UNITED NATIONS

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

Case No.: IT-96-23/2-AR11bis.1

Date: 1 September 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr Hans Holthuis**

Decision: **1 September 2005**

THE PROSECUTOR

v.

Radovan STANKOVIĆ

DECISION ON RULE 11*BIS* REFERRAL

Counsel for the Accused:
Mr. Victor Koppe

The Office of the Prosecutor:
Mr. Mark McKeon

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seized of appeals by Radovan Stanković ("Appellant") and by the Prosecution against the "Decision on Referral of Case Under Rule 11*bis*," rendered by the Referral Bench on 17 May 2005.

I. Procedural History and Background

2. The Appellant was originally included with seven other accused in an indictment that was confirmed on 26 June 1996.[1] After the Appellant was apprehended by SFOR forces in the Foča area of Republika Srpska, Bosnia and Herzegovina, on 9 July 2002 and transferred the following day to the United Nations Detention Unit, the Prosecution filed a separate indictment against the Appellant alone.[2] The Prosecution then filed a Third Amended Indictment ("Indictment") that was confirmed on 24 February 2004. That Indictment sets out the basis for the charges in this case.

3. The Indictment alleges that the Appellant – a national of Bosnia and Herzegovina whose permanent residence was in the village of Miljevina, located in the municipality of Foča in Republica Srpska – was a soldier in the Miljevina Battalion of the Foča Tactical Brigade under the command of the Serb regional paramilitary leader Pero Elez.[3] According to the Indictment, for a period of more than two months – from 3 August 1992 until about 10 October 1992 – the Appellant and two other soldiers were in charge of "Karaman's house," the abandoned house of a Muslim named Nusret Karaman.[4] The house was located near the

[1] Case No. IT-96-23, Indictment, 26 June 1996.
[2] Case No. IT-96-23/2-I, Second Amended Indictment, 3 March 2003. This was the Second Amended Indictment because the Prosecution had filed an Amended Indictment against the Appellant and four others on 7 October 1999. Case No. IT-96-23-PT, First Amended Indictment, 7 Oct. 1999.
[3] Indictment, para. 2.1.
[4] Indictment, paras 4.1-4.3.

battalion headquarters and served as a residence for several of the Serb soldiers.[5] The Indictment alleges that the Appellant brought at least nine Muslim women and girls to the house so that Serb soldiers could rape, sexually assault, and otherwise degrade them.[6] The Appellant himself allegedly raped and sexually assaulted at least two of the women.[7]

4. In light of these alleged events, the Indictment charges the Appellant on the basis of individual criminal responsibility under Article 7(1) of the Statute of the Tribunal with two counts of enslavement as a crime against humanity, two counts of rape as a crime against humanity, two counts of rape as a violation of the laws or customs of war, and two counts of outrages upon personal dignity as a violation of the laws or customs of war.[8]

5. On 21 September 2004, the Prosecutor submitted a motion to refer the case to Bosnia and Herzegovina.[9] The motion was filed under Rule 11*bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"). That rule, amended to reflect Security Council resolution 1534 (2004),[10] allows the Tribunal to transfer cases involving lower-level accused to competent national jurisdictions. Rule 11*bis* provides in part:

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

[5] *Id.*, para. 4.1.
[6] *Id.*, paras 4.2-4.4.
[7] *Id.*, paras 4.8, 5.3.
[8] *Id.*, Counts 1-8.
[9] Request by the Prosecutor under Rule 11*bis* of the Rules of Procedure and Evidence (RPE) for Referral of Indictment to the State of Bosnia and Herzegovina, 21 September 2004.
[10] U.N. Doc. S/RES/1534 (2004) at paras 4-5.

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

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

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

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

6. Upon receipt of the Prosecution's motion, the President of the Tribunal established a Referral Bench for this case by filing, on 5 October 2004, an "Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should Be Referred to Another Court Under Rule 11*bis*." Defence Counsel for the Appellant filed a response to the Prosecution's referral motion on 22 December 2004, objecting to the referral of the case to the State Court of Bosnia and Herzegovina.[11] Following briefing and an oral hearing on 4 March 2005 at which the parties and the Government of Bosnia and Herzegovina were represented,[12] the Referral Bench concluded in its decision of 17 May 2005 that referral was appropriate and ordered that the case be transferred to the authorities of Bosnia and Herzegovina.[13]

7. In determining that the case was fit for transfer, the Referral Bench examined the level of the Appellant's responsibility and the gravity of the crimes charged and concluded that these factors were "not *ipso facto* incompatible with referral of the case" to a national

[11] Defence's Motion in Accordance Rule 11*bis*(B), 22 December 2004.
[12] Decision on Referral of Case Under Rule 11*bis* ("Referral Decision"), filed partly confidentially and *ex parte* on 17 May 2005, paras 7-8.
[13] Referral Decision, para. 96.

jurisdiction.[14] It also assessed the status of the State Court of Bosnia and Herzegovina, the laws that would be applicable upon transfer, whether the death penalty would be imposed, and whether the Appellant would receive a fair trial.

8. On 25 May 2005, the Appellant filed an application indicating his intent to appeal the Referral Decision and requesting an extension of time in which to file his appeal.[15] The Prosecutor filed her response on 30 May 2005, stating her opposition to the Appellant's application,[16] and, on the same day, she simultaneously filed a Notice of Appeal setting forth her objections to the Referral Decision.[17] The Appeals Chamber filed a decision on 9 June 2005 that granted the application.[18] The parties subsequently filed timely briefings, and the Appeals Chamber will consider each appeal in turn, beginning with the Appellant's arguments.

II. Appeal of Radovan Stanković

9. The Appellant's Notice of Appeal contains six grounds of appeal.[19] His appeal brief drops the sixth ground of appeal and presses only five grounds.[20] The Prosecution has responded to each of the five grounds,[21] and the Appellant filed a reply.[22] The Appeals Chamber will address each ground of appeal in the order presented by the Appellant.

A. First Ground of Appeal

[14] *Id.*, para. 20.
[15] Application for Extension of Time to File Notice of Appeal, 25 May 2005.
[16] Prosecutor's Response to Defence Motion for Extension of Time to File Notice of Appeal, 30 May 2005.
[17] Prosecution's Notice of Appeal, 30 May 2005.
[18] Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005.
[19] Notice of Appeal, 16 June 2005.
[20] Appellant's Brief, 1 July 2005 ("Stanković Appeal Brief").
[21] Prosecutor's Response to Appellant's Brief, 11 July 2005 ("Prosecutor's Response").
[22] Reply, 15 July 2005 ("Stanković Reply").

10. The Appellant first contends that the Referral Bench erred in assuming that it possessed the power to refer a case from the Tribunal to another jurisdiction, and in then acting on that assumed authority.[23] The Appellant notes that the Tribunal can exercise only those powers conferred on it by the Security Council. Given this limitation on its authority, the Appellant submits, the Referral Bench was obligated first to "examine the legal basis and scope of its power to refer the case to the authorities of the State of Bosnia and Herzegovina."[24] Had the Referral Bench undertaken such an inquiry, he suggests, it would have found that it lacks the power to refer cases to national jurisdictions – that, in other words, "Rule 11*bis* lacks a legal basis in the Statute and in any implied or inherent powers that the Tribunal may have."[25]

11. The Appellant traces the adoption of Rule 11*bis* and notes that the Security Council declined to amend the Statute of the Tribunal to incorporate the referral rule.[26] The Security Council's stated support for the completion strategy is not enough, the Appellant asserts, to create a legal basis for transferring cases out of the Tribunal's jurisdiction.[27] Nor, he contends, does any provision of the Statute provide a legal basis for the adoption of Rule 11*bis*: not Article 15, which authorizes the Tribunal to adopt new Rules of Procedure and Evidence only for certain enumerated purposes, not expressly including the referral of cases to national jurisdictions;[28] not Article 9, which states that the Tribunal shall have concurrent jurisdiction with national courts and primacy over those courts with respect to matters within

[23] Stanković Appeal Brief, para. 3.
[24] *Id.*, para. 4.
[25] *Id.*, para. 5.
[26] *Id.*, paras 7-8.
[27] *Id.*, para. 9.
[28] *Id.*, para. 10-11. Article 15 of the Statute states: "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."

the competence of the Tribunal;[29] and not Article 29, which instructs states to cooperate with the Tribunal in its investigations and prosecutions.[30]

12. The Appellant argues finally that the Tribunal's inherent powers similarly supply no basis for Rule 11*bis*'s adoption.[31] He submits that the Tribunal's inherent powers must relate to its judicial functions – the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991 – and the referral of a case to a national court is not an inherent function because it does not involve prosecution by the Tribunal itself.[32]

13. The Appeals Chamber notes that the Appellant challenges the competence of the Referral Bench to refer a case to another jurisdiction for the first time on appeal. He did not raise the issue of competence before the Referral Bench either in his written submissions or during the hearing held on 4 March 2005. Although the Appeals Chamber could dismiss the Appellant's first ground of appeal on this basis alone, the Appeals Chamber considers that it raises an issue of significance and therefore sets forth its views on this issue.

14. It is true, as the Appellant points out, that the Statute of the Tribunal does not contain an explicit legal basis for Rule 11*bis*. But the explicit language of the Statute is neither an exclusive nor an exhaustive index of the Tribunal's powers. It is axiomatic under Article 9 of the Statute that it was never the intention of those who drafted the Statute that the Tribunal try all those accused of committing war crimes or crimes against humanity in the Region.[33] The Tribunal was granted primary – but explicitly not exclusive – jurisdiction over such crimes.

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[29] Stanković Appeal Brief, paras 12-15.
[30] *Id.*, paras 16-20.
[31] *Id.*, paras 21-24.
[32] *Id.*, paras 22-24.
[33] *See* Report of the Secretary-General, Article 9, Concurrent Jurisdiction, paras 64-65, Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 & Add. 1, para. 28 (1993)

In this regard, it is clear that alternative national jurisdictions have consistently been contemplated for the "transfer" of accused.[34]

15. And even if the explicit authority to conduct such transfers from the Tribunal to national jurisdictions is not given to the Tribunal by the Statute itself, the interpretation of Article 9 of the Statute noted previously giving implicit authority to do so has been backed by Security Council resolutions. The Appeals Chamber recalls that the Tribunal is bound by the resolutions concerning the Tribunal that the Council passes under its Chapter VII authority. Most significant among those documents are Resolution 1503 and Resolution 1534.[35] Under Resolution 1503, the Security Council endorsed the Tribunal's proposed strategy of concentrating on the "trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions." [36] The Council noted especially that this strategy required "the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber') and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber."[37] Furthermore, under Resolution 1534, the Security Council requested the Tribunal to keep it informed of the "transfer of cases involving intermediate and lower rank accused to competent national jurisdictions." [38]

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[34] Indeed, the President of the Security Council stated on 23 July 2002 that the Council "recognize[d]" that the ICTY should be concentrating on those most responsible, *i.e.* the leaders, in the war and "endorse[d] the...broad strategy for the *transfer* of cases involving intermediary and lower-level accused to competent national jurisdictions" (emphasis added). UN Doc. S/PRST/2002/21.
[35] S/Res/1503 (2003); S/Res/1534 (2004).
[36] S/Res/1503.
[37] *Ibid.*
[38] S/Res/1534, para. 6.

16. As these Resolutions make clear, the referral of cases is not just a notion that seemed prudent and sensible enough to the Tribunal judges to be worth incorporating into the Rules of Procedure and Evidence. On the contrary, the Tribunal judges amended Rule 11*bis* to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the Tribunal has implicit authority to do so under the Statute. The Security Council plainly contemplated the transfer of cases out of the Tribunal's jurisdiction and agreed with the Tribunal that referrals would advance its judicial functions. It is true that the Council did not amend the Statute accordingly, but that was not required. The Council accepted that the Tribunal was authorized to do so and thus confirmed the legal authority behind the Tribunal's referral process, but it left it up to the Tribunal to work out the logistics for doing so, such as through amendment of its Rules.

17. In short, the Referral Bench assumed that it had the power to effect a transfer, and that assumption was correct. For these reasons, the Appellant's arguments concerning the lack of a legal foundation for the referral are rejected, and the Appellant's first ground of appeal is dismissed.

B. Second and Third Grounds of Appeal

18. The parties have treated the Appellant's second and third grounds together because the two grounds are closely associated. Both assert at bottom that the Referral Bench failed properly to inform itself on the question whether the Appellant would receive a fair trial in Bosnia and Herzegovina.

19. Rule 11*bis*(B) authorizes the transfer of a case only where the Referral Bench is "satisfied that the accused will receive a fair trial." The Appellant contends that the Referral Bench's inquiry was not sufficiently rigorous. He notes that the Referral Bench was satisfied

that there are legal instruments in place that *could* result in a fair trial, but that finding, he asserts, is not enough: those legal instruments must actually be shown to be *in use*.[39]

20. The Appellant identifies a number of ways in which current legal structures in Bosnia and Herzegovina are not sufficient to guarantee a fair trial. He first notes that the Referral Bench properly posed questions about the right of the Appellant to have adequate time and facilities for the preparation of his defence, but he contends that the Referral Bench ignored a critical deficiency: the availability of funds for the support of defence counsel.[40] The Appellant states that he "has it on reliable authority" that the funding sought for legal aid "has not been forthcoming."[41] He asserts that the Referral Bench's failure to address this deficiency, despite his having flagged the issue, constitutes an error of law.[42]

21. The Referral Bench took particular care to examine the BiH Criminal Procedure Code ("CPC")[43] and noted that it provides "the right to a defence attorney of one's own choosing and require[s] that an accused be given sufficient time to prepare a defense."[44] The Referral Decision also emphasizes that "a suspect has the right to request appointment of defence counsel if unable to bear the costs due to financial circumstances."[45] Having satisfied itself that the State would supply defence counsel to accused who cannot afford their own representation, and having learned that there is financial support for that representation, the Referral Bench was not obligated in its opinion to itemize the provisions of the BiH budget.

22. The Appellant also asserts that the Referral Bench neglected to consider whether he would have access to all materials from the International Tribunal that would aid in his

[39] Stanković Appeal Brief, paras 26-30.
[40] *Id.*, para. 33.
[41] *Id.*, para. 37.
[42] *Id.*, para. 36.
[43] Official Gazette of Bosnia and Herzegovina, No. 36/03, 26/04, 63/04, 13/5.
[44] Referral Decision, para. 61.

defence.[46] He expresses particular concern about his future access to various materials, including witness statements from the cases of *Prosecutor v. Kunarac* and *Prosecutor v. Krnojelac*, which may prove difficult because he would lack standing to ask the International Tribunal to vary orders implementing protective measures.[47]

23. The Appellant errs in asserting that the Referral Bench did not adequately consider the Appellant's ability to access relevant materials. With respect to materials directly related to the Appellant's case, the Referral Bench, consistent with Rule 11*bis*(D)(iii), expressly ordered the Prosecution "to hand over to the Prosecutor of Bosnia and Herzegovina . . . the material supporting the Indictment against the Accused."[48] The Referral Bench also ordered the Prosecution to hand over "*all* other appropriate evidentiary material" consistent with Rule 11*bis*(D)(iii).[49] Because the BiH CPC gives defence counsel the right to inspect all files and evidence against him after an indictment has been issued, the Appellant will have access to these materials.[50]

24. Moreover, with respect to materials from related cases, defence counsel in a BiH proceeding, like the BiH Prosecutor, may request that the Prosecutor of the International Tribunal apply to vary protective measures under Rule 75 of the Rules.[51] Thus, the relevant parties to the proceeding in the national jurisdiction – both the Prosecutor and the Appellant – are on equal footing in terms of their ability to gain access to confidential materials from other Tribunal cases.

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[45] *Ibid.*
[46] Stanković Appeal Brief, para. 41.
[47] *Id.*, para. 44-45.
[48] Referral Decision, Part VII, Disposition (emphasis added). The Prosecution notes that it has already made this disclosure. Prosecutor's Response, para. 31.
[49] Referral Decision, Part VII, Disposition (emphasis added).
[50] Article 47 of the CPC.
[51] *See* Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina pursuant to Rule 33(B), IT-05-8-Misc 2 (6 April 2005).

25. The Appellant further contends that he will face difficulty in calling witnesses from outside Bosnia and Herzegovina, and that the Referral Bench committed an error of law when it failed to address this difficulty.[52] He notes that "both witnesses and documentary evidence" in his case "are likely to come from outside Bosnia and Herzegovina, as much of the populations and the documentation of the various republics of the SRFY have been divided between the new nation States."[53]

26. The Referral Bench did not ignore the issue of witness availability for witnesses outside of Bosnia and Herzegovina. It noted that Bosnia and Herzegovina recently ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 ("ECMACM"),[54] which will facilitate cooperation with nearby Croatia and Serbia and Montenegro, since those bordering states have also ratified the ECMACM.[55] With regard to other States, the Appeals Chamber notes that the Trial Chamber also considered generally Security Council resolution 1503, which obliges, under Chapter VII of the UN Charter, "the international community to assist national jurisdictions . . . in improving their capacity to prosecute cases transferred from the ICTY," an instruction that implicitly includes cooperation with respect to witnesses.[56] In any event, the compulsion of witness testimony is an issue in every criminal jurisdiction. The Referral Bench found that the authorities in Bosnia and Herzegovina have taken substantial steps to promote the obtaining of witnesses and evidence.[57] The Appellant has not shown that the Referral Bench's finding was in error or that the judicial process in Bosnia and Herzegovina would be unfair in this respect.

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[52] Stanković Appeal Brief, paras 48-53.
[53] *Id.*, para. 52.
[54] CETS No. 030; ratified 25 April 2005; entered into force 24 July 2005. *See* http://conventions.coe.int/Treaty. Forty-four other member states have ratified the Treaty.
[55] Referral Decision, para. 82.
[56] S/Res/1503 at para. 1.
[57] Referral Decision, paras 81-86.

27. In arguing that the Referral Bench did not adequately examine the fairness of the available judicial process in Bosnia and Herzegovina, the Appellant concentrates on a portion of a sentence in the last paragraph of the Referral Decision. In that sentence, the Referral Bench wrote that it was satisfied "on the information presently available that the Accused *should* receive a fair trial."[58] The Appellant focuses on the word "should" and asserts that the Referral Bench's choice of words betrays its lack of confidence in its own decision. Rule 11*bis*, he emphasizes, requires that the accused *will* receive a fair trial. The use of the word "should," the Appellant submits, demonstrates that the Referral Bench was "aware that it had not sufficiently informed itself to be able to declare that it was satisfied that Mr. Stanković would receive a fair trial."[59]

28. The Appeals Chamber acknowledges that the Referral Bench's word choice was imprecise. But the meaning of its language was unmistakable. As is clear from the foregoing discussion, the Referral Bench devoted considerable energy, and much of the Referral Decision, to assessing whether the trial in Bosnia and Herzegovina would be fair. Its emphasis was on what *would* be the case in the national jurisdiction, not what it *hoped* would be the case. "Should," taken in the context of the decision, is effectively synonymous with "will." And regardless of whether its terminology left its level of confidence open to question, the remainder of the Trial Chamber's discussion demonstrated a clear basis for finding that the trial will be fair.

29. In his final argument under his second and third grounds of appeal, the Appellant criticizes the Referral Bench for basing its conclusions in part on Rule 11*bis*(D)(iv) and (F), the provisions concerning the sending of monitors to the national jurisdiction on the

[58] *Id.*, para. 96 (emphasis added).
[59] Stanković Appeal Brief, paras 54-55.

Prosecution's behalf and revocation of a referral order.[60] Because the Appellant's contentions overlap substantially with the Prosecution's sole ground of appeal, the parties' arguments will be considered together later in this decision.[61]

30. The Appeals Chamber concludes that the Referral Bench was reasonable in determining that the Appellant will receive a fair trial in the national jurisdiction of Bosnia and Herzegovina. The second and third grounds of appeal accordingly are dismissed.

C. Fourth Ground of Appeal

31. The Appellant argues in his fourth ground of appeal that the Referral Bench erred in law and fact in failing properly to inform itself about the conditions of detention that the Appellant will experience in Bosnia and Herzegovina. He particularly emphasizes the conditions of post-conviction detention and the high risk of torture or degrading treatment to which he would be exposed.[62]

32. The Appellant acknowledges that Rule 11*bis* makes no explicit mention of the issue of detention, but he argues that it is a well-settled principle of human rights law that no person may be confined in circumstances in which he or she would face torture or inhumane treatment.[63] He acknowledges that the Referral Bench inquired into, and the Government of Bosnia and Herzegovina addressed, the conditions of detention before and during the proceedings, but no one (including the Appellant's prior defence counsel) raised the issue of post-conviction detention.[64] He nonetheless asserts that the Referral Bench should have addressed the matter *proprio motu*, particularly since the issue was raised in another Rule

[60] Stanković Appeal Brief, paras 56-60.
[61] *See infra* Part III.
[62] Stanković Appeal Brief, para. 61.
[63] *Id.*, para. 62.
[64] *Id.*, paras 65-67.

11*bis* case before the same Referral Bench.[65] Citing recent newspaper accounts suggesting that Serb prisoners face dangerous conditions in Bosnian detention facilities, the Appellant contends that his case should not be referred to Bosnia and Herzegovina.[66]

33. The Prosecution submits that the Appellant's arguments are not a proper subject for this proceeding. According to the Prosecution, "conditions of detention following conviction is a matter to be addressed before the national courts, including the Constitutional Court and, subsequently, before the European Court of Human Rights. To address issues of post-conviction detention at this stage of the proceedings would violate the presumption of innocence afforded the Appellant by the CPC of BiH."[67]

34. The Appeals Chamber does not agree with the Prosecution that this subject is wholly off limits. The condition of detention units in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction's criminal justice system. And that is an inquiry squarely within the Referral Bench's mandate.

35. In this case, the Referral Bench was well informed about the conditions of detention in Bosnia and Herzegovina. It asked about the conditions of confinement and had ample information before it. Based on that information, it concluded that "the Accused's generalised claim about prison problems in Bosnia and Herzegovina has not been substantiated," and it noted that "[d]etainee and prisoner treatment is appropriately regulated by statute."[68]

36. The Appellant submits with his appeal brief copies of a newspaper account and correspondence with the Ombudsman of the Federation of Bosnia-Herzegovina, which he

[65] *Id.*, para. 67.
[66] *Id.*, para. 70.
[67] Prosecutor's Response, para. 49.

argues show the dangerous situation faced by Serb prisoners in Bosnia and Herzegovina.[69] He acknowledges that this evidence is new but argues that the Referral Bench should have considered it *proprio motu*.[70]

37. The Appeal Bench cannot consider this new evidence on appeal because it is not part of the record of the case and has not been admitted consistent with Rule 115 procedures. And apart from these submissions, the Appellant has offered nothing to suggest that the Referral Bench was negligent in considering the fairness of the conditions of confinement in Bosnia and Herzegovina. Specifically, it addressed and deemed "unsubstantiated" the Appellant's "generalised claim about prison problems in Bosnia and Herzegovina," which would encompass a concern about post-conviction detention.[71] The Referral Bench also made reference to domestic laws as well as European and international standards governing prison conditions in Bosnia and Herzegovina, standards that protect prisoners both before and after conviction.[72] Thus, the record and the Referral Decision reveal that the Referral Bench drew well-informed conclusions on this point. The fourth ground of appeal is therefore dismissed.

D. Fifth Ground of Appeal

38. In his final ground of appeal, the Appellant submits that the Referral Bench erred in law and fact because it neglected to examine properly whether the authorities of Bosnia and Herzegovina are, in the language of Rule 11*bis*, "willing and adequately prepared" to accept the transfer.[73] The Appellant expresses particular concern about the substantive law that

[68] Referral Decision, para. 67.
[69] Stanković Appeal Brief, para. 70 & annexes.
[70] *Id.*, para. 71.
[71] Referral Decision, para. 67.
[72] *Id.*, para. 54.
[73] Stanković Appeal Brief, para. 72.

would apply in Bosnia and Herzegovina and asserts that the Referral Bench's analysis of the applicable substantive law was "incomplete."[74]

39. Specifically, he argues that the Referral Bench failed to consider "the applicability of the principles governing individual responsibility," "the applicability of general principles of criminal law in that domestic law," and the availability of "particular defences that would have been available under international law before the Tribunal."[75] He adds that the Referral Bench erred when it observed that the applicable law might be international law without examining "whether the court in question would be able to apply this correctly."[76]

40. The Appeals Chamber first notes that, as a strictly textual matter, Rule 11*bis*(A) does not require that a jurisdiction be "willing and adequately prepared to accept" a transferred case if it was the territory in which the crime was committed or in which the accused was arrested.[77] But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a referred case is an explicit prerequisite for any referral to a domestic jurisdiction, as the Tribunal has no power to order a State to accept a transferred case. Thus, the "willing and adequately prepared" prong of Rule 11*bis*(A)(iii) is implicit also in the Rule 11*bis*(B) analysis.

41. The Referral Bench engaged in a thorough assessment of Bosnia and Herzegovina's willingness and capacity to accept the Appellant's case. Contrary to the Appellant's arguments, the Referral Bench devoted eight full pages of its decision to a consideration of the substantive law that would be applicable in Bosnia and Herzegovina. It examined the criminal codes of the Socialist Federal Republic of Yugoslavia ("SFRY") and the Socialist

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[74] *Id.*, para. 86.
[75] *Id.*, para. 89.
[76] *Id.*, para. 90.
[77] *Compare* Rule 11*bis*(A)(i) & (ii) *with* Rule 11*bis*(A)(iii).

Republic of Bosnia and Herzegovina ("SRBiH") as well as international law.[78] It concluded that the SFRY Criminal Code would apply to most of the alleged criminal acts, but that the State Court of Bosnia and Herzegovina might determine that either the BiH Criminal Code or international law applied to other acts.[79] Regardless of which of the three legal codes applies, however, the Referral Bench was satisfied that "there are appropriate provisions to address each of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure."[80]

42. The Appeals Chamber concludes that the Referral Bench correctly determined that the authorities of Bosnia and Herzegovina are willing and adequately prepared to accept the transfer of this case. This final ground of the Appellant's appeal is accordingly dismissed.

III. Prosecution Appeal

43. The Referral Bench included in the Disposition of the Referral Decision the following orders:

> ORDERS the Prosecutor to continue its efforts to conclude an agreement with an international organisation of notable standing, such as the Organization for Security and Cooperation in Europe, for the purpose of monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina, provided that if an agreement is not concluded, the Prosecutor should seek further direction from the Referral Bench;
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> FURTHER ORDERS the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include the reports of the international organisation monitoring or reporting on the proceedings pursuant to this Decision provided to the Prosecutor.[81]

[78] Referral Decision, paras 32-46.
[79] *Id.*, para. 46.
[80] *Ibid.*
[81] Referral Decision, Part VII, Disposition.

Those orders are the subject of the Prosecution's appeal, and a point of contention for the Appellant as well.

44. The Prosecution contends that the Referral Bench in issuing these orders "acted *ultra vires* and encroached on the discretion of the Prosecutor by making the . . . orders requiring the Prosecutor to take actions solely within the Prosecutor's mandate."[82] According to the Prosecution, Rule 11*bis* vests in the Prosecutor, and the Prosecutor alone, the authority to monitor the proceedings in the State Court.[83] Focusing on the language of the Rule, which states that "the Prosecutor *may* send observers to monitor the proceedings in the national courts *on her behalf*,"[84] the Prosecution argues that "the decision whether to monitor a case, and how to do so, is assigned solely to the discretion of the Prosecutor."[85] "There is," adds the Prosecution, "no provision for this mandate to be supervised by the Referral Bench."[86] For the Referral Bench to have ordered the Prosecutor to engage in monitoring, the Prosecution asserts, was an improper arrogation of power to the Referral Bench at the expense of the Prosecutor's discretion.[87]

45. The Prosecution further asserts that Rule 11*bis*(D)(iv) explicitly states that the monitoring is to be done "on . . . behalf" of the Prosecutor. In other words, the Prosecution argues, "[t]he monitoring is for the benefit of the Prosecution, and not the Referral Bench."[88]

46. The Prosecution also asserts that the Referral Bench lacks the power to order monitoring because once the Bench has handed jurisdiction in the case over to the national

[82] Appellant's Brief, 24 June 2005 ("Prosecution Appeal Brief"), para. 2.3.
[83] *Id.*, para. 2.4.
[84] Rule 11*bis*(D)(iv) (emphasis added).
[85] Prosecution Appeal Brief, para. 2.6.
[86] *Id.*, para. 2.4.
[87] *Id.*, para. 2.6.
[88] *Id.*, para 2.7.

authorities, it has relinquished jurisdiction over the proceedings altogether.[89] For instance, the Prosecution notes, under the language of Rule 11*bis*, after a case has been referred to the authorities of a State, the Referral Bench may only revoke the transfer order once it is seized of a request by the Prosecutor; it "may not simply revoke the order and resume jurisdiction *proprio motu*."[90] Thus, the Prosecutor asserts, "it is a matter solely within the Prosecutor's discretion whether to seek to have a case returned to the Tribunal."[91]

47. Reasoning by analogy, the Prosecution argues that the decision to seek revocation of a transfer order is like the decision to file an indictment, or even to initiate an investigation. It is, at bottom, a decision about whether to take action and whether to initiate a proceeding before the International Tribunal.[92] All such decisions, the Prosecution notes, are wholly vested in the Prosecutor: "'the key to the Tribunal's action lies in the hand of the Prosecutor.'"[93]

48. For his part, the Appellant does not disagree with the bottom line of the Prosecution's arguments.[94] He, too, asserts that the Referral Bench should not have ordered the Prosecutor to report back in six months about the proceedings in Bosnia and Herzegovina, but his reasoning is rather different. In the Appellant's view, the Referral Bench's order is problematic not because it impinged upon the Prosecutor's discretion, but because the Referral Bench used the order to satisfy itself that the proceedings in Bosnia and Herzegovina will be fair, when instead that satisfaction should have derived from a more thoroughgoing examination of the legal structure in the national jurisdiction.[95] He argues that the Referral

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[89] *Id.*, para. 2.8.
[90] *Ibid.*
[91] *Ibid.*
[92] *Id.*, paras 2.10-2.19.
[93] *Id.*, para. 2.12 (quoting Address of Antonio Cassese, President of the ICTY to the General Assembly of the United Nations, 14 November 1994, Yearbook of the ICTY, 1994, p. 137).
[94] Stanković Appeal Brief, para. 58.
[95] *Ibid.*, paras 56-60.

Bench erred by relying on Rule 11bis(D)(iv) and Rule 11*bis*(F) since, under Rule 11*bis*(D)(iv), monitors may only be sent on the Prosecution's behalf, and under Rule 11*bis*(F) a referral order can be revoked only upon the request of the Prosecutor, not the accused. He argues that because of the one-sided nature of the revocation mechanism, Rule 11*bis*(F) cannot be relied on as a safety net or as a guarantee of a fair trial.

49. Rule 11*bis* is taciturn about the considerations that go into a Referral Bench's transfer decision and the powers that accompany such a decision. All the Rule has to say is that the Referral Bench may order a referral "after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out."[96] That is not much to go on.

50. The question, then, is how much authority the Referral Bench has in satisfying itself that the accused will receive a fair trial. In the view of the Appeals Chamber, the answer is straightforward: 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 that the accused will receive.

51. This standard derives from the inherent authority conferred upon Tribunal judges not only by Rule 11*bis*, but by the Rules and Statute generally. It cannot be said that judges – whether a Referral Bench, a Trial Chamber, or the Appeals Chamber – are limited strictly and

[96] Rule 11*bis*(B).

narrowly to the text of the Rules in carrying out their mandate.[97] Instead, judges have the inherent authority to render orders that are reasonably related to the task before them and that "derive[] automatically from the exercise of the judicial function."[98] That is no less true under Rule 11*bis*.

52. The Appellant is therefore wrong to suggest that it was improper for the Referral Bench to have satisfied itself that the Appellant would receive a fair trial in part on the basis of Rule 11*bis*(F) monitoring and the Rule 11*bis*(F) revocation mechanism. Although the Referral Bench was not loquacious in explaining its reasoning on this point, it is clear that the Bench felt reassured that monitoring would occur and that it would be kept apprised if the proceedings in Bosnia and Herzegovina were not going well. The Appeals Chamber is satisfied that that was a reasonable variable for the Referral Bench to have included in the Rule 11*bis*(B) equation.

53. It was also reasonable for the Referral Bench to have ordered the Prosecutor to report back in six months on the progress of the case in Bosnia and Herzegovina. The Appeals Chamber acknowledges that Rule 11*bis*(D)(iv) and (F) confer a substantial amount of discretion on the Prosecutor to send monitors on her behalf and to determine how best to go about that monitoring. But that discretion cannot derogate from the Referral Bench's inherent authority under the Rule. Just because the Prosecutor "*may* send observers to monitor the

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[97] "[T]he Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by [the] Statute is not frustrated and that its basic judicial functions are safeguarded." *Prosecutor v. Aleksovsi*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt ("*Aleksovski* Contempt Appeal"), 30 May 2001, para. 30.

[98] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," 2 October 1995, para. 14. The Tribunal's inherent authority includes, for instance, the power to examine its own jurisdiction, *id.*, at paras 15-22; "to admit . . . evidence even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice," *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 November 2000, para. 3; and to hold persons in contempt to ensure the fairness of a proceedings and to provide for the due administration of justice, *see, e.g.*, *Aleksovski* Contempt Appeal, para. 30. The content of the inherent power to hold an individual in contempt, like

proceedings in the national courts on *her* behalf"[99] does not mean that the Referral Bench lacks the authority to instruct the Prosecutor that she *must* send observers on the *Tribunal's* behalf. The former does not preclude the latter.

54. It is no answer to cite the Statute's provision that the Prosecutor may not "receive instructions from any Government or *from any other source.*"[100] Of course a Chamber of judges may issue orders to the Prosecutor as a party to a case before it. And, as explained above, 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.

55. The Appeals Chamber therefore concludes that the Referral Bench acted within its authority when it ordered the Prosecution to report back in six months concerning developments in the case following transfer, and the Prosecution appeal on this point is dismissed.

56. But that is not all the Referral Bench ordered, and not all to which the Prosecution objects. The Referral Bench also ordered the Prosecutor to continue her efforts to conclude an agreement with an international organisation of notable standing for the purposes of carrying out the monitoring. The order added that if the Prosecutor did not enter such an agreement, she should "seek further direction from the Referral Bench."[101] That order is farther afield from the Referral Bench's inherent authority and closer to the core of the Prosecutor's inherent discretionary powers.

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that of all inherent powers, "must be discerned by reference to the usual sources of international law." *Aleksovski* Contempt Appeal, para. 30.

[99] Rule 11*bis*(D)(iv) (emphasis added).

[100] Article 16(2) of the Statute (cited at Prosecution Appeal Brief, para. 2.20) (emphasis in Prosecution Appeal Brief).

[101] Referral Decision, Part VII, Disposition.

57. The Appeals Chamber acknowledged above that the Prosecutor enjoys considerable discretion under Rule 11*bis* in deciding whether to send monitors on her behalf and in determining how that monitoring should be conducted. The decision concerning *how* to conduct a reliable and controllable monitoring falls more squarely within the inherent authority of the Prosecutor not only to conduct investigations, but also to "act independently as a separate organ of the International Tribunal"[102] in entering agreements with States and third parties.

58. A Chamber seized of a particular case does not ordinarily possess the authority to instruct the Prosecutor to enter agreements with outside organisations. Nor is the Chamber inherently authorized to require the Prosecutor to seek further direction from the Chamber if no agreement is reached. The Chambers are not in the business of giving counsel to the Prosecutor about decisions that are customarily within her domain.

59. In this case, it was reasonable for the Referral Bench to order the Prosecutor to report back on the progress of the case, because that order reasonably aided the Bench in discharging its duties under Rule 11*bis*. But it was neither necessary nor reasonable for the Referral Bench to go a substantial step farther and instruct the Prosecutor that she must enter agreements and come back for more advice if she does not. Such an order treads too far, with too little justification, into the Prosecutor's inherent authority. The Prosecution appeal in this respect is accordingly allowed.

IV. Disposition

a. The appeal of the Appellant is dismissed.

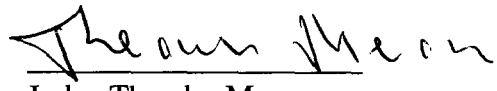
[102] Article 16(2) of the Statute.

b. The appeal of the Prosecution is allowed in part, insofar as it objects to the Referral Bench's order instructing the Prosecutor to continue her efforts to conclude an agreement with an international organisation for monitoring purposes and to seek further direction from the Referral Bench if an agreement is not concluded.

c. The remainder of the Prosecution appeal is dismissed.

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

Dated this 1st day of September 2005,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]