 25, 1993) (urging “States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel”). Monitoring by the OSCE would clearly fall under this provision. *Id.*

306. *See* Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 103 (July 22, 2005); Prosecutor v. Mejakić, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 103 (July 20, 2005); Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, ¶ 111 (July 8, 2005) (observing that the prosecutor may disregard the interests of the defense); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, ¶ 94 (May 17, 2005).

307. The prosecutor submitted that monitoring in Rule 11 *bis* is envisaged “on behalf of” the prosecutor—not the referral bench—and maintained that the bench in issuing orders acted “*ultra vires*.” Prosecutor v. Stanković, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11 *bis* Referral, ¶¶ 44–45 (Sept. 1, 2005).

308. *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 54; *see also* Prosecutor v. Mejakić, Case No. IT-02-65-AR11bis, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 93 (Apr. 7, 2006); Prosecutor v. Janković, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 *bis* Referral, ¶ 62 (Nov. 15, 2005).

has the authority to satisfy itself that the accused will receive a fair trial. In the view of the bench,

whatever information the Referral Bench reasonably feels it needs and whatever orders it reasonably finds necessary, are within the Referral Bench's authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair. The Referral Bench must bear in mind the considerable discretion that the Rule affords the Prosecutor, but always the ultimate inquiry remains the fairness of the trial the accused will receive.³⁰⁹

The approach of the bench has altered the rationale behind the adoption of the monitoring provision in the RPE. It is beyond doubt that the bench has the ability to order the prosecutor to conduct monitoring. Deciding in favor of referrals on the basis of availability of subsequent monitoring, however, is not grounded in Rule 11 *bis*. The objection is not so much because monitoring is being employed in a manner different to its originally intended use, but because the bench finds that the fairness requirement has been satisfied on the basis of a mechanism (i.e. monitoring), which has yet to take place.

The bench has to be admired for its ingenuity. It is hoped that by using monitoring in such a way, the limited scope Rule 11 *bis* contemplates regarding the examination of the fair trial requirement will be overcome. The burden is shifted away from the Tribunal so that it can proceed with the referral. Despite the limited insight into fair trial at the time of the referral hearing, subsequent monitoring offers relief to the bench.

CONCLUSION

The pressing need to conclude the trials before the *ad hoc* international tribunals contributed to reverting cases back to national courts. However, this approach would have never been adopted were it not for a significant shift in the political attitude and the ability of the judiciaries in the affected states. While it is still early to assess whether the national trials on referred cases will satisfy the interests of justice since the final decision has been

309. *Stanković*, Decision on Rule 11 *bis* Referral, ¶ 50; see also *Mejakić*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11 *bis*, ¶ 92.

reached in six of them;³¹⁰ it must be said that these cases, along with numerous other national trials, have contributed in overturning the presumption that prosecution for core international crimes is better served by international tribunals. In the inception of the tribunals, national courts were deemed unfit to deal with such serious cases. The recent emphasis placed on national courts is not only due to improvement on the situation on the ground, but may be largely attributed to the fact that the ICTY is reaching the end of its life. Referrals, encouraged by the completion strategy, belatedly rectify the noninvolvement of national legal orders in most part of the Tribunal's work. Although concurrent jurisdiction has always played a key part in the ICTY Statute, the real shift came with the need to complete more cases prior to the termination of its functions. Concurrent jurisdiction was therefore reinterpreted to enable referrals of indictments to national courts.

Rule 11 *bis* is not perfect, however. The referral practice reveals numerous shortcomings in the process. The superficial examination of the suitable forum and applicable law criteria has already led to some practical problems. The (almost) total reliance on the principle of territoriality heavily burdens the State Court of Bosnia and Herzegovina with all but two cases referred to its War Crimes Chamber. With more than eighty other indictees and considerably more modest resources than those at the ICTY, the state court will undoubtedly have great problems in dealing with the entrusted cases. At the same time, the dropping of some of the charges in the case of *Ademi & Norac*, and the inability of the Croatian prosecutor to amend the indictment in order to include all forms of command responsibility of the accused, led to the acquittal of one and to the very lenient conviction of the other.³¹¹ The trial of Kovačević, the only case referred to Serbia, has not even commenced due to the inability of the accused to stand trial, a fact that was well-known to the ICTY before the referral took place.

Notwithstanding these problems, the fact that practically all of the states from the affected territory received at least one case from the ICTY shows that the criminal justice systems in these countries have achieved a certain level of respect and trust

310. See *supra* note 254 and accompanying text.

311. See *supra* note 9.

amongst the international community. The opportunity to exercise jurisdiction in such serious cases involving grave breaches of humanitarian and human rights law represents an opportunity for further empowerment of the national legal systems in the Balkans.

Although, owing to time constraints, it is highly unlikely that there will be any further referrals, it is expected that national jurisdictions will have to tackle the numerous cases that did not reach the ICTY.³¹² The experience gained through their cooperation with the ICTY will be most valuable in these future national prosecutions. In addition, mutual cooperation and judicial assistance between the judiciaries from the region needs to be strengthened and supported, primarily from the perspective of the exchange of experiences. This is not only in the service of the past. Effective prosecution of war crimes, crimes against humanity, and genocide on a national level will contribute to the prevention of future crimes. But the lessons learned from the ICTY episode will be of the utmost importance also for the permanent International Criminal Court, which will face similar challenges when interacting with national courts.³¹³

312. Particularly with the genesis of so-called “Category 2 cases,” knowledge transfers between the Tribunal and national prosecution agencies consisting of evidence and other investigatory information were never actively pursued by the prosecutor due to the office’s need to focus entirely on the most serious crimes before it. This legacy demonstrates how far the shattered legal systems of former Yugoslavian states, particularly BiH, have come, but also the way that the relationship between those nations and the Tribunal has itself matured. See Tolbert & Kontic, *supra* note 20, at 157.

313. Indeed, it has been suggested that a “positive complementarity” model, along the lines of article 11 *bis*, ought to be adopted by the ICC in some form, with the aim of encouraging dialogue between the national and international strata of criminal accountability. *E.g.*, David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT’LL. 1281, 1293–94 (2009).