UNITED
NATIONS

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

Case No.: IT-02-65-AR11*bis*.1
Date: 7 April 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: **7 April 2006**

PROSECUTOR

v.

Željko MEJAKIĆ
Momčilo GRUBAN
Dušan FUŠTAR
Duško KNEŽEVIĆ

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

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Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Mrs. Slobodanka Nedić for Duško Knežević

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

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

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of an appeal filed by counsel for Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević ("Defence" and "Appellants" respectively), pursuant to Rule 11*bis* of the Rules of Procedure and Evidence ("Rules")[1] against the "Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* with Confidential Annex" rendered by the Referral Bench on 20 July 2005 ("Impugned Decision").[2]

I. PROCEDURAL BACKGROUND

2. The original indictment against Željko Mejakić, Momčilo Gruban, and Duško Knežević was confirmed on 13 February 1995 and included 16 other co-accused. The original indictment against Dušan Fuštar was confirmed on 21 July 1995 and included 12 other co-accused. On 17 September 2002, the indictments against Željko Mejakić, Momčilo Gruban, Duško Knežević and Dušan Fuštar were joined.[3] On 21 November 2002, the Trial Chamber granted the Prosecution's application to amend and consolidate the original indictments and ordered that the body of the consolidated indictment filed on 5 July 2002, and the attached schedules submitted by the Prosecution be the operative indictment against the Appellants.[4] Subsequently, the Prosecution was granted leave to amend the schedules attached to the indictment, and the last amended schedules were submitted on 13 January 2005.[5] The Impugned Decision is based upon the operative indictment dated 5 July 2002 and the schedules submitted on 13 January 2005 ("Indictment").[6]

3. The Indictment alleges that, following the forcible take-over of Prijedor by Bosnian Serb police and army forces on 30 April 1992, the Crisis Staff imposed severe restrictions on all aspects of life for non-Serbs, principally Bosnian Muslims and Bosnian Croats, including movement and employment. According to the Indictment, Bosnian Serb authorities in the Prijedor municipality unlawfully segregated, detained and confined more than 7,000 Bosnian Muslims, Bosnian Croats and other non-Serbs from the Prijedor area in the Omarska, Trnopolje and Keraterm camps between May and August 1992.[7] The Indictment charges the Appellants with crimes which took place in the

[1] IT/32/Rev.36, 8 August 2005.
[2] *See Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Joint Defence Notice of Appeal, 4 August 2005; Joint Defense Appellants' Brief in Support of Notice of Appeal, 19 August 2005.
[3] *See* Impugned Decision, para. 4 footnotes 6-8.
[4] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on the Consolidated Indictment, 21 November 2002, p. 4.
[5] Impugned Decision, para. 4.
[6] *Ibid.*
[7] Indictment, paras 10- 12.

Omarska and Keraterm camps during this period. Severe beatings, killings as well as other forms of physical and psychological abuse, including sexual assault, are alleged to have been commonplace at these camps, which operated in a manner designed to discriminate and subjugate the non-Serbs by inhumane acts and cruel treatment.[8]

4. Željko Mejakić, Momčilo Gruban, and Dušan Fustar are charged with individual criminal responsibility under Article 7(1) of the Statute of the International Tribunal ("Statute") and with criminal responsibility as superiors for the acts and omissions of their subordinates pursuant to Article 7(3) of the Statute.[9] Duško Knežević is charged on the basis of his individual criminal responsibility under Article 7(1) of the Statute.[10] The Indictment charges each of the Appellants with five counts: Persecutions as a Crime Against Humanity pursuant to Article 5(h) of the Statute; Murder as a Crime Against Humanity pursuant to Article 5(a) of the Statute; Murder as a Violation of the Laws or Customs of War pursuant to Article 3 of the Statute; Inhumane Acts as a Crime Against Humanity pursuant to Article 5(i) of the Statute, and Cruel Treatment as a Violation of the Laws or Customs of War pursuant to Article 3 of the Statute.[11]

5. Željko Mejakić and Momčilo Gruban were transferred from Serbia and Montenegro to The Hague on 4 July 2003 and 2 May 2002, respectively. Dušan Fuštar and Duško Knežević were transferred from Bosnia and Herzegovina ("BiH") to The Hague on 31 January 2002 and 18 May 2002, respectively.[12] Momčilo Gruban had been granted provisional release on 17 July 2002 to reside in Belgrade, but was ordered to return to the United Nations Detention Unit of the International Tribunal ("UNDU") to be present for the delivery of the Impugned Decision.[13] All Appellants are currently being held at the UNDU.

6. On 2 September 2004, the Prosecution filed a motion for the referral of the case against the Appellants[14] to the authorities of BiH pursuant to Rule 11*bis* of the Rules, and the President of the International Tribunal appointed a Referral Bench to consider whether the case against the Appellants should be referred to the authorities of a State.[15] On 9 February 2005, the Referral Bench issued decisions scheduling a hearing, ordering the parties, and inviting the Government of

[8] *Ibid.*, paras 15-16.
[9] *Ibid.*, paras 18, 23.
[10] *Ibid.*, para. 18.
[11] *Ibid.*, paras 29-34.
[12] Impugned Decision, para. 14.
[13] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on Request for Pre-Trial Provisional Release, 17 July 2002; "Scheduling Order", 8 July 2005. As ordered by the Referral Bench, Momčilo Gruban arrived at The Hague on 18 July 2005.
[14] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Request by the Prosecutor under Rule 11*bis*. (This motion included public Annex I and confidential Annexes II and III).
[15] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court under Rule 11*bis*, 4 October 2004.

BiH to submit responses to specific questions.[16] The written submissions of Željko Mejakić, and the Prosecution were filed on 21 February 2005.[17] Momčilo Gruban, Dušan Fuštar, Duško Knežević,[18] and the Government of BiH[19] filed their written submissions on 25 February 2005. On 3 and 4 March 2005, the Referral Bench heard the parties and representatives of the Governments of BiH and Serbia and Montenegro.[20] Further submissions of the Government of BiH and the parties were filed following the Rule 11*bis* Hearing.[21]

7. Following the briefing and the Rule 11*bis* Hearing, the Referral Bench examined the gravity of the crimes with which the Appellants are charged and the level of their responsibility, and concluded that it was satisfied "on the information presently available" that the Appellants would receive a fair trial and that the death penalty would not be imposed or carried out.[22] The Referral Bench held that the referral was appropriate and concluded that referral of the case to the authorities of BiH should be ordered.[23]

8. On 4 August 2005, the Prosecution filed its Notice of Appeal against the Impugned Decision setting forth one ground of appeal related to the infringement of the Prosecution's discretion to monitor the trial once the case had been referred.[24] As the same ground had been raised by the Prosecution in its appeal against the decisions on referral in the *Rašević and Todović*, *Stanković,* and *Janković* cases, the Prosecution requested that these cases be assigned "to a single judicial

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[16] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Scheduling Order for a Hearing on Referral of a Case under Rule 11*bis*, 9 February 2005; Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis*, *Partly Confidential with Confidential Annex,* 9 February 2005. In addition, the Referral Bench invited the Government of Serbia and Montenegro to be prepared to address, by way of oral submission at the scheduled hearing, its proposal that the case be referred to Serbia and Montenegro.

[17] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, The Motion of the Defence of Željko Mejakić in Complying to the Order of the Specially Appointed Chamber for Further Information in the Context of the Prosecutor's Request Under Rule 11*bis*, *Confidential,* 21 February 2005; Prosecution's Further Submissions Pursuant to Chamber's Order of 9 February 2005, 21 February 2005.

[18] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Corrigendum to 22 February 2005 Joint Defence Response to the Trial Chamber Decision for Further Information in the Context of the Prosecution's Request under Rule 11*bis*, *Confidential*, 25 February 2005. The corrigendum contained the entire corrected version of the Defence filing of 22 February 2005. *See* Joint Defence Response to the Trial Chamber Decision for Further Information in the Context of the Prosecution's Request under Rule 11*bis*", *Confidential,* 22 February 2005.

[19] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Specially Appointed Chamber in its Decision for Further Information in the Context of the Prosecutor's Request under Rule 11*bis* of 9 February 2005, 25 February 2005 ("First BiH Submission").

[20] Rule 11*bis* Hearing, 3 - 4 March 2005 ("Rule 11*bis* Hearing").

[21] *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Joint Supplemental Submission by the Defence Teams of All the Named Accused in Opposition of the Prosecution's Motion under Rule 11*bis,* 18 March 2005 ("Second Joint Defence Submissions"). The Defence filed, with leave, the Second Joint Defence Submissions because they had not yet received the First BiH Submission at the time of the Rule 11*bis* Hearing. *See* Rule 11*bis* Hearing, T. 177-178, 279. *See* Letter to the Government of Bosnia and Herzegovina from Herman von Hebel, Senior Legal Officer, 11 March 2005; Response by the Government of Bosnia and Herzegovina to the Request for Further Written Submissions by the Referral Bench in the Mejakić and Stanković Cases", 23 March 2005. *See also* Further Supplemental Response Made Jointly on Behalf of all the Accused in Opposition to the Prosecution's Submission Pursuant to Rule 11*bis*, 31 March 2005.

[22] Impugned Decision, para. 137.

[23] *Ibid.*

bench of the Appeals Chamber, and that this issue be heard and resolved in a consolidated manner."[25] The Prosecution filed its Appellant's Brief on 5 August 2005.[26] No Respondent's Brief was filed by the Appellants.

9. The Appellants filed their Notice of Appeal on 4 August 2005, setting forth nine grounds of appeal against the Impugned Decision and requesting, *inter alia,* that the case be tried before the International Tribunal. Alternatively, if the Appeals Chamber determined that the case should be referred to the authorities of a State, the Appellants seek 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.[27] On 19 August 2005, the Defence filed their Appeal Brief[28] to which the Prosecution responded on 29 August 2005.[29] The Defence filed its reply on 2 September 2005.[30] Following the rendering of the Appeal's Chamber decision in the *Stanković* case,[31] the Prosecution withdrew its appeal on 19 September 2005.[32]

II. STANDARD OF REVIEW

10. The Appeals Chamber recalls that an appeal pursuant to Rule 11*bis*(I) of the Rules is more akin to an interlocutory appeal, than to an appeal from judgement.[33] The Appeals Chamber further recalls that a Trial Chamber exercises discretion in different situations, *inter alia,* when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and in deciding points of practice or procedure.[34]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 such a discretionary decision. Under the plain language of Rule 11*bis*(B), the Referral Bench "may order" referral *proprio motu* or at the request of the Prosecutor. Thus, where an appeal is brought from a Rule 11*bis* referral

[24] Prosecution's Notice of Appeal, 4 August 2005.
[25] *Prosecutor v. Radovan Stanković,* Case No.: IT-96-23/2-AR11*bis*.1, *Prosecutor v. Mitar Rašević and Savo Todović,* Case No.: IT-97-25/1-AR11*bis*.1, *Prosecutor v. Željko Mejakić et al.,* Case No.: IT-02-65-AR11*bis*.2, *Prosecutor v. Gojko Janković,* Case No.: IT-96-23/2-AR11*bis*.2, Notice of Related Cases and Request to Join Issues for Appeal, 5 August 2005, para. 2.
[26] Prosecution's Appellant's Brief, 5 August 2005.
[27] Joint Defence Notice of Appeal, p. 13(2) – 14.
[28] Joint Defense Appellants' Brief in Support of Notice of Appeal, 19 August 2005 ("Joint Defence Brief").
[29] Prosecution's Response to "Joint Defense Appellants' Brief in Support of Notice of Appeal", 29 August 2005 ("Prosecution's Response").
[30] Joint Defense Reply to the Prosecution's Response to Joint Defense Appellants' Brief in Support of Notice of Appeal, Confidential, 2 September 2005 ("Joint Defence Reply").
[31] *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").
[32] Notice of Withdrawal of Appeals, 19 September 2005.
[33] *Prosecutor v. Radovan Stanković,* Case No.: IT-96-23/2-AR11*bis*.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras 14-16.

decision, the issue "is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[35] The burden rests upon the party challenging a discretionary decision to demonstrate that the Trial Chamber has committed a "discernible error."[36] Accordingly, the party challenging a decision pursuant to Rule 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.[37]

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

A. First Ground of Appeal

11. The Appellants submit that the Referral Bench erred in law and in fact, by failing to examine whether it had the jurisdiction and the authority to refer the case to another court.[38]

(a) Submissions

12. The Appellants first contend that the Referral Bench erred in assuming that it possessed the authority to refer a case from the International Tribunal to another jurisdiction, and in then acting on that assumed authority.[39] The Appellants claim that the International Tribunal can exercise only those powers conferred on it by the Security Council.[40] Given this limitation on its authority, the Appellants submit, the Referral Bench was obliged to "first examine whether it had the legitimate authority and competence to exercise the powers set forth in Rule 11*bis*."[41] The Appellants further submit that a proper review of the basis of its authority would have established that the Referral Bench lacks the power to refer cases to national jurisdictions.[42]

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[34] *Prosecutor v. Slobodan Milošević,* Cases Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3.
[35] *Ibid.*, para. 4.
[36] *Ibid.*, para. 5.
[37] *Ibid.*, para. 6; *Prosecutor v. Slobodan Milošević*, Case No: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10.
[38] Joint Defence Notice of Appeal, p. 3(A).
[39] Joint Defence Brief, para. 1.
[40] *Ibid.*, para. 6.
[41] *Ibid.*, p. 2 (1).
[42] *Ibid.*, para. 2.

13. The Appellants contend that there is no provision in the Statute, which provides a legal basis for the adoption of Rule 11*bis* of the Rules. They trace the adoption of Rule 11*bis* and note that the Security Council declined to amend the Statute to incorporate the referral rule.[43] They assert that the Security Council's stated support for the completion strategy is not enough to create a legal basis for referring cases out of the International Tribunal's jurisdiction.[44] With respect to Article 15 of the Statute, which authorizes the International Tribunal to adopt new Rules of Procedure and Evidence only for certain enumerated purposes, the Appellants further argue that it does not expressly include adoption of Rules for purposes of referral of cases to "newly created national courts."[45] In addition, they submit that Articles 9 and 29 of the Statute do not contain —expressly or by implication— a basis for the power to effectuate referral.[46] Finally, they argue that the International Tribunal's inherent powers cannot be invoked to confer authority upon the Referral Bench to act under Rule 11*bis* of the Rules. They submit that the International Tribunal's inherent powers must relate to its judicial functions – the prosecution of persons responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991 – and the referral of a case to a national court "negates rather than relates to the International Tribunal's primary judicial function."[47]

14. The Prosecution responds that as a subsidiary organ of the United Nation's Security Council, the International Tribunal has the power to refer intermediate and lower level cases to national jurisdictions, and submit that the Appellants' attempt to raise this jurisdictional question for the first time on appeal should be dismissed.[48]

(b) Discussion

15. The Appeals Chamber recalls its previous holdings on this issue in the *Stanković* Rule 11*bis* Appeal Decision. As the Appellants in the instant case, Radovan Stanković had challenged the competence of the Referral Bench to refer a case to another jurisdiction for the first time on appeal. However, the Appeals Chamber did not dismiss the arguments on that basis alone. It considered that the issue raised was of significance, and decided to set forth its views on the issue.[49]

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[43] *Ibid.*, para.16.
[44] *Ibid.*, paras 16 - 18.
[45] *Ibid.*, para. 20. Article 15 of the Statute reads: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."
[46] *Ibid.*, paras 21 - 23, 26 - 28. Article 9 provides that the International Tribunal shall have concurrent jurisdiction with national courts and primacy over those courts with respect to matters within the competence of the International Tribunal. Article 29 instructs states to cooperate with the International Tribunal in its investigations and prosecutions.
[47] *Ibid.*, para. 31; *see also* paras 30, 32.
[48] Prosecution's Response, para. 2.1.
[49] *Stanković* Rule 11*bis* Appeal Decision, para. 13.

16. In the *Stanković* case, the Appeals Chamber held that even if the explicit authority to conduct referral of cases to national jurisdictions is not given to the International Tribunal by the Statute itself, Article 9 of the Statute gives the International Tribunal the implicit authority to do so, and emphasized that this has been backed by Security Council resolutions.[50] Recalling resolution 1503[51] and resolution 1534[52] passed by the Security Council under its Chapter VII authority, the Appeals Chamber made clear that Rule 11*bis* was amended to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the International Tribunal has implicit authority to do so under the Statute.[53] After explaining that it was unnecessary that the Security Council amend the Statute so that it would contain a specific provision allowing for the referral of cases, the Appeals Chamber stated that the Security Council "confirmed the legal authority behind the [International] Tribunal's referral process, but it left it up to the [International] Tribunal to work out the logistics for doing so, such as through amendment of its Rules."[54]

17. For the foregoing reasons, and pursuant to the holding in the *Stanković* Rule 11*bis* Appeal Decision, the first ground of appeal is dismissed.

B. Second Ground of Appeal

18. The Appellants contend that the Referral Bench erred in concluding that the gravity of the crimes charged against the Appellants and their level of responsibility are not *ipso facto* incompatible with referral of their case.[55]

(a) Submissions

19. The Appellants argue that the Referral Bench erred in its analysis of the gravity of the crimes charged and the level of responsibility based on their participation in a joint criminal

[50] *Ibid.*, paras 14-15.
[51] Under Resolution 1503, the Security Council endorsed the International Tribunal's proposed strategy of concentrating on the "trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and referring cases involving those who may not bear this level of responsibility to competent national jurisdictions." The Security Council noted especially that this strategy required "the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber') and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber." U.N. Doc. S/RES/1503 (2003) 28 August 2003, p. 2.
[52] Under Resolution 1534, the Security Council requested the International Tribunal to keep it informed of the "transfer of cases involving intermediate and lower rank accused to competent national jurisdictions."U.N. Doc. S/RES/1534 (2004) 26 March 2004, para. 6.
[53] *Stanković* Rule 11*bis* Appeal Decision, para.16.
[54] *Ibid.*
[55] Joint Defence Notice of Appeal, p. 4 (A).

enterprise.[56] Drawing a comparison with the *Stakić* case, the Appellants contend that it is contradictory "that persons similarly charged with what may be described as 'peripheral' involvement in the joint criminal enterprise [...] have been convicted and sentenced to the harshest sentence available, life imprisonment, as merely an indirect co-perpetrator, rather than a direct participant."[57] In contrast, they submit, each of the Appellants is charged with "direct personal involvement in the crimes alleged," thus they "stand the potential of being found more culpable than a mere indirect co-perpetrator."[58] The Appellants further argue that "[b]y failing to take into account other [a]ccused [before the International Tribunal] who have been tried for the events in Prijedor, the Referral [Bench] failed to properly apply the Rule 11*bis* test."[59] Finally, they submit that the Impugned Decision violates the rights provided for in Article 21 of the Statute because it subjects the Appellants "to a different set of laws, different standard of liability and different standard of sentencing, under the [BiH] system, than their alleged cohorts who were tried by the [International] Tribunal."[60]

20. The Prosecution responds that the Appellants' alleged participation in the joint criminal enterprise does not alter the finding of the Referral Bench that the level of responsibility of the Appellants is proper for referral.[61] It submits that even though participation in a joint criminal enterprise is alleged in the Indictment, the Appellants' alleged participation is not such that could be described as being part of "the big picture."[62] The Prosecution also argues that the Referral Bench did not err by not considering whether crimes which took place in Prijedor had already been tried before the International Tribunal, as this is not a relevant factor to be considered in determining the gravity of the crimes charged against the Appellants and their level of responsibility.[63]

21. In reply the Appellants submit that "Rule 11*bis* [...] is more appropriately applied to new cases, which do not have such a long history before the [International] Tribunal."[64]

(b) Discussion

22. The Appellants have failed to show that the Referral Bench's finding that the gravity of the crimes charged against them and their level of responsibility are not *ipso facto* incompatible with

[56] Joint Defence Brief, para. 33-35.
[57] *Ibid.*, para. 34.
[58] *Ibid.*, para. 35.
[59] *Ibid.*
[60] *Ibid.*, para. 36. The Appeals Chamber notes that since this submission is more relevant to the fifth ground of appeal than the present ground of appeal, it will address it in its discussion on the Appellants' fifth ground of appeal.
[61] Prosecution's Response, para. 3.3.
[62] *Ibid.*, para. 3.4. referring to Impugned Decision, para. 23.
[63] *Ibid.*, para. 3.6.

referral of the case, was in error. When assessing the gravity of the crimes charged against the Appellants and their level of responsibility, the Referral Bench properly considered only those facts alleged in the Indictment before reaching a determination concerning the appropriateness of referring the case to a national jurisdiction.[65] Consequently, it was on the basis of its consideration of *all* the facts alleged in the 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 Appellants' participation in the joint criminal enterprise, as well as the fact that all of them are charged with criminal responsibility pursuant to Article 7(1) of the Statute, were factors properly considered by the Referral Bench in reaching its conclusion.

23. The Impugned Decision points out that the Indictment pleads that the Omarska and Keraterm camps were set up by the Crisis Staff "in order to carry out a *part of* the overall objective of the joint criminal enterprise *of the Bosnian Serb leadership*."[66] The Impugned Decision notes that the Indictment names the Appellants amongst those who participated in the joint criminal enterprise, nonetheless, the Referral Bench emphasized that it is expressly pleaded in paragraph 19 of the Indictment that their participation was limited to their activities within the two camps. Hence, the Referral Bench concluded that

> while a major joint criminal enterprise is identified, which is alleged to have involved the highest political leadership, it is not the Prosecutor's case that these Accused were participants at that level in what may be described as the 'big picture'. Rather, it is merely alleged against these Accused that they participated in the joint criminal enterprise by acts and conduct at the Keraterm and Omarska camp, conduct which was a means of implementing a part of the objectives of the alleged joint criminal enterprise.[67]

24. The Appeals Chamber considers that a comparison with the *Stakić* case is irrelevant to the Appellants in the context of this case, and recalls that "[n]othing in Rule 11*bis* of the Rules indicates that [a] Referral Bench is obliged to consider the gravity of the crimes charged and the level of responsibility of accused in other cases in order to make its referral decision. Although the Referral Bench may be guided by a comparison with an indictment in another case, it does not commit an error of law if it bases its decision on referral merely on the individual circumstances of the case before it."[68] Accordingly, the Referral Bench did not err in law "[b]y failing to take into

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[64] Joint Defence Reply, para. 25.
[65] *See* Impugned Decision, para. 20.
[66] *Ibid.*, para. 23 (referring to Indictment para. 19, emphasis added in the Impugned Decision).
[67] *Ibid.*
[68] *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. 26.

account other [a]ccused who have been tried for the events in Prijedor"[69], as alleged by the Appellants.

25. In support of their second ground of appeal, the Appellants submit that the Referral Bench "misconstrued" the Defence's argument that they needed access to findings and evidence from other proceedings before the International Tribunal "arising out of the same alleged criminal enterprise" since they are crucial for the preparation of their defence; they claim that if their case is referred to BiH they will have no access to such materials. [70] First, the Appeals Chamber notes that this argument is not relevant to the present ground of appeal and that no reference to the Appellants' submissions before the Referral Bench on this issue is provided. If this issue was not raised before the Referral Bench, the Appellants cannot claim that their argument was "misconstrued" or that the Referral Bench failed to address a matter which was not brought before it, thereby committing an error of law or fact. Second, pursuant to Rule 11*bis* of the Rules, the Referral Bench was not required to consider the Appellants need to access materials from related proceedings before the International Tribunal (for the preparation of their defence) when reaching a determination concerning the assessment of the gravity of the crimes and the level of responsibility of the Appellants. Therefore, the Appellants have failed to show that the Referral Bench erred in law. Third, with respect to access to confidential materials from related cases before the International Tribunal, defence counsel in a proceeding in BiH, like the BiH Prosecutor, may request that the Prosecutor of the International Tribunal applies to vary protective measures under Rule 75 of the Rules.[71] Thus, the relevant parties to the proceeding in the national jurisdiction – both the Prosecutor and the Appellants – are on equal footing in terms of their ability to gain access to confidential materials from other International Tribunal cases.[72]

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

C. Third Ground of Appeal

27. The Appellants submit that the Referral Bench erred in law in concluding that the laws governing extradition do not apply to prevent the referral of the case against the Appellants pursuant to Rule 11*bis* of the Rules.[73]

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[69] *See* Joint Defence Brief, para. 35.
[70] *Ibid.*, para. 38.
[71] *See* Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina pursuant to Rule 33(B), IT-05-8-Misc 2 (6 April 2005).
[72] *Stanković* Rule 11*bis* Appeal Decision, para. 24; *Janković* Rule 11*bis* Appeal Decision, para. 51.
[73] Joint Defence Notice of Appeal, p. 5(A).

(a) Submissions

28. The Appellants argue that the Impugned Decision misconstrues and misapplies the prevailing "legal authorities relating to extradition" thus violating the Appellants' fundamental rights.[74] In support of this argument, the Joint Defence Brief sets forth an analysis of European provisions concerning extradition, in particular, the rule of specialty, re-extradition to a third state, and simplified extradition procedure.[75] Second, the Appellants argue that the Referral Bench erred by "overstepping its authority [...] when it instructed Serbia- Montenegro to make Momčilo Gruban available for the public hearing on Rule 11*bis*, knowing that he was going to be extradited to a third party",[76] and by keeping him at the UNDU "even before the [Impugned] Decision was rendered, and before the provisional release was terminated."[77] Third, the Appellants argue that the Referral Bench further erred by not seeking additional information and requesting a formal response from the Defence or the authorities of Serbia and Montenegro and BiH to determine the true status of the citizenship of Dušan Fuštar and Željko Mejakić.[78] The Appellants assert that the Referral Bench preferred to keep the citizenship issue "vague" and that the Impugned Decision makes contradictory statements in this respect.[79] The Appellants further submit that the Referral Bench erred by not allowing the Defence to supplement its response to the Prosecution's submission as requested on 1 June 2005.[80]

29. The Prosecution submits that the Appellants have failed to understand the unique position of the International Tribunal with respect to national jurisdictions, since the laws governing extraditions have no counterpart in the arrangements relating to the International Tribunal.[81] It further responds that pursuant to Rule 11*bis*(H) of the Rules, the Referral Bench has the requisite authority to order Momčilo Gruban to return to the International Tribunal to attend the Rule 11*bis* Hearing, and to detain him in its custody, prior to the rendering of the Impugned Decision.[82] The Prosecution contends that the Defence did provide a response to the Prosecution's supplemental submissions regarding the Appellants' citizenship and that no submission was made regarding

[74] Joint Defence Brief, paras 39 - 41.
[75] *Ibid.*, paras 43-46, 53-62 referring *inter alia* to the European Convention Relating to Extradition Between the Member States of the European Union, and the Model Convention on Extradition.
[76] *Ibid.*, para. 47.
[77] *Ibid.*, para. 47.
[78] *Ibid.*, para. 50.
[79] *Ibid.*
[80] *Ibid.*, para. 51.
[81] Prosecution's Response, para. 4.3 citing *Prosecutor v. Milan Kovačević,* Case No.: IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 37 ("*Kovačević* Decision").
[82] *Ibid.*, para. 4.5.

Željko Mejakić.[83] Finally it adds that despite the Appellants assertion that all four are citizens of Serbia and Montenegro, the Joint Defence Brief contains no evidence in support of this assertion.[84]

30. In reply, the Appellants largely repeat the arguments advanced in the Joint Defence Brief; they argue that the *Kovačević* Decision is irrelevant to the issue at hand,[85] and submit that with the exception of the transfer of an accused to the International Tribunal pursuant to Article 29 of the Statute, in all other cases, the International Tribunal is bound by the international laws on extradition.[86]

(b) Discussion

31. The Appeals Chamber considers that the Referral Bench did not misconstrue or misapply "prevailing legal authorities relating to extradition."[87] The Referral Bench's reliance on the *Kovačević* Decision in support of the proposition that regardless of the manner in which the Appellants were originally transferred to the International Tribunal, referral pursuant to Rule 11*bis* of the Rules would not amount to an extradition *stricto sensu,* is correct.[88] Accordingly, the Referral Bench properly concluded that the treaty or national law governing extradition does not apply to prevent the referral of the Appellants' case pursuant to Rule 11*bis* of the Rules because, as with the initial transfer of the Appellants to the International Tribunal, their transfer to the State authorities under Rule 11*bis* is not the result of an agreement between the State and the International Tribunal.[89] The Appeals Chamber recalls that the obligation upon States to cooperate with the International Tribunal and comply with its orders arises from Chapter VII of the United Nations Charter. Accordingly, a State cannot impose conditions on the transfer of an accused, or invoke the rule of specialty or non-transfer concerning its nationals.[90] The referral procedure envisaged in Rule 11*bis* is implemented pursuant to a Security Council resolution, which, under the United Nations Charter, overrides any State's extradition requirements under treaty or national law.[91]

32. With respect to the allegation that the Referral Bench overstepped its authority when it instructed Serbia and Montenegro to make Momčilo Gruban available for the "public hearing on

[83] *Ibid.*, para. 4.6. refering to Joint Defence Response to the Prosecution's Supplemental Submission, filed on 10 June 2005.
[84] *Ibid.*
[85] Joint Defence Reply, para. 28.
[86] *Ibid.*, para 32.
[87] Joint Defence Brief, para. 39.
[88] Impugned Decision, para. 31.
[89] *Ibid; see also* Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber pursuant to Rule 115, 16 November 2005, para. 39 ("*Mejakić et al.* Rule 115 Decision").
[90] Impugned Decision, para. 31; *Mejakić et al.* Rule 115 Decision, para. 39.
[91] U.N. Doc. S/RES/1503 (2003) 28 August 2003.

Rule 11*bis*"[92], the Appeals Chamber notes that this allegation concerns the public hearing held on 20 July 2005 for the delivery of the Impugned Decision and not the Rule 11*bis* Hearing.[93] In any event, the Appeals Chamber considers that this allegation is without merit. The Referral Bench was entitled to secure the presence of an accused that had been provisionally released in order to deliver its decision on the referral of his case and make sure that the said decision could be implemented. As the Prosecution points out, pursuant to Rule 11*bis*(H) of the Rules — which states that a Referral Bench shall have the powers of a Trial Chamber under the Rules — the Referral Bench had the power to order the return of Momčilo Gruban.[94]

33. With respect to the Appellants' third argument, the Appeals Chamber considers that the Appellants have failed to show that the Referral Bench erred by failing to seek additional information and request a formal response from the Defence or the authorities of Serbia and Montenegro and BiH to determine the true status of the citizenship of Dušan Fuštar and Željko Mejakić. The Impugned Decision provides a detailed account of the Defence's submissions on the issue of the citizenship of the Appellants.[95] Therefore, the Appeals Chamber does not consider that the Referral Bench preferred to keep this issue "vague" as alleged by the Appellants.[96] The Impugned Decision notes the inconsistency of the Defence's submissions in support of the proposition that grounds of nationality call for the referral of the Appellants' case to Serbia and Montenegro, and the further submissions of the parties on this issue, and concludes that citizenship has no significant relevance to the determination of the State to which referral should be ordered.[97] The Referral Bench considered that neither the Defence, nor Serbia and Montenegro, were in a position to request the referral of the Appellants' case to Serbia and Montenegro pursuant to Rule 11*bis* of the Rules.[98] Therefore, it was not required to request any information from the authorities of Serbia and Montenegro or BiH concerning the citizenship of Dušan Fuštar and Željko Mejakić.

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

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[92] *See* Joint Defence Brief, para. 47.
[93] Momčilo Gruban had been granted provisional release on 17 July 2002 to reside in Belgrade, but on 8 July 2005 he was ordered to return to the UNDU to be present for the delivery of the Impugned Decision. As ordered by the Referral Bench, Momčilo Gruban arrived at the UNDU in The Hague on 18 July 2005. *See Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Decision on Request for Pre-Trial Provisional Release, 17 July 2002; Scheduling Order, 8 July 2005.
[94] *Cf.* Rule 65(C) and (I).
[95] *See Mejakić et al.* Rule 115 Decision, para. 31.
[96] Joint Defence Brief, para. 50.
[97] Impugned Decision, paras 34-38.
[98] *Ibid.*, para. 39.

D. Fourth Ground of Appeal

35. The Appellants submit that the Referral Bench erred in law and in fact in "concluding that the referral for trial of the instant case to the authorities of [BiH] would be appropriate due to a 'significantly greater nexus' than in Serbia and Montenegro, and that it could only consider referral *proprio motu* to Serbia and Montenegro if there were significant problems with referral to [BiH]."[99]

(a) Submissions

36. In support of the argument that the Referral Bench erred in finding that the referral of the case to the BiH authorities would be appropriate due to the significantly greater nexus that existed between BiH and their cases, the Appellants submit that: (a) the Referral Bench erred in determining that Serbia and Montenegro did not have standing to request the referral of the proceedings[100] because it fulfils the requirements set out in Rule 11*bis*(A)(iii) and "as a country with a right and priority to prosecute its own citizens, it has jurisdiction over the Appellants";[101] (b) the "Referral Bench erred by not realizing that it could, *proprio motu* decide to refer the proceedings to Serbia-Montenegro";[102] (c) the Referral Bench "erred when it determined that it was bound [...] by the Prosecution's petition for referral to [...] [BiH]",[103] and (d) after concluding that Rule 11*bis*(A) does not prescribe a hierarchy of states for the referral of cases, the Referral Bench should have analyzed the "potential preparedness" of Serbia and Montenegro to take the case.[104] Nonetheless, argue the Appellants, despite this finding, the Referral Bench "proceeded to employ precisely the same hierarchy of descending priority that had been rejected, as the criteria for choosing [BiH] over Serbia-Montenegro."[105]

37. The Prosecution submits that the Referral Bench did not err in law by "engaging in the 'nexus' analysis prior to assessing BiH capacity to accept the referred case,'"[106] 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."[107] The Prosecution further submits that: (a) it is clear from Rule 11*bis*(B) that States do not have a standing to file requests for referral of cases, thus the Referral Bench did not err in finding that Serbia and Montenegro did not have the standing to present a request for referral to its jurisdiction; (b) the

[99] Joint Defence Notice of Appeal, p. 5(A).
[100] Joint Defence Brief, para. 68.
[101] *Ibid.*, para. 70.
[102] *Ibid.*, para. 71.
[103] *Ibid.*
[104] *Ibid.*
[105] *Ibid.*, para. 72.
[106] Prosecution's Response, para. 5.1.

Referral Bench did acknowledge that it was not bound by the Prosecution's request to refer the case to BiH and that it could, *proprio motu,* order referral to a different Sate,[108] and (c) the Referral Bench did not apply a hierarchy of descending priority of states, but rather weighed the appropriate factors and concluded that they were in favour of a referral to BiH.[109]

38. In support of the argument that the Referral Bench erred in concluding that there were no significant problems with the referral of the case to BiH "such that the Referral Bench did not come to consider whether it should *proprio motu* refer the case to Serbia and Montenegro",[110] the Appellants submit that: (a) the Referral Bench erred when it failed to determine the applicable law in the case of referral, in so far as the Appellants are supposed to be tried under the law which is more lenient;[111] (b) once the Referral Bench had determined that Serbia and Montenegro had a relatively weak nexus or connection to the crimes alleged, it should have considered whether the nexus with BiH threatened the Appellants' ability to obtain a fair trial;[112] (c) the Referral Bench erred in law and violated the Appellants' fundamental rights by failing to consider that since "the war touched everyone in Bosnia personally [...] a change of venue from the location of the alleged crimes is warranted to ensure a fair trial,"[113] and thus the Referral Bench should have referred the proceedings to a more neutral location, namely, Serbia and Montenegro.[114]

39. The Prosecution submits in response that: (a) the Referral Bench thoroughly addressed the issues of an adequate legal framework and the applicable substantive law,[115] and correctly held that it is for the State Court of BiH[116] to determine which is the applicable law;[117] (b) the Appeals Chamber has confirmed that the principle of *lex mitior* does not apply between different jurisdictions,[118] and (c) the Appellants cite no authority in support of the proposition that the Referral Bench should have referred the proceedings to a more neutral location, namely, Serbia and Montenegro, and have shown no error in the Referral Bench's approach.[119]

40. Most of the Appellants' arguments in reply concern the issue of the fairness of the proceedings, which the Appellants justify on the basis that"[t]he analysis of nexus has to take into

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[107] *Ibid.*, para. 5.6. citing Ian Brownlie, *Principles of Public International Law*, 6th ed., p. 305.
[108] Prosecution's Response, para. 5.3 referring to Impugned Decision, para. 39.
[109] *Ibid.*, para. 5.5. where the Prosecution lists those factors considered by the Referral Bench.
[110] Joint Defence Brief, p. 24(B).
[111] *Ibid.*, para. 84.
[112] *Ibid.*, para. 89.
[113] *Ibid.*, para. 90, *see also* para. 92.
[114] *Ibid.*, paras 90-91.
[115] *See* Prosecution's Response, paras 5.9 – 5.10 referring to Impugned Decision at paras 43-63.
[116] Referred to in the Impugned Decision as "State Court." The present Decision will use the term: "State Court of BiH."
[117] Prosecution's Response, para. 5.10.
[118] *Ibid.*, para. 5.11.

account prospects of a fair trial."[120] They further submit that "[n]exus should not have been the only criteria determined in deciding where to transfer the case"[121] and argue that "the Referral Bench had an obligation to determine which law was more lenient for the [Appellants] and which jurisdiction provided guarantees of enforcing the more lenient law on the [Appellants] in the case of referral."[122]

(b) Discussion

41. First, the Appeals Chamber notes that the Impugned Decision correctly states that neither the Appellants nor Serbia and Montenegro had *locus standi* to file a formal request for referral of the case to Serbia and Montenegro pursuant to Rule 11*bis*.[123] However, the Referral Bench recognised that it was not bound to consider only BiH as a possible state of referral,[124] and thus did not err by "not realizing that it could, *proprio motu* decide to refer the proceedings to Serbia and Montenegro"[125] as alleged by the Appellants.

42. It is clear from the Impugned Decision that the Referral Bench did not conclude that the referral of the Appellants' case to the authorities of BiH would be appropriate "due to a 'significantly greater nexus' between their case and [BiH]"[126] as alleged by the Appellants. This was only one of several factors taken into account by the Referral Bench, which consequently held as follows:

> [t]he Referral Bench is persuaded for the reasons indicated that [BiH] has a significantly greater nexus with the trial of each of these Accused for the offences alleged against them than Serbia and Montenegro. The Referral Bench will therefore consider whether, in light of *all relevant factors*, referral for trial of the case to the authorities of [BiH] would be appropriate.[127]

43. The Appeals Chamber finds that the Appellants have failed to show that the Referral Bench "proceeded to employ precisely the same hierarchy of descending priority that had been rejected, as the criteria for choosing [BiH] over Serbia-Montenegro." [128] 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 relevant factors after it had determined that BiH had a

[119] *Ibid.*, para. 5.17.
[120] Joint Defence Reply, para. 52.
[121] *Ibid.*, para. 41.
[122] *Ibid.*, para. 44.
[123] Impugned Decision, para. 39; *Janković* Rule 11*bis* Appeal Decision, para. 32.
[124] *Ibid.*
[125] Joint Defence Brief, para. 71.
[126] *See* Joint Defence Notice of Appeal, p. 5(A); Joint Defence Brief, p. 19(A).
[127] Impugned Decision para. 42 (emphasis added).
[128] Joint Defence Brief, para. 72.

"significantly greater nexus" with him and the offences alleged against him. In that case it 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.[129] 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.[130] In that case, 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.[131]

44. 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.[132]

The Appeals Chamber considers that the Impugned Decision is consistent with these findings. The Referral Bench exercised its discretion to choose BiH as the State to which the Appellants' case should be referred, based, *inter alia,* on the fact that the crimes are alleged to have been committed in BiH against persons living there, the fact that the Referral Bench was satisfied that they would receive a fair trial in BiH and that the death penalty would not be imposed or carried out.[133] In light of the foregoing, the Appeals Chamber finds that the Appellants have failed to show that the Referral Bench erred in law by failing to refer the proceedings to a more "neutral location" namely, Serbia and Montenegro.

45. As pointed out by the Prosecution, the Referral Bench thoroughly addressed the issue of the applicable substantive law.[134] The Referral Bench correctly concluded that it did not have the authority to decide which law was to be applied if the case was referred to BiH since this determination fell within the competence of the State Court of BiH.[135] Yet, the Referral Bench

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[129] *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.
[130] *Janković* Rule 11*bis* Appeal Decision, para. 37.
[131] *Ibid.*
[132] *Ibid.*, para. 33.
[133] Impugned Decision, para. 137.
[134] *Ibid.*, paras 43-63.
[135] *Ibid.*, para. 43.

determined that it had to be satisfied, that if the case were to be referred to BiH, there would exist an adequate legal framework "which not only criminalizes the alleged conduct of the [Appellants] so that the allegations can be duly tried and determined, but which also provides for appropriate punishment in the event that conduct is proven criminal."[136] The Referral Bench devoted twenty paragraphs of the Impugned Decision addressing the submissions of the parties on this issue and considering whether the laws applicable in proceedings before the State Court of BiH would permit the prosecution, trial and appropriate punishment of the Appellants, if found guilty.[137]

46. The Appellants further argue that the Referral Bench erred when it failed to determine the applicable law in the case of referral.[138] In support of this contention, they submit that the Referral Bench had an obligation to determine which jurisdiction provided guarantees of enforcing the more lenient law on the Appellants. [139] The Appellants assert that if referred to BiH, and tried pursuant to the 2003 Criminal Code of BiH ("BiH CC"), they "will be sent to a jurisdiction whose sentencing scheme foresees a **MINIMUM** sentence of 20 years" for the crimes charged against them.[140] The Appeals Chamber considers that this assertion is unsubstantiated.

47. When addressing the principle of legality, the Impugned Decision cites Article 4 of the BiH CC which provides as follows:

> Article 4 (Time Constraints Regarding Applicability)
>
> (1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.
>
> (2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, *the law that is more lenient* to the perpetrator shall be applied.[141]

Moreover, the Appeals Chamber notes that the Defence itself asserts that Serbia and Montenegro and BiH have in place specific provisions in their domestic legal systems which mandate "that an analysis first be performed to determine which law (if there had been an amendment)" is the more lenient *vis-á-vis* an accused.[142] The Referral Bench noted that under Article 42(2) of the BiH CC long-term imprisonment is defined as being a term of twenty to forty-five years, and that if less than

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[136] *Ibid.*
[137] *Ibid.*, paras 44-63.
[138] Joint Defence Brief, para. 84.
[139] Joint Defence Reply, para. 44.
[140] *Ibid.*, para. 49 (emphasis in the original); *see also* Joint Defence Brief, paras 99-101.
[141] Emphasis added.
[142] Joint Defence Reply, para. 46.

long-term imprisonment were adjudged, then under a system of compounding punishment for concurrent offences, the maximum penalty could not exceed imprisonment for twenty years.[143]

48. The Referral Bench had no obligation to determine which jurisdiction provided guarantees of enforcing the more lenient law on the Appellants in the case of referral; it had only to satisfy itself that there were appropriate provisions —within the legal framework of BiH— to address the criminal acts alleged in the Indictment and that there was an adequate penalty structure in place. The Appeals Chamber finds that the Referral Bench exercised its discretion within the confines of its mandate and therefore correctly concluded that if the case was referred, it would be for the State Court of BiH to determine the law applicable to each of the alleged criminal acts of the Appellants.[144]

49. For the foregoing reasons, the fourth ground of appeal is dismissed.

E. Fifth and Seventh Grounds of Appeal[145]

50. Under the fifth ground of appeal, the Appellants argue that the Referral Bench erred in law and in fact by failing to properly examine whether the courts and legal system in BiH are adequately prepared to accept the case as required by Rule 11*bis*(A)iii) of the Rules.[146]

51. Under the seventh ground of appeal, the Appellants argue that the Referral Bench erred in law and in fact, in failing to properly examine general conditions of and the risks involved in the Appellants' pre-trial, trial and post-trial detention under the prison system in BiH.[147]

(a) Submissions

52. Under the fifth ground of appeal the Appellants submit that the Referral Bench erred in law and fact in failing to properly inform itself about the conditions of detention that the Appellants will encounter in BiH. They particularly emphasize the conditions of post-conviction detention and the risk of torture or degrading treatment.[148] The Appellants acknowledge that Rule 11*bis* makes no explicit mention of the issue of detention, but they argue 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 be subjected

[143] Impugned Decision, para. 59.
[144] *Ibid.*, para. 63.
[145] Since the arguments raised under these grounds of appeal concern the conditions of detention in BiH, they will be addressed together.
[146] Joint Defence Notice of Appeal, p. 7(A).
[147] *Ibid.*, p. 10(A).
[148] Joint Defence Brief, para. 93.

to torture or inhumane treatment.[149] They argue that since there is no high security detention facility in BiH the assumption is that if convicted, they will be sent to serve their sentence at the Zenica prison (at least pending completion of the new prison) where Serb inmates face severe problems.[150] They further submit that the Referral Bench erroneously ignored the fact that the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY CC") is the more lenient as to sentencing.[151] They suggest that the Referral Bench should have determined which law is the more lenient.[152]

53. Under the seventh ground of appeal the Appellants submit that: (a) the conditions of detention "fall under the conditions for 'fair trial' and due process rights",[153] and (b) the Referral Bench "seemed unable to quantify" the Appellants' rights while incarcerated, which are codified in various international instruments such as the European Convention of Human Rights.[154]

54. The Prosecution responds that the Referral Bench did inform itself as to the conditions of detention in BiH and satisfied itself that those conditions would be consistent with recognized international norms.[155] With regard to the Appellants' allegations concerning the Zenica prison, the Prosecution submits that: (a) the Zenica detention facility is the only medium security prison in the BiH Federation but that there are other security prisons in BiH which are situated in Republika Srpska, and (b) according to the laws of BiH, the Minister of Justice is the only authority which can decide where a convicted person should serve his sentence.[156]

55. In reply, the Appellants submit that the Referral Bench had to inform itself *proprio motu* of the prison system in BiH, and point out that paragraph 108 of the Impugned Decision discusses the pre-trial detention unit and not post-conviction detention.[157] They further assert that "the Bosnian authorities confirmed to the defense that Zenica was to be the prison for any of [the Appellants] if convicted."[158] No references or evidence are provided in support of this assertion. Finally, the Appellants state that the situation for ethnic Serb detainees in Bosnian prisons is horrific and that no evidence has been presented either by the Prosecutor or the BiH authorities to rebut this proposition.[159]

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[149] *Ibid.*, para. 94.
[150] *Ibid.*, paras 97-98.
[151] *Ibid.*, para. 99.
[152] *Ibid.*, para. 100.
[153] *Ibid.*, p. 31.
[154] *Ibid*, p. 32.
[155] Prosecution's Response, para. 6.3.
[156] *Ibid.*, para. 6.4.
[157] Joint Defence Reply, para. 69.
[158] *Ibid.*, para. 70.
[159] *Ibid.*, para. 74.

(b) Discussion

56. As a preliminary matter, the Appeals Chamber notes that under the fifth ground of appeal, the Joint Defence Reply raises a number of arguments which were not advanced in the Joint Defence Notice of Appeal, the Joint Defence Brief, or the Prosecution's Response, and thus go beyond the scope of what is permissible to include in a reply.[160] Consequently, these arguments will not be considered in the present Decision. The Appeals Chamber also notes that even though the Appellants' fifth ground of appeal concerns whether the Referral Bench failed to properly examine whether the courts and legal system in BiH are adequately prepared to accept the case,[161] the arguments advanced under this ground relate to: (a) the conditions of detention in BiH, and (b) allegations already raised in the fourth ground of appeal regarding the Referral Bench's obligation to determine which was the more lenient law to be applied to the Appellants' case if referred.

57. In the Impugned Decision, the Referral Bench considered the parties' submissions on the issue of detention within the context of specific considerations concerning fair trial, and concluded that "there is no factual support offered for the Defence's general submission that the 'sorely inadequate general prison system in BiH' and the lack of a prison for those accused of war crimes should be a bar to a referral."[162] The Referral Bench noted that a high security detention unit expected to be in operation under the guidance of international experts, had been established, and that detainee and prisoner treatment is appropriately regulated by statute within the BiH legal system.[163]

58. The Appeals Chamber recalls that the Referral Bench considered submissions of the Government of BiH made in the present case and in the *Stanković* case.[164] In the *Stanković* case, the Appeals Chamber found that the Referral Bench: (i) was well informed about the conditions of detention in BiH; (ii) had asked about the conditions of confinement, and (iii) had ample information before it.[165] Consequently, the Appeals Chamber considers that it was reasonable for the Referral Bench in the present case to conclude that there was no support for the contention that the prison system in BiH is inadequate. Pursuant to its previous findings, the Appeals Chamber considers that this conclusion of the Referral Bench would encompass concerns about post-

[160] *See ibid.*, paras 54-67.
[161] Joint Defence Notice of Appeal, p. 7(A).
[162] Impugned Decision, para. 108.
[163] *Ibid.*
[164] Further submissions of the Government of Bosnia and Herzegovina were invited on 11 March 2005 and received on 23 March 2005. *See Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-PT, Letter to the Government of Bosnia and Herzegovina from Herman von Hebel, Senior Legal Officer, 11 March 2005; Response by the Government of Bosnia and Herzegovina to the Request for Further Written Submissions by the Referral Bench in the Mejakić and Stanković Cases, 23 March 2005.
[165] *Stanković* Rule 11*bis* Appeal Decision, para. 35.

conviction detention.[166] Accordingly, the Appeals Chamber finds that the Appellants have 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 Appellants.

59. With respect to the Appellants' argument that the Referral Bench should have determined that the SFRY CC is the more lenient law, the Appeals Chamber has already found in the present Decision that the Referral Bench exercised its discretion within the confines of its mandate and therefore correctly concluded that if the case was referred, it would be for the State Court of BiH to determine the law applicable to each of the alleged criminal acts of the Appellants.[167]

60. The Appeals Chamber further considers that the Referral Bench engaged in a thorough assessment of BiH's willingness and capacity to accept the Appellants' case, and carefully considered the substantive law that might be applicable.[168] It examined the SFRY CC and the BiH CC.[169] It concluded that the SFRY CC as it was in force at the time relevant to the 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 Appellants.[170] The Referral Bench was satisfied that there are appropriate provisions to address most, if not all, of the criminal acts alleged in the Indictment and an adequate penalty structure.[171]

61. As the 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."[172] In light of the foregoing, and pursuant to its previous findings in the *Janković* and *Stanković* cases, the Appeals Chamber finds that the Appellants have failed to show that the Referral Bench committed any error of law or fact when it ascertained that the authorities of BiH are willing and adequately prepared to accept the referral of their case.

62. For the foregoing reasons, the fifth and seventh grounds of appeal are dismissed.

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[166] *Cf. ibid.*, para. 37; *see also 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."
[167] *See supra* para. 48.
[168] Impugned Decision, paras 43-62.
[169] *Ibid.*, paras 49-62.
[170] *Ibid.*, para. 63.
[171] *Ibid.*
[172] Rule 11*bis*(B).

F. Sixth Ground of Appeal

63. The Appellants submit that the Referral Bench erred in law and in fact by declaring itself satisfied that: (a) the laws applicable to the proceedings against the Appellants in BiH are generally comparable with the fair trial guarantees provided in Article 21 of the Statute and, (b) the Appellants will receive a fair trial if their case is referred to the authorities of BiH.[173]

64. In general, the Appellants argue that the Referral Bench focused on whether there was a legal framework in place, instead of assessing whether such framework was in fact implemented.[174] They claim that the Referral Bench failed to fulfil its duty to properly inform itself of a number of elements that constitute the fair trial guarantees provided in Article 21 of the Statute.[175]

1. The right of the Appellants to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing

(a) Submissions

65. The Appellants submit that the Referral Bench failed to properly inform itself as to whether their right to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing would be adequately guaranteed before the State Court of BiH.[176] In support of this argument, they assert that the Bosnian Government "does not have adequate funding for consistent payment of appointed defence counsel."[177] They further submit that no details had been provided by the BiH Government with respect to the funds available for defence counsel and support staff, such as investigators.[178] The Appellants further claim that it would be impossible for them to obtain the services of defence counsel experienced in litigating complex international crimes, and that in contrast, the Prosecutor's Office in BiH is "exclusively staffed by lawyers recruited from international criminal tribunals, thus causing a violation of the equality of arms principle."[179]

66. The Prosecution submits that: (a) in the *Janković* case the BiH Government provided the Referral Bench with a payment scale for defence counsel pursuant to the laws in place;[180] (b) "remuneration for court appointed counsel is a function exclusively for the national court

[173] Joint Defence Notice of Appeal, pp 8(A)-9.
[174] Joint Defence Brief, para. 106.
[175] *Ibid.*, paras 103-105.
[176] *Ibid.*, para. 107.
[177] *Ibid.*, para. 110.
[178] *Ibid.*, para. 112.
[179] *Ibid.*, para. 114.
[180] Prosecution's Response, para. 7.7.

system;"[181] (c) the majority of the employees at the BiH State Prosecutor's Office are national,[182] and (d) on 30 June 2005, the plenary session of the State Court of BiH adopted rules that allow defence counsel that have appeared before the International Tribunal, in a case that has been referred, to appear before the State Court of BiH.[183]

67. The Appellants reply that the Prosecution's reliance upon "mysterious newly adopted rules of procedure for the State Court of BiH" is improper because this material was not admitted into the record of the proceedings in this case.[184] In addition, they submit that the provisions relied upon by the Prosecution do not provide an "absolute guarantee" that non-Bosnian attorneys will be allowed to appear before the State Court of BiH[185] and thus there is no "support in the [r]ecord that there will be adequate legal defense funds made available to [the Appellants]."[186]

(b) Discussion

68. Bearing in mind that the same arguments have been dismissed by the Appeals Chamber,[187] 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.[188] Therefore, pursuant to the findings of the Appeals Chamber in the *Stanković* and *Janković* cases the Appellants arguments must fail.

69. The Appeals Chamber finds that the Appellants have failed to show that the Referral Bench erred by focusing on whether there was a legal framework in place in BiH. The Referral Bench correctly considered whether it was satisfied that the Appellants would receive a fair trial by establishing that the legislation in BiH allows for adequate time and facilities for the preparation of their defence. That is all it was required to do pursuant to Rule 11*bis* of the Rules. In doing so, the Referral Bench 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),(3) of the Law on the Court of Bosnia and Herzegovina ("Law on the State Court of BiH").[189] After satisfying itself that these provisions

[181] *Ibid.*, para. 7.8.
[182] *Ibid.*, para. 7.9 referring to *Prosecutor v. Gojko Janković*, Case No.: IT-96-23/2, Additional Submission from Bosnia and Herzegovina Regarding their Response to Questions Posed by the Specially Appointed Chamber, 25 February 2005.
[183] *Ibid.*, para. 7.10 referring to the "Additional Rules of Procedure for Defence Advocates Appearing Before Section I for War Crimes and Section II for Organized Crime, Economic Crime and Corruption of the Court of Bosnia and Herzegovina," ("Additional Rules for Defence Advocates") Art 3.4(4)(b).
[184] Joint Defence Reply, para. 75.
[185] *Ibid.*, para. 77.
[186] *Ibid.*, para. 78.
[187] *See Stanković* Rule 11*bis* Appeal Decision, para. 21; *Janković* Rule 11*bis* Appeal Decision, para. 44.
[188] *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-A, Appeal Judgement, signed 17 September 2003, filed 5 November 2003, para. 10.
[189] Impugned Decision, para. 74.

addressed the Appellants' concerns, the Referral Bench correctly concluded that it was "satisfied that the laws applicable to proceedings against the [Appellants in BiH] provide an adequate basis to ensure compliance with the requirement for a fair trial."[190]

70. The Appeals Chamber finds that the Appellants have failed to show that the Referral Bench did not properly inform itself about their right to communicate with counsel of their own choosing. The Referral Bench considered that the legislation of BiH addressed the Appellants' concerns 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]."[191] The Referral Bench also 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 said court.[192] In light of the foregoing, the Appeals Chamber considers that the Appellants have failed to show that the Referral Bench "speculated" [193] as to the availability of funds to pay for the Appellants' defence. Moreover, the Referral Bench was not legally required to make a finding on whether the funding of the Appellants' defence would be adequate to cover current counsel's fees and other expenses incurred by investigators. Having satisfied itself that even if present counsel did not continue to represent the Appellants in BiH, the Appellants would not be denied counsel, the Referral Bench was not obliged to itemize the provisions of the BiH budget in the Impugned Decision.[194]

71. In the Impugned Decision, the Referral Bench considered that Article 12(2) of the Law on the State Court of BiH "permits the special admission of attorneys to appear before it even though not licensed to practice in [BiH]."[195] The Impugned Decision also pointed out that, recent amendments to the rules of procedure of the State Court of BiH granted "special permission for defence counsel to appear before the State Court if they previously appeared before the

[190] Impugned Decision, para. 81.
[191] *Ibid.*, para. 111.
[192] *Ibid.*
[193] *See* Joint Defence Brief, para. 112.
[194] *See Stanković* Rule 11*bis* Appeal Decision, para. 21; *Janković* Rule 11*bis* Appeal Decision, para. 44.
[195] Impugned Decision, para. 112 and fn. 149; *see also* Law on the State Court of BiH, Article 12(2) "An attorney who does not fulfil the requirements under paragraph 1 [to be licensed to practice by an authority in BiH which has been recognized by the State Court] may be specially admitted by the Court. Procedures for special admission of attorneys and for recognition of licensing authorities for attorneys shall be established by the Court in its Rules of procedure." Official Gazette of Bosnia and Herzegovina, 29/00; Official Gazette of the Federation of Bosnia and Herzegovina, 52/00; Official Gazette of the Republika Srpska, 40/00.

International Tribunal in a case that has been transferred pursuant to Rule 11*bis*."[196] The Appeals Chamber does not consider that "it was a discernible error for the Referral Bench to rely on such information that had not been submitted to the scrutiny of defense examination"[197], as submitted by the Appellants. It was open to the Referral Bench to refer to legislation concerning the State Court of BiH regardless of whether it had been "introduced or referenced by any of the parties in the proceedings."[198] Such reference was not "improper" as claimed by the Appellants since the amendments in question had already been adopted at the time the Impugned Decision was rendered.[199] For the foregoing reasons, this part of the Appellants' sixth ground of appeal is dismissed.

2. Appellants' access to materials from cases before the International Tribunal

(a) Submissions

72. The Appellants submit that the Referral Bench failed to consider whether they would have access to material from the International Tribunal which would be necessary for the preparation of their defence, if their case is referred.[200] They claim that their right to access material from the Prijedor cases might be lost if their case is referred.[201]

73. The Prosecution 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.[202]

(b) Discussion

74. The Appeals Chamber notes that this issue was not raised before the Referral Bench, thus the Appellants cannot claim that the Referral Bench failed to address a matter which was not brought before it, thereby committing an error of law or fact. The Referral Bench considered the issue of the admission of materials from other cases before the International Tribunal within the context of the Appellants' submission that the discretion of the State Court of BiH to admit these

[196] Impugned Decision, para. 112 footnote 149. Even though not specifically mentioned in the Impugned Decision, it is evident that the Referral Bench was referring to the Additional Rules for Defence Advocates, which were adopted on 30 June 2005, and entered into force seven days later.
[197] Joint Defence Reply, para. 75.
[198] Joint Defence Brief, para. 110.
[199] The amendments entered into force seven days after their adoption and are publicly available in the website of the Criminal Defense Section of the State Court of BiH (also known as OKO). *See* Additional Rules for Defence Advocates, Article 1.2 at http//www.okobih.ba. OKO is the licensing authority for those attorneys who wish to appear before the State Court of BiH. *See* Additional Rules for Defence Advocates, Article 2.2(2).
[200] Joint Defence Brief, para. 115.
[201] *Ibid.*, para. 120.
[202] Prosecution's Response, para. 7.14.

materials might be detrimental as it might hinder their ability to defend themselves,[203] and concluded that the final determination concerning the admission of these materials, lies with the State Court of BiH.[204] With respect to materials directly related to the Appellants' case, the Referral Bench expressly ordered the Prosecution "to hand over to the Prosecutor of [BiH] [...] *all* other appropriate evidentiary material."[205] 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 Appellants will have access to these materials.[206]

75. The Appeals Chamber has previously stated in the present Decision that with respect to confidential material from related cases before the International Tribunal, 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, and hence. the parties to the proceedings in the national jurisdiction are on equal footing in terms of their ability to gain access to confidential material from other cases before the International Tribunal.[207] For the foregoing reasons, this part of the Appellants sixth ground of appeal is dismissed.

3. Appellants' right to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf

(a) Submissions

76. The Appellants submit that if their case is referred to BiH, they would be unable to call any witnesses to testify on their behalf, due to fear of arrest and retaliation, propaganda that has been generated in Sarajevo, and the fact that there are no protections or rights of "free passage" in place for witnesses coming from the Republika Srpska or the Federation.[208]

77. The Prosecution responds that the Referral Bench correctly concluded that the existence of means available for securing witnesses before the State Court of BiH were sufficient indicia to conclude that the Appellants' right to call witnesses on their behalf is given effect.[209]

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[203] Impugned Decision, paras 92-96.
[204] *Ibid.*, para. 96.
[205] *Ibid.*, VI. Disposition p. 44 (emphasis added).
[206] *See Janković* Rule 11*bis* Appeal Decision, para. 50 referring to Article 69 of the BiH CPC.
[207] *See supra* para. 25.
[208] Joint Defence Brief, paras 121-123.
[209] Prosecution's Response, para. 7.15.

(b) Discussion

78. The Appeals Chamber notes that under this part of the sixth ground of appeal, no specific error of law or fact is alleged by the Appellants; instead, they mostly re-argue issues put forward before the Referral Bench.[210] The Defence had previously argued that it wouldn't be able to secure attendance of its witnesses because there are no safe conduct guarantees, in particular for witnesses from within BiH.[211] The Referral Bench had noted that for witnesses residing in BiH, including Republika Srpska, attendance to give evidence when summoned is obligatory, and found that to the extent that these witnesses might fail to appear because of a perceived risk of arrest, the issue was purely hypothetical.[212] However, on appeal, it is alleged that since "the Bosnian authorities have made it publicly known that they intend to indict upwards of 10,000 persons for war crimes [...] most witnesses have outright refused to agree to travel to Sarajevo to testify on behalf of the defense."[213] In support of this allegation the Appellants rely upon the following remarks by Mr. Marinković, deputy chief prosecutor of BiH, at the hearing held pursuant to Rule 11*bis* in the *Stanković* case:

> It is true that there are grounds for suspicion that war crimes have been committed against over 10.000 cases, but the criteria that applied was the sensitivity of each case.[214]

79. The Appeals Chamber considers that the meaning of these remarks has been misconstrued and thus, the allegation of the Appellants is not substantiated. The Appeals Chamber notes that the Defence had earlier submitted that without safe conduct, a witness could be at risk of arrest. However, the Referral Bench correctly stated that this submission "wrongly presume[d] the applicability of the safe conduct mechanism in the context of witness production within a State,"[215] and explained the nature of a safe conduct mechanism in detail.[216] Consequently, it was not unreasonable for the Referral Bench to conclude that "[i]n any event, any disadvantage to the [Appellants] by virtue of this national procedure, which reflects a generally accepted direct enforcement mechanism for ensuring the presence at trial of a witness, cannot be properly regarded as prejudicial to the right to a fair trial."[217]

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[210] *See* Joint Defence Brief, paras 121-123.
[211] *See* Impugned Decision, para. 97.
[212] *Ibid.*, para. 103.
[213] Joint Defence Reply, para. 82.
[214] *Prosecutor v. Radovan Stanković,* Case No.: IT-96-23/2-PT, Rule 11*bis* Hearing, 4 March 2005, T. 249, lines 15-18.
[215] Impugned Decision, para. 104.
[216] *Ibid.*
[217] *Ibid.*, para. 103.

80. In light of the foregoing, the Appeals Chamber finds that the Appellants have failed to show that the Referral Bench committed a discernible error by failing to consider their right to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. Therefore, this part of the sixth ground of appeal is dismissed.

81. For the foregoing reasons, the sixth ground of appeal is dismissed.

G. Eighth Ground of Appeal

82. The Appellants submit that the Referral Bench erred in law and in fact in concluding that: (a) the referral of the case to the authorities of BiH would not prejudice the rights of the Appellants pursuant to Rule 6(D) and, (b) it was satisfied that Rule 6(D) did not operate to prevent the referral of the case.[218]

(a) Submissions

83. The Appellants argue that "the version of Rule 11*bis* that existed at the time of their surrender granted to them the assurance that they could not be referred to another jurisdiction."[219] They claim that: (a) the current text of Rule 11*bis* "dramatically alters their relationship to the rights they previously were endowed with at the [International] Tribunal;"[220] (b) since they would have to spend an additional year and a half in detention, the Appellants would end up spending three times more in pre-trial detention than their Bosnian counterparts, and this would be unjust,[221] and (c) the referral of their case would prejudice them because the work of three and a half years of pre-trial preparation would be lost. [222]

84. The Prosecution responds that: (a) the Appellants have failed to identify which rights would be lost and to provide any evidence in support;[223] (b) in light of the fact that pre-trial detention in BiH cannot exceed one and a half years, the Appellants would have to be released within that time regardless of whether their trial is finished, whereas if their case was not referred they would remain in the custody of the International Tribunal until the case is finished,[224] and (c) if current counsel is

[218] Joint Defence Notice of Appeal, p. 11(A).
[219] Joint Defence Brief, p. 32.
[220] *Ibid.*
[221] *Ibid.*, p. 33.
[222] *Ibid.*
[223] Prosecution's Response, para. 9.2.
[224] *Ibid.*, para. 9.5.

able to continue representing the Appellants the pre-trial preparation work already done wouldn't be lost, and if a new counsel is assigned the latter would benefit from the work of previous counsel. [225]

(b) Discussion

85. At the outset, the Appeals Chamber recalls that an appeal is not an opportunity for the parties to reargue their cases. That being said, it notes that most of the Appellants' submissions under this ground of appeal had already been put forward before the Referral Bench, which clearly explained that the rights referred to in Rule 6(D)[226] of the Rules encompass only those prerogatives that an accused, acquitted or convicted person is legally entitled to.[227] The Referral Bench correctly reasoned that while the initial text of Rule 11*bis* might not have enabled the referral of a case to a state which was not the state of arrest, that could not be understood as granting a right to an accused, to be tried only before the International Tribunal, or to be exempted from referral to another state for trial.[228]

86. With respect to those claims which are brought again on appeal, the Referral Bench had concluded that: (a) Rule 11*bis* concerns the procedural powers of the International Tribunal and does not bestow rights on an accused,[229] and (b) the Appellants would not suffer a disadvantage in comparison to other accused before the State Court of BiH, because the maximum period of pre-trial and trial detention in BiH would not exceed one and a half years, whereas there is no limit on the time spent in detention if tried before the International Tribunal.[230] Additionally, the Impugned Decision notes that the BiH Law on Transfer provides that the time spent in custody at the International Tribunal shall be considered for the calculation of the sentence pursuant to the provisions of the BiH CC.[231] Finally, the Appeals Chamber recalls that it cannot be expected to distil legal arguments from vaguely pleaded suggestions of legal error mentioned in passing that are connected with factual arguments. If an argument is clearly without foundation, the Appeals Chamber is not required to provide a detailed written explanation of its position with regard to that argument.[232] Therefore, the Appeals Chamber finds that the argument to the effect that the referral

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[225] *Ibid.*, para. 9.4.
[226] Rule 6(D) provides that "[a]n amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case."
[227] Impugned Decision, para. 123.
[228] *Ibid.*, para. 125.
[229] *Ibid.*
[230] *Ibid.*, para. 109.
[231] *Ibid.*, referring to "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" ("BiH Law on Transfer"), Article 2(4), Official Gazette of Bosnia and Herzegovina No. 61/04.
[232] *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No.: IT-98-30/1-A, Judgement, 28 February 2005, para. 15.

of the case would prejudice the Appellants because the work of three and a half years of pre-trial preparation would be lost is without merit.

87. The Appeals Chamber finds that the Appellants have failed to show that the Referral Bench erred in concluding that the referral of the case would not prejudice their rights within the meaning of Rule 6(D), and that it was satisfied that Rule 6(D) did not operate to prevent referral of the case.

88. For the foregoing reasons, the eighth ground of appeal is dismissed.

H. Ninth Ground of Appeal

89. The Appellants submit 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 Organization for Security and Cooperation in Europe ("OSCE") or a similar organisation by arrangement with the Prosecution; (b) determining that it had authority under Rule 11*bis* to order the Prosecution to continue its efforts to ensure the monitoring of and reporting on the proceedings before the 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,[233] and (c) "failing to further consider the aspect of the defense submissions concerning impartial and adequate monitoring of this case, whether by the OSCE or a similar organisation, following referral to [BiH]."[234] The Appellants do not, however, explicitly challenge the Referral Bench's order that if arrangements with an international organisation for monitoring and reporting should prove ineffective, the Prosecution should seek further direction from the Referral Bench.[235]

(a) Submissions

90. The Appellants submit that the Referral Bench erred "when it issued orders to the Prosecutor relative to monitoring of the case post referral, and assumed that the serious concerns raised by the defense relative to the issue of fair trial guarantees could be resolved by enacting a regime of trial monitoring involving the Office of the Prosecutor and perhaps some other organization."[236] They state that "[insofar as this ground of appeal [...] relate[s] to the exact same topics raised by the Prosecutor, for the sake of judicial economy the Defense shall reserve its

[233] Joint Defence Notice of Appeal, pp 11(A)-12.
[234] *Ibid.*, p. 12(B).
[235] *See* Impugned Decision, VI. Disposition.
[236] Joint Defence Brief, p. 33.

comments for its response to the Prosecution's Appeal."[237] In light of the fact that the Appellants reserved their comments, the Prosecution relies upon the submissions made in the Prosecution's Notice of Appeal and the Prosecution's Appellant's Brief and does not submit any arguments in response to the Appellants' submissions under the ninth ground of appeal.[238]

(b) Discussion

91. The Appeals Chamber notes that the Defence did not file a response to the Prosecution's appeal and the latter was withdrawn on 19 September 2005.[239] Almost one month later, the Appellants attempted to supplement the Joint Defence Brief and thus filed the Second Defence Supplement which contained arguments relating to their ninth ground of appeal. The Appellants submitted that: (i) the arguments in question were being saved for oral submissions on the Prosecution's appeal; (ii) the Defence had not argued the monitoring issue in detail in its Joint Defence Brief because its arguments concerning the ninth ground of appeal were almost identical to those advanced by the Prosecution in its appeal, and (iii) the Appeals Chamber would not consider the monitoring issue given that the Prosecution had withdrawn its appeal, thus it was now necessary to supplement its submissions on this issue.[240] The Appeals Chamber recalls its Decision on Second Defence Supplement, where it found that none of the arguments raised by the Defence constituted good cause within the meaning of Rule 127(A) of the Rules and dismissed the Second Defence Supplement.[241] Accordingly, and in the absence of any arguments substantiating the allegation that the Referral Bench failed to consider the Defence's submissions concerning the monitoring of the case, the Appeals Chamber finds that the Defence has not demonstrated that the Referral Bench failed "to further consider the aspect of the defense submissions concerning impartial and adequate monitoring of this case"[242] as alleged by the Appellants.

92. 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

[237] *Ibid.* As noted earlier in the present Decision, the Prosecution had appealed against the Referral Bench's infringement of the Prosecutor's discretion to monitor the trial and the Appellants did not file a response to the Prosecution's Appellant's Brief. *See supra* para. 8
[238] Prosecution's Response, para. 10.1.
[239] *See supra* paras 8 and 9.
[240] "Second Joint Defense Supplement to Joint Appeal Brief in Support of Notice of Appeal," 12 October 2005 ("Second Defence Supplement"), paras 2.2.-2.3.
[241] Decision on Second Joint Defense Supplement to Joint Appeal Brief in Support of Notice of Appeal, 16 November 2005 ("Decision on Second Defence Supplement"), pp 4-5.
[242] Joint Defence Notice of Appeal, p. 12(B).

> transfer will be fair.[243]

93. The Appeals Chamber there determined that under Rule 11*bis* of the Rules, the 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.[244] 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.[245]

94. In light of the *Stanković* Rule 11*bis* Appeal Decision 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 reasonably aided the Referral Bench in discharging its duties under Rule 11*bis* of the Rules.[246]

95. In relation to the Referral Bench's order to the Prosecution to continue its efforts in cooperation with the OSCE, or another international organisation of notable standing, to ensure the monitoring and reporting on the proceedings of this case before the State Court of BiH, the Appeals Chamber recalls the disposition of the *Stanković* Rule 11*bis* Appeal Decision:

> The appeal of the Prosecution is allowed in part, insofar as it objects to the Referral Bench's order instructing the Prosecutor to continue her efforts to *conclude an agreement with* an international organisation for monitoring purposes and to seek further direction from the Referral Bench if an agreement is not concluded.[247]

The Appeals Chamber notes that in the present case the instruction was not the same since the Referral Bench ordered the Prosecution "to continue its efforts *in cooperation with* the OSCE or another international organisation." [248] While the wording and the substance of both orders differ, their *rationale* is similar: in both cases, the Referral Bench instructed the Prosecution to collaborate with an international organisation, either by an agreement or some other form of co-operation. This, however, is not within the authority of the Referral Bench, as "Chambers are not in the business of giving counsel to the Prosecutor about decisions that are customarily within her domain."[249]

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[243] *Stanković* Rule 11*bis* Appeal Decision, para. 50.
[244] *Ibid.*, para. 51.
[245] *Ibid.*, paras 53-55.
[246] *Ibid.*, para. 59.
[247] *Ibid.*, IV. Disposition. b (emphasis added).
[248] Impugned Decision, VI. Disposition (emphasis added).
[249] *Stanković* Rule 11*bis* Appeal Decision, para. 58.

96. In light of the *Stanković* Rule 11*bis* Appeal Decision, the Appeals Chamber finds *proprio motu* that the Referral Bench erred in ordering the Prosecution to seek further direction from the Referral Bench if arrangements for monitoring and reporting should prove ineffective.[250]

97. For the foregoing reasons, the ninth ground of appeal is allowed in part, and the remainder of this ground of appeal is dismissed.

IV. DISPOSITION

The Appeals Chamber **ALLOWS IN PART**, the ninth ground of appeal, insofar as it objects to the Referral Bench's order instructing the Prosecutor to continue her efforts in co-operation with the OSCE or another international organisation of notable standing, to ensure the monitoring and reporting on the proceedings of this case before the State Court of BIH;

VACATES the order of the Referral Bench to the effect that if arrangements for monitoring and reporting should prove ineffective, the Prosecution should seek further direction from the Referral Bench, and

DISMISSES the Appellants' appeal in all other respects.

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

Dated this 7th day of April 2006
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

[250] *See* Impugned Decision, VI. Disposition. *See* also *Stanković* Rule 11*bis* Appeal Decision, IV Disposition. b.