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**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-01-42/2-AR11bis.1
Date: 28 March 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Hothuis

Decision: 28 March 2007

PROSECUTOR

v.

VLADIMIR KOVAČEVIĆ

**DECISION ON APPEAL AGAINST DECISION ON REFERRAL
UNDER RULE 11bis**

Office of the Prosecutor

Ms. Susan Somers
Mr. David Re
Mr. Philip Weiner
Mr. Aleksandar Kontić

The Government of the Republic of Serbia

per: The Embassy of Serbia to the
Netherlands, The Hague

Counsel for Vladimir Kovačević

Ms. Tanja Radosavljević

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 (“Appeals Chamber” and “International Tribunal” respectively) is seized of an appeal filed by Counsel for Vladimir Kovačević, also known as “Rambo” (“Defence” and “Appellant” respectively), pursuant to Rule 11bis(I) of the Rules of Procedure and Evidence (“Rules”)¹ against the “Decision on Referral of Case Pursuant to Rule 11bis with Confidential and Partly Ex Parte Annexes” (“Impugned Decision”) rendered by the Referral Bench on 17 November 2006.²

I. PROCEDURAL BACKGROUND

2. On 25 September 2003 the Appellant was arrested in Belgrade and transferred to the United Nations Detention Unit in The Hague (“UNDU”) on 23 October 2003.³ The Appellant’s initial appearance was held on 3 November 2003, and further hearings were held on 28 November 2003 and 15 March 2004. The Appellant did not enter a plea due to his mental health.⁴ On 7 April 2006, the Trial Chamber rendered a decision in which it found that the Appellant “does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change.”⁵ He was subsequently granted provisional release until further notice, and is currently in a mental health facility in Serbia.⁶

3. The initial indictment against the Appellant was confirmed on 27 February 2001 and included three other co-accused.⁷ Subsequently, the indictment was amended on 26 July 2002,⁸ 31

¹ IT/32/Rev. 39, 22 September 2006.

² Defense Notice of Appeal, 1 December 2006 (“Notice of Appeal”).

³ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42-I, Scheduling Order, 27 October 2003, p. 32; *See also*, Impugned Decision, para. 5.

⁴ Status Conference, 15 March 2004. T. 266-268.

⁵ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Accused’s Fitness to Enter a Plea and Stand Trial (Confidential), 7 April 2006, para. 51.

⁶ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Provisional Release, 2 June 2004; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision to Extend the Order for Provisional Release, 2 December 2004.

⁷ *Prosecutor v. Pavle Strugar, Miodrag Jokić, Milan Zec and Vladimir Kovačević*, Case No. IT-01-42-I, Indictment, 22 February 2001 (Confidential), confirmed by *Ex Parte-Under Seal* Order on Review of Indictment Pursuant to Article 19 of the Statute and Order for Limited Disclosure, 27 February 2001. This indictment was unsealed on 2 October 2001, *see Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-I, Decision on Application to Vacate Order of Limited Disclosure, 2 October 2001, p. 2. The charges in the Indictment against Milan Zec were withdrawn pursuant to *Prosecutor v. Milan Zec*, Case No. IT-01-42-I, Order Authorising the Withdrawal of the Charges Against Milan Zec Without Prejudice, 30 July 2002.

⁸ *Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-PT, Decision on Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002; *See also Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-PT, Prosecution’s Amended Indictment and Application for Leave to Amend, 26 July 2002.

March 2003⁹ and on 17 October 2003.¹⁰ The operative indictment against the Appellant is the Second Amended Indictment filed on 17 October 2003 (“Indictment”).¹¹

4. The Indictment relates to crimes committed in Dubrovnik, Croatia, between 6 December 1991 and 31 December 1991.¹² The Prosecution alleges that the Appellant as Commander of the Third Battalion of the Yugoslav Peoples’ Army (“JNA”) 472 (Trebinje) Motorised Brigade, holding the rank of Captain First Class, acting individually or in concert with others, participated in a military campaign which was launched on 1 October 1991, during which, on 6 December 1991, the Appellant ordered, committed, or otherwise aided and abetted the unlawful artillery and mortar shelling of the old town of Dubrovnik.¹³ It alleges that as a result of this unlawful shelling, two civilians were killed and three others were seriously wounded.¹⁴

5. In addition, the Indictment alleges that on 6 December 1991, the Appellant, acting individually or in concert with others, ordered, committed or otherwise aided and abetted the destruction or wilful damage to dwellings and other buildings and the unlawful shelling of civilian objects in the Old Town area of Dubrovnik.¹⁵ During the course of this attack, hundreds of shells impacted in the Old Town area of Dubrovnik, a United Nations Educational Scientific and Cultural Organisation (UNESCO) World Cultural Heritage Site in its entirety, resulting in the complete destruction of at least six buildings protected as cultural property.¹⁶ Alternatively, the Indictment alleges that the Appellant knew or had reason to know that forces under his command, direction and/or control or subordinate to him were committing the acts described and failed to take necessary and reasonable measures to prevent the commission of such acts or punish the perpetrators thereof.¹⁷

6. The Indictment charges the Appellant under Articles 7(1) and 7(3) of the Statute of the International Tribunal (“Statute”) with six counts of violations of the laws or customs of war.¹⁸ They encompass murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction or wilful damage done to institutions

⁹ *Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-PT, Amended Indictment, 31 March 2003.

¹⁰ *Prosecutor v. Pavle Strugar et al.*, Case No. IT-01-42-PT, Second Amended Indictment, 17 October 2003.

¹¹ The case against Miodrag Jokić was severed subsequent to a plea of guilty, see *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-PT, Order for Separation, 17 September 2003. The proceedings against Pavle Strugar were separated from those against the Appellant under the Indictment of 17 October 2003 pursuant to *Prosecutor v. Pavle Strugar and Vladimir Kovačević*, Case No. IT-01-42-PT, Decision on the Prosecutor’s Motion for Separate Trial and Order to Schedule a Pre-trial Conference and the start of the Trial Against Pavle Strugar, 27 November 2003.

¹² Indictment, para. 13.

¹³ Indictment, paras 2, 13, 15, 10, 17 and 18.

¹⁴ Indictment, para. 19.

¹⁵ Indictment, paras 24 and 25.

¹⁶ Indictment, paras 26 and 27.

¹⁷ Indictment, para. 29.

dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science.¹⁹

7. On 28 October 2004, the Prosecution filed a motion for referral of the Indictment against the Appellant to the authorities of the Republic of Serbia (“Serbia”) pursuant to Rule 11*bis* of the Rules.²⁰ The President of the International Tribunal appointed a Referral Bench to consider whether the case against the Appellant should be referred to the authorities of a State.²¹ On 7 February 2005, the Prosecution re-filed the motion for referral pursuant to an Order by the Referral Bench.²² After receiving further submissions from the Parties²³ as well as those of the Government of Serbia²⁴ and holding a hearing on the Request for Referral on 15 September 2006 (“Referral Hearing”), the Referral Bench issued the Impugned Decision on 17 November 2006. The Referral Bench considered the gravity of crimes with which the Appellant is charged, his alleged level of responsibility, and the fact that the death penalty would not be imposed, and concluded that it was satisfied, “based on information presently available” that should the Appellant’s mental health condition sufficiently improve, he would receive a fair trial in Serbia.²⁵ Accordingly, the Referral Bench ordered the referral of this case to Serbia in order for the Serbian authorities to “refer the case to the appropriate court for trial within the Republic of Serbia”.²⁶

8. On 1 December 2006, the Defence filed the Defense Notice of Appeal against the Impugned Decision, setting forth four grounds of appeal and requesting that the Appeals Chamber reverse the Impugned Decision.²⁷ According to the Defence, the Referral Bench erred as a matter of law and/or in fact: 1) in holding that the Defence posed no objection to the referral proceedings;²⁸ 2) in identifying the applicable Serbian Law;²⁹ 3) in failing to give weight or sufficient weight to relevant considerations pertaining to the Appellant’s mental health when discussing the monitoring of

¹⁸ Indictment, pp 1-6.

¹⁹ Indictment, pp 1-6.

²⁰ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Request by the Prosecutor Under Rule 11*bis* for Referral of the Indictment to Another Court, 28 October 2004.

²¹ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should be Referred to Another Court under Rule 11*bis*, 2 November 2004.

²² *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I Order on the Prosecutor’s Request for Referral to National Authorities Under Rule 11*bis*, 20 January 2005, p. 2; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Prosecutor’s Re-submission of Rule 11*bis* Request Pursuant to Chamber’s Order of 20 January 2005, 7 February 2005 (“Request for Referral”).

²³ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Prosecution’s Further Submissions Pursuant to Referral Bench’s Order of 17 July 2006, 11 August 2006; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Submission of the Defense in Accordance to the Order of the Referral Bench from 17th July 2006 (Partly Confidential), 11 August 2006.

²⁴ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Republic of Serbia’s Submission Relating to the Prosecutor’s Motion Under Rule 11*bis* of the Rules, 10 August 2006.

²⁵ Impugned Decision, para. 92.

²⁶ Impugned Decision, para. 93.

²⁷ Defence Notice of Appeal, p. 3.

²⁸ Defence Notice of Appeal, First Ground of Appeal, p. 4.

²⁹ Defence Notice of Appeal, Second Ground of Appeal, p. 5.

proceedings and;³⁰ 4) in failing to consider the Defence's written and oral submissions addressing the specifics of the Appellant's case in light of his mental disease.³¹ On 15 December 2006, the Defence filed the Defense Appeal Brief to which the Prosecution responded on 20 December 2006.³² The Appellant did not file a reply.

II. STANDARD OF REVIEW

9. The Appeals Chamber recalls that an appeal pursuant to Rule 11bis(I) of the Rules is more akin to an interlocutory appeal, than to an appeal from judgement.³³ A decision on whether to refer a case to the authorities of a State which meets the requirements set out in Rule 11bis of the Rules is a discretionary one.³⁴ Under the plain language of Rule 11bis(B), the Referral Bench "may order" referral *proprio motu* or at the request of the Prosecutor. Thus, where an appeal is filed regarding a Rule 11bis referral decision, the issue "is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."³⁵ The burden rests upon the party challenging a discretionary decision to demonstrate that the Trial Chamber has committed a "discernible error."³⁶ Accordingly, the party challenging a decision pursuant to Rule 11bis of the Rules must show that the Referral Bench misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of its discretion, or that the Referral Bench gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Referral Bench must have failed to exercise its discretion properly.³⁷

³⁰ Defence Notice of Appeal, Third Ground of Appeal, p. 6.

³¹ Defence Notice of Appeal, Fourth Ground of Appeal, p. 7.

³² Prosecution's Response to Appellant's Brief of 15 December 2006, 20 December 2006.

³³ *Prosecutor v. Željko Mejačić*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, 7 April 2006, ("*Mejačić* Rule 11bis Decision"), para. 10; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras 14-16; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral under Rule 11bis, 4 July 2006 ("*Ljubičić* Rule 11bis Decision"), para. 6.

³⁴ *Mejačić* Rule 11bis Decision, para. 10; *Ljubičić* Rule 11bis Decision, para. 6.

³⁵ *Mejačić* Rule 11bis Decision, para. 10; *Ljubičić* Rule 11bis Decision, para. 6.

³⁶ *Mejačić* Rule 11bis Decision, para. 10; *Ljubičić* Rule 11bis Decision, para. 6.

³⁷ *Mejačić* Rule 11bis Decision, para. 10; *Ljubičić* Rule 11bis Decision, para. 6.

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

A. The First Ground of Appeal

10. The Appellant submits that the Referral Bench erred in fact and in law in holding that “[t]he Defence subsequently posed no objection to proceeding with the referral hearing on 15 September 2006.”³⁸

(a) Submissions

11. In the Appeal, the Defence contends that the Referral Bench erred in observing, in the Impugned Decision, that the Defence posed no objection to proceeding with the Referral Hearing on 15 September 2006.³⁹ It argues that after the Trial Chamber found the Appellant not fit to stand trial, the Defence filed two requests on 27 April 2006, one before Trial Chamber I (“Trial Chamber”) to dismiss the Indictment, and the other, before the Referral Bench to suspend the consideration of the Prosecution’s application to schedule a hearing on the Request for Referral, until after the Trial Chamber rendered a decision on the motion to dismiss the Indictment.⁴⁰ The Defence points out that, on 17 July 2006, the Referral Bench issued an Order, ordering the Parties, and inviting the Government of the Republic of Serbia to respond to specific questions regarding the Appellant’s case and its possible referral to the authorities of Serbia.⁴¹ It submits that by failing to respond to the Motion for Suspension of Rule 11*bis* Proceedings, the Referral Bench prevented the Defence from potentially seeking certification to appeal any decision denying its request.⁴²

12. The Defence submits that although it complied with the Order and filed the Appellant’s responding submissions on 11 August 2006, each of his answers to the questions put by the Referral Bench included its opposition to referral of the case.⁴³ The Defence recalls that the Trial Chamber denied the Defence Motion to dismiss the Indictment on 1 September 2006 “on the basis that the Appellant’s present mental health condition did not exclude the resumption of proceedings in the future and thus there was no reason to terminate proceedings”,⁴⁴ and that its request for certification

³⁸ Appeal, para. I.A.

³⁹ Appeal, para. I.A; referring to Impugned Decision, para. 48.

⁴⁰ Appeal, para. 1. See *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Defense Motion Regarding the Prosecutor’s Application to Schedule a Hearing on 11*bis* Request, 27 April 2006 (“Motion for Suspension of Rule 11*bis* Proceedings”); *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Defense Motion to Dismiss the Indictment, 27 April 2006 (“Defence Motion to Dismiss the Indictment”).

⁴¹ Appeal, para. 2.

⁴² Appeal, para. 2.

⁴³ Appeal, para. 2.

⁴⁴ Appeal, para. 1.

of that decision⁴⁵ was denied by the Trial Chamber on 27 September 2006, thus subsequent to the Referral Hearing which was held on 15 September 2006.⁴⁶ As a result, it submits that “the Defense was put in a highly strange position and left without any legal provision within the Rules [...] to oppose such a line of procedure, where at the same time one procedure went parallel but independent of the other, although in this particular case the two are strongly dependant from [one] another.”⁴⁷

13. In response, the Prosecution submits that while the Defence’s argument that the Referral Bench erred in holding that the Defence posed no objection to the referral proceedings may be technically correct and, if found to be so, may constitute a minor error of fact, it could not have affected the Impugned Decision.⁴⁸ The Prosecution adds that the Defence argued its case before the Referral Bench by filing the submissions responding to the Referral Bench’s enquiry.⁴⁹ The Prosecution submits that whether or not the Defence objected to the referral hearing was irrelevant to the ultimate determination of the Request for Referral because the Defence’s objection could not determine whether or not a hearing in the Rule 11*bis* proceedings would be held.⁵⁰

(b) Discussion

14. First, the Appeals Chamber notes that in the Motion for Suspension of Referral Proceedings, the Defence specifically requested the Referral Bench to disregard the Prosecution Application to Schedule a Hearing on Rule 11*bis* Request from 21st April 2006 “until Trial Chamber 1 brings a decision on the ‘Defense Motion to Dismiss the Indictment.’”⁵¹ The Appeals Chamber further observes that the Defence’s argument that the Referral Bench never responded to the Motion for Suspension of 11*bis* proceedings is incorrect. On 22 August 2006, without waiting for the Decision on Defence Motion to Dismiss the Indictment, the Referral Bench considered the Motion for Suspension of 11*bis* proceedings and found that there was “no valid reason to forego holding a hearing on the Prosecution’s [11*bis* Request] pending a decision on the ‘Defence Motion to Dismiss the Indictment’” and then proceeded to schedule the Referral Hearing on 15 September 2006.⁵² Subsequently, the Defence Motion to Dismiss the Indictment was denied on 1 September 2006. The Referral Hearing accordingly only took place after the dismissal of the Motion for Suspension of

⁴⁵ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Request for Certification for Interlocutory Appeal of “Decision on Defence Motion to Dismiss the Indictment” from 1st September 2006 (“Request for Certification”), 8 September 2006.

⁴⁶ Appeal, para. 3.

⁴⁷ Appeal, para. 3.

⁴⁸ Response, para. 5.

⁴⁹ Response, para. 5.

⁵⁰ Response, para. 5.

⁵¹ Motion for Suspension of Rule 11*bis* Proceedings, p.3.

⁵² Scheduling Order for a Hearing on Referral of a Case Under Rule 11*bis*, 21 August 2006, p. 2.

11bis proceedings and the Motion to Dismiss the Indictment by the Referral Bench and the Trial Chamber, respectively.

15. With respect to the holding by the Referral Bench in the Impugned Decision that, “[t]he Defence subsequently posed no objection to proceeding with the referral hearing on 15 September 2006,” the Appeals Chamber is of the view that the Defence has failed to show why this is incorrect. The Defence does not point out anything that would indicate that it was so. While it clearly objected to the referral of the Appellant’s Indictment at the Referral Hearing and in the Request for Certification, it has not been shown that it specifically objected to the Referral Hearing. In any event, it is clear that the Referral Bench’s decision did not hinge on whether the Defence posed an objection to convening a referral hearing, and it is not a factor that the Referral Bench was obliged to consider prior to deciding on the request for referral. Pursuant to Rule 11bis(H) and Rule 54 of the Rules, a Referral Bench may issue such orders as may be necessary for the conduct of proceedings. It was thus within the Referral Bench’s discretion to convene a hearing when it did. Recalling that an allegation of an error of law which has no possibility of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground,⁵³ the Appeals Chamber finds no reason for disturbing the Referral Bench’s decision.

16. For the foregoing reasons, this ground of appeal is dismissed.

B. Second Ground of Appeal

17. Under the Second Ground of Appeal, the Defence argues that the Referral Bench erred in considering that the Serbian Law on Extra-Judicial Procedure, in particular, its Article 51(2), constituted a legal framework applicable to the Appellant.

(a) Submissions

18. The Defence submits that the Referral Bench erred in law and in fact in finding that as a result of Article 51(2) of the Serbian Law on Extra-Judicial Procedure according to which a medical institution detaining an accused shall submit periodical reports about a patient’s health condition to a competent court, Serbia would be obligated to regularly monitor the mental health condition of the Appellant and resume the trial process should he become fit for trial.⁵⁴ It submits that, contrary to the Referral Bench’s holding, this provision is applicable only to persons who are not accused in

⁵³ *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 5 November 2003, para. 10.

⁵⁴ Appeal, para. II(A).

criminal proceedings.⁵⁵ Therefore, it would only be a mechanism of safeguarding the Appellant's rights during his severe mental illness if the Prosecution would submit a motion to withdraw the Indictment, or if the Trial Chamber were to grant the Defence motion to dismiss the Indictment.⁵⁶

19. The Prosecution submits that under Serbian law, provisions for resuming the proceedings against the Appellant exist if his mental health condition were to improve. These provisions include Article 289 and other provisions of the Criminal Procedure Code which deal with the resumption of proceedings against an accused who is mentally ill, if he recovers to the extent that he is fit to stand trial.⁵⁷ The Prosecution submits that Article 51(2) of the Serbian Law on Extra-Judicial Procedure merely provides that in the event of a person being detained in a health facility pursuant to a court order, the health facility is required to provide regular updates to the court.⁵⁸ It argues that this law is applicable to all citizens of Serbia regardless of whether they are accused in criminal proceedings.⁵⁹ The Prosecution further submits that in any event, the Referral Bench does not determine the application of Serbian law because this is the responsibility of the Courts in Serbia.⁶⁰ It argues that the Referral Bench was merely demonstrating the established legal procedure in Serbia and that implementation of the monitoring procedure as applied to this case is for a court in Serbia to decide.⁶¹

(b) Discussion

20. The Appeals Chamber notes that the Defence challenges the application of Serbian Law on Extra-Judicial Procedure as a legal framework applicable to the Appellant for the first time on appeal. During the proceedings before the Referral Bench, the Government of Serbia indicated that there is an appropriate procedure in place to ensure that the Appellant would not have to stand trial if found unfit.⁶² Further, it stated that in this particular case, provisions of the Serbian Law on Extra-Judicial Procedure can be used for the Appellant since he is already accommodated in a medical institution under constant supervision.⁶³ At the Referral Hearing, this was further submitted by one of the representatives of the Republic of Serbia.⁶⁴ The Defence did not object or make this

⁵⁵ Appeal, para. 6, referring to Law on Extra-Judicial procedure, Medical Institution Section dealing with neuropsychiatry restraining, Articles 45-55.

⁵⁶ Appeal, para. 6.

⁵⁷ Response, para. 8.

⁵⁸ Response, para. 9.

⁵⁹ Response, para. 9.

⁶⁰ Response, para. 10.

⁶¹ Response, para. 10.

⁶² *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Republic of Serbia's Submission Relating to the Prosecutor's Motion under Rule 11bis of the Rules, 11 August 2006, para. 9.

⁶³ *Ibid.*

⁶⁴ Referral Hearing, T. 491-3.

argument in its submission, and was specifically invited to respond to this submission at the Referral Hearing, but declined to do so.⁶⁵

21. In addition, the Appeals Chamber finds that the Referral Bench acted within the confines of its mandate when it concluded that if the case were to be referred to Serbia, there is an appropriate procedure to ensure that the Appellant would not have to stand trial if he is found unfit, and that there are appropriate mechanisms in place to ensure his periodical monitoring during this time.

22. For the foregoing reasons the second ground of appeal is dismissed.

C. Third Ground of Appeal

23. Under the third ground of appeal the Appellant submits that the Referral Bench erred in not giving weight or in giving insufficient weight to relevant considerations in the context of the monitoring of proceedings.

(a) Submissions

24. The Defence recalls that the Appellant has been diagnosed with paranoid psychosis and that on this basis he was found not to be fit to stand trial.⁶⁶ It stresses that all the medical reports submitted by medical expert witnesses conclude that the main feature of his illness is paranoia in progression.⁶⁷ Accordingly, the Defence submits that because the Appellant sees the proceedings in a paranoid light, the mechanism of monitoring will deepen his belief that “everyone is monitoring him with intent to harm him.”⁶⁸

25. With respect to the monitoring by the Organisation for Security and Cooperation in Europe (“OSCE”),⁶⁹ the Defence argues that if the OSCE were to find that the domestic proceedings do not meet the principles of a fair trial or are not in compliance with protected human rights,⁷⁰ and if, as a result, the case were to be referred back to the International Tribunal pursuant to Rule 11*bis* (F), (G) and (H), it would aggravate the paranoia of the Appellant.⁷¹

26. The Prosecution submits that the Defence has not alleged any specific error of law or fact in this ground of appeal.⁷² The Prosecution submits that it is also not clear what the Defence means by not giving weight or sufficient weight to relevant considerations when discussing the monitoring

⁶⁵ Referral Hearing, 15 September 2006, T. 493.

⁶⁶ Appeal, para. 9.

⁶⁷ Appeal, para. 9.

⁶⁸ Appeal, para. 9.

⁶⁹ Appeal, para. 11.

⁷⁰ Appeal, para. 11.

⁷¹ Appeal, para. 11.

proceedings, as the Appeal Brief does not classify this issue as an error of law or fact.⁷³ The Prosecution argues that although the Appellant was found unfit to plead and stand trial, it was “without prejudice to any future criminal proceedings against him should his mental health condition change.”⁷⁴ The Prosecution further argues that this entire ground of appeal is based upon a hypothetical situation and as such, it is not a valid ground of appeal.⁷⁵ Therefore, the Prosecution submits that it should be dismissed.⁷⁶

(b) Discussion

27. At the outset, the Appeals Chamber recalls that in setting out its contentions on appeal, a party cannot merely repeat arguments that did not succeed before the Referral Bench, unless that party can demonstrate that rejecting them occasioned such an error as to warrant the intervention of the Appeals Chamber.⁷⁷ The Appeals Chamber notes that under this third ground of appeal the Defence merely re-argues an issue earlier put forward before the Referral Bench.

28. The Defence previously argued that continued monitoring could cause the Appellant’s mental state to deteriorate.⁷⁸ Consequently, the Referral Bench noted that “[t]he Defence opposes referral of this case exclusively on the basis that Serbian domestic procedures following referral would ‘derogate the already poor mental health’” of the Appellant.⁷⁹ After considering the submissions on the Appellant’s welfare, the Referral Bench was “satisfied that there are appropriate mechanisms in place in the Republic of Serbia to provide for the welfare of the Accused in view of his mental health condition at present and in the event that he continues to be unfit to stand trial.”⁸⁰ The Defence has not shown how the Referral Bench erred in reaching this conclusion.

29. In addition, the Defence submission that if monitoring by the OSCE⁸¹ were to result in a finding that the domestic proceedings do not meet the principles of a fair trial or are not in

⁷² Response, para. 11.

⁷³ Response, para. 11.

⁷⁴ Response, para. 12, referring to *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2, “Public Version of the Decision on the Accused’s Fitness to Enter a Plea and Stand Trial” 12 April 2006, p. 12.

⁷⁵ Response, para. 13.

⁷⁶ Response, para. 13.

⁷⁷ *Prosecutor v. Mitar Rasević and Savo Todović*, Case No. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todović’s Appeals Against Decisions on Referral Under Rule 11bis, 4 September 2006, para. 112; *Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Appeal Judgement, 29 July 2004, para. 13.

⁷⁸ See Confidential Addendum A to the Submission of the Defense In Accordance to [Sic] the Order of the Referral Bench from 17th July 2006, 11 August 2006, para. 2. Although this submission was made in a confidential filing, the Appeals Chamber notes that the Defence has reiterated its submission in the Appeal which is filed as a public document.

⁷⁹ Impugned Decision, para. 49.

⁸⁰ Impugned Decision, para. 62.

⁸¹ The Appeals Chamber agrees with the order expressed in the disposition of the Impugned Decision that the Prosecution is to continue its efforts to ensure the monitoring and reporting on the proceedings of this case.

compliance with human rights, the case could then be transferred to the International Tribunal and thus exacerbate the Appellant's paranoia, is premature and speculative.

30. For the foregoing reasons, the third ground of appeal is dismissed.

D. Fourth Ground of Appeal

31. Under the fourth ground of appeal, the Defence submits that the Referral Bench erred in law and in fact by not considering its written and oral submissions regarding the particular nature of the Appellant's case in light of his mental illness.⁸²

(a) Submissions

32. The Defence argues that because of the Appellant's serious mental illness, subjecting him to further examinations and criminal proceedings may result in stress, which in turn may have grave consequences for the Appellant such as deterioration of his mental state or suicide.⁸³ In support of this submission, the Defence has included excerpts from the reports of seven medical experts who have examined the Appellant since 23 October 2003 when he was transferred to the International Tribunal.⁸⁴ It submits that by failing to take this factor into account, the Referral Bench failed to give weight to relevant considerations upon which it exercised its discretion.⁸⁵

33. The Prosecution submits that the Defence does not precisely identify any alleged error of fact or law, or state how the alleged error invalidates the Impugned Decision.⁸⁶ The Prosecution submits that consequently, this ground of appeal cannot be reviewed and should be dismissed.⁸⁷

34. Regarding the reports, the Prosecution further argues that the Defence tries to introduce into the referral proceedings the record of the trial proceedings relating to the Appellant's mental health.⁸⁸ It contends that this is an irrelevant consideration on appeal because it is not part of the record before the Referral Bench.⁸⁹

⁸² Response, para. IV(A).

⁸³ Appeal, para. 13, 14

⁸⁴ Appeal, para. 14. The Defence includes excerpts detailing the evidence of Dr. Vera Petrović, T. 228-235, 15 March 2004; an Expert Report by Dr. Miroslav Goreta and Prof. Dunja Krajnović, 12 January 2004, 20 January 2005 and 2 November 2005; Expert Report by Dr. Dusan Kosović, February 2004; Expert Report by Dr. Vesna Rosić, 22 March 2005; Expert Report by Dr. Vladimir Ortakov-Ana Najman, 3 November 2005; Periodical of the Military Medical Academy Hospital in Belgrade.

⁸⁵ Appeal, para. IV(A)

⁸⁶ Response, para. 14.

⁸⁷ Response, para. 14.

⁸⁸ Response, para. 15.

⁸⁹ Response, para. 15.

(b) Discussion

35. The Appeals Chamber notes that the reports relied upon in support of the Defence contentions above were the basis of its arguments before the Referral Bench at the Referral Hearing.⁹⁰ The mere fact that the Impugned Decision does not refer to these reports which were consulted by the Referral Bench⁹¹ does not suffice to show that it did not consider them.

36. Further, the Referral Bench's mandate is to "solely and exclusively [...] determine whether the case should be referred to the authorities of a State".⁹² Considering that the Trial Chamber has already held that the Appellant is currently unfit to stand trial, and that its decision in this regard is without prejudice to any future criminal proceedings against him should his mental condition change, the Appellant will thus be subjected to future examinations for the determination of this purpose, whether or not his case is referred. Any arguments intended to challenge this decision should be directed towards the Trial Chamber. Similarly, any arguments other than those directed at referral would have clearly been *ultra vires* the mandate of the Referral Bench.

37. In light of the foregoing, the Appeals Chamber finds that the Defence has failed to show that the Referral Bench committed a discernible error by not considering, relevant factors in light of his mental illness. Accordingly, the fourth ground of appeal is dismissed.

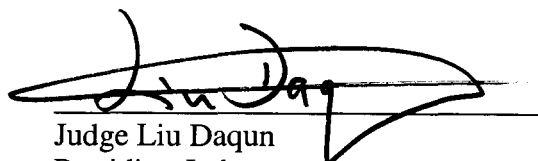
IV. DISPOSITION

On the basis of the foregoing, the Appeals Chamber,

DISMISSES the Defence's appeal in its entirety;

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

Done this 28th day of March 2007
At The Hague,
The Netherlands.



Judge Liu Daqun
Presiding Judge

[Seal of the International Tribunal]

⁹⁰ See for e.g., Referral Hearing, 15 September 2006, T. 478, 479, 482.

⁹¹ Referral Hearing, 15 September 2006, T. 480. The Appeals Chamber further notes that the Prosecution did not pose an objection to the use of the reports before the Referral Bench. For this reason, the Appeals Chamber will not consider its argument on appeal.

⁹² Rule 11bis(A).