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-AR11*bis*.2

Date: 15 November 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Andrésia Vaz

Registrar: **Mr. Hans Holthuis**

Decision: **15 November 2005**

PROSECUTOR

v.

GOJKO JANKOVIĆ

DECISION ON RULE 11*bis* REFERRAL

The Office of the Prosecutor:

Mr. Mark J. McKeon
Ms. Susan L. Somers

Counsel for the Accused:

Mr. Aleksandar Lazarević
Mr. Tomislav Višnjić

The Government of Bosnia and Herzegovina:

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

The Government of Serbia and Montenegro:

per: The Embassy of Serbia and Montenegro to The Netherlands, The Hague

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 an appeal by Gojko Janković ("Appellant") against the "Decision on Referral of Case under Rule 11*bis* With Confidential Annex", rendered by the Referral Bench on 22 July 2005 ("Impugned Decision").

1. Procedural History and Background

2. The Appellant was initially jointly charged with seven other accused in an indictment that was confirmed on 26 June 1996.[1] An amended indictment was confirmed against the Appellant and four of the other accused on 7 October 1999 ("Indictment").[2] The Appellant was transferred from Banja Luka, Bosnia and Herzegovina, to the United Nations Detention Unit on 14 March 2005.

3. The Indictment alleges that, between July 1992 and October 1992, the Appellant participated in a persecutorial campaign against the non-Serb, primarily Bosnian Muslim civilian population of the town of Foča and its surroundings. The Appellant is charged on the basis of individual criminal responsibility under Article 7(1) of the Statute of the Tribunal ("Statute") with seven counts of crimes against humanity (three counts of torture under Article 5(f) and four counts of rape under Article 5(g)) and seven counts of violations of the laws or customs of war (three counts of torture and four counts of rape under Article 3).[3] In addition, the Appellant is charged on the basis of superior criminal responsibility under Article 7(3) of the Statute with two counts of crimes against humanity (torture under Article 5(f) and rape under Article 5(g)) and two counts of violations of the laws or customs of war (torture and rape under Article 3).[4]

4. According to the Indictment, the Appellant was, in 1992, a sub-commander of the military police and one of the main paramilitary leaders in Foča. It is alleged that the Appellant was in charge of a group of soldiers who, on 3 July 1992, arrested a group of women and transported them to a location identified as Buk Bijela, where they were interrogated and raped. The Indictment alleges that the Appellant personally participated in the interrogations and the rapes.[5] Between 3 July 1992 and 13 August 1992, when this group of women was detained in the Foča High School and the Partizan Sports Hall, the Indictment alleges that the Appellant, and soldiers subordinate to him, sexually assaulted the women in these detention facilities. The Appellant is furthermore

[1] Case No. IT-96-23, Indictment, 26 June 1996. For the names of the other accused *see* Impugned Decision, para. 4 (footnote 6).
[2] Case No. IT-96-23-PT, First Amended Indictment, 7 October 1999. The remaining accused were Janko Janjić, Zoran Vuković, Dragan Zelenović, and Radovan Stanković.
[3] Indictment, paras 5.8, 6.17, 7.25, and 9.3.
[4] Indictment, paras 4.7, 5.8.
[5] Indictment, para. 3.1.

accused of having raped four young girls and women, together with two other participants, in an apartment near the Foča Fish Restaurant on 30 October 1992. It is also alleged that the Appellant knew or had reason to know that soldiers subordinate to him sexually assaulted women and girls during or immediately following interrogations.[6]

5. The Prosecution filed a motion for referral on 29 November 2004,[7] while the Appellant was still at large, and on 1 December 2004, the President of the Tribunal transferred the motion to the Referral Bench to consider whether the case should be referred to the authorities of a State pursuant to Rule 11*bis* of the Rules of Procedure and Evidence ("Rules").[8] That Rule, amended to reflect Security Council resolution 1534 (2004),[9] provides in its relevant parts:[10]

> (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
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> (iii) having jurisdiction and being willing and adequately prepared to accept such a case,
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> so that those authorities should forthwith refer the case to the appropriate court for trial within that State.
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> (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. On 15 April 2005, the Referral Bench issued a decision ordering the parties and inviting the Government of Bosnia and Herzegovina to submit responses to specific questions.[11] The

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[6] Indictment, paras 3.1, 5.1-5.8, 6.1-6.13, 7.1-7.22, and 9.1-9.3.
[7] Case No. IT-96-23/2-PT, Motion by the Prosecutor under Rule 11*bis* with Annexes I, II, III and Confidential Annexes IV and V, 29 November 2004 ("Prosecution Referral Motion").
[8] Case No. IT-96-23/2-PT, Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should be Referred to Another Court Under Rule 11*bis*, 1 December 2004.
[9] U.N. Doc. S/RES/1534 (2004), 26 March 2004, paras 4-5.
[10] The Defence has not raised any issue of non-applicability of Rule 11*bis* of the Rules pursuant to Rule 6(D) of the Rules resulting from the amendments which were made after December 2004.
[11] Case No. IT-96-23/2-PT, Decision for Further Information in the Context of the Prosecutor's Motion under Rule 11*bis*, 15 April 2005.

Prosecution filed a response on 5 May 2005,[12] the Defence on 6 May 2005,[13] and the Government of Bosnia and Herzegovina on 11 May 2005.[14] A motion hearing was held on 12 May 2005 with the parties present, along with representatives of the Governments of Bosnia and Herzegovina and Serbia and Montenegro.[15] The hearing was held jointly with the case of *Prosecutor v. Mitar Rašević and Savo Todović*,[16] with counsel for Savo Todović also representing the Appellant. Further submissions were filed prior to and after the motion hearing.[17]

7. The Referral Bench examined the gravity of the crimes with which the Appellant is charged, and the level of his responsibility as charged in the Indictment. Furthermore, the Referral Bench was satisfied that based "on the information presently available" the Appellant would receive a fair trial and that the death penalty would not be imposed or carried out.[18] The Referral Bench held that the referral was appropriate and concluded that referral of the case to the authorities of Bosnia and Herzegovina should be ordered.

8. On 5 August 2005, the Prosecution filed a notice of appeal against the Impugned Decision, setting forth one ground of appeal.[19] As this ground of appeal had been raised in other proceedings, the Prosecution requested that several referral cases, *inter alia*, *Prosecutor v. Gojko Janković*, be assigned "to a single judicial bench of the Appeals Chamber, and that this issue be heard and resolved in a consolidated manner".[20] On the same day, the Prosecution filed its Appellant's brief.[21] The Defence filed its Respondent's brief on 15 August 2005, indicating that it did not oppose the Prosecution's Appellant's brief "[a]s one of the Defence grounds of appeal[22] is in part identical to

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[12] Case No. IT-96-23/2-PT, Prosecution's Further Submissions Pursuant to Referral Bench's Decision of 15 April 2005, 5 May 2005.
[13] Case No. IT-96-23/2-PT, Gojko Janković's Defence Submission of Further Information in Accordance with the Referral Bench's Decision of 15 April 2005 and in the Context of the Prosecutor's Motion Under Rule 11*bis*, 6 May 2005.
[14] Case No. IT-96-23/2-PT, Response from the Government of Bosnia and Herzegovina to Questions Posed by Referral Bench in its Decision Dated 15th April 2005 Regarding Further Information in Context Prosecutor's Motion under Rule 11*bis*, 11 May 2005.
[15] Serbia and Montenegro had applied to attend this hearing and to explain why the case should be referred to Serbia and Montenegro. The Referral Bench decided "that the representatives of Serbia and Montenegro may attend this hearing", Case No. IT-97-25/1-PT, Rule 11*bis* Motion Hearing (Open Session), 12 May 2005, pp 89-90 and 110-111, respectively.
[16] Case No. IT-97-25/1-PT.
[17] *See* Impugned Decision, paras 8, 10.
[18] Impugned Decision, para. 105.
[19] Case No. IT-96-23/2-AR11*bis*.2, Prosecution's Notice of Appeal, 5 August 2005.
[20] Case Nos IT-96-23/2-AR11*bis*.1; IT-97-25/1-AR11*bis*.1; IT-02-65-AR11*bis*.2, Notice of Related Cases and Request to Join Issues for Appeal, 5 August 2005, para. 2.
[21] Case No. IT-96-23/2-AR11*bis*.2, Prosecution's Appellant's Brief, 5 August 2005.
[22] *See* Case No. IT-96-23/2-AR11*bis*.2, Gojko Jankovic's [*sic*] Defence Notice of Appeal, 8 August 2005 ("Defence Notice of Appeal"), Sixth Ground of Appeal, *i.e.* that the Referral Bench erred "in assuming that 'monitoring of the trial of this case, if referred, would be undertaken by the OCSE or a similar organization by arrangement with the Prosecutor' and in determining that it had authority under Rule 11*bis* to order the Prosecution [*sic*] continue its efforts to ensure the monitoring of and reporting on the proceedings before the State Court of Bosnia and Herzegovina after the case was referred to Bosnia and Herzegovina, and to report to the Referral Bench on the progress made by the Bosnia

the Prosecution's single ground of appeal".[23] On 19 September 2005, the Prosecution withdrew its appeals in several cases, *inter alia* in *Prosecutor v. Gojko Janković* "in light of the recent decision by the Appeals Chamber in *Prosecutor v. Radovan Stanković*".[24]

9. The Defence Notice of Appeal was filed on 8 August 2005, setting forth six grounds of appeal against the Impugned Decision and requesting *inter alia* that the case be tried before the Tribunal. Alternatively, if the Appeals Chamber determined that the case should be referred to the authorities of a State, the Defence seeks that the case be referred

> not to Bosnia and Herzegovina but to the authorities of some other State which fulfils conditions under Rule 11*bis* of the Rules, preferably to Serbia and Montenegro.[25]

On 23 August 2005, the Defence filed its Appellant's brief[26] to which the Prosecution responded on 2 September 2005.[27] On 6 September 2005, the Defence filed its brief in reply.[28]

10. As the Prosecution has withdrawn its appeal, the Appeals Chamber in turn only considers the appeal raised by the Appellant.

2. First Ground of Appeal

11. The Appellant argues that the Referral Bench erroneously concluded that the level of responsibility of the Accused and the gravity of the crimes charged against him are not *ipso facto* incompatible with referral of the case.[29]

(a) Appellant's Submissions

12. According to the Appellant, the Referral Bench referred only to a part of the period covered in the Indictment (July to October 1992), although the Indictment encompasses a longer period (April 1992 to February 1993).[30]

13. In relation to his level of responsibility, the Appellant states that he allegedly was a sub-commander of the military police and one of the main paramilitary leaders in Foča, and that the Referral Bench erred in relying on the fact that the Appellant is not suggested to have had any

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and Herzegovina Prosecutor and on the progress of the proceedings"; Defence Notice of Appeal, para. 12 (footnotes omitted).
[23] Case No. IT-96-23/2-AR11*bis*.2, Defence Response to Prosecution's Appellant's Brief, 15 August 2005, para. 3.
[24] Case Nos IT-97-25/1-AR11*bis*.1, IT-02-65-AR11*bis*.1, IT-96-23/2-AR11*bis*.2, Notice of Withdrawal of Appeals, 19 September 2005, para. 1.
[25] Defence Notice of Appeal, para. 13, lit. 2.
[26] Case No. IT-23/2-AR11*bis*.2, Defence Appellant's Brief, 23 August 2005 ("Janković Appellant's Brief").
[27] Case No. IT-23/2-AR11*bis*.2, Prosecutor's Response Brief, 2 September 2005 ("Prosecution Respondent's Brief").
[28] Case No. IT-23/2-AR11*bis*.2, Defence Reply Brief, 6 September 2005 ("Janković Reply Brief").
[29] Janković Appellant's Brief, para. 21.
[30] Janković Appellant's Brief, para. 23; Janković Reply Brief, paras 8-10.

political role.[31] He adds that the Indictment charges him also as a superior under Article 7(3) of the Statute,[32] which implies that he allegedly had a certain level of authority. Further, the Appellant contends that the Referral Bench erroneously held that "the fact that the Accused may have been in command of others on a local level is ... not a sufficient basis to characterize him as a 'leader' for the purposes of Rule 11*bis*".[33] He refers, *inter alia*, to the finding of the Referral Bench in *Dragomir Milošević* that the term "most senior leaders" used by the Security Council is not restricted to the "architects" of an "overall policy" forming the basis of alleged crimes.[34]

14. As far as the gravity of the crimes charged is concerned, the Appellant refers to the finding of the Trial Chamber in *Kunarac et al.* that the "accused committed, by any measure, particularly serious offences against the most vulnerable of persons in any conflict, namely, women and girls".[35] The Appellant further argues that the Referral Bench erred in failing to take into account the fact that the Prosecution acknowledged the high level of gravity of the charges against him and to address the Prosecution's position that this case might be prosecuted either in an international forum or before a competent national court.[36]

15. Additionally, the Appellant refers to the "Prosecution's Request to Hold the Decision on the Defence's Preliminary Motion on the Form of the Amended Indictment in Abeyance" in which the Prosecution stated that "it is highly probable that the Prosecution would seek leave to amend the indictment" if the case was tried at the Tribunal.[37] The Appellant argues that "the only appropriate course" for the Referral Bench would have been to postpone the assessment of the gravity of the crimes charged and the alleged level of responsibility until after the filing of the new amended indictment.[38]

16. The Appellant further submits that the gravity of the crimes charged and the alleged level of his responsibility distinguish his case from the cases of accused like Radovan Stanković,[39] Vladimir Kovačević, and Duško Knežević who have also been put forward for referral.[40] Similarly, the

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[31] Janković Appellant's Brief, paras 24-25, with reference to Security Council resolution 1329 (2000), where the Security Council had taken "note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders (*emphasis added*) should be tried before them in preference to minor actors".
[32] Janković Appellant's Brief, para. 26.
[33] Janković Appellant's Brief, para. 36.
[34] Janković Appellant's Brief, para. 38, with reference to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005, para. 22.
[35] Janković Appellant's Brief, para. 27, referring to *Prosecutor v. Kunarac et al.*, Case Nos IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 858.
[36] Janković Appellant's Brief, para. 28; Prosecution Referral Motion, para. 20.
[37] Case No. IT-96-23/2-PT, 23 May 2005, para. 5.
[38] Janković Appellant's Brief, para. 32.
[39] The Appeals Chamber rejected the appeal of Radovan Stanković against the Referral Bench's Decision to refer the case to the authorities of Bosnia and Herzegovina, Case No. IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Rule 11*bis* Appeal Decision").
[40] Janković Appellant's Brief, para. 33.

Appellant argues that the cases of Sefer Halilović and Milomir Stakić were rather limited in geographic and temporal scope, and that the charges brought against the former are less grave than those against him.[41]

17. Finally, the Appellant submits that the Referral Bench erroneously considered "only the 'incidents of torture and rape involving sixteen females'", to the exclusion of allegations concerning "thousands" of unlawfully confined Muslims and Croats and arrests during which "many civilians were killed, beaten or subjected to sexual assault", thus rendering "the case incompatible with referral under Rule 11*bis*".[42]

(b) Prosecution's Submissions

18. The Prosecution responds, *inter alia*, that any amendment to the Indictment would not have any impact on the referral with regard to the gravity of the crimes charged and the alleged level of responsibility of the Appellant, as such amendment would be in form and not in substance.[43] In relation to the temporal scope of the crimes charged, the Prosecution argues that, while the Indictment covers the period from April 1992 until February 1993, the crimes specific to Janković took place between July and October 1992.[44] The Prosecution also argues that the Referral Bench did not err in concluding that the geographic scope of the alleged crimes was limited. Further, the Prosecution states that the indictment in the case against Dragomir Milošević and the Indictment in the present case are "significantly" different.[45]

(c) Discussion

19. The Referral Bench did not err when it relied on the fact that the Appellant is not suggested to have had any political role. Nothing in the wording of Rule 11*bis* (C) of the Rules indicates that the "level of responsibility" is restricted to military responsibility to the exclusion of political responsibility. This is in particular supported by Security Council resolution 1534 (2004),[46] stating that the Tribunal should "concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the [...] Tribunal". Nothing in this wording suggests that the resolution only refers to military leaders. Furthermore, as to the Appellant's submission that the Indictment charges him also as a superior under Article 7(3) of the Statute, the Appeals Chamber notes that the Referral Bench itself referred to the Appellant as "one of the main

[41] Janković Appellant's Brief, para. 35.
[42] Janković Appellant's Brief, paras 40-43.
[43] Prosecution Respondent's Brief, para. 2.4.
[44] Prosecution Respondent's Brief, para. 2.6.
[45] Prosecution Respondent's Brief, para. 2.17.
[46] U.N. Doc. S/RES/1534 (2004), 26 March 2004.

paramilitary *leaders* in Foča, and a *sub-commander* of the military police there".[47] This demonstrates that the Referral Bench was conscious of the Appellant's alleged role as a superior. It found, however, that his alleged "command of others on a local level" did not suffice to qualify him "as a 'leader' for the purposes of Rule 11*bis* [...]".[48]

20. In relation to the Appellant's comparison of his case with the case against Dragomir Milošević in which the Referral Bench denied the Prosecution's request for referral, the Appeals Chamber notes that the Referral Bench held in the latter case that among the accused whose cases should not be referred under Rule 11*bis* of the Rules are those

> who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the "most senior", rather than "intermediate".[49]

The Appeals Chamber accepts this approach. The Appeals Chamber also notes the Prosecution's argument of the significant difference between the Indictment in this case and that in the case against Dragomir Milošević with regard to the level of responsibility of the respective accused.[50] The Appeals Chamber finds that the Appellant has not demonstrated an error in the Referral Bench's finding in this case that the Appellant cannot be characterised "as a 'leader' for the purposes of Rule 11*bis*"[51] and the Referral Bench was correct in giving little weight to the Article 7(3) charge when deciding that the case should be referred to national authorities.

21. Furthermore, when discussing the prerequisites of Rule 11*bis* of the Rules, the Referral Bench did not erroneously fail to consider the gravity of the crimes charged. While the Defence correctly submits that the period covered in the Indictment ranges from April 1992 to February 1993, the Referral Bench did not err in limiting its considerations to the period in which the crimes as charged allegedly took place, *i.e.* between July 1992 and October 1992. As the Appellant is charged with acts of torture and rape only during that time period, the Referral Bench could not consider any other criminal act which was allegedly committed outside this period when determining whether the case should be referred to national authorities.

22. With reference to these alleged offences, the Referral Bench "readily accepted that these charges allege serious offences".[52] However, having taken into consideration both the geographical and temporal scope of the alleged crimes, as well as the number of victims affected, "[i]n the

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[47] Impugned Decision, para. 19 (emphasis added).
[48] Impugned Decision, para. 19.
[49] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005, para. 22.
[50] Prosecution Respondent's Brief, para. 2.17.
[51] Impugned Decision, para. 19.
[52] Impugned Decision, para. 19.

context of the offences dealt with by this Tribunal", the Referral Bench did not err in concluding that the gravity of the crimes charged is not "*ipso facto* incompatible with referral of the case".[53]

23. In relation to the Appellant's argument that the Referral Bench failed to address the Prosecution's position that this case might be prosecuted either in an international forum or before a competent national court, the Appeals Chamber recalls the Prosecution's statement

> that, as matters stand, neither the gravity of the crimes alleged nor the level of responsibility of the accused demand that this case be brought to trial before the International Tribunal. In all the circumstances therefore the Prosecutor regards the present case as suitable for referral under Rule 11*bis*.[54]

Therefore, the Appellant has not demonstrated that the Referral Bench erred in failing to consider any alleged indeterminateness of the Prosecution as to the forum which could prosecute this case.

24. As to the Appellant's argument that the Referral Bench should have postponed the assessment of the gravity of the crimes charged and the alleged level of responsibility until the Prosecution would have filed a new amended indictment, the Appeals Chamber recalls that Rule 11*bis* of the Rules explicitly refers to crimes charged, and not to crimes an accused might later be charged with. Furthermore, the Prosecution stated that

> it is highly probable that the Prosecution would seek leave to amend the indictment [...] should the case against the Accused be tried at the Tribunal.[55]

Thus, the Prosecution made clear that it only intended to amend the Indictment if the case would not be referred pursuant to Rule 11*bis* of the Rules. Consequently, the Referral Bench did not err in assessing the gravity of the crimes and the level of the Appellant's responsibility as charged by the Prosecution at the time the Referral Bench was seized of the Prosecution's Referral Motion.

25. The Appeals Chamber also takes into account that the Prosecution only intended to seek leave for amendments as to form, not substance:

> [t]he charges and the scope of the indictment would remain the same [and] any amendment would not have any impact on the referral with regard to the gravity of crimes and level of responsibility of the Accused.[56]

With a view to this explicit submission, the Appeals Chamber takes it for granted that the Prosecution would not seek to influence the proceedings in such a way that by increasing the charges alleged, this Tribunal would have decided the referral request differently.

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[53] Impugned Decision, paras 19-20.
[54] Case No. IT-96-23/2-I, *Partly Confidential* Motion by the Prosecutor Under Rule 11*bis* With Annexes I, II, III and *Confidential* Annexes IV and V, 29 November 2004, para. 26.

26. The Appellant's references to the cases of Radovan Stanković, Vladimir Kovačević, and Duško Knežević, who have also been put forward for referral,[57] and to the cases of Dragoljub Kunarac *et al.*, Sefer Halilović and Milomir Stakić are of limited use – if at all – in the context of this case. While the Appeals Chamber has dismissed the appeal of Radovan Stanković against the Referral Bench's decision to refer his case to the authorities of Bosnia and Herzegovina,[58] the Appeals Chamber cannot pronounce in the present case on issues related to the cases of Vladimir Kovačević and Duško Knežević of which it is not seized. As to the cases of Sefer Halilović and Milomir Stakić, the question of whether or not the Referral Bench should have referred these cases to the authorities of a State is irrelevant to the Appellant's case. Nothing in Rule 11*bis* of the Rules indicates that the Referral Bench is obliged to consider the gravity of the crimes charged and the level of responsibility of accused in other cases in order to make its referral decision. Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it.

27. For the reasons set out above, the Appellant's first ground of appeal is rejected.

3. Second Ground of Appeal

28. The Appellant argues that the Referral Bench erred in relying on the "significantly greater nexus" Bosnia and Herzegovina has with the trial of the Appellant than Serbia and Montenegro, which in the opinion of the Appellant is not in accordance with Rule 11*bis*(A) of the Rules.[59]

(a) Appellant's Submissions

29. The Appellant submits that Rule 11*bis*(A) of the Rules should not be interpreted as ranking the possible states to which a case may be referred in descending order and argues that the Referral Bench erroneously failed to address this matter.[60] He states that the only test to be applied is a combination of the requirements set out in Rule 11*bis*(A) and (B) of the Rules.[61] The Appellant reasons that Serbia and Montenegro also meets the first part of the Rule 11*bis*(A)(iii) requirement and that it had declared its willingness and preparedness to accept the Appellant's case for trial.[62] According to the Appellant, the Referral Bench erred in failing to treat Bosnia and Herzegovina and

[55] Case No. IT-96-23/2-PT, Prosecution's Request to Hold the Decision on the Defence's Preliminary Motion on the Form of the Amended Indictment in Abeyance, 23 May 2005, para. 5.
[56] Prosecution Respondent's Brief, para. 2.4.
[57] Janković Appellant's Brief, para. 33.
[58] *Stanković* Rule 11*bis* Appeal Decision.
[59] Janković Appellant's Brief, para. 44.
[60] Janković Appellant's Brief, para. 49.
[61] Janković Appellant's Brief, para. 50.

Serbia and Montenegro equally and to fully examine whether the latter was indeed prepared to take over the case.[63]

30. The Appellant further submits that the President of the Bosnia and Herzegovina State Court ("BiH State Court") made "unsubstantiated assertions" in *Mejakić et al.* that Bosnia and Herzegovina has a "fully competent system" to try cases referred by the Tribunal.[64] On the other hand, the Appellant argues that Serbia and Montenegro has a coherent judicial system, as already confirmed by the Prosecutor.[65] Finally, the Appellant submits that the nexus of Bosnia and Herzegovina is in fact "'too great' [and] much more likely to be an obstacle to a fair trial".[66]

(b) Prosecution's Submissions

31. The Prosecution submits that the Referral Bench correctly concluded that Bosnia and Herzegovina had a greater nexus and was therefore the appropriate State for referral, as under international law it is appropriate to resolve a conflict of competing claims for jurisdiction on the basis of the more effective nexus between the crime in question and the forum State.[67] The Prosecution argues that (i) pursuant to the territoriality principle, crimes, when possible, should be tried in the State where they were committed; (ii) the Appellant is and always was a national of Bosnia and Herzegovina; and (iii) many victims of the alleged crimes were and still are in Bosnia and Herzegovina.[68]

(c) Discussion

32. At the outset, it must be noted that the Referral Bench correctly stated that under Rule 11*bis* of the Rules, neither the Appellant nor Serbia and Montenegro had the *locus standi* to file a formal request to refer the case to Serbia and Montenegro. The Referral Bench was also correct in, nevertheless, considering Serbia and Montenegro because, pursuant to Rule 11*bis* (B) of the Rules, the Referral Bench may order referral *proprio motu.* Thus, the Referral Bench was not bound to only consider Bosnia and Herzegovina as a referral State as requested by the Prosecution.

33. The Appeals Chamber holds that, where there are concurrent jurisdictions under Rule 11*bis*(A)(i)-(iii) of the Rules, discretion is vested in the Referral Bench to choose without

[62] Janković Appellant's Brief, paras 46-47.
[63] Janković Appellant's Brief, paras 47, 51.
[64] Janković Reply Brief, para. 28.
[65] Janković Appellant's Brief, paras 55, 56.
[66] Janković Appellant's Brief, paras 53-57.
[67] Prosecution Respondent's Brief, paras 3.1-3.2, with reference to Ian Brownlie, *Principles of Public International Law*, 6th ed., p. 305.
[68] Prosecution Respondent's Brief, para. 3.3, with reference to *S.S. Lotus (France v. Turkey)*, 1927, P.C.I.J. ("in all systems of law the principle of the territorial character of criminal law is fundamental").

establishing any hierarchy among these three options and without requiring the Referral Bench to be bound by any party's submission that one of the alternative jurisdictions is allegedly the most appropriate. A decision of the Referral Bench on the question as to which State a case should be referred (vertical level, *i.e.* between the International Tribunal and individual States) must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11*bis*(A) of the Rules.

34. In this context, the Appeals Chamber notes that attempts among States to establish a hierarchy of criteria for determining the most appropriate jurisdiction for a criminal case, where there are concurrent jurisdictions on a horizontal level (*i.e.* among States), have failed thus far. Instead, States have agreed on various criteria and opted to give weight to certain criteria over others depending on the circumstances of a particular case.

35. For example, the Appeals Chamber notes Article 31 of the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972[69] which – in conjunction with its Article 8 – provides that in a situation of concurrent jurisdictions, the States concerned shall evaluate certain enumerated circumstances in order to decide which State alone shall continue to conduct the proceedings.[70] Instead of establishing a hierarchical order among these circumstances however, the Council of Europe's European Committee on Crime Problems stated that

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[69] CETS No. 073. This Convention entered into force in Bosnia and Herzegovina on 26 July 2005 and in Serbia and Montenegro on 31 December 2002. (http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp).

[70] Some of these circumstances include *inter alia*:

> (a) if the suspected person is ordinarily resident in the requested State;
>
> (b) if the suspected person is a national of the requested State or if that State is his State of origin;
>
> (c) if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;
>
> (d) if proceedings for the same or other offences are being taken against the suspected person in the requested State;
>
> (e) if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;
>
> (f) if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;
>
> [...]

See also in this context the Convention on the Transfer of Sentenced Persons of 21 March 1983, CETS No. 112 (as for the source see *supra* footnote 69), ratified at present by 60 states around the globe, including, *inter alia*, Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, France, Russia, Serbia and Montenegro, Slovenia, United Kingdom, Australia, Japan, Mauritius, Panama, and the United States of America.

> [t]he objective is to devise a practical way to determine, *on the face of the concrete circumstances of the case*, using objective criteria, how better to ensure that justice is done [...].[71]

36. Many of the same criteria in the European Convention on the Transfer of Proceedings in Criminal Matters are mentioned in the guidelines adopted by Eurojust in 2003.[72] In these guidelines, Eurojust offers criteria which should be considered when making a decision as to which concurrent State jurisdiction should prosecute.[73] In relation to the question of a hierarchy among the criteria, Eurojust stated that "[t]he priority and weight which should be given to each factor will be different in each case."[74]

37. When determining Bosnia and Herzegovina as the State to which the case should be referred, the Referral Bench considered that

> (a) the crimes charged were allegedly committed in Bosnia and Herzegovina;
>
> (b) these crimes were allegedly committed against persons living in Bosnia and Herzegovina;

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[71] European Committee on Crime Problems (CDPC), Reflection Group on developments in international co-operation in criminal matters (PC-S-NS), Final Activity Report and Summary Report of the 5th Meeting (Strasbourg, 18-20 March 2002), Secretariat Memorandum of 21 March 2002, p. 22 (emphasis added).

[72] Eurojust is a European Union body which was established in 2002 in order to stimulate and improve the co-operation of investigations and prosecutions between the Member States of the European Union (http://www.eurojust.eu.int).

[73] Among these criteria are the following:

> (a) There should be a preliminary presumption that, if possible, a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained.
>
> (b) The willingness of witnesses both to give evidence and, if necessary, to travel to another jurisdiction to give that evidence should be considered.
>
> (c) It should be ensured that witnesses or those who are assisting the prosecution process are not endangered.
>
> (d) Consideration should be given to the time it will take for the proceedings to be concluded.
>
> (e) The interests of victims should be taken into account.
>
> (f) The availability of evidence in the proper form and its admissibility and acceptance by the court must be considered.
>
> (g) The sentencing powers of courts in the different potential jurisdictions must not be a primary factor in deciding in which jurisdiction a case should be prosecuted, and the Prosecution should not seek to prosecute cases in a jurisdiction where the penalties are highest.
>
> (h) The cost of prosecuting a case should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another when all other factors are equally balanced.

See Eurojust – Annual Report 2003, pp 60-66.

[74] *Id.*, p. 66.

> (c) the Appellant was at the time of the alleged crimes and still is a citizen of Bosnia and Herzegovina.[75]

Accordingly, the Referral Bench did not err in finding that "those considerations weigh heavily in favour of referral being to Bosnia and Herzegovina".[76] The Referral Bench correctly relied on a "significantly greater nexus" of the case to Bosnia and Herzegovina rather than Serbia and Montenegro. Even if Serbia and Montenegro fulfilled the prerequisite found in the first part of Rule 11*bis*(A)(iii)[77] of the Rules, as explicitly submitted by the Appellant,[78] the Referral Bench would not have erred in not referring the case to the authorities of Serbia and Montenegro because – as stated above – there is no hierarchical order between Rule 11*bis*(A)(i), (ii) and (iii) of the Rules.

38. In relation to the Appellant's argument that the President of the BiH State Court made "unsubstantiated assertions" in *Mejakić et al.* as to the fact that the courts in Bosnia and Herzegovina are able to try cases referred by the Tribunal, the Appeals Chamber has carefully considered these assertions. The Appeals Chamber notes that the President of the BiH State Court made elaborate submissions on the legal, staffing, financial and technical situation of the judicial system in Bosnia and Herzegovina, and in particular the BiH State Court.[79] The Appellant did not demonstrate that these submissions were merely "unsubstantiated assertions". By the same token, he did not demonstrate that the Referral Bench should have relied instead on the submissions of Serbia and Montenegro at the *Mejakić et al.* Rule 11*bis* Hearing and referred the case to its authorities.

39. Based on these considerations, the Appeals Chamber finds that the Referral Bench did not err in giving priority and weight to the circumstances considered in favour of a referral of the case to Bosnia and Herzegovina and in holding that "the arguments in favour of referral *proprio motu* to Serbia and Montenegro are comparatively of little weight".[80]

40. Consequently, the Appellant's second ground of appeal is rejected.

4. Third and Sixth Grounds of Appeal

41. The Appellant submits that the Referral Bench erroneously declared that it was satisfied that the proceedings in Bosnia and Herzegovina fulfil the requirements of a fair trial, and that it failed to

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[75] Impugned Decision, para. 24.
[76] *Ibid.*
[77] It must be noted that the Referral Bench did not make an explicit finding pursuant to Rule 11*bis*(A)(ii) of the Rules on whether the Appellant was arrested in Serbia and Montenegro. The Appellant does not submit on appeal that the case should be referred to Serbia and Montenegro pursuant to that provision.
[78] *See supra*, para. 29.
[79] *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Rule 11*bis* Hearing, 3 March 2005 ("*Mejakić et al.* Rule 11*bis* Hearing"), pp 213-225.
[80] Impugned Decision, para. 25.

fulfil the duty of properly and fully informing itself on a number of fair trial elements.[81] The parties have treated the Appellant's third and sixth grounds of appeal together because the two grounds are closely associated. The Appeals Chamber will likewise address both grounds together.

(a) Appellant's Submissions

42. The Appellant argues that the legal structure in Bosnia and Herzegovina in itself is insufficient to guarantee a fair trial and that further inquiry into the implementation of the necessary standards was required.[82] In particular, the Appellant submits that the Referral Bench failed to properly inform itself

(i) as to whether the right of the Appellant to have adequate time and facilities for the preparation of his defence would be adequately guaranteed before the BiH Courts;[83]

(ii) whether the right of the Appellant to be present and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him would be adequately guaranteed before the BiH Courts;[84]

(iii) on the issue of witness availability;[85]

(iv) whether the Appellant would have access to all materials from the Tribunal which would be necessary for his defence;[86]

(v) whether the Appellant would be tried without undue delay;[87] and

(vi) about the existence of potential prejudice towards the Appellant if his case is referred to the authorities of Bosnia and Herzegovina.[88]

The Appellant also submits that the Referral Bench erroneously

(vii) declared itself "satisfied on the information presently available that the Accused **will** receive a fair trial";[89] and

[81] Janković Appellant's Brief, paras 58, 61.
[82] Janković Appellant's Brief, para. 63.
[83] Janković Appellant's Brief, paras 67-82.
[84] Janković Appellant's Brief, paras 83-87.
[85] Janković Appellant's Brief, paras 88-91.
[86] Janković Appellant's Brief, paras 92-96.
[87] Janković Appellant's Brief, paras 97-101.
[88] Janković Appellant's Brief, paras 102-107.
[89] Janković Appellant's Brief, paras 108-111 (emphasis in the original).

(viii) relied on Rule 11*bis*(D)(iv) and (F) of the Rules to satisfy itself that the right to a fair trial was guaranteed.[90]

(b) Prosecution's Submissions

43. The Prosecution responds, *inter alia*, arguing that

(i) the Appellant fails to substantiate what further considerations the Referral Bench could have carried out, and that the Tribunal has no obligation to resolve any disparity in remuneration of counsel in national and international jurisdictions;[91]

(ii) the legislation in Bosnia and Herzegovina contains safeguards with respect to the right of an accused to attend the trial and examine witnesses;[92]

(iii) the Appeals Chamber held in the *Stanković* Rule 11*bis* Appeals Decision that the ratification by Bosnia and Herzegovina and neighbouring countries of the European Convention on Mutual Assistance in Criminal Matters "will facilitate cooperation with nearby Croatia and Serbia and Montenegro";[93]

(iv) Rule 11*bis*(D)(iii) of the Rules in no way limits the disclosure of material deemed appropriate by the Prosecutor, and that the Appellant can make a request pursuant to Rule 75 of the Rules;[94]

(v) the Appellant has not demonstrated that any delay that might arise from the disclosure and translation of documents could be characterized as undue;[95]

(vi) speculation as to potential prejudice is not an element of a fair trial;[96]

(vii) the Appeals Chamber held in the *Stanković* Rule 11*bis* Appeals Decision that "should", in the context of that decision is effectively synonymous with "will";[97] and that

(viii) there is no need for a special provision authorizing the Defence to send monitors, as the Defence – unlike the Prosecution – will be a party to the national proceedings, and the Defence will be able to apply for a remedy through the national system of Bosnia and Herzegovina.[98]

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[90] Janković Appellant's Brief, paras 112-116.
[91] Prosecution Respondent's Brief, paras 4.6-4.12.
[92] Prosecution Respondent's Brief, paras 4.13-4.14.
[93] Prosecution Respondent's Brief, paras 4.15-4.19 (with reference to *Stanković* Rule 11*bis* Appeal Decision, para. 26).
[94] Prosecution Respondent's Brief, paras 4.20-4.22.
[95] Prosecution Respondent's Brief, para. 4.23.
[96] Prosecution Respondent's Brief, paras 4.24-4.26.
[97] Prosecution Respondent's Brief, paras 4.27-4.30.
[98] Prosecution Respondent's Brief, paras 4.31-4.37.

(c) Discussion

(i) Adequate Time and Facilities to Prepare Defence

44. The Referral Bench took particular care to examine the BiH Criminal Procedure Code 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 defence".[99] The Referral Bench also correctly emphasized that "a suspect has the right to request appointment of defence counsel if unable to bear the costs due to financial circumstances".[100] Having satisfied itself that the State would provide 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 Bosnia and Herzegovina budget. Thus, the Appellant has failed to demonstrate that the Referral Bench erred in its conclusion that the Appellant would be provided with adequate time and facilities in Bosnia and Herzegovina to prepare his defence.

(ii) Right of Appellant to be Present and to Examine Witnesses

45. The Referral Bench mentioned a number of provisions of the Bosnia and Herzegovina Law on Protection of Witnesses under Threat and Vulnerable Witnesses ("Vulnerable Witness Protection Law")[101] and commented on some of them in more detail.[102] The Appeals Chamber notes that the Referral Bench did not comment on Articles 10 and 12 of the Vulnerable Witness Protection Law. Article 10 deals with the possibility of removing an accused where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly. Article 12 states that in exceptional circumstances, if revealing some or all of the personal details of a witness or other details would contribute to identifying a witness, and would seriously endanger a witness under threat, the preliminary proceedings judge may, upon the motion of the Prosecutor, decide that some or all of the personal details of a witness may continue to be kept confidential after the indictment is issued.

46. Both provisions encompass safeguards intended to protect the right of an accused to a fair trial, such as the presence of his defence attorney pursuant to Article 10(3) and the right to be heard pursuant to Article 12(2) and (5). Furthermore, it must be noted that Articles 10 and 12, *inter alia*, aim at balancing the rights of an accused to a fair trial on the one hand and the protection of witnesses on the other.

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[99] Impugned Decision, para. 68. *See* also para. 75.
[100] Impugned Decision, para. 68. *See* also para. 77.
[101] *Official Gazette of Bosnia and Herzegovina*, Nos. 21/03, 61/04 (*see* also No. 36/03).
[102] Impugned Decision, paras 80-83.

47. As to the Appellant's submission that there is no guarantee that the provisions of the Vulnerable Witness Protection Law will be adequately applied in practice, the Appeals Chamber finds that the Appellant did not substantiate his concerns further than referring to "the nature of the charges against the Appellant and the structure of potential witnesses against him".[103]

48. Consequently, the Appellant has not demonstrated that the Referral Bench's consideration of the Vulnerable Witness Protection Law was erroneous.

(iii) Witness Availability

49. In the *Stanković* Rule 11*bis* Appeal Decision, the Appeals Chamber agreed with the Referral Bench's findings that (a) the authorities in Bosnia and Herzegovina have taken substantial steps to promote the obtaining of witnesses and evidence and that (b) Stanković had not shown that the judicial process in Bosnia and Herzegovina would be unfair in this respect.[104] By the same token, the Appeals Chamber finds in the present case that the Appellant has not shown any error in the Referral Bench's reasoning in relation to this issue. In particular, the Appellant failed to demonstrate that the Referral Bench erroneously failed to discuss the statement of Mr. Refik Hodžić, BiH State Court Officer for contacts with the public and former Head of the Tribunal's Outreach Programme in Bosnia and Herzegovina, who said, *inter alia*, "that it is impossible to absolutely protect the identity of a witness"; he also stated that this had been shown by the Tribunal, "which spent millions of dollars on [a witness protection mechanism]".[105] His statement shows that he was merely referring to an issue which is self-evident: no judicial system, be it national or international, can guarantee absolute witness protection. Thus, the Referral Bench did not commit an error of law or fact when it omitted to discuss this statement in the Impugned Decision.

(iv) Access to Material from Other Cases of the Tribunal

50. The Appellant errs in asserting that the Referral Bench did not adequately consider the Appellant's ability to access relevant material. With respect to material 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".[106] The Referral Bench also ordered the Prosecution to hand

[103] Janković Appellant's Brief, para. 86.
[104] *Stanković* Rule 11*bis* Appeal Decision, para. 26.
[105] *See* Janković Appellant's Brief, para. 89.
[106] Impugned Decision, Part VI, Disposition.

over "*all* other appropriate evidentiary material" consistent with Rule 11*bis*(D)(iii) of the Rules.[107] Because the BiH Criminal Procedure Code gives defence counsel the right to inspect all files and evidence against the accused after an indictment has been issued, the Appellant will have access to these materials.[108]

51. Moreover, with respect to material from related cases, defence counsel in a BiH proceeding, like the BiH Prosecutor, may request that the Prosecutor of the Tribunal apply to vary protective measures under Rule 75 of the Rules.[109] Thus, the 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 material from other Tribunal cases.

(v) Trial Without Undue Delay

52. The Referral Bench did not err in its consideration of whether the Appellant's right to trial without undue delay is infringed by a decision of referral. If the Defence decided that it would be necessary to review voluminous material from the *Kunarac et al.* case, the concern that this might be a time-consuming undertaking would also arise if the case were tried before the Tribunal. Also, the Appellant's submission that a situation might arise where present counsel could not continue to represent him and where another counsel who did not speak English were assigned to him, is speculative.

(vi) Potential Prejudice Towards the Appellant

53. The Referral Bench did not err in failing to consider statements made by certain individuals which allegedly demonstrated "an atmosphere of lynch [*sic*] [...] in the public".[110] The Appellant has not demonstrated that such statements would cause prejudice towards his right to a fair trial, as the judges at the BiH State Court are professional – and partly international – judges.

(vii) "The Accused *will* receive a fair trial"

54. Further, the Referral Bench concluded "that the Accused will receive a fair trial",[111] the language employed in Rule 11*bis*(B) of the Rules. Thus, the Referral Bench did not err in making this finding.

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[107] Impugned Decision, Part VI, Disposition (emphasis added).
[108] Article 69 of the BiH Criminal Procedure Code.
[109] *See* Case No. IT-05-85-Misc 2, Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina pursuant to Rule 33(B), 6 April 2005.
[110] Janković Appellant's Brief, paras 103-106.
[111] Impugned Decision, para. 105.

(viii) Reliance on Rule 11*bis*(D)(iv) and (F) to Satisfy Itself that the Right to Fair Trial is Guaranteed

55. The Appeals Chamber held in *Stanković* that the Referral Bench correctly satisfied itself that Stanković would receive a fair trial in part on the basis of the Rule 11*bis*(D)(iv) monitoring and the Rule 11*bis*(F) revocation mechanism. The Appeals Chamber was also satisfied that this was a reasonable variable for the Referral Bench to have included in the Rule 11*bis*(B) equation.[112]

56. It was also reasonable for the Referral Bench in this case to have ordered the Prosecution 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 Appellant six weeks after the transfer of the evidentiary material and, thereafter, every three months.[113] The Appeals Chamber acknowledges that Rule 11*bis*(D)(iv) and (F) of the Rules 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. However, that discretion cannot derogate from the Referral Bench's inherent authority under this Rule. Just because the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf 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. Thus, the Referral Bench did not err in its finding that "Rules 11*bis*(D)(iv) and 11*bis*(F) serve as precautions against a failure to diligently prosecute a referred case or conduct a fair trial."[114]

57. Consequently, the Appellant's third ground is rejected.

58. In his sixth ground of appeal, the Appellant argues that the Referral Bench erred in assuming that "monitoring of the trial of this case, if referred, would be undertaken by the Organisation for Security and Cooperation in Europe (OSCE) or a similar organisation by arrangement with the Prosecutor"[115] and in determining that it had authority under Rule 11*bis* to order the Prosecution to continue its efforts to ensure the monitoring of and reporting on the proceedings before the BiH State Court and to report to the Referral Bench on the progress made by the Bosnia and Herzegovina Prosecutor and on the progress of the proceedings.[116] The Appellant does not, however, explicitly challenge the Referral Bench's order that if arrangements with an

[112] *Stanković* Rule 11*bis* Appeal Decision, para. 52.
[113] Impugned Decision, Part VI, Disposition.
[114] Impugned Decision, para. 102.
[115] Impugned Decision, para. 104.
[116] Defence Notice of Appeal, para. 12.

international organisation for monitoring and reporting should prove ineffective, the Prosecution should seek further direction from the Referral Bench.[117]

59. As stated above – and in light of the *Stanković* Rule 11*bis* Appeal Decision – the Appeals Chamber finds that it was reasonable for the Referral Bench to order the Prosecution to report back on the progress of the case, because that order reasonably aided the Referral Bench in discharging its duties under Rule 11*bis* of the Rules.[118]

60. In relation to the Referral Bench's order to the Prosecutor to continue its efforts in co-operation with an international organisation to ensure monitoring and reporting of the proceedings, the Appeals Chamber recalls its disposition in the *Stanković* Rule 11*bis* Appeal Decision:

> 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.[119]

The Appeals Chamber notes that while the Referral Bench ordered the Prosecution in *Stanković* "to continue its efforts to *conclude an agreement with* an international organisation",[120] the Referral Bench ordered the Prosecution in the present case "to continue its efforts *in cooperation with*"[121] an international organisation. While the wording and the substance of both orders differ, their rationale is similar: in both cases, the Referral Bench instructed the Prosecution to collaborate with an international organisation, either by an agreement or some other form of co-operation. This, however, is not within the authority of the Referral Bench, as "Chambers are not in the business of giving counsel to the Prosecutor about decisions that are customarily within her domain."[122]

61. Also, in light of the *Stanković* Rule 11*bis* Appeal Decision, the Appeals Chamber finds *proprio motu* that the Referral Bench erred in ordering the Prosecution to seek further direction from the Referral Bench if arrangements for monitoring and reporting should prove ineffective.[123]

62. Thus, the sixth ground of appeal is allowed in part, and the remainder of this ground of appeal is rejected.

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[117] *See* Impugned Decision, Part VI, Disposition.
[118] *See Stanković* Rule 11*bis* Appeal Decision, para. 59.
[119] *Stanković* Rule 11*bis* Appeal Decision, Part IV b.
[120] *Stanković* Rule 11*bis* Appeal Decision, Part IV b (emphasis added).
[121] Impugned Decision, Part VI, Disposition (emphasis added).
[122] *Stanković* Rule 11*bis* Appeal Decision, para. 58.
[123] *See* Impugned Decision, Part VI, Disposition. *See* also *Stanković* Rule 11*bis* Appeal Decision, Part IV b.

5. Fourth Ground of Appeal

63. The Appellant argues that the Referral Bench erred in failing to properly examine whether the courts of Bosnia and Herzegovina are adequately prepared to accept the case as required by Rule 11*bis* (A)(iii) of the Rules.[124]

(a) Appellant's Submissions

64. The Appellant submits, *inter alia*, that the Referral Bench considered neither the applicability of the principles governing individual responsibility nor the applicability of general principles of criminal law in that domestic law.[125] The Appellant also submits that the unproven capability of a national court to apply complex rules of international law to complex facts falls below the "adequately prepared" standard.[126] He further argues that a March 2005 Report of the OSCE shows that the national courts in Bosnia and Herzegovina are not adequately prepared.[127]

(b) Prosecution's Submissions

65. The Prosecution responds, *inter alia*, that the Referral Bench undertook a comprehensive analysis of all relevant provisions of law applicable in Bosnia and Herzegovina.[128] It also argues that lengthy and involved procedures in a national jurisdiction may be a reasonable consequence of thorough review and proper consideration, which are supportive of a determination that there exists an adequately prepared system.[129]

(c) Discussion

66. 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 the Impugned 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 Criminal Code of Bosnia and Herzegovina ("BiH CC") as well as international law.[130] It concluded that the SFRY Criminal Code would apply to most of the alleged criminal acts, but that the BiH State Court might determine that either the BiH Criminal Code or international law applied to other acts.[131] Regardless

[124] Defence Notice of Appeal, para. 10.
[125] Janković Appellant's Brief, para. 127.
[126] Janković Appellant's Brief, para. 130.
[127] Janković Appellant's Brief, para. 131.
[128] Prosecution Respondent's Brief, para. 5.4.
[129] Prosecution Respondent's Brief, para. 5.7.
[130] Impugned Decision, paras 28-44.
[131] Impugned Decision, para. 44.

of which of the three legal codes applies, however, the Referral Bench was satisfied that "there are appropriate provisions to address most, if not all, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure".[132]

67. In light of the *Stanković* Rule 11*bis* Appeal Decision, 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.

68. The fourth ground of appeal is accordingly rejected.

6. Fifth Ground of Appeal

69. The Appellant argues that the Referral Bench erred in failing to properly examine general conditions of and the risks involved concerning the Appellant's pre-trial, trial and potential post-trial detention in a Bosnia and Herzegovina prison, particularly in light of the personal circumstances of the Appellant.[133]

(a) Appellant's Submissions

70. The Appellant submits that while Rule 11*bis* of the Rules does not deal with the issue of detention or a safeguard against inhuman treatment, it is self-evident that no accused can be transferred to a situation in which he would face such treatment.[134] The Appellant argues that neither the Government of Bosnia and Herzegovina nor the Referral Bench discussed post-conviction detention,[135] and that there is at present no high security detention facility in Bosnia and Herzegovina.[136] He further submits various newspaper reports that deal with attacks on Serb prisoners in BiH prisons.[137]

(b) Prosecution's Submissions

71. The Prosecution responds that evidence before the Referral Bench shows "that the high security detention unit of the [BiH] State Court is a permanent facility".[138] The Prosecution argues that there are "security prisons [...] in Republika Srpska" where the Appellant could be imprisoned,

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[132] Impugned Decision, para. 44.
[133] Defence Notice of Appeal, para. 11.
[134] Janković Appellant's Brief, paras 137-138.
[135] Janković Appellant's Brief, paras 139, 145, 148.
[136] Janković Appellant's Brief, paras 146-147.
[137] Janković Appellant's Brief, paras 141-142.
[138] Prosecution Respondent's Brief, para. 6.2 (referring to *Prosecutor v. Stanković*, Case No. IT-96-23/2, Additional Submissions from BiH Regarding Their Response to Questions Posed by the Specially Appointed Chamber, 24 January 2005).

and "that a new maximum security prison will be finished in the near future".[139] The Prosecution also notes that Bosnia and Herzegovina is a party to the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[140] Furthermore, the Prosecution states that the newspaper articles constitute new evidence which cannot be considered on appeal.[141]

(c) Discussion

72. At the outset, the Appeals Chamber recalls its finding in the *Stanković* Rule 11*bis* Appeal Decision that

> [t]he 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.[142]

73. In relation to the newspaper articles on alleged attacks on Serb prisoners in BiH prisons, the Appeals Chamber notes that the Appellant has filed these documents on appeal without authorization of the Appeals Chamber. The Appeals Chamber cannot consider this new evidence on appeal because it is not part of the record of the case and has not been admitted under Rule 115 of the Rules.

74. Apart from these submissions, the Appellant has offered nothing to suggest that the Referral Bench erred in considering the fairness of the conditions of confinement in Bosnia and Herzegovina, be it pre- or post-conviction. Specifically, the Referral Bench accepted that "the Government of Bosnia and Herzegovina had previously noted that the Law of Bosnia and Herzegovina on Execution of Criminal Sanctions, Detention, and other Measures ('Law on Detention')[143] regulates the operation of the detention facility in accordance with State, European, and international standards, including providing detainees with the means of having confidential communications with counsel."[144] This shows that the Referral Bench 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.

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[139] Prosecution Respondent's Brief, para. 6.3 (referring to a statement of the BiH Minister of Justice that a new maximum security prison for the needs of the BiH State Court will be finished in the next 18 months, *Večernji List*, 23 July 2005).
[140] Prosecution Repondent's Brief, para. 6.4.
[141] Prosecution Respondent's Brief, para. 6.5.
[142] *Stanković* Rule 11*bis* Appeal Decision, para. 34.
[143] *Official Gazette of Bosnia and Herzegovina*, No. 13/05.
[144] Impugned Decision, para. 53.

75. The Referral Bench also considered that Article 3 of the Law on Detention provides that detainees "shall retain all rights other than those necessarily restricted for the purpose for which they were ordered and in accordance with this Law and international agreements".[145] Furthermore, the Referral Bench stated that Article 68(1) of the Law on Detention "specifically permits detainees and prisoners to communicate confidentially with a lawyer of their choice".[146]

76. Consequently, the Appellant has not demonstrated that the Referral Bench erred in failing to properly examine general conditions of the Appellant's pre-trial, trial and potential post-trial detention in Bosnia and Herzegovina. The fifth ground of appeal is rejected.

7. Disposition

77. The Appellant's sixth ground of appeal is **ALLOWED IN PART**, insofar as it objects to the Referral Bench's order instructing the Prosecutor

a. to continue her efforts in co-operation with the OSCE or another international organisation to ensure the monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina, and

b. to seek further direction from the Referral Bench if arrangements for monitoring and reporting should prove ineffective.

78. The remainder of the Appellant's appeal is **DISMISSED**.

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

Dated this fifteenth day of November 2005,
At The Hague,
The Netherlands.

Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]

[145] Impugned Decision, para. 76.
[146] *Ibid.*