



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-00-41-AR11bis.1
Date: 4 July 2006
Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg**

Registrar:

Mr. Hans Holthuis

Decision:

4 July 2006

PROSECUTOR

v.

PAŠKO LJUBIČIĆ

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

Counsel for the Prosecution

Ms. Susan L. Somers
Ms. Ann Sutherland

Counsel for the Appellant

Mr. Tomislav Jonjić
Ms. Nika Pinter

The Government of Bosnia and Herzegovina

per: The Embassy of Bosnia and Herzegovina 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 Paško Ljubičić (“Appellant”), pursuant to Rule 11bis(I) of the Rules of Procedure and Evidence (“Rules”)¹ against the “Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis” (“Impugned Decision”) rendered by the Referral Bench on 12 April 2006.²

I. PROCEDURAL BACKGROUND

2. The original indictment against the Appellant was confirmed on 27 September 2000.³ On 9 November 2001, the Appellant surrendered to the authorities of the Republic of Croatia (“Croatia”) and was transferred to the International Tribunal on 21 November 2001. At his initial appearance on 30 November, the Appellant pleaded not guilty as to all counts in the indictment.⁴ On 16 January 2002, the Appellant filed a preliminary motion challenging the form of the indictment.⁵ The Trial Chamber granted this motion in part⁶ and the Corrected Amended Indictment (“Indictment”) was filed on 8 April 2002 and accepted by the Trial Chamber on 2 August 2002.⁷ At his second initial appearance, the Appellant again pleaded not guilty to all counts of the Indictment.⁸

3. The Indictment refers to crimes against Bosnian Muslim civilians in the Lašva Valley in central Bosnia and Herzegovina between January and July 1993. The Prosecution alleges that the Appellant, as commander of the Fourth Military Police Battalion of the Croatian Defence Council, together with members of this battalion under his control, including a formation called the “Jokers”,⁹ planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crimes during a number of attacks on the town of Vitez and neighbouring villages between January and April 1993.¹⁰ It is further alleged that during these attacks, over one hundred Bosnian Muslim civilians were killed, many more were detained and

¹ IT/32/Rev. 37, 6 April 2006.

² Notice of Appeal, 25 April 2006 (“Notice of Appeal”).

³ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-I, Indictment, 27 September 2000 confirmed by *Confidential Order* on Review of the Indictment Pursuant to Article 19 of the Statute, 27 September 2000, and unsealed on 30 October 2001 by Order on Prosecution’s Motion to Unseal the Indictment.

⁴ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-I, Initial Appearance, T. 30 November 2001.

⁵ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Defence Motion on the Form of the Indictment Pursuant to Rule 72, 16 January 2002.

⁶ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on the Defence Motion on the Form of the Indictment, 15 March 2002.

⁷ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision on Motion for Leave to Amend the Indictment, 2 August 2002.

⁸ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Second Initial Appearance, T. 26 September 2002.

⁹ Indictment, paras 4-18.

¹⁰ *Ibid.*, paras 21-28.

abused and Muslim property was destroyed, including two mosques in the village of Ahmići.¹¹ The Indictment charges the Appellant under Articles 7(1) and 7(3) of the Statute of the International Tribunal (“Statute”) with six counts of Crimes Against Humanity pursuant to Article 5 of the Statute (persecutions on political, racial or religious grounds, two counts of murder and three counts of inhumane acts) and nine counts of Violations of the Laws or Customs of War pursuant to Article 3 of the Statute (unlawful attack on civilians, two counts of murder, two counts of violence to life and person, devastation not justified by military necessity, destruction or wilful damage to institutions dedicated to religion or education, plunder of public or private property and cruel treatment).¹²

4. On 19 July 2005, the Prosecution filed a motion for the referral of the case against the Appellant to the authorities of the State of Bosnia and Herzegovina (“Bosnia and Herzegovina” or “BiH”) pursuant to Rule 11*bis* of the Rules,¹³ and the President of the International Tribunal appointed a Referral Bench to consider whether the case against the Appellant should be referred to the authorities of a State.¹⁴ After receiving the submissions of the Parties as well as of the Government of Bosnia and Herzegovina¹⁵ and holding a hearing on the motion for referral on 20 September 2005, the Referral Bench issued the Impugned Decision on 12 April 2006, with a Corrigendum thereto filed on 27 April 2006,¹⁶ ordering the referral of the case to the BiH authorities “so that those authorities should forthwith refer the case to the appropriate court for trial within Bosnia and Herzegovina”.¹⁷

5. On 25 April 2006, the Appellant filed his Notice of Appeal. On 5 May 2006, he requested an extension of time for the filing of the Appeal Brief,¹⁸ which was denied on 10 May 2006 by the Pre-Appeal Judge.¹⁹ In the Appeal Brief, the Appellant requests that in the event that the Appeals Chamber denies his Request for Extension of Time, that the Appeals Chamber grant him leave “to submit to the Chamber possible new information and the position of the Government of the Republic of Croatia in an additional submission.”²⁰ The Appeals Chamber denies the request

¹¹ *Ibid.*, paras 29-34.

¹² *Ibid.*, paras 36-66.

¹³ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Motion by the Prosecutor under Rule 11*bis* for Referral of the Indictment, filed on 19 July 2005.

¹⁴ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Order Appointing a Trial Chamber for the Purpose of Determining Whether the Indictment Should be Referred to Another Court under Rule 11*bis*, 17 August 2005.

¹⁵ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Response from the Government of Bosnia and Herzegovina (BiH) to Questions Posed by Referral Bench in its Decision Dated 5th of September 2005 Regarding Further Information in Context Prosecutors Motion under Rule 11*bis*, 16 September 2005.

¹⁶ *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Corrigendum to Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis* of 12 April 2006, 27 April 2006.

¹⁷ Impugned Decision, p. 20.

¹⁸ Request for the Extension of Time to File a Brief of Appeal, 5 May 2006 (“Request for Extension of Time”).

¹⁹ Decision on Motion for Extension of Time, 10 May 2006.

²⁰ Appeal Brief, para. 2.

finding that the Appellant has failed, as in his Request for Extension of Time, to show good cause to be allowed further time to allow for such a submission pursuant to Rule 127 of the Rules. On 9 May 2006, the Appellant filed his Appeal Brief;²¹ the Prosecution's Response was filed on 17 May 2006,²² and the Appellant's Reply on 22 May 2006.²³

II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that an appeal pursuant to Rule 11bis(I) of the Rules is more akin to an interlocutory appeal than to an appeal from judgement.²⁴ Under the plain language of Rule 11bis(B), the Referral Bench "may order" referral *proprio motu* or at the request of the Prosecution, thus indicating that such decision is a discretionary one.²⁵ Where an appeal is brought from a Rule 11bis referral decision, the issue is whether the Referral Bench "has correctly exercised its discretion in reaching that decision."²⁶ The burden rests upon the party challenging such discretionary decision to demonstrate that the Referral Bench has committed a discernible error.²⁷ Accordingly, the appellant 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, gave weight to irrelevant considerations, failed to give 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.²⁸ Finally, the Appeals Chamber recalls that it "cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, and vague or suffer from other formal and obvious insufficiencies."²⁹

²¹ Appellant's Brief in Support of Notice of Appeal Against Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis of 12th April 2006, 9 May 2006 ("Appeal Brief").

²² Prosecution's Response to "Appellant's Brief in Support of Notice of Appeal Against Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis of 12th April 2006", 17 May 2006 ("Response").

²³ Appellant's Reply to the Prosecution's Response to "Appellant's Brief in Support of Notice of Appeal Against Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis of 12th April 2006", 22 May 2006 ("Reply").

²⁴ *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral under Rule 11bis, 7 April 2006, ("Mejakić et al. Appeal Decision"), para. 10; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras 14-16.

²⁵ *Mejakić et al. Appeal Decision*, para. 10.

²⁶ *Ibid.*, quoting *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. 4.

²⁷ *Mejakić et al. Appeal Decision*, para. 10.

²⁸ *Mejakić et al. Appeal Decision*, para. 10, referring to *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.

²⁹ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Appeal Judgement, 25 February 2004, para. 12. See also *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23&IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 43; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 13.

III. INAPPLICABILITY OF THE LAWS ON EXTRADITION (1ST GROUND OF APPEAL)

7. Under his first ground of appeal, the Appellant submits that the Referral Bench erred by disregarding the provisions of the Constitution of the Republic of Croatia on the extradition of Croatian nationals.³⁰ He argues that the Constitution of the Republic of Croatia prohibits the extradition of Croatian citizens to other States and only exceptionally allows the extradition of Croatian nationals to the International Tribunal. The Appellant argues that the referral of his case to the authorities of Bosnia and Herzegovina would amount to an extradition to Bosnia and Herzegovina “by a roundabout route” in violation of the Croatian Constitution.³¹ In its Response, the Prosecution points to the jurisprudence of the Appeals Chamber that neither treaty nor national laws governing extradition prevent the referral of a case from the jurisdiction of the International Tribunal pursuant to Rule 11*bis* of the Rules.³²

8. The Appellant acknowledges that the Appeals Chamber recently addressed this same issue in the *Mejakić et al.* case,³³ but asks the Appeals Chamber to reconsider its position.³⁴ The Appeals Chamber is not persuaded that the Appellant has presented any arguments to show that it should do so. As the Appeals Chamber there determined, a referral pursuant to Rule 11*bis* does not amount to an extradition *stricto sensu* and constitutes a procedure “implemented pursuant to a Security Council resolution, which, under the United Nations Charter, overrides any State’s extradition requirement under treaty or national law”.³⁵ The Appellant does not advance any arguments to challenge this determination. Accordingly, the Referral Bench correctly considered that “the laws governing extradition do not apply to prevent the referral of this case”.³⁶

9. In addition, the Appellant refers to the fact that at the time when he was transferred to the Tribunal, Rule 11*bis* allowed only for the return of the accused to the State where he was arrested and not to a State where the charged crimes were allegedly committed.³⁷ In the Impugned Decision, the Referral Bench addressed this issue and found that Rule 11*bis* of the Rules and its subsequent amendments are concerned with the procedural powers of the International Tribunal, but do not confer rights on an accused. Accordingly, the Referral Bench concluded, the changes did not “operate to prejudice the rights of an accused” and for this reason, Rule 6(D) of the Rules did not

³⁰ Notice of Appeal, para. 3.

³¹ Appeal Brief, para. 7.

³² Response, para. 7.

³³ Appeal Brief, para. 4; *cf. Mejakić et al.* Appeal Decision, para. 31.

³⁴ Appeal Brief, para. 5.

³⁵ *Mejakić et al.* Appeal Decision, para. 31 (footnote omitted).

³⁶ Impugned Decision, para. 24.

³⁷ Appeal Brief, para. 6.

prevent the application of the current version of Rule 11bis of the Rules.³⁸ This is consistent with the conclusion of the Appeals Chamber in the *Mejakić et al.* Appeal Decision that

the rights referred to in Rule 6(D) of the Rules encompass only those prerogatives that an accused, acquitted or convicted person is legally entitled to. The Referral Bench correctly reasoned that while the initial text of Rule 11bis 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.³⁹

Accordingly, the Appeals Chamber affirms the conclusion of the Referral Bench.

10. On the basis of the foregoing, the Appellant's first ground of appeal is dismissed.

IV. THE APPELLANT'S NEXUS WITH CROATIA (2ND GROUND OF APPEAL)

11. Under his second ground of appeal, the Appellant submits that the Referral Bench erred in law and fact by finding that the only apparent nexus between himself and Croatia is his Croatian citizenship.⁴⁰ With regard to the Referral Bench's finding that he "subsequently" obtained Croatian citizenship, the Appellant argues that he had applied for Croatian citizenship "long before the events described in the Indictment".⁴¹ Furthermore, the Appellant submits that the Referral Bench ignored evidence on his former residency in Croatia.⁴² In addition, the Appellant argues, criminal proceedings against him have already been initiated in Croatia, and a large number of classified documents related to his case are kept at the Croatian State Archive in Zagreb.⁴³

12. The Prosecution responds that the Referral Bench considered the issues raised by the Appellant, but nevertheless found that the Appellant's case had a stronger nexus with Bosnia and Herzegovina than with Croatia.⁴⁴

13. The Appeals Chamber recalls that while the Appellant has no *locus standi* to file a formal request for referral to a particular State, the Referral Bench is not limited to considering only the State indicated by the Prosecution as a possible State of referral.⁴⁵ The Appeals Chamber has previously held that:

³⁸ Impugned Decision, para. 51.

³⁹ *Mejakić et al.* Appeal Decision, para. 85.

⁴⁰ Notice of Appeal, para. 4.

⁴¹ Appeal Brief, para. 8.

⁴² *Ibid.*, para. 9.

⁴³ *Ibid.*, paras 10-13.

⁴⁴ Response, paras 11-12.

⁴⁵ *Mejakić et al.* Appeal Decision, para. 41.

where there are concurrent jurisdictions under Rule 11bis(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 [...] must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11bis(A) of the Rules.⁴⁶

14. The Appeals Chamber notes that, to support its conclusion that the Appellant "has a stronger nexus with Bosnia and Herzegovina than with Croatia", the Referral Bench relied on the following factual circumstances:

- 1) The Appellant, both at the time of the alleged crimes and to this date, was a citizen of Bosnia and Herzegovina;
- 2) At the time of the alleged crimes, the Appellant resided and held various positions in Bosnia and Herzegovina; and
- 3) The crimes are alleged to have been committed in the territory of Bosnia and Herzegovina and against citizens of that State.

With respect to the nexus of the Appellant with Croatia, the Referral Bench considered his subsequently obtained Croatian citizenship, the fact that criminal proceedings have allegedly been initiated against him, and that he had surrendered from that State to the International Tribunal.⁴⁷

15. In characterizing the Appellant's Croatian citizenship as "subsequently obtained", the Referral Bench relied on the Appellant's submissions during the referral proceedings and his filed certificate of his citizenship, which shows that he was granted Croatian citizenship on 4 May 1993.⁴⁸ Even if the Appellant, as he now claims, applied for this citizenship "long before the events described in the Indictment",⁴⁹ he has not shown that the Trial Chamber erred in considering that his citizenship became effective only in 1993, subsequent to the events in the Indictment for which he is alleged responsible.

16. Further, contrary to the Appellant's assertion,⁵⁰ the Referral Bench did not consider that his citizenship was the only nexus between the Appellant and Croatia. As noted above, the Referral Bench was also aware of the fact that the Appellant had surrendered to the International Tribunal

⁴⁶ *Ibid.*, para. 44, quoting *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11bis Referral, 15 November 2005 ("Janković Appeal Decision"), para. 33.

⁴⁷ Impugned Decision, para. 29.

⁴⁸ *Prosecutor v. Paško Ljubičić*, Case No.: IT-00-41-PT, Defence Position to the Prosecutor's Request under Rule 11bis for Referral of the Indictment to Another Court, 2 August 2005 ("Defence Position"), Annex 1: Paško Ljubičić – Certificate of Citizenship.

⁴⁹ Appeal Brief, para. 8.

⁵⁰ *Ibid.*, para. 8; Reply, para. 4.

from Croatia⁵¹ and that criminal proceedings had been initiated against him in Croatia. The Appellant argues that these proceedings “included the most serious allegation from the Amended Indictment, the crime in Ahmići”,⁵² but does not identify the exact subject and scope of the criminal proceedings in Croatia. The Indictment before this Tribunal alleges that the Appellant bears criminal responsibility for attacks on the towns of Busovača and Vitez and a large number of villages, of which Ahmići is only one.⁵³ The importance of the fact that 42 witnesses have allegedly already testified in the course of the proceedings in Croatia to the present charges against the Appellant is equally unclear.⁵⁴

17. With respect to the Appellant’s claim that documentary evidence relevant to his case is available in the Croatian State Archive in Zagreb,⁵⁵ if this material, which the Appellant characterizes only in a general manner, is of importance to his defence, the Appellant can seek to adduce it at his trial in Bosnia and Herzegovina. The Appeals Chamber notes that both Croatia and Bosnia and Herzegovina have ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (“ECMACM”)⁵⁶ and that this instrument provides for the transmission of documents to be produced in evidence.⁵⁷

18. On the basis of the foregoing, the Appeals Chamber finds that the Appellant has not shown that the Trial Chamber committed a discernible error when it concluded that the “trial of the [Appellant] has a stronger nexus with Bosnia and Herzegovina than with Croatia” and accordingly declined to consider *proprio motu* whether a referral to Croatia would be more appropriate. This ground of appeal is dismissed.

V. DEFENCE COUNSEL AND TRIAL WITHOUT UNDUE DELAY (3RD AND 4TH GROUNDS OF APPEAL)

19. Under his third ground of appeal, the Appellant submits that the Referral Bench erred in law and fact by not considering whether his representation by the same Defence Counsel in Bosnia and Herzegovina would actually be ensured.⁵⁸ The Appellant submits under his fourth ground of appeal

⁵¹ Impugned Decision, para. 29.

⁵² Appeal Brief, para. 10.

⁵³ Indictment, paras 22 (Busovača) and 23 (Vitez). In paras 24-28 attacks on no less than eight villages, including Ahmići, are mentioned.

⁵⁴ See Appeal Brief, para. 10.

⁵⁵ *Ibid.*, para. 12.

⁵⁶ Council of Europe, European Treaty Series No. 030; cf. *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005 (“*Stanković* Appeal Decision”), para. 26.

⁵⁷ Art. 3(1) ECMACM.

⁵⁸ Notice of Appeal, para. 5; Appeal Brief, para. 16.

that he would be forced to appoint new counsel, which would lead to an unacceptable delay of his trial.⁵⁹

20. The Appellant argues that, although the law of Bosnia and Herzegovina provides the possibility of his ongoing representation by the same counsel, this applies only to the BiH State Court. Should the authorities of Bosnia and Herzegovina decide to try him before a cantonal court, he submits, his current Counsel, who is not authorized to practise in Bosnia and Herzegovina, could no longer represent him.⁶⁰ In fact, the Appellant argues, the Referral Bench was obliged to ascertain “without reasonable doubt” that he would be granted a fair trial, and could not rely on the mere expectation that he would be tried by the State Court.⁶¹

21. In response, the Prosecution submits that, according to the “Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH” (“Law on Transfer”), the State Court of Bosnia and Herzegovina is the only forum which will try cases referred to Bosnia and Herzegovina by the International Tribunal.⁶²

22. The Appeals Chamber notes that the Appellant raised this issue during the referral hearing:

The lawyers practicing in other states don't even have a theoretical possibility of representing clients before ordinary courts, including cantonal county Courts which have jurisdiction over such cases, and to which theoretically the authorities of Bosnia-Herzegovina could refer war crimes cases. So the Tribunal is referring this case to the national authorities of Bosnia-Herzegovina who in turn would decide to whom to assign this case. So there is a theoretical possibility.⁶³

The Presiding Judge reminded him of the Referral Bench’s decision in the *Stanković* case, where it had noted that according to the Law on Transfer, the BiH State Court was the only competent court to try a case referred to Bosnia and Herzegovina from the International Tribunal, and asked him:

would you have any specific reason to expect that Bosnia-Herzegovina would act in violation of its own laws, which prescribe such cases to be referred to the state Court?⁶⁴

As an answer, the Appellant expressed only general concern about possible “abuse in this system”.⁶⁵

⁵⁹ Notice of Appeal, para. 6; Appeal Brief, paras 22-24.

⁶⁰ Appeal Brief, para. 16.

⁶¹ *Ibid.*, para. 17.

⁶² Response, para. 16, referring to Article 2(1) of the Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH, Official Gazette of Bosnia and Herzegovina, No 61/04.

⁶³ Referral Hearing, T. 20 September 2005, p. 242 (unofficial version).

⁶⁴ Referral Hearing, T. 20 September 2005, pp. 242-243 (unofficial version), referring to *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11bis, 17 May 2005, paras 24-25.

⁶⁵ Referral hearing, T. 20 September 2005, p. 244 (unofficial version).

23. Under this ground of appeal, the Appellant merely repeats the argument he raised before the Referral Bench, without indicating why the Referral Bench's reasoning that the case would be tried before the BiH State Court in accordance with the laws in force, and that he could be represented by the same counsel, was erroneous. Such an argument cannot succeed on appeal.⁶⁶

24. The Appellant further submits that, even if the theoretical possibility of representation by the same Counsel before the State Court existed, it would be a practical impossibility for financial reasons. In fact, he argues, there is no case which has been transferred to the authorities of Bosnia and Herzegovina in which the same defence counsel continued to represent the accused.⁶⁷

25. The Appeals Chamber notes that similar arguments have been raised in other appeals against decisions under Rule 11*bis* and recalls that

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.⁶⁸

The Referral Bench is not obliged to satisfy itself that defence counsel will receive the same level of remuneration as they do before this Tribunal. Rule 11*bis* requires only that the Referral Bench be satisfied that the accused will receive a fair trial, including adequate provisions for the defence of indigent accused. The Referral Bench is, as the Prosecution correctly submits,⁶⁹ not obliged to resolve any disparity in remuneration of counsel in national and international jurisdictions. The Appellant's submissions on this point do not provide any concrete reason to believe that he will receive an unfair trial in Bosnia and Herzegovina; rather, they seem to reflect not a threat to the Appellant's rights but rather a concern for the financial interests of the Appellant's present counsel, which provide no basis for refusing a request for referral under Rule 11 *bis*. The Referral Bench was therefore not required to address the Appellant's argument that in the case of a referral to Bosnia and Herzegovina, only "rather modest" financial means would be available for his defence.⁷⁰

26. To support his submissions, the Appellant enumerates on appeal a number of issues to show that, in his view, there are no adequate provisions for the financing of defence counsel for indigent

⁶⁶ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 17; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 13; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 21.

⁶⁷ Appeal Brief, para. 18.

⁶⁸ *Mejakić et al.* Appeal Decision, para. 70 (footnote omitted). See also *Janković* Appeal Decision, para. 44.

⁶⁹ Response, fn. 27, referring to the *Janković* Appeal Decision, paras 43-44.

⁷⁰ Defence Position, para. 14.

accused before the State Court.⁷¹ Reviewing the record of the referral proceedings, the Appeals Chamber notes that the Appellant neither submitted these arguments to the Referral Bench, nor adduced them consistent with Rule 115 of the Rules.⁷² In addition, the Appeals Chamber notes that the Appellant bases his arguments on “information published at <http://www.okobih.ba> (Website of the Criminal Defence section of the State Court of BiH), and newspaper articles”,⁷³ without giving any more details about the sources of his information. The Appeals Chamber declines to address so vague an argument.

27. On the basis of the foregoing, the Appeals Chamber rejects the third ground of appeal.

28. Regarding the fourth ground of appeal, the Appeals Chamber recalls that the Appellant based his argument mainly on the assumption that he will need to appoint new counsel because of the issues raised under his third ground of appeal, which would lead to undue delay.⁷⁴ Considering the preceding discussion of the Appellant’s third ground of appeal, the Appeals Chamber finds that the Appellant has not shown that the Referral Bench erred when it did not consider the possible change of Defence Counsel as a reason for possible delays. Accordingly, the fourth ground of appeal is dismissed.

VI. FAIR TRIAL (6TH GROUND OF APPEAL)

29. Under his sixth ground of appeal, the Appellant advances a number of arguments related to the issue of whether he will receive a fair trial.⁷⁵ As a number of his submissions under this ground are also relevant to the issue raised under his fifth ground of appeal, the Appeals Chamber finds it convenient to address the sixth ground before the fifth.

A. Access to Material and Technical Conditions

30. The Appellant first submits that a number of questions were raised during the referral hearing regarding access to material and the technical conditions for the Defence before the State Court of Bosnia and Herzegovina.⁷⁶ In the Appellant’s view, the Referral Bench should have addressed these issues.⁷⁷

⁷¹ Appeal Brief, para. 18.

⁷² Cf. *Janković* Appeal Decision, para. 73.

⁷³ Appeal Brief, fn. 32.

⁷⁴ *Ibid.*, paras 22-24.

⁷⁵ Notice of Appeal, para. 8; Appeal Brief, paras 30-39. In the Notice of Appeal, this ground is erroneously labelled the 8th ground of appeal, cf. Appeal Brief, fn. 1.

⁷⁶ Appeal Brief, para. 30.

⁷⁷ *Ibid.*, para. 40

31. The Appeals Chamber sees no merit in the Appellant's submissions. First, the Appellant's right to a fair trial is not violated by the circumstances that the parties receive audio recordings rather than written transcripts of the sessions of the State Court.⁷⁸ Regarding the question whether material from the Tribunal will be delivered to the authorities in electronic version or in hardcopy,⁷⁹ the Appeals Chamber notes that the Prosecution informed the Referral Bench and the Defence after the referral hearing that the BiH authorities would receive certified copies of the transmitted documents.⁸⁰ The Appellant did not make any further submissions on this issue, despite an invitation by the Referral Bench,⁸¹ and accordingly the Referral Bench was entitled to consider the issue as resolved.

B. Applicable Law: Sentencing

32. Second, the Appellant submits that the law on sentencing is unclear. He acknowledges that the BiH Criminal Code contains a provision that, in case of a change of the law after an offence has been committed, the law most favourable to the accused shall be applied. However, the Appellant argues, an OSCE report indicates that this provision will not be applied consistently. Therefore, in the Appellant's view, there exists the "theoretical possibility" that he receives a sentence of 45 years' imprisonment in Bosnia and Herzegovina, whereas in Croatia, the maximum sentence he would face would be 20 years' imprisonment.⁸²

33. The Appellant relies on an OSCE Report of March 2005⁸³ to support his argument. The Appeals Chamber notes that the OSCE Report indeed addresses the issue of the applicable law with regard to the 2003 Bosnia and Herzegovina Criminal Code and states that this is a "complex legal issue [which] will have to be resolved by the BiH Court in one of its first cases".⁸⁴ It is not uncommon in any jurisdiction that diverging opinions exist in the lower tiers of the judiciary regarding a complex legal issue, until this issue is resolved by a higher court, as the OSCE Report expects in this particular case.

34. The Appeals Chamber recalls that the Referral Bench is not obliged to determine which jurisdiction provides guarantees of enforcing the more lenient law on the accused in the case of referral; it has only to be satisfied that there are appropriate provisions covering the criminal acts

⁷⁸ *Ibid.*, para. 30.

⁷⁹ *Ibid.*

⁸⁰ *Prosecutor v. Paško Ljubičić and Ivica Rajić*, Case No. IT-00-41-PT and IT-95-12-PT, Prosecutor's Response Concerning Transmission of Materials to Bosnia and Herzegovina Pursuant to Rule 11*bis* Referrals, 27 September 2005.

⁸¹ Referral Hearing, T. 20 September 2005, p. 274 (unofficial version).

⁸² Appeal Brief, para. 34.

⁸³ OSCE Mission to Bosnia and Herzegovina, Human Rights Department: War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina – Progress and Obstacles, March 2005 ("OSCE Report").

alleged in the Indictment and that adequate penalty structures exist.⁸⁵ Accordingly, the Appeals Chamber finds that the Appellant's argument regarding the applicable law is unfounded.

C. Detention

35. Third, the Appellant submits that the Referral Bench erred in finding that "the Prosecution has proven the existence of satisfactory conditions in BiH prisons".⁸⁶ In particular, he takes issue with certain statements made during the referral hearing by the Representative of Bosnia and Herzegovina with regard to the role of the BiH Ministry of Justice. The Appellant argues that orders of the Ministry concerning the safety of prisoners have been disregarded and that the Representative of the Ministry was not informed about the work of a commission established to examine the conditions in the prisons.⁸⁷

36. In examining these arguments, the Appeals Chamber finds it useful to recall the context in which the statements to which the Appellant refers were made. During the referral hearing, the Appellant cited newspaper reports about the insecurity in prisons in Bosnia and Herzegovina, and that an order by the federal Minister of Justice to improve the situation of Croat and Serbian prisoners had not been respected.⁸⁸ In response to these submissions, the Representative of Bosnia and Herzegovina stated that "[t]here is no doubt that there have been problems in the prison in Zenica, in the penal institution there, but probably due to lack of information, the statements made by the Defence of the Accused are incorrect".⁸⁹ She explained that this incident fell into the competence of the entity authorities, in this case the Federation of Bosnia and Herzegovina, but not the State authorities, which she was representing. The federal authorities were not obliged to submit a report on this incident to the State authorities, but the BiH Representative indicated that she could request the report for the information of the Referral Bench.⁹⁰ She added that "[t]he action taken by the [S]tate Ministry of Justice was to request from the ministries of justice in [the] entities to ensure that entity laws are in compliance with the law of Bosnia-Herzegovina on enforcing criminal sanctions".⁹¹

37. The Appeals Chamber notes that the report the BiH Representative mentioned during the referral hearing was duly transmitted to the Referral Bench. Based on this report, the Referral Bench found "that in separate incidents on 4 and 5 June 2005, respectively, two prisoners who were

⁸⁴ OSCE Report, p. 20.

⁸⁵ *Mejakić et al.* Appeal Decision, para. 48.

⁸⁶ Appeal Brief, para. 36.

⁸⁷ *Ibid.*, para. 38.

⁸⁸ Referral Hearing, T. 20 September 2005, p. 232 (unofficial version).

⁸⁹ *Ibid.*, p. 234 (unofficial version).

⁹⁰ *Ibid.*, p. 239-240.

serving sentences for war crimes, had been physically attacked by two other prisoners. Disciplinary sanctions had been imposed on the perpetrators”.⁹²

38. The Appellant does not substantiate his claim, which had been rejected by the State Representative, that orders concerning the safety of prisoners had been disregarded.⁹³ The fact that the State Representative as a representative of the State Ministry of Justice was, at the time of the referral hearing, not informed about the report of a commission established by the Ministry of Justice of the Federation of Bosnia and Herzegovina is the consequence of the normal bureaucratic workings of a federally organized government system. The Appellant’s submissions on appeal completely ignore the fact that the report was duly transmitted as requested to the Referral Bench. In sum, the Appeals Chamber finds that the Appellant once again merely repeats the arguments which have been already rejected by the Referral Bench without showing that the Referral Bench’s conclusions were erroneous. They cannot form the basis of a successful appeal.⁹⁴

39. In addition, the Appellant submits that the statements of the State Representative during the referral hearing regarding the construction of a new prison to accommodate persons convicted by the State Court were incorrect.⁹⁵ With his Reply, he submits a “Declaration of the Conference on the Funding Needs of the State Justice Institutions of BiH of 31 March 2006” (“Declaration”) to show that, in fact, the financing of this facility is still not resolved.⁹⁶

40. The Appeals Chamber notes that the Declaration constitutes new evidence and has not been adduced in accordance with Rule 115 of the Rules. In any case, the Declaration is not inconsistent with the information given to the Referral Bench by the BiH Minister of Justice indicating that the building of the facility was dependent on the receipt of international funding.⁹⁷

41. The Appeals Chamber acknowledges that there are some inconsistencies in the position of the State Representative. The State Representative stated at the referral hearing that “[f]unds have been collected and work is underway, very expeditiously, to construct this prison at the state level in Bosnia-Herzegovina”⁹⁸ and that “that the completion of the building would enable the facility to

⁹¹ *Ibid.*, p. 239.

⁹² Impugned Decision, para. 46, referring to “Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina, 19 October 2005, including the ‘Report of the Commission for Establishing Lawful and Due Treatment of the Convicted Persons in the Closed-Type Correctional Facility in Zenica’” (“Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina”).

⁹³ Appeal Brief, para. 38.

⁹⁴ *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement, 3 May 2006, para. 17; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 13; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 21.

⁹⁵ Appeal Brief, para. 38.

⁹⁶ Reply, para. 8.

⁹⁷ Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina, p. 2.

⁹⁸ Referral Hearing, T. 20 September 2005, p. 236 (unofficial version).

become operational on the 31st of December 2006”,⁹⁹ whereas the Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina indicates that the Ministry is currently awaiting the receipt of funding and, “should international donations be forthcoming”, expects the completion of the building by mid-2007.¹⁰⁰ However, the Appeals Chamber finds that these discrepancies do not carry sufficient weight to support the Appellant’s claim that the whole judicial system of the State is unreliable.¹⁰¹

42. The Referral Bench took note of the Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina and noted that, pending the completion of the new prison, convicted persons “will for the time being be sent to a prison within their respective entity”.¹⁰² Given these circumstances, the Appeals Chamber finds that the Appellant has not shown that the Referral Bench committed a discernible error when it concluded that the concerns raised by the Appellant regarding post-trial detention “have been appropriately addressed by the authorities of Bosnia and Herzegovina and do not prevent a referral of the present case to the authorities of that State”.¹⁰³ Accordingly, the Appeals Chamber rejects this argument of the Appellant.

43. However, the Appeals Chamber affirms that “[t]he condition of detention units in a national jurisdiction, whether pre- or post-conviction, is a matter that touches upon the fairness of that jurisdiction’s criminal justice system” and therefore the consideration of these conditions fall under the Referral Bench’s mandate.¹⁰⁴ As the Referral Bench found in the Impugned Decision,¹⁰⁵ the Prosecution has an obligation to monitor the proceedings under Rule 11bis(D)(iv) of the Rules.¹⁰⁶ The Appeals Chamber is satisfied that the pre-trial conditions in the detention unit attached to the State Court meet internationally recognized standards. However, particularly in light of the uncertainty about when the new prison discussed above will be completed, the Appeals Chamber expects that the Prosecution will mention in its reports to the Referral Bench any serious issues with regard to the conditions of pre-trial or post-conviction detention.

D. Conclusion

44. The Appellant’s sixth ground of appeal is dismissed in its entirety.

⁹⁹ *Ibid.*, p. 241.

¹⁰⁰ Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina, p. 2-3.

¹⁰¹ Appeal Brief, para. 38.

¹⁰² Impugned Decision, para. 47, quoting Correspondence and Report of the Minister of Justice of Bosnia and Herzegovina, p. 2.

¹⁰³ Impugned Decision, para. 48.

¹⁰⁴ *Stanković* Appeal Decision, para. 34.

¹⁰⁵ Impugned Decision, Disposition. *See also* Corrigendum to Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11bis of 12 April 2006, 27 April 2006.

¹⁰⁶ *Ibid.*

VII. PREPAREDNESS OF THE COURTS OF BOSNIA AND HERZEGOVINA (5TH GROUND OF APPEAL)

45. Under his fifth ground of appeal, the Appellant submits that the Referral Bench erred in law and in fact by failing to examine whether the courts of Bosnia and Herzegovina are adequately prepared to accept the case.¹⁰⁷ He maintains that the legal system of Bosnia and Herzegovina is beset by a number of serious problems, which were not taken into consideration by the Referral Bench. Croatia, on the other hand, would offer a “level of legal security” which is “incomparably higher” according to the Appellant.¹⁰⁸

46. The Prosecution responds that the OSCE Report, on which the Appellant relies to support his submissions, was considered by the Referral Bench in the *Mejakić et al.* Referral Decision and was not found to preclude referral of cases to Bosnia and Herzegovina.¹⁰⁹

47. The Referral Bench stated that it had already found in its earlier decisions that an accused would receive a fair trial by the courts of Bosnia and Herzegovina, and therefore limited its analysis to the particular issues raised by the Parties in the present case, namely the right to a trial without undue delay and the conditions of detention.¹¹⁰ To support his fifth ground of appeal, the Appellant relies on the OSCE Report, as he had already done during the proceedings before the Referral Bench.¹¹¹ However, the references in both the Defence Position before the Referral Bench and the Appeal Brief to this report are rather vague. In the Defence Position, the Appellant quoted the report to show that there are “gross flaws in the BiH justice” and that there exist “divergent practice in relation to the new system, resulting from misinterpretation and confusion about the law”.¹¹² The Appeals Chamber notes that the quote taken from the OSCE report concerning divergent practice refers to a particular jurisdictional issue that will clearly have no impact on the Appellant’s case.¹¹³ The Appellant did not identify any other “gross flaws” in the judicial system of Bosnia and Herzegovina. In addition, the Appeals Chamber notes that the OSCE Report is mainly concerned with war crimes proceedings before the cantonal and district courts of Bosnia and Herzegovina, as opposed to the State Court,¹¹⁴ the only competent court to try a case referred to BiH by the

¹⁰⁷ Notice of Appeal, para. 7; Appeal Brief, paras 27-29. In the Notice of Appeal, this ground is erroneously labelled the 7th ground of appeal, *cf.* Appeal Brief, fn. 1.

¹⁰⁸ Appeal Brief, paras 27-28.

¹⁰⁹ Response, para. 29, referring to *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11*bis*, 20 July 2005, para. 81.

¹¹⁰ Impugned decision, para. 40.

¹¹¹ Appeal Brief, para. 28; Defence Position, para. 16.

¹¹² Defence Position, para. 16, referring to OSCE Report, p. 19.

¹¹³ OSCE Report, p. 19.

¹¹⁴ “With the establishment of the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH) in January 2005, it is imperative to draw attention to the efforts of the BiH authorities in relation to war crimes cases proceeding before the cantonal and district courts”, OSCE Report, p. i.

International Tribunal. The Appeals Chamber finds that the Referral Bench was not obliged to address an argument so vague. The Appellant's submissions under his fifth ground of appeal are no more precise; he does not even give any specific reference to the OSCE Report. The Appeals Chamber therefore finds that the Appellant has not established that the Referral Bench erred when it disregarded the OSCE Report.

48. In addition, the Appellant submits that the Representative of Bosnia and Herzegovina admitted that the Ministry of Justice of Bosnia and Herzegovina had only limited influence on the judicial authorities of Bosnia and Herzegovina, and that, for example, the prison administration "totally ignore[s] orders issued by the Minister of Justice".¹¹⁵

49. The Appeals Chamber has already considered these arguments under the Appellant's sixth ground of appeal and concluded that the Representative's statements do not support the Appellant's claim that the Federation authorities "totally ignore orders by the [State] Ministry of Justice",¹¹⁶ but rather describe the consequences of the normal workings of a federally organized government system.¹¹⁷ Moreover, the Appellant has not established that whatever inefficiencies may exist in the system in Bosnia and Herzegovina are such as to violate his rights or render the system incapable of appropriately and fairly handling his case. Accordingly, the Appeals Chamber finds that the Appellant has not shown that it was erroneous on the part of the Referral Bench not to consider these statements as an indication that the authorities of Bosnia and Herzegovina were not adequately prepared to accept this case.

50. The fifth ground of appeal is dismissed.

VIII. DISPOSITION

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

DISMISSES the Appellant's appeal in its entirety;

AFFIRMS the referral of the case of *Prosecutor v. Ljubičić* to the State Court of Bosnia and Herzegovina;

¹¹⁵ Appeal Brief, para. 29, referring to Referral hearing, T. 20 September 2005, p. 232 (unofficial version).

¹¹⁶ Appeal Brief, para. 29.

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

Dated this 4th day of July 2006
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

¹¹⁷ See above, para. 38.