

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No.: MICT-17-111-R90

Date: 12 December 2018

Original: English

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**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge William H. Sekule  
Judge Ivo Nelson de Caires Batista Rosa

**Registrar:** Mr. Olufemi Elias

**Decision of:** 12 December 2018

**IN THE CASE AGAINST**

**PETAR JOJIĆ  
VJERICA RADETA**

**PUBLIC**

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**DECISION ON *AMICUS CURIAE*'S APPEAL AGAINST THE  
ORDER REFERRING A CASE TO THE REPUBLIC OF SERBIA**

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***Amicus Curiae* Prosecutor**

Ms. Diana Ellis  
Mr. Sam Blom-Cooper

**Office of the Prosecutor**

Mr. Serge Brammertz

**Government of the Republic of Serbia**

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively)<sup>1</sup> is seised of an appeal filed by the *Amicus Curiae* Prosecutor (“*Amicus*”) against the order of a Single Judge *In the case against Petar Jojić and Vjerica Radeta*, Case No. MICT-17-111-R90, which referred the case to the Republic of Serbia (“Serbia”) for trial.<sup>2</sup>

## I. BACKGROUND

2. On 30 October 2012, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) issued an order in lieu of an indictment charging, *inter alios*, Petar Jojić and Vjerica Radeta (collectively, the “Accused”) with contempt of the ICTY for allegedly having threatened, intimidated, offered bribes to, or otherwise interfered with witnesses in the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.<sup>3</sup> Warrants of arrest and orders for the Accused to surrender were issued and directed to the authorities of Serbia and all United Nations Member States.<sup>4</sup> Those warrants remaining outstanding, on 29 November 2017, the ICTY President, noting the imminent closure of the ICTY, ordered that the case against the Accused, as well as all judicial records concerning this case in the ICTY’s custody, be transferred to the Mechanism as the successor institution to the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”).<sup>5</sup>

<sup>1</sup> Order Assigning Judges to a Case Before the Appeals Chamber, 17 July 2017, p. 2.

<sup>2</sup> Notice of Appeal Against the Order Referring a Case to the Republic of Serbia, 26 June 2018 (“Notice of Appeal”); Appeal Brief Against the Order Referring a Case to the Republic of Serbia, 11 July 2018 (“Appeal Brief”), paras. 1, 119; *In the Case Against Petar Jojić and Vjerica Radeta*, Case No. MICT-17-111-R90, Public Redacted Version of the 12 June 2018 Order Referring a Case to the Republic of Serbia, 12 June 2018 (“Impugned Order”).

<sup>3</sup> *Prosecutor v. Svetozar Džigurski et al.*, Case No. IT-03-67-R77.5, Decision Issuing Order in Lieu of Indictment, 30 October 2012 (confidential and *ex parte*), Annex, p. 3. See *In the Case Against Petar Jojić, Jovica Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Order Lifting Confidentiality of Order in Lieu of Indictment and Arrest Warrants, 1 December 2015 (“Order of 1 December 2015”). The Appeals Chamber notes that the Order in Lieu of Indictment was further revised, in part due to the deaths of the other co-accused, and the operative indictment in this case is dated 17 August 2017. See *In the Case Against Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Revised Order in Lieu of Indictment, 17 August 2017 (public with confidential and *ex parte* annex A, confidential annex B, and public annex C), Annex C (“Order in Lieu of Indictment”); *Prosecutor v. Svetozar Džigurski et al.*, Case No. IT-03-67-R77.5, Further Decision on Order in Lieu of Indictment, 5 December 2014 (confidential and *ex parte*).

<sup>4</sup> See *Prosecutor v. Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Warrant of Arrest and Order for Surrender of Petar Jojić, 19 January 2015 (confidential); *Prosecutor v. Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Warrant of Arrest and Order for Surrender of Vjerica Radeta, 19 January 2015 (confidential); *In the Case Against Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, International Arrest Warrant and Order for Surrender [re Petar Jojić], 5 October 2016 (confidential and *ex parte*); *In the Case Against Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, International Arrest Warrant and Order for Surrender [re Vjerica Radeta], 5 October 2016 (confidential and *ex parte*). See also *In the case against Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Order Lifting Confidentiality of International Arrest Warrants, 29 November 2016, p. 2, Annexes A and B; Order of 1 December 2015, p. 1, Annexes C and D (collectively “Orders”).

<sup>5</sup> See *In the Case Against Petar Jojić and Vjerica Radeta*, Case No. IT-03-67-R77.5, Order of Transfer to the International Residual Mechanism for Criminal Tribunals, 29 November 2017, pp. 3, 4. See also *Prosecutor v. Petar Jojić and Vjerica Radeta*, Case Nos. MICT-17-111-R90 & IT-03-67-R77.5, Certificate, 4 December 2017 (public with confidential and *ex parte* annex), Annex.

3. On 18 January 2018, a Single Judge found that the Mechanism has jurisdiction over the case against the Accused in accordance with Article 1(4) of the Statute of the Mechanism (“Statute”).<sup>6</sup> On 12 June 2018, after having considered submissions from the *Amicus* and Serbia, the Single Judge found that the requirements of Articles 1(4), 6(2)(i), 6(2)(iii), and 6(4) of the Statute for referring the case to Serbia were met.<sup>7</sup>

4. In the Notice of Appeal filed on 26 June 2018 and the Appeal Brief filed on 11 July 2018, the *Amicus* requests, *inter alia*, that the Appeals Chamber quash the Impugned Order referring the case to Serbia for trial and order that the case be retained by the Mechanism for trial.<sup>8</sup> Serbia filed submissions opposing the appeal on 13 and 25 July 2018, respectively.<sup>9</sup> The *Amicus* filed a reply on 29 July 2018.<sup>10</sup> On 18 September 2018, the *Amicus* filed a further confidential and *ex parte* submission.<sup>11</sup>

## II. SUBMISSIONS

5. The *Amicus* alleges that the Single Judge erred by: (i) failing to have regard or give due weight to relevant considerations<sup>12</sup> or wrongly taking into account or giving weight to irrelevant considerations;<sup>13</sup> (ii) failing to provide reasons;<sup>14</sup> and (iii) improperly exercising his discretion.<sup>15</sup>

6. The *Amicus* contends that the history of the proceedings demonstrates Serbia’s blatant disregard for the interests of justice.<sup>16</sup> In this respect, she submits that the Single Judge failed to have regard or give due weight to Serbia’s actions and their effects over this time.<sup>17</sup> In particular, the *Amicus* argues that insufficient weight was given to: (i) Serbia’s disregard for the obligations set out in Article 29 of the ICTY Statute as demonstrated by its failure to arrest and surrender the

<sup>6</sup> Decision on Jurisdiction, 18 January 2018, p. 2.

<sup>7</sup> Impugned Order, pp. 3-5.

<sup>8</sup> Notice of Appeal, paras. 1, 7; Appeal Brief, paras. 1, 119.

<sup>9</sup> Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor against the Order referring [the] *Petar Jojić and Vjerica Radeta* case to the Republic of Serbia, 13 July 2018 (confidential) (“Serbia’s Comments”); Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018, 25 July 2018 (confidential) (“Serbia’s Response”).

<sup>10</sup> Reply to the Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor, 29 July 2018 (“Reply”).

<sup>11</sup> Note Re: *The Contempt Case Against Petar Jojić & Vjerica Radeta*, 18 September 2018 (confidential and *ex parte*) (“Note”), paras. 5-7. The submissions in the Note are raised for the first time before the Mechanism on appeal and should have been made before the Single Judge. In any case, the *Amicus*’s proposal is not contemplated by the Statute and Rules, and therefore it would have had no impact on the decision on whether to refer the case to Serbia.

<sup>12</sup> See Appeal Brief, paras. 45, 46-91.

<sup>13</sup> See Appeal Brief, paras. 45, 92-114.

<sup>14</sup> See Appeal Brief, paras. 45, 109, 115-117; Reply, paras. 32, 33.

<sup>15</sup> See Appeal Brief, paras. 45, 118. See also Appeal Brief, paras. 59, 82.

<sup>16</sup> See Appeal Brief, para. 46; Reply, paras. 5-8.

<sup>17</sup> See Appeal Brief, paras. 46-59; Reply, paras. 5-8.

Accused to the ICTY<sup>18</sup> as well as the Accused's own failure to surrender voluntarily, despite knowing about the Orders;<sup>19</sup> (ii) Serbia's repeated refusal to provide reports giving reasons for its failure to arrest the Accused as directed by the ICTY;<sup>20</sup> (iii) the decisions of the ICTY declining to refer the case to Serbia<sup>21</sup> and findings that Serbia was "unwilling" to execute the Orders and was obstructing the course of justice;<sup>22</sup> (iv) Serbia's indifference to concerns the ICTY President expressed to the United Nations Security Council regarding its failure to comply with its statutory obligations;<sup>23</sup> (v) Serbia's failure to respond to its referral to the Security Council by the ICTY President;<sup>24</sup> and (vi) the ruling of Belgrade's High Court that Serbia had no obligation to transfer the Accused to the ICTY rendering the revocation provisions of the Mechanism's Statute redundant.<sup>25</sup>

7. The *Amicus* further submits that the Single Judge failed to have regard or give due weight to: (i) the fact that the intention of the crimes alleged was to interfere with and disrupt the *Šešelj* trial in The Hague;<sup>26</sup> (ii) the witnesses's mistrust of and unwillingness to cooperate with Serbian authorities due to their fear for their and their families' safety and security;<sup>27</sup> and (iii) the *Amicus*'s in-depth knowledge of the case which would allow her to proceed more expeditiously than Serbian authorities.<sup>28</sup>

8. The *Amicus* also submits that the Single Judge erroneously took into account or gave weight to irrelevant considerations including: (i) the Accused's presence in Serbia and their willingness to be tried there;<sup>29</sup> (ii) Serbia's willingness to try the Accused;<sup>30</sup> (iii) that the alleged crimes took place within Serbia;<sup>31</sup> (iv) Serbia's assertion that in the past it had complied with its obligations in other cases;<sup>32</sup> (v) the Mechanism's monitoring provisions and ability to revoke a referral order;<sup>33</sup> and

<sup>18</sup> See Appeal Brief, paras. 46-59, 66-68; Reply, paras. 5-15.

<sup>19</sup> See Appeal Brief, paras. 63-65.

<sup>20</sup> See Appeal Brief, paras. 69-71; Reply, paras. 16, 17.

<sup>21</sup> See Appeal Brief, paras. 74-77; Reply, paras. 18, 19.

<sup>22</sup> See Appeal Brief, paras. 60-62, 79; Reply, paras. 20, 21.

<sup>23</sup> See Appeal Brief, paras. 72, 73.

<sup>24</sup> See Appeal Brief, para. 78.

<sup>25</sup> See Appeal Brief, paras. 83-85.

<sup>26</sup> See Appeal Brief, paras. 80-82.

<sup>27</sup> See Appeal Brief, paras. 86-89; Reply, paras. 22, 23. See also Note, para. 5.

<sup>28</sup> See Appeal Brief, paras. 90, 91; Reply, paras. 24, 25.

<sup>29</sup> See Appeal Brief, paras. 92-95; Reply, para. 26.

<sup>30</sup> See Appeal Brief, paras. 96-98.

<sup>31</sup> See Appeal Brief, paras. 99, 100. See also Appeal Brief, paras. 80-82.

<sup>32</sup> See Appeal Brief, paras. 101, 102; Reply, para. 27.

<sup>33</sup> See Appeal Brief, paras. 103-105; Reply, para. 28. See also Appeal Brief, paras. 83-85.

(vi) Serbia's submissions on the immunity provisions in Serbia's Constitution, which she contends misled the Single Judge.<sup>34</sup>

9. Serbia opposes the *Amicus's* appeal and submits that the Impugned Order represents a step forward in relations between it and the Mechanism, in the sense that it demonstrates the Mechanism's confidence in Serbia and its ability to meet its obligations.<sup>35</sup> In response to the *Amicus's* arguments, Serbia counters that: (i) it has not disregarded its obligations and has a history of cooperating with the ICTY and the Mechanism;<sup>36</sup> (ii) it has not obstructed the course of the proceedings in this case;<sup>37</sup> (iii) no evidence supports the ICTY's finding that Serbia was "unwilling" to execute the arrest warrant;<sup>38</sup> (iv) it has not shown "indifference" in its failure to comply with its statutory obligations before the ICTY;<sup>39</sup> and (v) it has a robust witness protection system that can handle a large number of cases.<sup>40</sup>

10. Serbia further submits that Serbian authorities are bound by the Belgrade High Court's ruling, which is not subject to extrajudicial control by the executive organs<sup>41</sup> and that the Belgrade High Court was not required to provide a justification for its ruling that the requirements for the arrest and transfer of the Accused had not been met.<sup>42</sup> In Serbia's view, neither the ICTY's decisions denying Serbia's requests for transfer, nor the length of the *Amicus's* involvement in this case, are relevant considerations.<sup>43</sup>

### III. DISCUSSION

11. The Mechanism has the power to prosecute persons who have knowingly and wilfully interfered with the administration of justice by the Mechanism, the ICTY and the ICTR, and to hold such persons in contempt.<sup>44</sup> States are required to cooperate with the Mechanism in the investigation and prosecution of contempt cases and shall comply without undue delay with any order issued by a Single Judge or Trial Chamber, including orders for the surrender or the transfer

<sup>34</sup> See Appeal Brief, paras. 107, 108; Reply, paras. 29-31. The *Amicus* also argues that the Single Judge misinterpreted her submission that Article 103 of Serbia's Constitution provided an absolute prohibition on prosecution when she had stated that the immunity was removable by the National Assembly. See Appeal Brief, para. 106, 110-114.

<sup>35</sup> Serbia's Response, p. 13.

<sup>36</sup> See Serbia's Response, pp. 3, 4. Serbia also submits that it did not rely on political sensitivities and national security concerns to excuse its non-compliance. See Serbia's Response, p. 4.

<sup>37</sup> See Serbia's Response, p. 7.

<sup>38</sup> See Serbia's Response, p. 6.

<sup>39</sup> See Serbia's Comments, para. 5; Serbia's Response, pp. 6, 7.

<sup>40</sup> See Serbia's Response, p. 8; Serbia's Comments, paras. 8, 11.

<sup>41</sup> See Serbia's Comments, paras. 2, 3; Serbia's Response, pp. 5, 6.

<sup>42</sup> See Serbia's Response, p. 5.

<sup>43</sup> See Serbia's Response, pp. 7, 9.

<sup>44</sup> Article 1(4) of the Statute.

of the accused to the Mechanism.<sup>45</sup> Before proceeding to try such persons, however, the Mechanism “shall” consider referring a case to the authorities of a competent national jurisdiction, taking into account the interests of justice and expediency.<sup>46</sup> This requirement is mandatory, and the inclusion of this provision in the Statute indicates a strong preference for referral if all relevant conditions are met. Accordingly, the Mechanism may only exercise jurisdiction after it has considered whether the case can be transferred to a national jurisdiction for trial.

12. Articles 6(2) and 12(1) of the Statute provide that a Single Judge may be designated to make this determination.<sup>47</sup> The Single Judge is to consider whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept the case and try it.<sup>48</sup>

13. Where an appeal is filed against a decision referring a case to a competent national jurisdiction for trial, the issue before the Appeals Chamber is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but whether in reaching that decision the Single Judge has correctly exercised his or her discretion.<sup>49</sup> The Appeals Chamber will only intervene with the decision of the Single Judge if the decision was based on a discernible error. To demonstrate such error, an appellant must show that the Single Judge: (i) misdirected him or herself as to the legal principles to be applied, or the applicable law; (ii) gave weight to irrelevant considerations or failed to give sufficient weight to relevant considerations; (iii) made an error as to the facts upon which the exercise of discretion relied; or (iv) the decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Single Judge must have failed to exercise his or her discretion properly.<sup>50</sup>

14. The *Amicus* alleges that the Single Judge committed two errors when determining whether Serbia was an appropriate referral State. First, she takes issue with the Single Judge’s reliance on the fact that the crimes charged in the Order in Lieu of Indictment allegedly took place in Serbia.<sup>51</sup>

<sup>45</sup> Articles 1(4), 28(1) of the Statute.

<sup>46</sup> Article 1(4) of the Statute. *See also* Article 6 (1) of the Statute.

<sup>47</sup> *See also* Rule 2(C) of the Rules of Procedure and Evidence (“Rules”).

<sup>48</sup> Article 6 (2) of the Statute.

<sup>49</sup> *See Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-AR14.1, Decision on an Appeal Concerning a Request for Revocation of a Referral, 4 October 2016 (“*Uwinkindi* Decision of 4 October 2016”), para. 7; *Prosecutor v. Radovan Stanković*, Case No. MICT-13-51, Decision on Stanković’s Appeal against Decision Denying Revocation of Referral and on the Prosecution’s Request for Extension of Time to Respond, 21 May 2014 (“*Stanković* Decision of 21 May 2014”), para. 12. *See also* Rule 2(C) of the Rules.

<sup>50</sup> *Stanković* Decision of 21 May 2014, para. 12, referring to *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 (“*Uwinkindi* Decision of 16 December 2011”), para. 23.

<sup>51</sup> Impugned Order, pp. 2, 4.

The *Amicus* asserts that the Single Judge failed to give sufficient weight to the fact that, while the alleged acts may have been committed in Serbia, their impact was on trial proceedings that were taking place in The Hague.<sup>52</sup> The Appeals Chamber recalls that the Statute explicitly contemplates referral to a State “in whose territory the crime was committed”, without requiring that all the alleged acts, omissions, or effects thereof be committed or sustained in the territory of that State.<sup>53</sup> Indeed, to read the Statute as so requiring would effectively render meaningless the provisions that allow for the referral of contempt cases as the impact of the alleged conduct will always be on proceedings that took place in The Hague or Arusha, while the alleged acts or omissions could be committed anywhere. If that impact is to be determinative, the Mechanism would be precluded from transferring any such case to another State for trial. Accordingly, the Appeals Chamber finds no error in the weight the Single Judge placed on the fact that the crimes charged in the Order in Lieu of Indictment allegedly took place in Serbia.

15. Next, the *Amicus* objects to the Single Judge’s conclusion that Serbia was willing and adequately prepared to accept the case for trial.<sup>54</sup> She argues that Serbia did not indicate that it was *willing* to conduct criminal proceedings, only that it was *prepared* to do so.<sup>55</sup> The Appeals Chamber does not consider the fact that Serbia failed to recite the specific language of Article 6(2)(iii) of the Statute to be fatal. Rather, Serbia’s submissions must be considered as a whole. Upon a review of Serbia’s submissions in this regard,<sup>56</sup> the Appeals Chamber is not persuaded that the *Amicus* has demonstrated that the Single Judge erred by finding that Serbia was willing and adequately prepared to accept the case for trial.

16. As part of the determination of whether to refer the case to Serbia, the Single Judge was required to take into account the interests of justice and expediency.<sup>57</sup> The *Amicus* asserts it is not in the interests of justice to refer the case to Serbia,<sup>58</sup> and identifies a number of considerations to which she contends that the Single Judge either gave too little or too much weight when reaching his conclusion.<sup>59</sup> She further contends that the Single Judge failed to provide reasons for concluding that it was in the interests of justice to refer the case to Serbia<sup>60</sup> and that ultimately the Impugned

<sup>52</sup> Appeal Brief, paras. 80-82, 99, 100.

<sup>53</sup> Article 6(2)(i) of the Statute.

<sup>54</sup> See Impugned Order, p. 4.

<sup>55</sup> Appeal Brief, para. 62 (emphasis added).

<sup>56</sup> Impugned Order, p. 4. The Appeals Chamber notes that Serbia indicated it was “prepared to conduct criminal proceedings against the [Accused], including the provision of all procedural guarantees for a fair trial.” See Letter signed by Ms. Nela Kuburović, Minister of Justice of the Republic of Serbia, 14 March 2018 (confidential), Registrar’s Pagination (“RP”) 41. See also Letter signed by Ms. Nela Kuburović, Minister of Justice of the Republic of Serbia, 26 April 2018 (public; made confidential on 9 May 2018), RP. 131-128.

<sup>57</sup> Article 1(4) of the Statute. See also Article 6 (1) of the Statute.

<sup>58</sup> Appeal Brief, para. 58.

<sup>59</sup> See e.g. Appeal Brief, paras. 65, 71, 79, 88, 108.

<sup>60</sup> Appeal Brief, paras. 45, 116.

Order is so unreasonable and unjust that it can be inferred that the Single Judge has not properly exercised his discretion.<sup>61</sup>

17. In the Impugned Order, in addition to the considerations relevant to determining whether Serbia was an appropriate referral State,<sup>62</sup> the Single Judge noted the history of the proceedings and the submissions of the *Amicus* and Serbia.<sup>63</sup> The Single Judge then took into account that: (i) the Accused remain at large; (ii) Serbia had indicated that it was prepared to provide all procedural guarantees for a fair trial and that the Accused, who reside in Serbia, were willing to appear for trial before a Serbian court; (iii) Serbia's Constitution prohibits the death penalty; and (iv) the *Amicus* did not demonstrate that Serbia lacked jurisdiction or undermine Serbia's assertion that it is willing and adequately prepared to accept this case for trial and that the Accused will be provided with all procedural guarantees for a fair trial.<sup>64</sup>

18. Finally, the Single Judge concluded that the requirements of Articles 1(4), 6(2)(i), 6(2)(iii) and 6(4) of the Statute for referring the case to Serbia were met.<sup>65</sup> Although the Single Judge did not provide extensive reasoning, it is implicit from all the factors that he considered that he had determined that the interests of justice were best served by referring the matter for trial in Serbia.<sup>66</sup> The Appeals Chamber is therefore not persuaded by the *Amicus* submission that the Single Judge failed to provide reasons for concluding that it was in the interests of justice to refer the case to Serbia.

19. The Appeals Chamber is similarly unpersuaded that the Impugned Order is so unreasonable and unjust that it can be inferred that the Single Judge has not properly exercised his discretion. The Appeals Chamber recalls that the information before the Single Judge indicated that there was little prospect of bringing the case to trial before the Mechanism. Notably, when the case was before the ICTY, all avenues to secure Serbia's cooperation, including those identified by the *Amicus*,<sup>67</sup> were exhausted without moving the case any closer to trial.<sup>68</sup> By contrast, the information before the

<sup>61</sup> Appeal Brief, para. 118.

<sup>62</sup> See *supra* paras. 14, 15.

<sup>63</sup> Impugned Order, pp. 2-4.

<sup>64</sup> Impugned Order, pp. 2, 4.

<sup>65</sup> Impugned Order, p. 4.

<sup>66</sup> Impugned Order, p. 4, wherein the Single Judge concluded that the requirements of Articles 1(4), 6(2)(i), 6(2)(iii), and 6(4) of the Statute for referring this case to Serbia were met after considering, *inter alia*, that the *Amicus*'s submissions "do not demonstrate that Serbia lacks jurisdiction in respect of this case nor do they undermine Serbia's assertion that it is willing and adequately prepared to accept this case for trial and that the Accused will be provided with all procedural guarantees for a fair trial".

<sup>67</sup> See *supra* para. 6.

<sup>68</sup> The Appeals Chamber observes that the ICTY Statute and the ICTY Rules of Procedure and Evidence ("ICTY Rules") did not provide for the transfer of contempt cases to domestic courts of a State. Cf. ICTY Rules, Rule 11*bis*; *In the Case Against Petar Jojić and Vjerica Radeta*, Case No. IT-03-67-R77.5, Decision on Serbia's Request for Referral Pursuant to Rule 11*bis*, 10 November 2015 (confidential and *ex parte*) ("Decision of 10 November 2015"), p. 2. The



Single Judge demonstrated that there was a reasonable prospect that the case would be brought to trial in Serbia. In this respect, Serbia indicated that it was prepared to conduct criminal proceedings against the Accused and that the Accused, who reside in Serbia, were willing to be tried in Serbia.<sup>69</sup> Bearing this in mind, the Appeals Chamber considers that it was reasonable for the Single Judge to find that the interests of justice were best served by referring the case to Serbia because there appeared to be a far greater likelihood that the case would be brought to trial in Serbia than at the Mechanism.

20. The Appeals Chamber finds, contrary to the *Amicus's* submissions,<sup>70</sup> that the Single Judge was live to the fact that the history of this case before the ICTY might raise questions about Serbia's *bona fides* and that one interpretation of Serbia's Constitution is that it grants National Assembly Deputies, such as the Accused, immunity that would prevent proceedings from being brought against them in Serbia.<sup>71</sup> The Appeals Chamber observes that, before the Single Judge ordered that the case be referred to Serbia for trial, he noted the provisions in the Statute and the Rules that allow the Mechanism to make a formal request for deferral where it is clear that the conditions for the referral of the case are no longer met and it is in the interest of justice.<sup>72</sup> Namely, if the Accused are not brought to trial within a reasonable time, or if a competent Serbian court determines that it does not have jurisdiction to prosecute the Accused for contempt of the ICTY as alleged in the Order in Lieu of Indictment,<sup>73</sup> a deferral may be sought in the interests of justice.<sup>74</sup> In this regard, the Appeals Chamber considers that it was reasonable for the Single Judge to have taken into account the availability of revocation procedures under Rule 14 of the Rules when deciding whether or not to refer the case to Serbia.<sup>75</sup> The Appeals Chamber considers this to be so regardless of the previous failure of Serbia to cooperate with the Orders of the ICTY.

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Appeals Chamber finds no merit in the *Amicus Curiae* Prosecutor's argument that the Single Judge failed to have regard to the ICTY decisions rejecting Serbia's proposals to refer the case. Serbia's request for the case to be referred was denied as the ICTY President held that contempt cases do not fall within the scope of cases that may be referred to domestic courts of a State pursuant to Rule 11*bis* of the ICTY Rules. Decision of 10 November 2015, p. 2; Appeal Brief, paras. 74-77.

<sup>69</sup> Impugned Order, p. 4.

<sup>70</sup> See *supra* para. 6.

<sup>71</sup> Impugned Order, pp. 3, 4 referring to the *Amicus's* submissions that Serbia "would prevent proceedings from being brought against the Accused, given that the Constitution of Serbia grants immunity to the Deputies of the National Assembly", and Serbia's submission that "immunity from prosecution for Deputies of the National Assembly only applies for the votes cast and opinions expressed in the performance of their duties, but does not shield them from criminal proceedings".

<sup>72</sup> Impugned Order, pp. 4, 5 referring to Article 6(6) of the Statute and Rule 14(C) of the Rules.

<sup>73</sup> See Order in Lieu of Indictment, paras. 18, 20, 21.

<sup>74</sup> Cf. *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands pursuant to Rule 11*bis* (F) & (G), 17 August 2007, paras. 3, 11, 12, pp. 5-6; *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007, paras. 15, 30.

<sup>75</sup> See *The Prosecutor v. Yussuf Muniyaki*, Case No. ICTR-97-36-R11*bis*, Decision the Prosecution's Appeal Against Decision on Referral under Rule 11*bis*, 8 October 2008, para. 30 ("*Muniyaki* Decision of 8 October 2008");

21. In this respect, the *Amicus* argues that the Single Judge erred in relying upon the revocation procedures because, in her view, the Belgrade High Court's ruling that there was no jurisdiction to transfer the Accused from Serbia to the ICTY has made the revocation procedures unavailable to the Mechanism.<sup>76</sup> At the outset, the Appeals Chamber observes that there are important differences between the ICTY Statute and that of the Mechanism. The Mechanism's Statute explicitly provides for the referral of contempt cases and requires States to comply with any order for the surrender or the transfer to the Mechanism of any person accused of contempt,<sup>77</sup> whereas the ICTY Statute did not.<sup>78</sup> In light of the specific provisions allowing for referral of contempt cases, the Appeals Chamber considers that where a State expresses a willingness and commitment to try a case over which it has jurisdiction, as Serbia has done in this case,<sup>79</sup> it should be given the opportunity to do so, provided other relevant factors are satisfied. As the Mechanism has its own Statute, notably one that includes an explicit requirement for cooperation in relation to contempt matters, the Appeals Chamber considers that it would be premature to state that Serbia would consider that the Belgrade High Court's ruling vis-à-vis the ICTY would make the Mechanism's revocation procedures unavailable. Accordingly, the *Amicus* has failed to demonstrate that the Single Judge erred in treating the revocation provisions as a safeguard.

22. Turning to the question of witness protection, the *Amicus* asserts that the Single Judge failed to take into account the unwillingness of witnesses to testify if this case is tried in Serbia.<sup>80</sup> She argues that the witnesses, who have been traumatized by their experiences, have cooperated with her as she was seen as a party quite separate from the Serbian authorities.<sup>81</sup> She contends that such cooperation will not be forthcoming if the case is transferred to Serbia as the witnesses mistrust the Serbian authorities and fear the Accused's power and influence within Serbia.<sup>82</sup> The *Amicus* maintains that the witnesses are unwilling to testify in Serbia, irrespective of the availability of protective measures.<sup>83</sup>

23. The *Amicus* did not raise the issue of the unwillingness of witnesses to testify if the case is tried in Serbia before the Single Judge so she cannot claim on appeal that the Single Judge erred by

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*Prosecutor v. Gojko Jankovic*, No. IT-96-23/2-AR11bis.2, Decision on Rule 11bis Referral, 15 November 2005, para. 55; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005 ("Stanković Decision of 1 September 2005"), para. 52.

<sup>76</sup> Appeal Brief, paras. 83-85.

<sup>77</sup> Articles 1(4), 6(1), 28(1) of the Statute.

<sup>78</sup> See e.g. ICTY Rules, Rule 11bis; ICTY Statute, Article 29(1) which reads: "[s]tates shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". See *supra* note 69.

<sup>79</sup> Serbia's Comments, p. 7; Serbia's Response, p. 13.

<sup>80</sup> Appeal Brief, para. 89. See also Appeal Brief, para. 91.

<sup>81</sup> Appeal Brief, para. 87. See also Note, para. 5.

<sup>82</sup> Appeal Brief, para. 89. See also Reply, para. 23; Note, para. 5.

<sup>83</sup> Appeal Brief, paras. 87, 89. See also Reply, para. 23; Note, para. 5. See also Appeal Brief, para. 91.

failing to take it into account.<sup>84</sup> Further, the *Amicus* has not provided any evidence to substantiate these new arguments. The Appeals Chamber recalls that it is under no obligation to consider mere assertions unsupported by any evidence<sup>85</sup> or arguments raised for the first time on appeal where the party could have reasonably done so in the first instance.<sup>86</sup> Nevertheless, given the importance to the trial process of ensuring that witnesses will appear to give evidence when called and of facilitating the attendance of witnesses through the provision of appropriate protective measures,<sup>87</sup> the Appeals Chamber considers these to be important factors that should be considered in the determination of whether it is in the interests of justice to refer this case to Serbia for trial.<sup>88</sup> Accordingly, the Appeals Chamber considers it appropriate to remand the matter to the Single Judge to consider further submissions on this issue from the *Amicus*, Serbia, and if necessary the Witness Support and Protection Unit.

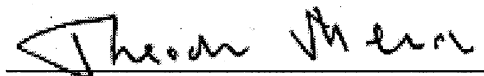
#### IV. DISPOSITION

24. For the foregoing reasons, the Appeals Chamber:

**REMANDS** the matter to the Single Judge for further consideration consistent with this decision.

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

Done this 12<sup>th</sup> day of December 2018,  
At The Hague,  
The Netherlands



Judge Theodor Meron  
Presiding Judge

[Seal of the Mechanism]

<sup>84</sup> The Appeals Chamber observes that the only arguments concerning witnesses that were before the Single Judge was that the witnesses were concerned for their safety, and that of their families, and that it would not be more expedient for the case to be tried in Serbia as there were witnesses in a number of different jurisdictions. See Response of the *Amicus Curiae* Prosecutor to the Letter from the Republic of Serbia re: Referral of the Case, 5 April 2018, paras. 24, 26.

<sup>85</sup> See *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgement, 8 April 2015, para. 14.

<sup>86</sup> See *Uwinkindi* Decision of 4 October 2016, para. 20. See *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 14. Cf. *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 10.

<sup>87</sup> See Article 20 of the Statute, Rule 86 of the Rules.

<sup>88</sup> See *Uwinkindi* Decision of 16 December 2011, paras. 61-66, *Munyakazi* Decision of 8 October 2008, paras. 37, 38, 42; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision the Prosecution's Appeal Against Decision on Referral under Rule 11bis, 30 October 2008, paras. 26-35; *Stanković* Decision of 1 September 2005, para. 26.



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