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-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2

Date: 4 September 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **4 September 2006**

PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

DECISION ON SAVO TODOVIĆ'S APPEALS AGAINST DECISIONS ON REFERRAL UNDER RULE 11*bis*

Counsel for the Prosecution:
Ms. Susan L. Somers
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Counsel for the Appellant:
Mr. Aleksandar Lazarević

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

The Government of the Republic of Serbia
per: The Embassy of the Republic of Serbia 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 ("Appeals Chamber" and "International Tribunal", respectively) is seized of two appeals by Savo Todović ("Appellant") against the "Decision on Referral of Case under Rule 11*bis* with Confidential Annexes I and II", rendered by the Referral Bench on 8 July 2005 ("First Impugned Decision"), and the "Decision on Rule 11*bis* Referral" rendered by the Referral Bench on 31 May 2006 ("Second Impugned Decision").

I. PROCEDURAL BACKGROUND

2. The Appellant's notice of appeal against the First Impugned Decision was filed on 25 July 2005, setting forth six grounds of appeal and requesting, *inter alia,* that the case be tried before the International Tribunal.[1] Alternatively, if the Appeals Chamber determined that the case should be referred to a State, the Appellant seeks that the case be referred to a State that fulfils the conditions of Rule 11*bis* of the Rules, and preferably to the State of Serbia and Montenegro.[2] The Appellant's Brief was filed on 9 August 2005,[3] the Prosecution responded on 19 August 2005,[4] and the Defence filed its reply on 26 August 2005.[5]

3. On 23 February 2006, the Appeals Chamber rendered its Decision on Rule 11*bis* Referral where it found that the fact that the First Impugned Decision was based on the proposed Joint Amended Indictment, which was subject to challenge by the Appellant and yet to be accepted by the Trial Chamber as the operative indictment, was an error of law which invalidated the First Impugned Decision.[6] The Appeals Chamber quashed the First Impugned Decision with respect to

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[1] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Savo Todović's Defence Notice of Appeal, 25 July 2005, ("First Notice of Appeal"), para. 13(1).
[2] First Notice of Appeal, para. 13(2). The Appeals Chamber notes that the Appellant's submissions were made at a time when Serbia and Montenegro existed as one State.
[3] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Appellant's Brief, 9 August 2005 ("First Appeal Brief").
[4] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Prosecutor's Response Brief, 19 August 2005 ("First Response").
[5] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Defence Reply Brief, 26 August 2005 ("First Reply").
[6] The Appeals Chamber provided the following reasons for its decision: (a) it was not within the mandate of the Referral Bench to consider the merits of the Prosecution's motion for referral on the basis that the proposed Joint Amended Indictment would be the operative indictment for both Accused and in so doing the Referral Bench pre-judged the Trial Chamber's decision on the proposed Joint Amended Indictment; (b) once cases have been referred by the International Tribunal to Bosnia and Herzegovina ("BiH") pursuant to Rule 11*bis* of the Rules, the BiH Prosecutor may only initiate criminal prosecution in the State Court of BiH on the basis of an indictment that has already been confirmed by the International Tribunal; and (c) if the case had been transferred pursuant to the Impugned Decision, in accordance with the "Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH" ("Law on Transfer"), the BiH Prosecutor would only be able to initiate criminal proceedings against the Appellant on the basis of the original confirmed indictment

the Appellant, remitted the matter to the Referral Bench, and directed the latter to defer issuance of any further decision on referral of this case until the Trial Chamber had rendered a decision on Savo Todović's Defence Preliminary Motion on the Form of the Joint Amended Indictment, filed on 27 June 2005 ("Motion on the Form of the Joint Amended Indictment").[7]

4. On 21 March 2006, the Trial Chamber rendered a decision on the Motion on the Form of the Joint Amended Indictment, whereby it granted the motion in part and ordered the Prosecution to file an amended indictment and supplemental supporting materials.[8] On 24 March 2006, the Prosecution filed the Second Joint Amended Indictment and requested the Trial Chamber to adopt it as the operative indictment.[9] On 31 March 2006, the Appellant filed a motion raising objections to the Second Joint Amended Indictment and requesting that further amendments be made.[10] On 7 April 2006, the Trial Chamber rejected the Appellant's request for further amendments to the Second Joint Amended Indictment and ordered that the latter should be the operative indictment in the case.[11]

5. On 27 April 2006 the Trial Chamber ordered the parties to file submissions addressing the effect that the Second Joint Amended Indictment should have upon the conclusions reached in the First Impugned Decision.[12] The Prosecution filed its submissions on 4 May 2006.[13] The Appellant filed his submissions on 11 May 2006.[14]

6. In its Second Impugned Decision, the Referral Bench considered that the parties had agreed that the amendments to the Second Joint Amended Indictment have no effect upon the findings reached in the First Impugned Decision and found "that the conclusions reached by the Referral

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against him. *Prosecutor v. Savo Todović,* Case No.: IT-97-25/1AR11*bis*.1, Decision on Rule 11*bis* Referral, 23 February 2006 ("*Todović* 23 February 2006 Appeal Decision"), paras 14-17.

[7] *Todović* 23 February 2006 Appeal Decision, para. 19.

[8] *Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006, p. 12.

[9] *Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Prosecution's Submission of Second Joint Amended Indictment with Annex A and Confidential Annex B, *Partly Confidential,* 24 March 2006, para. 17. The Second Joint Amended Indictment was filed as Annex A.

[10] *Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Savo Todović Motion for Leave to File a Response and the Defence Response to "Prosecution's submission of Second Joint Amended Indictment with Annex A and Confidential Annex B," 31 March 2006.

[11] *Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Order on Operative Indictment, 7 April 2006, p. 3.

[12] *Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Order to File Submissions on Effect of Operative Indictment in Rule 11*bis* Referral of the Case Against the Accused Savo Todović, 27 April 2006.

[13] *See Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Prosecutor's Submission Pursuant to Chamber's Order to File Submissions on Effect of Operative Indictment in Rule 11*bis* Referral of the Case Against the Accused Savo Todović of 27 April 2006, 4 May 2006.

[14] *See Prosecutor v. Savo Todović and Mitar Rašević,* Case No.: IT-97-25/1-PT, Defence Submissions on Effect of Operative Indictment in Rule 11*bis* Referral of the Case Against the Accused Savo Todović, 11 May 2006 ("Todović's Submissions on Effect of Operative Indictment").

Bench with respect to the gravity of the crimes charged and the level of responsibility of the [Appellant] and with respect to the consideration of referral to [BiH] remain unchanged from those set forth in the [First Impugned Decision]".[15] Thus, it ordered "that the disposition of the [First Impugned Decision] be reinstated insofar as it pertains to Savo Todović."[16]

7. On 15 June 2006, the Appellant filed a notice of appeal against the Second Impugned Decision, setting forth one ground of appeal and requesting, *inter alia,* that the case be tried before the International Tribunal.[17] Alternatively, if the Appeals Chamber determined that the case should be referred to the authorities of a State, the Appellant seeks that the case be referred to the State of Serbia and Montenegro. On 16 June 2006, the Appellant filed a clarification explaining that the ground of appeal set out in the Second Notice of Appeal "is being filed in addition to the six grounds of appeal set forth in the [First Notice of Appeal] and argued in the [First Appeal Brief]".[18] The Appellant's Brief was filed on 30 June 2006,[19] the Prosecution's response was filed on 10 July 2006,[20] and the Appellant replied on 14 July 2006.[21]

II. STANDARD OF REVIEW

8. The Appeals Chamber recalls that a decision on whether or not a case should be referred to the authorities of a State which meets the requirements set out in Rule 11*bis* of the Rules is a discretionary one.[22] Accordingly, the party challenging a decision pursuant to Rule 11*bis* 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.[23]

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[15] Second Impugned Decision, p. 4.
[16] *Ibid.*, p. 5.
[17] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Savo Todović's Defence Notice of Appeal, 15 June 2006 ("Second Notice of Appeal"), paras 9-10.
[18] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, Savo Todović's Defence Clarification Regarding Notice of Appeal Filed on 15 June 2006, 16 June 2006, para. 2.
[19] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.2, Appellant's Brief, 30 June 2006 ("Second Appeal Brief").
[20] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.2, Prosecution's Response Brief, 10 July 2006 ("Second Response").
[21] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.2, Defence Reply Brief, 14 July 2006 ("Second Reply").
[22] *Prosecutor v. Željko Mejakić et al.,* Case No.: IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*, 7 April 2006 ("*Mejakić* Rule 11*bis* Appeal Decision"), para. 10.
[23] *Mejakić* Rule 11*bis* Appeal Decision, para. 10.

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

A. First Ground of Appeal

9. The Appellant submits that the Referral Bench erred in law and in fact, in concluding that the gravity of the crimes charged against him and his level of responsibility are not *ipso facto* incompatible with referral of the case.[24]

(i) Temporal scope of the crimes charged against the Appellant

(a) Submissions

10. The Appellant argues the Referral Bench erred in its analysis of the gravity of the crimes charged and his level of responsibility, *inter alia,* on the ground that it referred only to part of the period covered by the Joint Amended Indictment, *i.e.,* April 1992 to August 1993, and failed to mention that from August 1993 until October 1994, the Appellant continued to be a senior member of the prison staff.[25]

11. The Prosecution responds that the Referral Bench did not err in finding that the Joint Amended Indictment charges the Appellant for crimes committed from April 1992 to August 1993, as the Joint Amended Indictment does not allege specific crimes against the Appellant after July 1993. Thus, the fact that the Appellant remained as an employee at KP Dom until October 1994, has no bearing on the temporal scope of the crimes charged. [26]

12. In reply, the Appellant states that the Prosecution's submission to the effect that the Joint Amended Indictment does not allege that he committed specific crimes after July 2003 is untrue.[27]

(b) Discussion

13. As a preliminary matter, the Appeals Chamber notes that the passage of the Joint Amended Indictment relied upon by the Appellant has been amended as follows: "[i]n the period from 10 August 1993 until 31 October 1994, [the Appellant], continued to be an Assistant Warden in KP Dom."[28] However, this amendment has no bearing upon the Referral Bench's assessment of the gravity of the crimes charged against the Appellant and his level of responsibility. When assessing

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[24] First Notice of Appeal, p. 3.
[25] First Appeal Brief, para. 21.
[26] First Response, para. 2.4; *see also* para. 2.20. Whereby the Prosecution submits that the Joint Amended Indictment does not allege specific crimes against the Appellant "at any time after August 1993."
[27] First Reply, para. 9 referring to paragraphs 12, 19(1)(i), 21, 42, 47, 51, 52 and Schedule E of the Joint Amended Indictment.
[28] Second Joint Amended Indictment, para. 2.

these factors, the Referral Bench properly considered only those facts alleged in the Joint Amended Indictment before reaching a determination concerning the appropriateness of referring the case to a national jurisdiction.[29] Consequently, the finding that the level of responsibility of the Appellant and the gravity of the crimes charged against him were not *ipso facto* incompatible with the referral of his case to the authorities of a State that met the requirements set out in Rule 11*bis*(A) of the Rules, was based on its consideration of *all* the facts alleged in the Joint Amended Indictment. The Referral Bench correctly considered the temporal scope of the crimes charged against the Appellant as one of several relevant factors in reaching its determination. Thus, the Appellant has failed to show that the Referral Bench committed any error in this respect.

(ii) Geographic scope of the crimes charged against the Appellant

(a) Submissions

14. The Appellant submits that the Referral Bench erred in considering the "limited geographic scope of the crimes charged" when determining the gravity of the crimes and his responsibility.[30] In support of this argument, he compares his case to other cases which were tried before the International Tribunal despite the fact that the charges brought against the accused in those cases were less grave and rather limited in geographic scope.[31]

15. The Prosecution responds that the geographic scope was only one amongst a number of factors examined by the Referral Bench to determine the gravity of the crimes charged.[32] In reply, the Appellant states that he never submitted that the Referral Bench relied *solely* on the geographic scope to determine the gravity of the crimes charged.[33]

(b) Discussion

16. The Appeals Chamber considers that, based on the Joint Amended Indictment, it was reasonable for the Referral Bench to conclude that the crimes alleged against the Appellant were limited in geographic scope to the region of Foča.[34] Accordingly, the Appeals Chamber does not find that "the Referral Bench erred in relying on the limited geographic scope of the crimes charged" as alleged by the Appellant.[35] The Appeals Chamber finds that the Appellant's allegations

[29] *See* First Impugned Decision, para. 22.
[30] First Appeal Brief, para. 23.
[31] *Ibid.*, para. 24 referring to the *Halilović* and *Orić* cases.
[32] First Response, para. 2.8.
[33] First Reply, para. 13.
[34] *See* First Impugned Decision, para. 23.
[35] First Appeal Brief, para. 23.

concerning paragraph 23 of the First Impugned Decision are unfounded, and that he has failed to show that the Referral Bench committed any error.

(iii) Appellant's position in the joint criminal enterprise

(a) Submissions

17. The Appellant acknowledges that the Referral Bench rightly concluded that "he could not be regarded as one of the 'most senior leaders suspected of being most responsible.'"[36] However, he points out that the Referral Bench in the *Dragomir Milošević* case held 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.[37] Against this backdrop, he concedes that according to the position he occupied, "he can indeed be characterized as an intermediary actor,"[38] nonetheless, he argues that if his position is assessed "in conjunction with the gravity of the crimes with which he is charged, particularly in terms of the [joint criminal enterprise], it is evident that his case is not appropriate for referral."[39]

18. The Prosecution argues that the Referral Bench did not err in considering the Appellant's position in the joint criminal enterprise, as this does not alter the finding that his level of responsibility is "proper for referral—lower to intermediate-level."[40] The Prosecution notes that the Appellant was a "prison administrator not of a military rank who received orders from 'outside authorities' and 'with the consent of other members of the senior management, in particular Milorad Krnojelac.'"[41]

(b) Discussion

19. The Appellant relies heavily upon the following holding in the *Dragomir Milošević* Rule 11*bis* Decision:

> The Referral Bench does not consider, however, that the phrase "most senior leaders" used by the Security Council is restricted to individuals who are "architects" of an "overall policy" which forms the basis of alleged crimes. Were it true that only cases against military commanders, who were at the highest policy-making levels of an army —in the case of the VRS the Republika Srpska highest political and supreme military levels —could not be referred under Rule 11 *bis*, this would diminish the true level of responsibility of many commanders in the field and those at staff level. This does not appear to be required by the resolutions of the

[36] *Ibid.*, para. 26.
[37] *Ibid.*, para. 28 referring 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 ("*Dragomir Milošević* Rule 11*bis* Decision"), para. 22.
[38] *Ibid.*, para. 29.
[39] *Id.*
[40] First Response, para. 2.12.
[41] *Ibid.*, para. 2.13.

Security Council nor is it their apparent effect.[42]

20. When addressing a similar argument in the *Janković* case, the Appeals Chamber noted that the *Dragomir Milošević* Rule 11*bis* Decision had held "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.'"[43] The Appeals Chamber stated that it "accept[ed] this approach," and made reference to the Prosecution's argument concerning the significant difference between the indictment against Gojko Janković and the indictment against Dragomir Milošević.[44]

21. When evaluating Dragomir Milošević's position and function, the Referral Bench in that case took into account that: (a) he was the permanent commander of the Sarajevo-Romanija Corps over a period exceeding a year; (b) the highest military command was only one rank above him, and (c) he negotiated, signed and implemented anti-sniping and local cease-fire agreements, participated in negotiations relating to heavy weapons, and controlled access of the United Nations Protection Force to territory around Sarajevo.[45] In contrast, the Appellant acknowledges that the Referral Bench in this case "*correctly* held that in light of the Appellant's positions within the overall chain of possible actors he could not be regarded as one of the 'most senior leaders suspected of being most responsible'"[46] and admits that "he can indeed be characterized as an intermediary actor."[47]

22. Considering that the International Tribunal is to concentrate on the prosecution and trial of the most senior leaders suspected of being the most responsible for crimes within its jurisdiction, and transfer the cases involving those individuals who may not bear this level of responsibility to competent national jurisdictions,[48] and in light of the Appellant's admissions, the Appeals Chamber finds that the Appellant has failed to demonstrate that the Referral Bench committed any error.

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[42] *Dragomir Milošević* Rule 11*bis* Decision, para. 22.
[43] *Prosecutor v. Gojko Janković*, Case No.: IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral, 15 November 2005, ("*Janković* Rule 11*bis* Appeal Decision"), para. 20 citing *Dragomir Milošević* Rule 11*bis* Decision at para. 22.
[44] *Janković* Rule 11*bis* Appeal Decision, para. 20.
[45] *Dragomir Milošević* Rule 11*bis* Decision, para. 23.
[46] First Appeal Brief, para. 26 (emphasis added).
[47] *Ibid.*, para. 29.
[48] *See* Security Council resolution 1503 (2003), U.N. Doc. S/RES/1503 (2003), 28 August 2003.

(iv) Number of persons allegedly affected by the crimes charged against the Appellant

(a) Submissions

23. The Appellant further submits that the Referral Bench failed to take into account the significant number of persons allegedly affected by the crimes charged against him, as the Referral Bench in the *Dragomir Milošević* case did.[49] In support of this argument, he points out that the Joint Amended Indictment refers to the "confinement of thousands of Muslims and other non-Serbs, an unspecified number of killings, beatings, torture, enslavement, deportation and forcible transfer."[50]

24. The Prosecution responds that the Referral Bench indeed considered the number of persons affected by the crimes alleged against the Appellant when it "found that the [Joint Amended Indictment] alleged [the commission of] crimes against a 'large number of detainees.'"[51] With respect to the comparison with the *Dragomir Milošević* case, the Prosecution points out some of the "stark differences between the two indictments."[52]In reply, the Appellant contends that the indictment against Dragomir Milošević alleges that the crimes charged took place within a period of fifteen months.[53]

(b) Discussion

25. The Appeals Chamber disagrees with the Appellant's assertion that the Referral Bench failed to take into account the number of persons allegedly affected by the crimes charged against him. As previously noted, when assessing the gravity of the crimes charged against the Appellant and his level of responsibility, the Referral Bench properly considered only those facts alleged in the Joint Amended Indictment when reaching a determination concerning the appropriateness of referring the case to a national jurisdiction.[54] Thus, it was on the basis of its consideration of *all* the facts alleged in the Joint Amended Indictment — in addition to being satisfied that the other requirements set out in Rule 11*bis* of the Rules were met— that the Referral Bench reached its conclusion. This means that the Referral Bench properly considered the alleged persecution, torture, beating, wilful killing, murder, imprisonment, inhumane acts, cruel treatment, and enslavement of a large number of detainees over a significant length of time,[55] as well as Schedules A to E — attached to the Joint Amended Indictment — which list the alleged victims of arbitrary beatings,

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[49] First Appeal Brief, paras 30, 31.
[50] *Ibid.*, para. 31.
[51] First Response, para. 2.16.
[52] *Ibid.*, para. 2.17. For instance, the Prosecution notes that the indictment against Dragomir Milošević alleges, *inter alia*, a forty – four month military strategy launched against Sarajevo.
[53] *See* First Reply, paras 21- 22.
[54] *See supra* para. 13 referring to First Impugned Decision, para. 22.
[55] *See* First Impugned Decision, para. 23 (emphasis added).

detainees who were beaten during interrogations at the KP Dom, detainees who died as a result of beatings and torture at the KP Dom, detainees who died or suffered physical and/or psychological effects due to the living conditions at the KP Dom, and detainees who were forced to work.[56]

26. In light of the foregoing, the Appeals Chamber finds that the Appellant has not established that the Referral Bench failed to take into account the alleged large number of persons who were affected by the crimes charged against him.

(v) Whether the crimes charged against the Appellant have been previously tried before the International Tribunal

(a) Submissions

27. Finally, the Appellant states that the crimes charged in the Joint Amended Indictment have not been sufficiently tried and fully addressed before the International Tribunal.[57] He concludes that the combination of the time period covered by the Joint Amended Indictment, the gravity of the crimes charged, the positions allegedly held by the Appellant, his level of responsibility, and the number of persons affected by the crimes alleged against him, render his case incompatible with referral under Rule 11*bis* of the Rules.[58]

28. The Prosecution submits that whether the crimes charged in the Joint Amended Indictment have already been tried before the International Tribunal is not relevant to a determination as to the gravity of the crimes or the level of responsibility of an accused.[59]

29. The Appellant replies that, based upon the *Dragomir Milošević* Rule 11*bis* Decision, "the situation where the crimes charged have not been previously tried before the [International] Tribunal, as is the case here, may have certain impact and weigh[t] in opposition to the referral."[60]

(b) Discussion

30. The Appeals Chamber notes that the Appellant's submission that the crimes charged in the Joint Amended Indictment have not been sufficiently tried and fully addressed before the International Tribunal, does not amount to an allegation of error on the part of the Referral Bench.[61] As admitted by the Appellant: "nowhere in its Appellant's Brief did the Defence state that it was a

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[56] *See ibid.*, footnote 51.
[57] First Appeal Brief, para. 34.
[58] *Ibid.*, para. 36.
[59] First Response, para. 2.19.
[60] First Reply, para. 29.
[61] *See Dragomir Milošević* Rule 11*bis* Decision, para. 20.

relevant factor to be considered or that the Referral Bench erred in failing to consider it."[62] In fact, the Appellant acknowledges that pursuant to Rule 11*bis* of the Rules, the Referral Bench was not required to consider whether the crimes charged against him had previously been sufficiently tried before the International Tribunal.[63] Accordingly, the Appeals Chamber considers that there is no need to discuss this issue further.

31. For the foregoing reasons, the Appellant's first ground of appeal is dismissed.

B. Second Ground of Appeal

32. The Appellant argues that the Referral Bench erred in law "in relying on a 'significantly greater nexus' [BiH] has with the trial of the [Appellant] than Serbia and Montenegro, which is not in accordance with Rule 11*bis*(A) of the Rules."[64]

(a) Submissions

33. The Appellant does not dispute that BiH has a "greater nexus" with his case; in fact he claims that the nexus is "too great" and thus, "much more likely to be an obstacle to a fair trial."[65] He argues that because: (a) the Referral Bench is able to order a referral *proprio motu;* (b) Serbia and Montenegro has jurisdiction over the Appellant's case as required by Rule 11*bis*(A)(iii) of the Rules, and (c) Serbia and Montenegro stated that it was willing and adequately prepared to accept his case for trial, the Referral Bench should have properly informed itself and fully examined whether Serbia and Montenegro was indeed adequately prepared to take the case in order to determine the State to which referral should be ordered.[66] Instead, he argues, the Referral Bench found that BiH has a significantly greater nexus with the Appellant's case, "and moved on to consider whether the referral to BiH was appropriate, thereby making an error in law which invalidated the [First Impugned] Decision."[67]

34. The Appellant further 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 failed to address this matter.[68] He states that the only test to be applied when

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[62] First Reply, para. 26.
[63] First Appeal Brief, para. 32.
[64] First Notice of Appeal Brief, para. 8.
[65] First Appeal Brief, para. 50.
[66] *Ibid.*, paras 38, 39, 40, 44. The Appeals Chamber recalls that the Appellant's submissions were made at a time when Serbia and Montenegro existed as one State.
[67] *Ibid.*, para. 41.
[68] *Ibid.*, para. 42.

determining the State to which referral should be ordered is a combination of the requirements set out in Rule 11*bis*(A) and (B) of the Rules.[69]

35. Relying upon some statements allegedly made by Mrs. Merdzida Kreso — president of the State Court of BiH — during the hearing held in the *Mejakić* case pursuant to Rule 11*bis* of the Rules, the Appellant argues that in contrast with BiH, Serbia and Montenegro has a coherent legal system, and adds that its ability and readiness to try war crimes cases have already been confirmed by the Prosecutor.[70]

36. The Prosecution submits that the Referral Bench did not err in law by "engaging in the 'nexus' analysis prior to assessing BiH's capacity to accept the referred case,'"[71] because "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 state of the forum."[72] It further submits that "the Referral Bench did not err in its finding, pursuant to a nexus analysis, that the appropriate State for referral is BiH,"[73] for the following reasons: (a) "pursuant to the territoriality principle, crimes, when possible, should be tried where they are committed;"[74] (b) even though the Appellant is a national of both BiH and Serbia and Montenegro, at the time when the crimes were committed, he was a Bosnian national and he only obtained the Serbian nationality while in custody at the United Nations Detention Unit in the Hague, therefore his real and effective nationality is that of BiH, and (c) the victims of the alleged crimes were and still are in BiH.[75]

37. With respect to the Appellant's submissions regarding Mrs. Kreso's statements, the Prosecution submits that they are "irrelevant to his assertion that the Referral Bench erred in law in engaging in a 'significantly greater nexus with BiH' approach.'"[76] Quoting the complete relevant passages from the *Mejakić* Rule 11*bis* Hearing, the Prosecution further submits that the Appellant's assertions are misleading, taken entirely out of context and not supported by the transcripts of the hearing.[77]

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[69] *Ibid.*, para. 43.
[70] *Ibid.*, paras 46-49. The Appellant refers to the following statement by Ms. Kreso: "Transferring cases such as this one would be particularly detrimental because the process of building trust and creating an atmosphere for the reconciliation of our peoples would be much more difficult." *Prosecutor v. Mejakić et al.*, Rule 11*bis* Hearing, 3 March 2005 ("*Mejakić* Rule 11*bis* Hearing"), T. 221. "And I have to point out that the war devastated our judicial system," *Ibid.*, T, 224.
[71] First Response, para. 3.1.
[72] *Ibid.*, para. 3.2 citing Ian Brownlie, *Principles of Public International Law*, 6th ed., p. 305.
[73] *Ibid.*, para. 3.4.
[74] *Ibid.*, para. 3.3.
[75] *Ibid.*
[76] *Ibid.*, para. 3.5.
[77] *Ibid.*, paras 3.6-3.10.

38. In reply, the Appellant claims that "the disputed paragraph contains nothing to suggest that the Defence was trying to misinterpret Mrs. Kreso's words."[78] He further adds that the assertions made by representatives of the State Court of BiH and the Prosecution to the effect that BiH has "a fully competent system" and its courts are "quite able" cannot be substantiated because there is no practice to rely upon.[79]

(b) Discussion

39. As a preliminary matter, the Appeals Chamber notes that the parties' submissions and the First Impugned Decision were filed at a time when Serbia and Montenegro existed as one State. Subsequently, and following a referendum, a declaration on the independence of the Republic of Montenegro was passed by its Parliament on 3 June 2006. However, the Appeals Chamber considers that this has no impact on the decision of the Referral Bench to transfer the case to BiH and not to Serbia.

40. First, the Appeals Chamber notes that the First Impugned Decision correctly states that neither the Appellant nor Serbia had *locus standi* to file a formal request for referral of the case to Serbia pursuant to Rule 11*bis* of the Rules.[80] The Referral Bench also implicitly recognised that it was not bound by the Prosecution's request to refer the case to BiH and although it acknowledged having the power to order referral to a State *proprio motu,* it found that "it would normally be appropriate to do so only in an obvious case."[81]

41. Pursuant to these holdings, the Referral Bench considered the specific circumstances and relevant factors of the present case, and found as follows:

> The crimes in the [Joint Amended Indictment] are alleged to have been committed by the two Accused who, both at the time of the alleged crimes and now, are citizens of Bosnia and Herzegovina. The crimes are alleged to have been committed against nationals of Bosnia and Herzegovina and in the territory of Bosnia and Herzegovina. [...] For the Accused Todović, the only apparent connecting factor of his case to Serbia and Montenegro is that he was recently granted citizenship of that State. The weight to be given this and the State's consequential claim of *parens patriae* must be considered in the context of the timing of the grant of citizenship. The Accused remains also a citizen of Bosnia and Herzegovina. He is alleged to have committed crimes in Bosnia and Herzegovina from 1992 to 1994, for which he was indicted in 1997, and which led to his surrender to the Tribunal from Bosnia and Herzegovina in 2005. Only after his surrender, while in detention in The Hague, did the Accused seek and acquire citizenship of Serbia and Montenegro, which was granted only a few weeks before the hearing of this Motion for Referral. In the view of the Referral Bench, the nexus with Serbia and Montenegro is much weaker with respect to the individual case of each Accused than the nexus with Bosnia and Herzegovina. Having regard to the circumstances of the case, the arguments in favour of referral

[78] First Reply, para. 35.
[79] *Ibid.*, para. 36.
[80] First Impugned Decision, para. 31; *see Janković* Rule 11*bis* Appeal Decision, para. 32.
[81] First Impugned Decision, para. 31.

proprio motu to Serbia and Montenegro are comparatively of little weight.[82]

42. As in the instant case, the Referral Bench in the *Janković* case considered the appropriateness of the referral of Gojko Janković's case to the authorities of BiH in light of all the relevant factors, after it had determined that BiH had a "significantly greater nexus" with him and the offences alleged against him. The Referral Bench in that case concluded that it would only consider whether it should act *proprio motu* to refer the case to Serbia and Montenegro, if there were significant problems with the referral of the case to BiH.[83] The Appeals Chamber did not find that this approach was erroneous, and held that the Referral Bench had correctly relied on the "significantly greater nexus" of Gojko Janković's case to BiH rather than Serbia and Montenegro.[84] The Appeals Chamber stated that even if Serbia and Montenegro had fulfilled the requirement set out in the first part of Rule 11*bis*(A)(iii) of the Rules, *i.e.*, "having jurisdiction," the Referral Bench would not have erred in not referring the case to the authorities of Serbia and Montenegro because there is no hierarchical order between Rule 11*bis*(A)(i), (ii) and (iii) of the Rules.[85]

43. The Appeals Chamber also held 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 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.[86]

The Appeals Chamber considers that the First Impugned Decision is consistent with these findings. The Referral Bench exercised its discretion to choose BiH as the State to which the Appellant's case should be referred, based, *inter alia,* on the following facts and circumstances: (a) the crimes are alleged to have been committed in BiH against its nationals, (b) the Appellant surrendered to the International Tribunal from BiH in 2005 and (c) the Appellant was a citizen of BiH when the crimes charged against him were allegedly committed and he still is at present.[87]

44. Consequently, and pursuant to the *Janković* Rule 11*bis* Appeal Decision, the Appeals Chamber considers that the Referral Bench in the instant case, did not err when it relied upon the

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[82] *Ibid.*, para. 32.
[83] *Prosecutor v. Gojko Janković,* Case No.: IT-96-23/2-PT, Decision on Referral of Case Under Rule 11*bis* With Confidential Annex, 22 July 2005, para. 26.
[84] *Janković* Rule 11*bis* Appeal Decision, para. 37.
[85] *Ibid.*
[86] *Ibid.*, para. 33.

fact that BiH has a "significantly greater nexus" with the Appellant's case than Serbia, and concluded that "[o]nly if there are significant problems with this will the Bench come to consider whether it should act *proprio motu* to refer the case to Serbia and Montenegro."[88]

45. For the foregoing reasons, the Appeals Chamber finds that the Appellant fails to show that the Referral Bench erred in finding that "[h]aving regard to the circumstances of the case, the arguments in favour of referral *proprio motu* to Serbia and Montenegro are comparatively of little weight,"[89] and was not required to "treat [Serbia and Montenegro] and BiH equally and to properly inform itself and to fully examine whether [Serbia and Montenegro] was indeed adequately prepared to take the case."[90]

46. With respect to the Appellant's argument to the effect that the Referral Bench failed to address 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 priority,"[91] the Appeals Chamber observes that in contrast with the *Mejakić* case where the Prosecution had argued that Rule 11*bis*(A) of the Rules prescribes a hierarchy of states for the referral of cases,[92] such argument was not raised in the present case. A Referral Bench is not required to deal with a matter which the parties had not raised before it unless it considers those matters to be vital to the issues it has to decide upon. Accordingly, the Appellant cannot claim that the Referral Bench "failed" to address a matter which was not brought before it.

47. A review of Ms. Kreso's submissions at the *Mejakić* Rule 11*bis* Hearing shows that the portions of her statements relied upon by the Appellant, were taken out of context.[93] As noted by the Prosecution, Ms. Kreso was in fact expressing her view about transferring a case such as the *Mejakić* case to neighbouring countries, as opposed to BiH, which she claimed would be particularly detrimental for trust-building and reconciliation processes.[94] Moreover, the Appeals

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[87] *See* First Impugned Decision, para. 32.
[88] *Ibid.*, para. 33.
[89] *Ibid.*, para. 32.
[90] First Appeal Brief, para. 40.
[91] *Ibid.*, para. 42.
[92] *See Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis*, 20 July 2005, para. 40.
[93] *See Mejakić* Rule 11*bis* Hearing, T. 220, line 19 to T. 221 line, 11.
[94] *See* First Response, para. 3.6. The Appeals Chamber notes that the fact that Ms. Kreso was expressing concern about transferring the case to neighboring countries and not to BiH, was clarified later on by the following question posed by Judge Kwon:
"JUDGE KWON: Perhaps while we are waiting, can I raise this: For the sake of the record, Madam President, the transcript says that you said, in page 76 from line 16 to 17, I quote: "Transferring cases such as this one would be particularly detrimental because" -- blah, blah, blah. *But that is quite opposite to what you are saying.* Could you remember what you did say at the time? MS. KRESO: [Interpretation] It would be detrimental to the confidence-building process or the process of the restoration of confidence.

Chamber considers that the Appellant's submissions concerning Mrs. Kreso's statements are not relevant to the second ground of appeal, and thus the Appeals Chamber will not discuss them further.

48. For the foregoing reasons, the Appellant's second ground of appeal is dismissed.

C. Third Ground of Appeal

49. The Appellant submits that the Referral Bench erred in law and in fact by failing to properly inform itself on a number of fair trial elements and declaring itself satisfied that the laws applicable to proceedings against the Appellant in BiH provide an adequate basis to ensure compliance with the requirements for a fair trial.[95]

50. In general, the Appellant argues that the Referral Bench focused on whether there was a legal framework in place, instead of assessing whether such a framework was in fact implemented.[96] He claims that a legal structure in itself is not sufficient to guarantee a fair trial.[97]

51. In his second notice of appeal against the Second Impugned Decision the Appellant submits that the Referral Bench erred in law and in fact, "by failing to properly inform itself on a number of fair trial elements and in failing to properly examine whether the Courts of [BiH] are adequately prepared to accept the case as required by Rule 11*bis*(A)(iii) of the Rules."[98] Thus, the appeal against the Second Impugned Decision will be addressed after considering the arguments advanced under the third ground of appeal against the First Impugned Decision.

(i) The Appellant's right to have adequate time and facilities to prepare his defence and to counsel of his own choosing

(a) Submissions

52. The Appellant notes that when the Referral Bench addressed his concerns with regards to the time required for the preparation of his defence, it stated that such preparation could begin before a plea was entered, however, he submits that the Referral Bench: (a) failed to consider the

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JUDGE KWON: What is detrimental, transferring the case?
MS. KRESO: [Interpretation] Yes. *That is to say, the courts in Bosnia and Herzegovina, especially the court of Bosnia and Herzegovina, are quite able.* And I have to point out that the war devastated our judicial system, and if such cases are referred to us, we are given a chance - and I appeal to you, Your Honours, to do this - give us a chance to prove not only to the people at home but also the international community that we are able to look the truth in the face and that we are able to issue both convictions and acquittals, that we are able to justify the confidence that the international community has placed in us.
JUDGE KWON: Thank you, Madam Kreso. I think I can follow." *See Ibid.*, T. 224 (emphasis added).
[95] First Notice of Appeal, para. 9.
[96] First Appeal Brief, para. 55.
[97] *Ibid.*, para. 56.

volume of the materials that need to be reviewed in preparation of his defence;[99] (b) failed to fully inform itself about a detainee's communication with his counsel, rather than just making reference to Article 3 on the Law of BiH on Execution of Criminal Sanctions, Detention, and other Measures ("BiH Law on Detention"),[100] and (c) erred in being satisfied that there were funds available to pay for an "appropriate defence team."[101] The Appellant points out that BiH provided no evidence concerning its budget.[102] Finally he adds that, since the Referral Bench "made no finding as to whether sufficient funds would be available to guarantee the right to a defence" it committed an error of law which invalidated the First Impugned Decision.[103]

53. The Prosecution responds that in the *Janković* case, the Government of BiH provided the Referral Bench with a payment scale for defence counsel pursuant to the laws in place.[104] It further submits that "remuneration for court appointed counsel is a function exclusively for the national court system."[105]

54. In reply, the Appellant points out the differences between the International Tribunal's budget for the lowest complexity level cases, and the annual legal aid budget of the State Court of BiH as submitted by the government of BiH in the *Stanković* case.[106]

(b) Discussion

55. Bearing in mind that the same arguments have previously been dismissed by the Appeals Chamber,[107] it must be emphasized that an allegation of an error of law which has no possibility of resulting in an impugned decision being quashed or revised may be rejected on that ground.[108] Thus, pursuant to the findings of the Appeals Chamber in the *Stanković* and *Janković* cases the Appellant's arguments must fail.[109]

56. The Appeals Chamber finds that the Appellant has failed to show that the Referral Bench erred by focusing on whether there was a legal framework in place in BiH. The Referral Bench

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[98] Second Notice of Appeal, para. 9.
[99] First Appeal Brief., para. 63.
[100] *Ibid.*, para. 65.
[101] *Ibid.*, para. 67.
[102] *Ibid.*, para. 69.
[103] *Ibid.*, para. 72.
[104] First Response, para. 4.9.
[105] *Ibid.*, para. 4.10.
[106] First Reply, para. 44.
[107] *Prosecutor v. Radovan Stanković,* Case No.: IT-96-23/2-AR11*bis*.1, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Rule 11*bis* Appeal Decision"), para. 21; *Janković* Rule 11*bis* Appeal Decision, para. 44.
[108] *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-A, Appeal Judgement, signed 17 September 2003, filed 5 November 2003, para. 10.
[109] *See Stanković* Rule 11*bis* Appeal Decision, para. 21; *Janković* Rule 11*bis* Appeal Decision, para. 44; *see also Prosecutor v. Paško Ljubičić,* Case No.: IT-00-41-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11*bis*, 4 July 2006 ("*Ljubičić* Rule 11*bis* Appeal Decision"), para. 25.

correctly considered whether it was satisfied that the Appellant would receive a fair trial by establishing that the legislation in BiH allows for adequate time and facilities for the preparation of a defence. That is all it was required to do pursuant to Rule 11*bis* of the Rules. In doing so, the Referral Bench considered the submissions of BiH "in their entirety in both this case and the [*Stanković*] case"[110] and examined Articles 7, 39(1), 46, 48(1), and 78(2)(b) of the Criminal Procedure Code of Bosnia and Herzegovina ("BiH CPC") and Articles 34(2) and 34(3) of the Bosnia and Herzegovina Law on the State Court ("Law on the Sate Court of BiH").[111] After satisfying itself that these provisions addressed the Appellant's concern, the Referral Bench did not err in law or in fact in concluding that: "[i]t is not for the Referral Bench to determine how these provisions will be applied, as this is a matter for the State Court if the case is referred. However, the guarantee of Article 7 fully addresses the contention that the time for preparation of a Defence, as envisaged by the current legislation in [BiH], is inadequate."[112]

57. With respect to the alleged failure of the Referral Bench to consider the extensive documentary evidence and witness testimony from other cases that the Appellant needs to review in preparation of his defence, the Appeals Chamber notes that the First Impugned Decision did address this issue and correctly concluded that "in any event, the same concern would arise, if at all, whether the [Appellant] were tried in the [International] Tribunal or in the State Court of [BiH]."[113]

58. Similar to paragraph 55 above, the Appeals Chamber further finds that the Appellant has failed to show that the Referral Bench failed to fully inform itself about his right to communicate with counsel of his own choosing. The Referral Bench properly informed itself that the legislation of BiH addressed the Appellant's concerns[114] and complied with the terms of Rule 11*bis* of the Rules, by satisfying itself that the BiH CPC "provides tha[t] an accused 'has a right to present his own defence or to defend himself with the professional aid of a defence attorney of his own choice,' a right which is reiterated in Article 36(3) of the Law on the State Court [of BiH].'"[115]

59. Finally, the Referral Bench correctly emphasized that if an accused cannot pay for counsel, he will be asked to select counsel from a list maintained by the State Court of BiH, and if no selection is made, one will be appointed by the State Court of BiH.[116] In light of this, the Appeals Chamber considers that the Appellant has failed to show that the Referral Bench committed "an

[110] First Impugned Decision, para. 60.
[111] *Ibid.*, para. 78.
[112] *Ibid.*, para. 85.
[113] *Ibid.*, para. 99.
[114] *Ibid.*, para. 86.
[115] *Ibid.*, para. 88.
[116] *Ibid.*

error of fact, insofar as [it] was satisfied [...] that funds were available to pay for an appropriate defence team."[117] Moreover, the Referral Bench was not legally required to make a finding on whether the funding of the Appellant's defence would be adequate to cover the lead counsel's fees, trial teams, co-counsel and investigations.[118] Having satisfied itself that even if present counsel did not continue to represent the Appellant in BiH, he would not be denied counsel, and having learned that there is financial support for that representation, the Referral Bench was not obligated to itemize the provisions of the BiH budget in the First Impugned Decision.[119] Thus, the Appeals Chamber finds that the Appellant has failed to show that the Referral Bench erred in law because it "made no finding as to whether sufficient funds would be available to guarantee the right to a defence."[120] For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

(ii) The Appellant's right to be tried in his presence and examine witnesses

(a) Submissions

60. The Appellant submits that the Referral Bench erred in law and in fact, in finding that there are safeguards in place in BiH which provide a reasonable assurance that a proper balance will be struck between the rights of an accused and the need to protect vulnerable witnesses and witnesses under threat.[121]

61. The Prosecution responds that the legislation in BiH contains safeguards with respect to the right of an accused to attend the trial and examine witnesses and submits that the record demonstrates that the Referral Bench inquired into this issue.[122]

(b) Discussion

62. In support of his allegation, the Appellant claims that the Referral Bench failed to properly inform itself as to whether the Appellant's right 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

[117] First Appeal Brief, para. 67.
[118] *Ibid.*, paras 72-74.
[119] *See Stanković* Rule 11*bis* Appeal Decision, para. 21; *Janković* Rule 11*bis* Appeal Decision, para. 44; *see also Ljubičić* Rule 11*bis* Appeal Decision, para. 25. The Appeals Chamber held that the Referral Bench was not obliged to satisfy itself that defence counsel will receive the same level of remuneration as they do before this International Tribunal. It stated that Rule 11*bis* requires only that the Referral Bench be satisfied that the accused will receive a fair trial, including adequate provisions for the defence of indigent accused. And thus, the Referral Bench is not obliged to resolve any disparity in remuneration of counsel in national and international jurisdictions.
[120] First Appeal Brief, para. 72.
[121] *Ibid.* para. 75.
[122] First Response, para. 4.13

courts in BiH.[123] He relies on the following arguments: (a) the Referral Bench failed to comment on Article 13 of the Law on the Protection of Vulnerable Witnesses and Witnesses Under Threat,[124] and (b) the fact that the said safeguards exist is not a guarantee that they will be properly applied in practice.[125]

63. The First Impugned Decision expressly refers to Articles 10-11, 13-15 and 19-23 of the Law on the Protection of Vulnerable Witnesses and Witnesses Under Threat;[126] thus, it is clear that Article 13 was considered by the Referral Bench, and the latter did not need to articulate every step of its reasoning concerning the said provisions. The Referral Bench was only required to ascertain whether the provisions concerning the measures which may be ordered by the State Court of BiH for the protection of witnesses, do not unfairly impinge upon the Appellant's right to a fair trial. The Appeals Chamber considers that in light of the foregoing, it was not unreasonable for the Referral Bench to conclude as it did, and finds that the Appellant has failed to show that the Referral Bench committed a discernible error by failing to properly inform itself whether his right to be present and to examine or have examined witnesses against him and to obtain attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, was adequately guaranteed before the BiH courts. For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

(iii) Witnesses' Availability

(a) Submissions

64. The Appellant acknowledges that different means are available for securing the presence and testimony of witnesses before the Bosnian courts, but submits that "the issue and uncertainty as to how all that will function in practice still leaves a stain on the claimed adequate means of providing for the presence of witnesses and their testimony before the BiH courts."[127] In support of this claim, the Appellant refers to a supplemental submission[128] which contains the view expressed by Mr. Refik Hodzić —officer of the State Court of BiH — in a television broadcast concerning the protection of witnesses.[129] He further submits that the Referral Bench commented on the Fifth

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[123] First Appeal Brief, para. 79.
[124] *Ibid.*, para. 76.
[125] *Ibid.*, para. 78.
[126] *See* First Impugned Decision, para. 90; *see also* footnote 139.
[127] *Ibid.*, para. 80.
[128] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-PT, Savo Todović's Defence Supplemental Response in the Context of the Prosecutor's Motion Under Rule 11 *bis* with Annexes I to III, 28 June 2005 ("Fifth Defence Submission").
[129] Mr. Hodzić said "that it is impossible to absolutely protect the identity of a witness." He also stated that this had been shown by the International Tribunal, "which spent millions of dollars on [a witness protection mechanism]." *See* First Appeal Brief, para. 81 footnote 48.

Defence Submission only briefly, thus failing to properly consider this issue.[130] The Prosecution responds that this assertion does not demonstrate an error of law or fact.[131]

(b) Discussion

65. The Appeals Chamber notes that despite the fact that it had been filed without leave, the Referral Bench reviewed the Fifth Defence Submission but determined that it was repetitive and contained "information of no assistance to the determination to be made by this Referral Bench."[132] Therefore, the Referral Bench was not required to consider the Fifth Defence Submission and elaborate on it in the First Impugned Decision. In light of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that "the Referral Bench failed to fully inform itself on this issue and to properly consider it."[133] Moreover, the Appeals Chamber recalls that the *Janković* Rule 11*bis* Decision held that the Referral Bench in that case did not commit an error of law or fact when it omitted to discuss Mr. Hodzić's statement.[134] The Appeals Chamber considered that the statement in question "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."[135] For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

(iv) Appellant's access to material from cases before the International Tribunal

(a) Submissions

66. The Appellant submits that the Referral Bench failed to properly consider whether the Appellant would have access to "all materials from the [International] Tribunal to the extent that it would be necessary for the preparation of his defence.[136] He claims that the First Impugned Decision only considered Rule 11*bis*(D)(iii) of the Rules in relation to possible delays due to referral and failed to note that there is no mechanism for the Appellant to gain access to materials from other cases. He submits that "this omission constitutes an error of law."[137]

67. The Prosecution responds that Rule 11*bis*(D)(iii) of the Rules in no way limits the disclosure deemed appropriate by the Prosecution, which may include materials from inter-related cases, and

[130] First Appeal Brief, paras 82-83.
[131] Prosecution's First Response, para. 4.16.
[132] First Impugned Decision, para. 12.
[133] First Appeal Brief, para. 83.
[134] *Janković* Rule 11*bis* Appeal Decision, para. 49.
[135] *Ibid.*
[136] First Appeal Brief, para. 84.
[137] *Ibid.*, para. 88.

notes that there is a procedure available to defence counsel to seek access to material subject to protective measures pursuant to Rule 75 of the Rules.[138]

(b) Discussion

68. The Appeals Chamber notes that in his submissions before the Referral Bench, the Appellant made reference to Rule 11*bis*(D)(iii) of the Rules only within the context of the monitoring of the proceedings by the Prosecution's observers.[139] The issue of the Appellant's access to *all* materials from cases before the International Tribunal was not raised before the Referral Bench, thus the Appellant cannot claim that the Referral Bench failed to address a matter which was not brought before it, thereby committing an error of law. Indeed the Referral Bench considered Rule 11*bis*(D)(iii) of the Rules within the context of the Appellant's right to be tried without undue delay,[140] nonetheless, with respect to material directly related to the Appellant's case, the Referral Bench, expressly ordered the Prosecution "to hand over to the Prosecutor of Bosnia and Herzegovina, as soon as possible and no later than 30 days after the [First Impugned Decision] has become final, the material supporting the [Joint Amended Indictment], and *all* other appropriate evidentiary material."[141] Because the BiH CPC 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.[142]

69. The Appeals Chamber recalls that with respect to material from related cases, defence counsel in proceedings in BiH, like the Prosecutor in BiH, may request that the Prosecutor of the International Tribunal apply to vary protective measures under Rule 75 of the Rules.[143] Hence, the parties to the proceedings 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 cases before the International Tribunal.[144] For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

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[138] First Response, paras 4.19- 4.20.
[139] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-PT, Savo Todović's Defence Response to Prosecution's 11 *bis* Motion and Defence's Submission of Further Information in Accordance with the Referral Bench's Decision of 14 April and in the Context of the Prosecutor's Motion under Rule 11*bis*, 28 April 2005 ("First Defence Submissions"), paras 75-77.
[140] *See* First Impugned Decision, para. 98.
[141] First Impugned Decision, VII, Disposition, p. 46 (emphasis added).
[142] *See Janković* Rule 11*bis* Appeal Decision, para. 50 referring to Article 69 of the BiH CPC.
[143] *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.
[144] *See Stanković* Rule 11*bis* Appeal Decision, para. 24; *Janković* Rule 11*bis* Appeal Decision, para. 51.

(v) Right to trial without undue delay

(a) Submissions

70. The Appellant asserts that the existence of relevant provisions within the legal system in BiH cannot provide sufficient guarantee that no undue delays would take place in practice if he was to be tried in BiH,[145] and submits that the Referral Bench "erred in fact and occasioned a miscarriage of justice"[146] in finding that,

> the Defence submission that there may be delay due to a need to review voluminous material from the *Prosecutor v. Krnojelac* case is based on speculation at this point in time. Even if the Defence ultimately determines there is a need to review such materials, the focus of Defence attention would undoubtedly remain on the materials and evidence in the present case against the Accused. In any event, the same concern would arise, if at all, whether the Accused were tried in the Tribunal or in the State Court of Bosnia and Herzegovina.[147]

71. He claims that the decisions granting him access to confidential materials in cases before the International Tribunal confirm his concerns about possible delays, and states that such concerns relate to "the language issue and to a situation where the present Counsel could not continue to represent the Appellant" and another counsel who did not speak English had to review materials available only in English.[148] In response, the Prosecution repeats the relevant findings by the Referral Bench, asserts that the issue was discussed at length, and states that the Appellant has failed to demonstrate any error.[149]

(b) Discussion

72. First, as previously noted, the fact that extensive documentary evidence and witness testimony from other cases (including the *Krnojelac* case) might need to be reviewed by the Appellant in preparation of his defence, was properly addressed by the Referral Bench within the context of the concerns raised by the Appellant in relation to the issue of adequate time to prepare a defence. The Appeals Chamber has held that the Referral Bench correctly concluded that "in any event, the same concern would arise, if at all, whether the [Appellant] were tried in the [International] Tribunal or in the State Court of [BiH]."[150]

73. Second, the Appeals Chamber emphasizes that a party may not merely repeat on appeal arguments that did not succeed when raised before the Referral Bench, unless the party can

[145] First Appeal Brief, para. 89.
[146] *Ibid.*, para. 90.
[147] First Impugned Decision, para. 99.
[148] First Appeal Brief, para. 91.
[149] First Response, para. 4.21.
[150] *See supra* para. 57.

demonstrate that the Referral Bench's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[151] Against this backdrop, the Appeals Chamber notes that in his submissions before the Referral Bench, the Appellant had argued that the referral of his case would inevitably bring delays, *inter alia,* because of the need to review voluminous material from the *Krnojelac* case, and the fact that "[t]his [Appellant] does not speak or understand English language, so he will inevitably have to listen to audio tapes of the witness testimony, which in itself is a time-consuming process. Moreover, if another counsel who does not speak English is assigned to the [Appellant], that counsel will have to go through the same exercise."[152] In addition, the Appellant argued that "depriving [him] and his counsel of an opportunity to familiarize himself with the [material in the *Kronjelac* case] and similar material would be in violation if the [Appellant's] basic right to be informed promptly, in a language which he understands and in detail, of the nature of the accusations against him."[153] Therefore, these arguments had been considered by the Referral Bench when concluding that "[i]t would be for the State Court [of BiH], if the case is referred, to achieve a balance among any potentially conflicting rights of the [Appellant] asserted by the Defence, such as the right to have adequate time to prepare a defence, the right to be informed of the nature and cause of the charges against him in a language which he understands, and the right to trial without delay."[154]

74. As noted by the Referral Bench, the argument 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 at this point. Nonetheless, if such a situation arose and there was a need to review materials from other cases (only available in English) for the preparation of his defence, the audiotapes of proceedings could be reviewed –as acknowledged by the Appellant – in which case, it would be for the State Court of BiH to adopt the necessary measures and order that the necessary resources are provided to ensure that the Appellant's right to have adequate time to prepare a defence is balanced against his right to be tried without undue delay. Moreover, the Appeals Chamber notes that access to confidential material from the *Krnojelac* case was granted to the Appellant more than a year ago.[155] Thus, counsel for the Appellant has had ample opportunity to

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[151] *Prosecutor v. Georges Anderson Nderubunwe Rutaganda*, Case No.: ICTR-96-3-A, Judgement, 26 May 2003, para. 18; *Prosecutor v. Eliézer Niyitegeka*, Case No.: ICTR-96-14-A, Appeal Judgement, 9 July 2004, para. 9; *Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Judgement, 29 July 2004, para. 13; *Prosecutor v. Juvénal Kajelijeli*, Case No.: ICTR-98-44A-A, Judgement, 23 May 2005, para. 6.
[152] First Defence Submissions, paras 92-93.
[153] *Ibid.*, para. 93.
[154] First Impugned Decision, para. 98.
[155] *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-PT, Decision on Savo Todović's Defence Motion for Access to all Confidential and Under Seal Material in the Krnojelac case, 30 June 2005.

examine said material, and summarize the relevant information (in a language which the Appellant understands) for his client's review.

75. Accordingly, the Appeals Chamber finds that the Appellant has failed to show that an error of fact resulting in a miscarriage of justice was committed by the Referral Bench, or that the latter failed to give weight or sufficient weight to relevant considerations when determining that the Appellant's right to trial without undue delay would not be infringed by the referral of his case to BiH. For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

(vi) The Referral Bench concluded that the Appellant should receive a fair trial

(a) Submissions

76. The Appellant alleges that the finding that the Referral Bench was "satisfied on the information presently available that the [Appellant] *should* receive a fair trial," constitutes an error of law.[156] He submits that Rule 11*bis* of the Rules requires that the accused *will* receive a fair trial, thus the use of the word "should" demonstrates that the Referral Bench was "aware that it had not sufficiently informed itself to be able to declare that it was satisfied that the Appellant would receive a fair trial."[157]

77. The Prosecution responds that the terms "should" and "will" are interchangeable; it submits that the Appellant improperly places emphasis on an alleged semantic difference between these two words, and that there is no error in the finding of the Referral Bench.[158]

78. In reply, the Appellant emphasizes that the Referral Bench made the same finding in the *Stanković* case whereas, in the *Mejakić* and *Janković* cases, it used the term "will" instead of "should," which in his view remains unclear.[159]

(b) Discussion

79. The Appeals Chamber acknowledges that, as in the *Stanković* case, the Referral Bench's word choice was imprecise which is unfortunate, nevertheless, the use of the word "should" instead of "will" does not amount to an error of law for the following reasons. The Referral Bench engaged in a lengthy discussion in order to assess whether the trial in BiH would be fair.[160] The emphasis in the First Impugned Decision was on what *would* be the case if the Appellant were to be tried in

[156] First Appeal Brief, para. 96.
[157] *Ibid.*, para. 94.
[158] First Response, paras 4.23, 4.25, 4.27, 4.28.
[159] First Reply, para. 50.
[160] First Impugned Decision, paras 72-102.

BiH, not what the Referral Bench hoped would be the case.[161] Therefore the term "should," taken in the context of the First Impugned Decision, is to be understood as being effectively synonymous with "will." Similarly to the *Stanković* case,[162] the Referral Bench's discussion in the instant case demonstrated a clear basis for finding that it was satisfied that the Appellant's trial in BiH will be fair.[163] For the foregoing reasons, this part of the Appellant's third ground of appeal is dismissed.

(vii) The Referral Bench concluded that the right to a fair trial was guaranteed

(a) Submissions

80. The Appellant submits that the Referral Bench erred in law and in fact, "by relying on Rule 11*bis*(D)(iv) and Rule 11*bis*(F) to satisfy itself that the right to a fair trial was sufficiently guaranteed."[164] He argues that, since under Rule 11*bis*(F) of the Rules, a referral order can be revoked only upon the request of the Prosecutor and not the Defence, Rule 11*bis*(F) of the Rules cannot be relied upon as a safety net or as a guarantee of a fair trial.[165] He adds that the Referral Bench erred in its implicit finding that the monitors, and its power to revoke the referral order, could ensure that the right to a fair trial was sufficiently guaranteed.[166]

81. The Prosecution responds that the findings in paragraph 102 of the First Impugned Decision "did not form part of the Referral Bench's determination that [the Appellant] would receive a fair trial if referred."[167] It submits that since the Defence will be a party to the national proceedings, there is no need for a special provision authorising the Defence to send monitors as well,[168]and suggests that if a violation of a fair trial guarantee takes place, an accused can apply for a remedy through the Constitutional Court of BiH or the European Court of Human Rights.[169]

(b) Discussion

82. The Appeals Chamber emphasizes that reference in the First Impugned Decision to the mechanisms encompassed in Rule 11*bis*(D)(iv) and Rule 11*bis*(F) of the Rules was made *after* the Referral Bench had declared itself satisfied that the laws applicable to proceedings against the Appellant in BiH provided an adequate basis to ensure compliance with the requirement for a fair trial. Accordingly, for the sake of clarity the Appeals Chamber recalls the finding challenged by the Appellant:

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[161] *Ibid.*
[162] *Stanković* Rule 11*bis* Appeal Decision, para. 28.
[163] First Impugned Decision, paras 72-102.
[164] First Appeal Brief, para. 98 referring to First Impugned Decision, para. 102.
[165] *Ibid.*, paras 99-100.
[166] *Ibid.*, para. 101.
[167] First Response, para. 4.32.

> The Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirement for a fair trial. As to the specific areas of concern raised by the Defence, the Referral Bench is not persuaded that any of the matters contained therein would result in the denial of a fair trial to the Accused if this case is to be referred. The Bench also observes that provision is made in Rule 11*bis* for a system to allow monitoring of the trial of a case which has been referred. By this means, it is possible to better ensure that the expectations of a fair trial are met. If not, a referral order may be revoked by this Tribunal.[170]

83. In the *Stanković* and *Janković* cases, the Appeals Chamber dismissed the same ground of appeal, and held that it was not improper for the Referral Bench to have satisfied itself that the appellants would receive a fair trial *in part* on the basis of Rule 11*bis*(D)(iv) monitoring and the Rule 11*bis*(F) revocation mechanisms.[171] In the *Stanković* case, the Appeals Chamber concluded that the monitoring of the proceedings pursuant to Rule 11*bis*(D)(iv) of the Rules "was a reasonable variable for the Referral Bench to have included in the Rule 11*bis*(B) equation."[172] In light of these previous findings, the Appeals Chamber finds that the Appellant has failed to show any error on the part of the Referral Bench in paragraph 102 of the First Impugned Decision. Accordingly, this part of the Appellant's third ground of appeal is dismissed.

84. For the foregoing reasons, the Appellant's third ground of appeal is dismissed in its entirety.

D. Fourth Ground of Appeal

85. The Appellant argues that the Referral Bench erred in law and in fact by failing to examine properly whether the courts in BiH are adequately prepared to accept the case as required by Rule 11*bis* (A)(iii) of the Rules.[173]

(a) Submissions

86. First, the Appellant states that "the requirement contained in Rule 11*bis*(A)(iii) that the State to which a case is referred is 'willing and adequately prepared' to accept the case, applies to each of the three categories of Rule 11*bis*(A).'"[174] He then submits, *inter alia,* that "the Referral Bench considered neither the applicability of the principles governing individual responsibility nor the

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[168] *Ibid.*, para. 4.33.
[169] *Ibid.*, para. 4.34.
[170] First Impugned Decision, para. 102.
[171] *See Stanković* Rule 11*bis* Appeal Decision, para. 52; *Janković* Rule 11*bis* Appeal Decision, para. 55 (emphasis added).
[172] *Stanković* Rule 11*bis* Appeal Decision, para. 52.
[173] First Notice of Appeal Brief, para. 10.
[174] First Appeal Brief, para. 104.

applicability of general principles of criminal law in BiH."[175] He acknowledges that the Referral Bench did examine the applicable domestic law, but claims that the "standard applied by the [Referral] Bench is incomplete"[176] since it "failed to examine whether the court in question would be able to apply [international law] correctly."[177] He further submits that "relying on an unproven capability of a national court to apply complex rules of international law to complex facts falls below the standard required of the Referral Bench in determining whether the courts in BiH are 'adequately prepared.'"[178] Finally, he notes that the decision on referral in the *Mejakić* case considered the OSCE Report dated March 2005 ("OSCE March 2005 Report"), within the section dealing with fair trial and the BiH legal structure, and acknowledged the lack of practice and experience of the State Court of BiH.[179] He points out that in contrast, the Referral Bench in the instant case "made no such observation or consideration" despite the fact that the Appellant had raised the issue.[180]

87. The Prosecution responds, *inter alia*, that the Referral Bench undertook a comprehensive analysis of all relevant provisions of law applicable in BiH.[181] It notes that "Rule 11*bis*(B) clearly defines the applicable standard required of the Referral Bench as 'after being satisfied that the Accused will receive a fair trial and that the death penalty will not be imposed', not that the national law be in conformity with the law of the [International] Tribunal."[182]

(b) Discussion

88. The Appeals Chamber recalls that

> as a strictly textual matter, Rule 11*bis*(A) does not require that a jurisdiction be "willing and adequately prepared to accept" a transferred case if it was the territory in which the crime was committed or in which the accused was arrested. But that is beside the point, because unquestionably a jurisdiction's willingness and capacity to accept a referred case is an explicit prerequisite for any referral to a domestic jurisdiction, as the International Tribunal has no power to order a State to accept a transferred case. Thus, the "willing and adequately prepared" prong of Rule 11*bis*(A)(iii) of the Rules is implicit also in the Rule 11*bis*(B) analysis.[183]

[175] *Ibid.*, para. 112.
[176] *Ibid.*, para. 113.
[177] *Ibid.*, para. 114.
[178] *Ibid.*, para. 115.
[179] *Ibid.*, paras 116-118 referring to *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis*, 20 July 2005, para. 81.
[180] First Appeal Brief, para. 118.
[181] First Response, para. 5.4.
[182] *Ibid.*, para. 5.6.
[183] *Stanković* Rule 11*bis* Appeal Decision, para. 40 (footnote omitted).

89. The Appeals Chamber considers that the Referral Bench in the instant case engaged in a thorough assessment of BiH's willingness and capacity to accept the Appellant's case, and carefully considered the substantive law that would be applicable.[184] It examined the criminal codes of the Socialist Federal Republic of Yugoslavia ("SFRY") and the BiH CC as well as international law.[185] It concluded that the SFRY Criminal Code as it was in force at the time relevant to the Joint Amended Indictment would apply to each of the alleged criminal acts, but that it would be for the State Court of BiH to determine the law applicable to each of the alleged criminal acts of the Appellant.[186] Regardless of which of the three legal codes is held by the State Court of BiH to be applicable, the Referral Bench was satisfied "that there are appropriate provisions to address most, if not all, of the criminal acts of the [Appellant] alleged in the [Joint Amended Indictment] and there is an adequate penalty structure."[187]

90. As the First Impugned Decision shows, the Referral Bench complied with the standard defined in Rule 11*bis*(B) of the Rules and ordered the referral "after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out."[188] With respect to the Appellant's argument regarding the OSCE March 2005 Report, the Appeals Chamber notes that the Defence had drawn the attention of the Referral Bench to the said report, within the context of the "intrastate mutual assistance in criminal matters amongst different organs and institutions in [BiH]."[189] The Referral Bench properly addressed the Appellant's concerns through its consideration of the submissions of the Government of BiH in this respect.[190]

91. In light of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that the Referral Bench erred in law or in fact by failing to properly examine whether the courts in BiH are adequately prepared to accept the case as required by Rule 11*bis* (A)(iii) of the Rules.

92. For the foregoing reasons, the Appellant's fourth ground of appeal is dismissed.

E. Fifth Ground of Appeal

93. The Appellant submits that the Referral Bench erred in law and in fact, "in failing to properly examine general conditions of and the risks involved concerning the [Appellant's] pre-

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[184] First Impugned Decision, paras 38-51.
[185] *Ibid.*, paras 40-50.
[186] *Ibid.*, para. 52.
[187] *Ibid.*
[188] Rule 11*bis*(B).
[189] Defence First Submissions, para. 57. The Defence also referred to the OSCE Report in a footnote when responding that it disagreed with the Prosecution's argument to the effect that justice in criminal matters should be rendered as close as possible to the victims and to the place where the crimes were committed. *See ibid.*, para. 99 footnote 14.
[190] First Impugned Decision, paras 67- 68.

trial, trial and potential post-trial detention in a [BiH] prison, particularly in the light of personal circumstances of the [Appellant]."[191]

(a) Submissions

94. The Appellant acknowledges that Rule 11*bis* of the Rules makes no explicit mention of the issue of detention, but he argues that it is a well-settled principle of human rights law that no person may be confined in circumstances in which he or she would face torture or inhumane treatment.[192] He submits that the Referral Bench committed an error of law because it failed to consider, *proprio motu,* the general conditions of post-conviction detention or the underlying principle —the prohibition of torture or inhuman or degrading treatment— despite the fact that he had raised fears of torture and inhuman treatment before the Referral Bench.[193] He points out that he had attached to the Fifth Defence Submission, two articles that provided an account concerning attacks by Bosniaks on Serb prisoners in the Zenica and Sarajevo prisons.[194] He adds that the Defence's submissions on this issue in the *Stanković* case support his allegation,[195] and asserts that the Referral Bench in the instant case was also put on notice of this issue by the submissions of the Defence in the *Mejakić* case.[196] Finally, he claims that if convicted he would be sent to the Zenica prison where attacks on Serbs because of their ethnic origin have been reported.[197]

95. The Prosecution responds that the Appellant has failed to raise specific allegations of BiH's failure to comply with recognized international norms concerning detention conditions, and that there is no error of law or fact in the First Impugned Decision because the Referral Bench did inform itself as to the detention conditions in BiH and discussed them in the First Impugned Decision.[198] The Prosecution submits that there is no indication that the isolated incident regarding the Zenica prison —referred to in the article attached to the Fifth Defence Submission as Annex I — is part of a systematic or official policy authorized by the prison authorities.[199] The Prosecution contends that the Appellant has not provided any evidence to support his claim that he will be sent to the Zenica prison if convicted, and adds that in any event, the only authority which can decide where a convicted person should serve his sentence is the Ministry of Justice of BiH.[200]

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[191] First Notice of Appeal, para. 11.
[192] First Appeal Brief, para. 122.
[193] *Ibid.*, paras 125,133, 136.
[194] *Ibid.*, para. 127.
[195] *Ibid.*, para. 128.
[196] *Ibid.*, para. 136.
[197] *Ibid.*, paras 135, 136.
[198] First Response, paras 6.1, 6.2.
[199] *Ibid.*, para. 6.7.
[200] *Ibid.*, para. 6.4.

(b) Discussion

96. In relation to the Appellant's claim that he had raised "fears of torture and inhuman treatment" which the Referral Bench failed to consider, the Appeals Chamber makes the following observations. First, the Appeals Chamber has noted that despite the fact that the Fifth Defence Submission had been filed without leave, the Referral Bench reviewed it but determined that it was repetitive and contained information of no assistance to the determination to be made by the Referral Bench.[201] Therefore, the Referral Bench was not required to consider the Fifth Defence Submission. Second, the Appeals Chamber notes that the Referral Bench did consider the concerns raised in the First Defence Submissions and concluded as follows:

> With respect to the concern expressed by the Todović Defence that the Accused might be the subject of retaliation if detained in Bosnia and Herzegovina due to his prior position as a prison official, the Referral Bench makes two observations. First, a similar concern no doubt exists whenever a former prison official is to be detained within a State in which he or she has acted in that capacity; however, this does not give rise to some kind of occupational entitlement to be excepted from detention and the other routine elements of the administration of justice. Secondly, the Defence provides no specific details concerning threatened retaliation, but only speculation. This is a matter best left to the authorities of Bosnia and Herzegovina if the case is referred.[202]

97. The Appeals Chamber recalls that the Referral Bench considered the submissions of BiH in their entirety in both the instant case and the *Stanković* case as to the conditions of detention within the context of whether the Appellant would receive a fair trial.[203] The Referral Bench considered the submissions of the Government of BiH on the BiH Law on Detention, which "regulates the operation of the detention facility in accordance with State, European, and international standards."[204] The First Impugned Decision makes specific reference to Article 68(1) of the BiH Law on Detention, which concerns confidential communication between detainees and counsel and, Article 3 which "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.'"[205]

98. In the *Stanković* case, the Appeals Chamber found that the Referral Bench: (a) was well informed about the conditions of detention in BiH; (b) had asked about the conditions of confinement, and (c) had ample information before it.[206] The Appeals Chamber considers that the

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[201] First Impugned Decision, para. 12.
[202] *Ibid.*, para. 87.
[203] *Ibid.*, para. 60.
[204] *Ibid.*, para. 62.
[205] *Ibid.*, para. 86.
[206] *Stanković* Rule 11*bis* Appeal Decision, para. 35.

Referral Bench did the same here and therefore, it was reasonable for the Referral Bench to conclude that, it was "satisfied that [BiH] has a legal structure in place to ensure that operation of the detention facility is in accordance with international standards" and that the Appellant failed to concretely establish that he would be subject to retaliation if detained in BiH.[207] Pursuant to its previous findings, the Appeals Chamber considers that the Appellant has failed to show that the Referral Bench's conclusion on conditions of detention in BiH do not also encompass concerns about post-conviction detention.[208] Accordingly, the Appeals Chamber finds that the Appellant has not demonstrated that the Referral Bench erred in law or in fact by failing to properly examine the general conditions of detention — including post-conviction detention — in BiH, as well as the risks involved in light of the personal circumstances of the Appellant.

99. The Appeals Chamber stresses that it is satisfied that the pre-trial conditions in the detention unit attached to the State Court of BiH meet internationally recognized standards. However, as to the vagueness of the timing for the construction of the new prison to accommodate persons convicted by the State Court of BiH, the Appeals Chamber recalls the Prosecution's obligation to alert the Referral Bench in case there are any serious concerns that the minimum standards of pre-trial—or, in case of a conviction, post-conviction— detention will not be met.

100. For the foregoing reasons, the Appellant's fifth ground of appeal is dismissed.

F. Sixth Ground of Appeal

101. The Appellant submits that the Referral Bench erred in law and in fact by: (a) assuming that monitoring of the case, if referred, would be undertaken by the OSCE or a similar organization by arrangement with the Prosecutor; (b) determining that it had the authority to order the Prosecution to continue its efforts to ensure the monitoring of and reporting on the proceedings before the State Court of BiH after the case had been referred to BiH, and to report to the Referral Bench on the progress made by the BiH Prosecutor, as well as on the progress of the proceedings.[209]

(a) Submissions

102. The Appellant submits that: (a) the Prosecution has no obligation to monitor the proceedings; (b) the Referral Bench has no authority to issue orders to the Prosecution in this respect, and (c) the Prosecution's observers "would not be an appropriate and sufficient tool to

[207] First Impugned Decision, para. 87.
[208] *Cf. Stanković* Rule 11*bis* Appeal Decision, para. 37; *Janković* Rule 11*bis* Appeal Decision, para. 74: "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"; *see also Mejakić* Rule 11*bis* Appeal Decision, para. 58.
[209] First Notice of Appeal, para. 12.

monitor the fairness of the proceedings."[210] The Prosecution does not oppose the Appellant's arguments.[211]

(b) Discussion

103. As a preliminary matter, the Appeals Chamber notes that in the Second Impugned Decision, the Referral Bench ordered that the relevant part of the disposition of the First Impugned Decision be amended as follows:

> **ORDERS** the Prosecution to continue its efforts to ensure the monitoring and reporting on the proceedings of this case before the State Court of Bosnia and Herzegovina;[212]

As a result, the Appellant's allegation that the Referral Bench erred in law and in fact by assuming that monitoring of the case, if referred, would be undertaken by the OSCE or a similar organization by arrangement with the Prosecutor, has become moot.

104. The question of the authority entrusted upon a Referral Bench has been addressed in the *Stanković* case, where the Appeals Chamber held that:

> ...whatever information the Referral Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within the Referral Bench's authority so long as they assist the Bench in determining whether the proceedings following the transfer will be fair.[213]

105. The Appeals Chamber there determined that under Rule 11*bis* of the Rules, Judges have inherent authority to issue orders which are reasonably related to the task before them, *i.e.*, satisfy themselves that the accused will receive a fair trial if his case is referred.[214] In that case, the Appeals Chamber reasoned that the Prosecution's discretion to send monitors cannot derogate from the Referral Bench's inherent authority pursuant to Rule 11*bis* of the Rules, stressed that the Referral Bench has the authority to instruct the Prosecution to send observers on behalf of the International Tribunal, and concluded that it was reasonable for the Referral Bench to have ordered the Prosecution to report back on the progress of the proceedings in BiH.[215]

106. Similarly, the Appeals Chamber finds that it was reasonable for the Referral Bench in the present case to order the Prosecution to report back on the progress of the case, because that order

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[210] First Appeal Brief, para. 143.
[211] First Response, para. 4.30.
[212] Second Impugned Decision, p. 5.
[213] *Stanković* Rule 11*bis* Appeal Decision, para. 50.
[214] *Ibid.*, para. 51.
[215] *Ibid.*, paras 53-55.

reasonably aided the Referral Bench in discharging its duties under Rule 11*bis* of the Rules.[216] The Appeals Chamber considers that contrary to the Appellant's contention, the Prosecution's efforts to comply with this instruction will constitute an appropriate tool to monitor the fairness of the proceedings. Thus, the Appellant has failed to show that the Referral Bench erred in fact and in law in determining that it had the authority "to order the Prosecution to continue its efforts to ensure the monitoring and reporting on the proceedings of the case before the [State Court of BiH]."[217]

107. For the foregoing reasons, the Appellant's sixth ground of appeal is dismissed.

G. Appeal against Second Impugned Decision

108. The Appellant submits that the Referral Bench erred in law and in fact, "by finding that 'while the relevant effect of the OSCE Report is to recommend some changes or improvements in some areas, it does not provide a basis for changing the conclusion of the Referral Bench that the conditions exist for a fair trial if this case is referred to [BiH].'"[218]

(a) Submissions

109. The submissions in support of the Appellant's appeal against the Second Impugned Decision are largely based on a report authored by the OSCE dated April 2006, entitled: "First Report Case of Defendant Gojko Janković Transferred to the State Court pursuant to Rule 11*bis*" ("OSCE April 2006 Report"), and presented to the Referral Bench by the parties.[219] The Appellant claims that concerns raised in the OSCE April 2006 Report regarding the legislative and judiciary authorities, "cast a big shadow on the preparedness and ability of the [State Court of BiH] to provide a fair trial in the war crime cases."[220] In support of this contention he relies upon: (a) the lack of clarity and foreseeability of the Law on Transfer;[221] (b) the approach taken by the State Court of BiH with respect to pre-trial custody in the *Janković* and *Stanković* cases,[222] and (c) the fact that Gojko Janković was denied a request for the assignment of co-counsel and "deprived of the

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[216] *Ibid.*, para. 59.
[217] First Appeal Brief, para. 137.
[218] Second Notice of Appeal, para. 9.
[219] *See Prosecutor v. Gojko Janković,* Case No.: IT-96-23/2-PT, Prosecutor's Second Progress Report, 3 May 2006, Annex A; *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-PT, Defence Submissions on Effect of the Operative Indictment in Rule 11*bis* Referral of the Case Against the Accused Savo Todović, 11 May 2006 ("Defence Submissions on Effect of the Operative Indictment") whereby the OSCE April 2006 Report is incorporated by reference.
[220] Second Appeal Brief, para. 37.
[221] *Ibid.*, para. 39.
[222] *Ibid.*, paras 40-41.

right to have investigators and other support staff assisting on the case [which] shows that the possibility of adequate preparation and effective defence is dramatically diminished."[223]

110. In response, the Prosecution submits that the OSCE April 2006 Report discusses procedural issues related to the application of international human right standards which "do not negatively impact upon the [Appellant's] receiving a fair trial, but rather serve as constructive recommendations."[224] It adds that "the OSCE has never suggested in its reports that the Prosecutor should ask the Referral Bench to revoke any order of referral."[225]

111. The Appellant replies that the OSCE's criticism of the State Court of BiH supports the contention that "the BiH Courts are not adequately prepared to try the war crimes cases and that conditions for a fair trial exist neither *de facto* nor *de jure.*"[226]

(b) Discussion

112. At the outset, the Appeals Chamber recalls that an appeal is not an opportunity for the parties to reargue their cases, and notes that some of the Appellant's submissions under this ground of appeal had already been put forward before the Referral Bench.[227] The Appeals Chamber considers that the Appellant's submissions do not show that the Referral Bench committed a discernible error in the exercise of its discretion by failing to give sufficient weight to the OSCE April 2006 Report when reaching the Second Impugned Decision.

113. The Appeals Chamber emphasises that it understands the seriousness of the concerns raised by the OSCE and acknowledges the importance of the role played by this organisation in the monitoring of the proceedings in cases transferred by the International Tribunal to the Sate Court of BiH, hence it gives due regard to its recommendations. However, the Appeals Chamber considers that the OSCE April 2006 Report does not provide reason to believe that the Appellant will not receive a fair trial in BiH, for the following reasons.

114. The Appeals Chamber notes that the OSCE April 2006 report makes recommendations under Article 5 of the European Convention on Human Rights ("ECHR"), which provides for the right to liberty and security of person, rather than Article 6 of the ECHR with respect to the right to a fair trial. The concerns raised in the OSCE April 2006 Report revolve around provisions in the Law on Transfer regarding the procedure for adapting the International Tribunal's indictment and

[223] *Ibid.*, para. 43.
[224] Second Response, para. 7.
[225] *Ibid.*, para. 8.
[226] Second Reply, para. 12.
[227] *See* Defence Submissions on Effect of the Operative Indictment, paras 8-10 and conclusion at p. 4.

for reviewing pre-trial custody during the pre-adaptation period, and is largely limited to examples from the *Janković* case.[228] It comments upon the approach of the State Court of BiH in the *Janković* case, in particular the Appellate Panel of that court, in reviewing his appeals on pre-trial detention.[229]

115. Nevertheless, the Appeals Chamber recalls that it has held that "'the conditions 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 system' and therefore, the consideration of these conditions fall under the Referral Bench's mandate."[230] Therefore, it was appropriate for the Referral Bench to take the OSCE April 2006 Report into consideration as part of the fair trial analysis under Rule 11*bis* in reaching its decision. In this regard, the Appeals Chamber recalls that it has already established that the Appellant failed to show that Referral Bench erred in law or in fact, by failing to properly inform itself on a number of fair trial elements and declaring itself satisfied that the laws

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[228] The Appeals Chamber notes, however, that the report also reiterates the recommendations made in its report on the *Stanković* proceedings with respect to the amendment of the Law on Transfer. OSCE April 2006 Report, pp 1-2.

[229] Article 5.

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    - (a) the lawful detention of a person after conviction by a competent court;
    - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
    - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
    - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
    - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

[230] *Ljubičić* Rule 11*bis* Appeal Decision, para. 43 *citing* the *Stanković* Rule 11*bis* Appeal Decision, para. 34.

applicable to proceedings against the Appellant in BiH provide an adequate basis to ensure compliance with the requirements for a fair trial.[231] In so doing, the Referral Bench compared the guarantees set out in Article 6 of the ECHR with those provided under the laws of BiH, and concluded that the BiH Constitution – in particular Articles II.3(e) and II.4, which guarantee the enjoyment of the right to a fair hearing in criminal matters, and other rights relating to criminal proceedings without discrimination on any ground – provides a foundation for certain guarantees.[232] The Referral Bench also examined other provisions which further the guarantees provided for in the BiH Constitution, *inter alia*, the BiH Criminal Code ("BiH CC") and the BiH CPC.[233]

116. With regard to the OSCE's observations on provisions in the Law on Transfer, the Appeals Chamber notes that the Law on Transfer provides that, in the absence of special provisions set out therein which regulate matters concerning cases transferred from the International Tribunal, other relevant provisions of the BiH CPC, the criminal procedure codes of the Republika Srpska and the Federation of BiH and the District of Brcko shall apply.[234] The Law on Transfer provides that the custody and detention of persons shall be regulated according to the BiH CPC.[235] In this respect, Article 132 of the BiH CPC sets out the legal grounds for pre-trial custody.[236] The Appeals

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[231] *See supra,* paras 49-83.
[232] First Impugned Decision, para. 73.
[233] *Ibid.*, paras 74-82.
[234] Law on Transfer, Article 1(2), BiH Official Gazette No. 61/04,
[235] "The custody and detention of persons shall be regulated according to the BiH CPC. For the purpose of calculating the custody under the BiH CPC, the time that a person has spent in custody at the ICTY shall not be considered, but the time the person has spent in ICTY custody shall be considered for the calculation of the sentence pursuant to the provisions of the BiH Criminal Code." Law on Transfer, Article 2(4), BiH Official Gazette No. 61/04.
[236] Article 132. Grounds for Pre-trial Custody.

(1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him:

a) if he hides or if other circumstances exist that suggest a possibility of flight;

b) if there is a justified fear to believe that he will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices;

c) if particular circumstances justify a fear that he will repeat the criminal offense or complete the criminal offense or commit a threatened criminal offense, and for such criminal offenses a prison sentence of five (5) years may be pronounced or more;

d) if the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense requires that custody be ordered for the reason of public or property security. If the criminal offense concerned is the criminal offense of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened.

(2) In a case of Item b), Paragraph 1 of this Article, custody shall be cancelled once the evidence for which the custody was ordered has been secured.

Chamber further recalls that within the context of its discussion on the Appellant's right to trial without undue delay, the Referral Bench noted that,

> Article 13 of the BiH CC grants an accused the right to be brought before the Court in the shortest reasonable time period and to be tried without delay, and requires the duration of custody to be reduced to the shortest time necessary. Furthermore, incentives exist under the law to proceed without undue delay. Article 135 of the BiH CPC provides for release from custody where an indictment has not been brought or confirmed within a maximum of six months after an accused enters into custody.[237]

The Appeals Chamber also notes that on 16 June 2006, the High Representative of BiH, Dr. Christian Schwarz-Schilling, issued a "Decision Enacting the Law on Amendments to the Criminal Procedure of Bosnia and Herzegovina,"[238] whereby further amendments to the BiH CPC set out the legal basis for the duration of custody before the confirmation of the indictment, when extraordinary circumstances require the undertaking of further investigations,[239] and the legal grounds for custody after the confirmation of the indictment.[240]

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[237] First Impugned Decision, para. 96.

[238] Official Gazette of BiH 46/06. The Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina entered into force the following day after its publication in the Official Gazette, on an interim basis, until its adoption by the Parliamentary Assembly of BiH.

[239] Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina. Official Gazette of BiH 46/06.
Article 1
(Amendment to Article 135)

(1) In Article 135 (*Duration of Custody*) of the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05 and 48/05; hereinafter: the Code), a new Paragraph (4) shall be added after Paragraph (3) to read:

"(4) Exceptionally and in an extraordinarily complex case concerning a criminal offense for which a long-term imprisonment is prescribed, custody may again be extended for no longer than three (3) months after the extension of the custody referred to in Paragraph 3 of this Article. Such an extension may occur twice consecutively, following a substantiated motion of the Prosecutor for each extension, which needs to contain the statement of the Collegium of the Prosecutor's Office about the necessary measures that have to be undertaken in order to complete the investigation (Article 225, Paragraph 3). An appeal against the decision of the Panel on the custody extension shall be decided by the Appellate Division Panel. An appeal does not stay the execution of the decision."

(2) In the current Paragraph (4) of Article 135 of the Code, which shall become Paragraph (5), the words "Paragraph 1 through 3" shall be replaced by the words "Paragraph 1 through 4."

[240] Article 2
(Amendment to Article 137)

(1) Paragraph (2) of Article 137 (*Custody after the Confirmation of the Indictment*) of the Code shall be amended to read:

"After the confirmation of an indictment and before the first instance verdict is pronounced, the custody may not last longer than:

a) one year in the case of a criminal offense for which a punishment of imprisonment for a term up to five years is prescribed;

b) one year and six months in the case of a criminal offense for which a punishment of imprisonment for a term up to ten years is prescribed;

c) two years in the case of a criminal offense for which a punishment of imprisonment for a term exceeding ten

117. However, the Appeals Chamber notes that the Appellant also makes reference to the concerns raised by the OSCE with regard to the fact that the State Court of BiH "justified Janković's detention by relying on the special ground of custody foreseen under Article 132(1)(d) of the BiH CPC, namely the risk of threatening public or property security. "[241] The said provision reads as follows:

> (1) If there is a grounded suspicion that a person has committed a criminal offense, custody may be ordered against him:
>
> d) if the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense requires that custody be ordered for the reason of public or property security. If the criminal offense concerned is the criminal offense of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened. [242]

The OSCE April 2006 Report states that, "the wording of this provision does not clearly define which actual danger it seeks to avert, and whether it is intended to correspond to the protection of public order [...] which [...] is accepted in international human right standards as an exceptional ground for detention."[243] After assessing the use of Article 132(1)(d) BiH CPC in the *Janković* case, the OSCE concludes that its application was not properly justified.[244] Hence, the OSCE "recommends that the legislative authorities delete from the [BiH CPC] Article 132(1)(d) [...] namely the ground for detention on the basis of threat to public or property security."[245]

118. The Appeals Chamber finds that the OSCE raises very legitimate concerns with regard to the Law on Transfer as well as Article 132(1)(d) of the BiH CPC. Nevetheless, it finds that the Referral Bench did not abuse its discretion in considering that overall, the BiH laws applicable to the Appellant still provide an adequate legal basis to ensure compliance with the requirement for a fair trial, which includes ensuring rights of an accused while in detention, and the Appeals Chamber

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years may be imposed, but not the long-term imprisonment;

d) three years in the case of a criminal offense for which a punishment of long-term imprisonment is prescribed.

(2) After Paragraph (2) of Article 137 of the Code, a new Paragraph (3) shall be added, which shall read:

"(3) If, during the period referred to in Paragraph 2 of this Article, no first instance verdict is pronounced, the custody shall be terminated and the accused released."

(3) The current Paragraphs (3) and (4) of Article 137 of the Code shall become Paragraphs (4) and (5).

[241] Second Appeal Brief, para. 41.
[242] Official Gazette of BiH, 36/03..
[243] OSCE April 2006 Report, p. 8.
[244] OSCE April 2006 Report, pp 11-13.
[245] OSCE April 2006 Report, p. 14. *See* also p. 15 for specific recommendations made to the judiciary and the BiH Prosecutor's Office.

does not read the OSCE April 2006 Report as asserting the contrary.[246] However, the Appeals Chamber has no doubt that the competent authorities of BiH will seriously take into consideration the OSCE's recommendation to strengthen this legal basis by making certain amendments to the Law on Transfer, as well as to Article 132(1)(d) of the BiH CPC.

119. With regard to the OSCE's recommendations on the interpretation and application of applicable law to pre-trial detention vis-à-vis proper judicial review of pre-trial custody conditions by the State Court, the Appeals Chamber does not yet consider that the OSCE's findings with regard to the *Stanković and Janković* cases, constitute evidence of an ongoing practice of "rubber stamping" by the Appellate Panel of the State Court when examining appeals of first instance decisions on pre-trial detention. Nevertheless, the Appeals Chamber agrees with the OSCE that the failure of preliminary hearing Judges and the Appellate Panel to consider the merits of complaints made by Stanković and Janković during the pre-adaptation of the indictment phase primarily on the basis of the primacy of the International Tribunal's Order on Detention on Remand, does not constitute meaningful judicial review of complaints as to pre-trial detention conditions. That being said, the Appeals Chamber emphasizes that despite the failure by the preliminary Judges and the Appellate Panel to apply the relevant provisions in those cases, the Referral Bench did not abuse its discretion in finding that there exists a satisfactory legal framework in BiH to ensure the respect of the rights of an accused in pre-trial custody. The Appeals Chamber reiterates that it expects that the State Court will adhere to the recommendations of the OSCE and will therefore apply those provisions in the BiH laws guaranteeing the rights of an accused in pre-trial custody in such a way as to actually guarantee those rights.

120. The Appeals Chamber considers that whether Gojko Janković has been denied a request for the assignment of co-counsel and has been "deprived of the right to have investigators and other support staff assisting on the case,"[247] as asserted by the Appellant, is irrelevant for the purposes of his appeal against the Second Impugned Decision. His main argument on appeal is, that the Referral Bench erred by finding that the OSCE April 2006 Report does not provide a basis for changing the conclusion that the conditions exist for a fair trial if the Appellant's case is referred to BiH. No reference to the denial of Gojko Janković's request for the assignment of co-counsel is made in the OSCE April 2006 Report, and thus this information was not before the Referral Bench. While this

[246] *See Prosecutor v. Gojko Janković,* Case No.: IT-96-23/2-PT, Prosecutor's Second Progress Report, 3 May 2006, para. 6. The Appeals Chamber notes that the Prosecution stated that it considered that the procedural issues identified by the OSCE, which were related primarily to the application of international human right standards, did not appear to affect Gojko Janković's right to a fair trial.
[247] Second Appeal Brief, para. 43.

argument could be dismissed on this basis alone, the Appeals Chamber considers that the Appellant's submissions in this regard merit a detailed reasoned opinion.[248]

121. The Appeals Chamber recalls its finding to the effect that the Referral Bench was not legally required to make a finding on whether the funding of the Appellant's defence would be adequate to cover the lead counsel's fees, trial teams, co-counsel and investigations.[249] The Appeals Chamber emphasizes that the Referral Bench properly considered that the legislation of BiH addressed the Appellant's concerns with respect to his right to counsel of his own choosing, and complied with the terms of Rule 11*bis* of the Rules, by satisfying itself that the BiH CPC provides for assignment of counsel where an accused has insufficient means to pay.[250] In light of the foregoing, the Appeals Chamber does not agree that the Appellant's reference to the *Janković* case is an example of a practice by the BiH Courts, which "clearly contravenes basic rights of the accused."[251]

122. For the foregoing reasons, the Appeals Chamber finds that the reference to Gojko Janković's denied request for the assignment of co-counsel does not constitute evidence of "a blatant breach of the fundamental right of an accused to a fair trial"[252] by the State Court of BiH, nor does it provide concrete reason to believe that the Appellant will not receive a fair trial if his case is referred to the State Court of BiH.

123. Finally, the Appeals Chamber notes that for the reasons set forth in section D of the present decision – concerned with the fourth ground of appeal against the First Impugned Decision – it has found that the Appellant has failed to show that the Referral Bench committed a discernable error by failing to properly examine whether the courts of BiH are adequately prepared to accept the case as required by Rule 11*bis*(A)(iii) of the Rules.[253] The Appellant's arguments in support of his appeal against the Second Impugned Decision do not alter this finding of the Appeals Chamber.

124. For the foregoing reasons, the Appeals Chamber finds that the Referral Bench did not err in the exercise of its discretion by finding that the OSCE April 2006 Report does not provide a basis for changing the conclusion that the conditions exist for a fair trial if the Appellant's case is referred to BiH. Accordingly, the appeal against the Second Impugned Decision is dismissed.

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[248] *See Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 47.
[249] *See supra,* para. 59.
[250] First Impugned Decision, para. 88.
[251] *See* Second Reply, para. 15.
[252] Second Appeal Brief, para. 43.
[253] *See supra,* para. 90.

IV. DISPOSITION

125. On the basis of the foregoing, the Appeals Chamber

DISMISSES the appeals against the First Impugned Decision and the Second Impugned Decision in their entirety, and

ORDERS the Prosecution to continue its efforts to ensure the monitoring and reporting on the proceedings of this case before the State Court of BiH.

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

Dated this fourth day of September 2006
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]