

**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-98-32/1-AR11bis.1
Date: 11 July 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. Hans Holthuis

Decision of: 11 July 2007

PROSECUTOR

v.

**MILAN LUKIĆ &
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON MILAN LUKIĆ'S APPEAL REGARDING
REFERRAL**

The Office of the Prosecutor:

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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 “Tribunal”, respectively) is seized of an appeal by Milan Lukić (“Appellant”) against the Referral Bench’s “Decision on Referral of Case Pursuant to Rule 11bis with Confidential Annex A and Annex B”, filed on 5 April 2007 (“Referral Decision”).¹

I. BACKGROUND

2. On 21 October 1998, the Prosecutor issued an indictment (“Indictment”) against the Appellant and Sredoje Lukić, both Bosnian Serbs from the Višegrad municipality.² The Indictment alleged that the two men had belonged to a paramilitary unit known as the White Eagles³ and that they had committed atrocities “from in or about April 1992 through in or about October 1994 in the Višegrad municipality and the surrounding area in the Republic of Bosnia and Herzegovina”.⁴ The Indictment charged both men with extermination, persecution, murder, and inhumane acts as crimes against humanity, and with murder, cruel treatment, and violence to life and person as violations of the laws or customs of war.⁵ The charge of persecution was framed in general terms.⁶ The other charges related to two specific occasions on which the two men were alleged to have forced Bosnian Muslim civilians into houses and set the houses on fire (resulting in a total of around 135 deaths) and to the accuseds’ alleged periodic abuse of Bosnian Muslim men in a detention camp.⁷ The Indictment also charged the Appellant with murder and inhumane acts as crimes against humanity, and with murder and violence to life and person as violations of the laws or customs of war, in relation to three other incidents involving attacks on 13 Bosnian Muslims (11 of whom were alleged to have been murdered in the course of the attacks).⁸ The Indictment was confirmed on 26 October 1998.⁹

3. In July 2001, arrest warrants for both accused were issued.¹⁰ By February 2005, however, they were still at large. That month, the Prosecutor filed a motion requesting that the case be

¹ Notice of Appeal of Milan Lukić from 5 April 2007 Decision on Referral of Case Pursuant to Rule 11bis, 18 April 2007 (“Notice of Appeal”); Brief of Appellant Milan Lukić, 3 May 2007 (“Appeal Brief”).

² The Indictment also covered a third accused, Mitar Vasiljević, whose case was subsequently severed and who will not be discussed further in this decision. *See generally* Indictment; *see also* *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004.

³ Indictment, paras 9-11. The Indictment suggested that the Appellant was the leader of this paramilitary unit. *See ibid.*, para. 11 (describing Sredoje Lukić as “join[ing the Appellant’s] paramilitary unit”).

⁴ Indictment, para. 13.

⁵ Indictment, paras 18-30, 38-40.

⁶ Indictment, paras 19-20.

⁷ Indictment, paras 18, 21-30, 38-40.

⁸ Indictment, paras 31-37.

⁹ Confidential Review of the Indictment, 26 October 1998.

¹⁰ *See* Motion by the Prosecutor Under Rule 11bis, 1 February 2005, paras 2, 4 (“Motion of 1 February 2005”).

referred to Bosnia and Herzegovina (“BiH”) pursuant to Rule 11*bis* of the Rules of Procedure and Evidence (“Rules”) and seeking the appointment of a Referral Bench to consider this issue.¹¹ Rule 11*bis* provides a way for the Tribunal to send certain cases to domestic jurisdictions for trial. Specifically, Rule 11*bis*(A) provides that a Referral Bench appointed by the President may “determine whether [a] case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case.” Rule 11*bis*(C) further specifies that in “determining whether to refer the case ... the Referral Bench shall, in accordance with Security Council resolution 1534 (2004),¹² consider the gravity of the crimes charged and the level of responsibility of the accused”. Finally, pursuant to Rule 11*bis*(B), the Referral Bench may only order referral upon “being satisfied that the accused will receive a fair trial [in the State to which the case is referred] and that the death penalty will not be imposed or carried out.”

4. The President of the Tribunal accordingly convened a Referral Bench for the purpose of considering the appropriateness of referral to BiH.¹³ Then, in September 2005, the ICTY gained custody over Sredoje Lukić after his voluntary surrender. Also in the fall of 2005, the Argentine police apprehended the Appellant. He was transferred to the ICTY in February 2006, following a decision of the Argentine Federal National Criminal and Correctional Court No. 8 (“Argentine Court Order”). This decision authorized the Appellant’s transfer to the Tribunal for trial and also authorized his subsequent extradition to Serbia (which has criminal charges pending against the Appellant and had requested his extradition).¹⁴

5. Shortly after the Appellant’s transfer to the ICTY, the Prosecution sought to amend the indictment in relation to him.¹⁵ Among other things, the revised indictment (“Second Amended Indictment”) (1) specifically alleged that the Appellant had organised the White Eagles (also known as the Avengers);¹⁶ (2) identified the factual bases for the crime of persecution;¹⁷ (3) clarified the dates (or the range of dates) on which the alleged crimes occurred;¹⁸ and (4) specified that all the

¹¹ Motion of 1 February 2005; *see also* Request by the Prosecutor under Rule 11*bis*, 1 February 2005 (“Request of 1 February 2005”).

¹² U.N. Doc. S/RES/1534 (2004).

¹³ Order Appointing a Trial Chamber for the Purpose of Determining Whether an Indictment Should be Referred to Another Court under Rule 11*Bis*, 2 February 2005.

¹⁴ Argentine Court Order, p. 9, *in* Registry Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Referral Bench’s Order to File the Decision of the Federal Court of Argentina, 7 July 2006.

¹⁵ *See* Prosecution’s Motion to Amend Indictment, 27 February 2006 (“Motion of 27 February 2006”) and the attached Second Amended Indictment. The Prosecution had sought and received permission to amend the Indictment on two prior occasions, but these prior amendments were not significant with regard to the Appellant. *See generally* Prosecution Motion to Amend Indictment, 12 July 2001; and Prosecution’s Motion to Amend Indictment, 17 November 2005.

¹⁶ Second Amended Indictment, paras 1, 31.

¹⁷ Second Amended Indictment, paras 3-4.

¹⁸ *See* Motion of 27 February 2006, para. 27.

alleged crimes occurred within the Višegrad municipality.¹⁹ The Trial Chamber granted leave to amend on 22 March 2006.²⁰

6. In the meantime, the request for referral remained pending before the Referral Bench. The Referral Bench received submissions not only from the parties, but also, at its invitation, from Argentina and BiH.²¹ In addition, the Referral Bench received submissions from Serbia, which requested that the case be referred to it rather than to BiH.²² Along with the parties, representatives of all three countries participated in the oral hearing held by the Referral Bench on 15 September 2006.²³

7. On 5 April 2007, the Referral Bench issued a decision referring the case to BiH. Looking to the allegations set forth in the Second Amended Indictment, the Referral Bench determined that while the crimes alleged were very serious, neither Sredoje Lukić nor the Appellant could be considered to hold the level of responsibility of “most senior leaders”.²⁴ In light of these factors, the Referral Bench found that the case was “not *ipso facto* incompatible” with referral.²⁵ The Referral Bench further found that the most appropriate State for the referral was BiH – a conclusion it reached in part by taking note of the fact that “the victims were allegedly Bosnian Muslims and other non-Serb nationals or residents of Bosnia and Herzegovina.”²⁶ Having considered the applicable substantive law in BiH, the Referral Bench went on to find that Sredoje Lukić and the Appellant would receive a fair trial if the case were referred to BiH and that the death penalty would not be imposed or carried out.²⁷ With regard to concerns raised by the Appellant about his personal safety in the event of a referral to BiH, the Referral Bench concluded that these concerns were unsubstantiated.²⁸ Finally, the Referral Bench concluded that the circumstances of the Appellant’s capture in Argentina and his transfer to the ICTY did not preclude referral to BiH, although these circumstances did place restrictions on BiH’s ability to try the Appellant for crimes other than those within the Tribunal’s jurisdiction.²⁹ Further particulars in relation to the Referral

¹⁹ See Motion of 27 February 2006, para. 28; Second Amended Indictment, para. 17. As compared to the Indictment, the Second Amended Indictment also increased the number of deaths resulting from the alleged fire-burning incidents somewhat, raising the tally from approximately 135 deaths to approximately 140 deaths. See Second Amended Indictment, paras 7, 11.

²⁰ See Decision Granting Prosecution’s Motion to Amend Indictment with regard to Milan Lukić, 22 March 2006, p. 2; see also Decision on the Form of the Indictment, 11 May 2006, para. 1.

²¹ Referral Decision, para. 8 and accompanying footnotes (identifying the submissions).

²² Referral Decision, para. 9 and accompanying footnotes (identifying the submission and related filings).

²³ Referral Decision, para. 10.

²⁴ Referral Decision, paras 29-30.

²⁵ Referral Decision, para. 31.

²⁶ Referral Decision, paras 37-41.

²⁷ Referral Decision, paras 42-93

²⁸ Referral Decision, paras 63-68.

²⁹ Referral Decision, para. 122.

Bench's decision will be discussed in the course of considering the Appellant's specific grounds of appeal.

8. Sredoje Lukić did not appeal the Referral Decision, but the Appellant has appealed it.³⁰ In his Notice of Appeal and his Appeal Brief, he raises 14 grounds of appeal. The Prosecution has responded to this appeal,³¹ and the Appellant has filed a reply to this response.³²

II. STANDARD OF REVIEW

9. "The Appeals Chamber recalls that a decision on whether or not a case should be referred to the authorities of a State which meets the requirements set out in Rule 11bis of the Rules is a discretionary one."³³ Therefore, "the party challenging a decision pursuant to Rule 11bis of the Rules must show that the Referral Bench misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of its discretion, or that the Referral Bench gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Referral Bench must have failed to exercise its discretion properly."³⁴

III. GROUNDS OF APPEAL RELATED TO THE REFERRAL BENCH'S FINDINGS ON GRAVITY AND LEVEL OF RESPONSIBILITY

A. First Ground of Appeal

10. In his first ground of appeal, the Appellant challenges the Referral Bench's use of the Second Amended Indictment in assessing the gravity of his crimes and level of responsibility. In the Appellant's view, the Referral Bench instead should have used the version of the indictment that was operative in February 2005 (the time when the Prosecution originally sought referral) instead of the Second Amended Indictment, which had neither been filed nor confirmed at the time the Prosecution sought referral.³⁵ The Appellant suggests that the Prosecution manipulated the Second Amended Indictment "to eradicate the facts averred in the [earlier indictment] which undermined

³⁰ After it became clear that only one of the two accused had appealed the Referral Decision, the Referral Bench issued an order staying the execution of Sredoje Lukić's transfer to BiH until after the resolution of the Appellant's appeal. See generally Order Concerning Submissions of the Registrar Pursuant to Rule 33(B), 17 May 2007.

³¹ Prosecution Response to Brief of Milan Lukić, 14 May 2007 ("Response Brief").

³² Reply Brief of Appellant Milan Lukić, 17 May 2007 ("Reply Brief").

³³ *Prosecutor v. Mitar Rašević and Savo Todović*, Case Nos. IT-97-25/1-AR11bis.1 & IT-97-25/1-AR11bis.2, Decision on Savo Todović's Appeals Against Decisions on Referral under Rule 11bis, 4 September 2006 ("Todović Decision of 4 September 2006"), para. 8.

³⁴ *Todović* Decision of 4 September 2006, para. 8.

³⁵ See Appeal Brief, paras 8-9.

the Rule 11bis Request.”³⁶ In this regard, the Appellant points specifically to the “constrict[ion of] the geographic and temporal scope of the alleged conduct” in the Second Amended Indictment.³⁷

11. The Prosecution responds that the Referral Bench appropriately used the indictment that, pursuant to the ruling of the Trial Chamber, was operative at the time of the Referral Decision.³⁸ The Prosecution points out that the Referral Bench considered and rejected the same arguments by the Appellant with regard to any tailoring of the indictment by the Prosecution for the purpose of furthering referral.³⁹

12. The Appeals Chamber sees no error in the Referral Bench’s use of the currently operative indictment at the time of its decision (in this case, the Second Amended Indictment) in evaluating gravity and level of responsibility. Indeed, the Appeals Chamber’s decisions in *Prosecutor v. Mitar Rašević and Savo Todović* plainly support this approach.⁴⁰ In that case, the Appeals Chamber indicated that the Referral Bench should rely on the most recently confirmed version of the indictment, even where the Prosecution sought and received leave to use this version after the appointment of the Referral Bench.⁴¹

13. The Appeals Chamber further rejects the Appellant’s claim that manipulation of the Indictment by the Prosecution justifies a different approach in this case. The Appeals Chamber need not address whether or not such manipulation, if proved, would justify a different approach, because here the Appellant fails to offer any credible evidence of manipulation.⁴² In the absence of support for an assertion of manipulation, “the Appeals Chamber takes it for granted that the

³⁶ Appeal Brief, para. 10.

³⁷ Appeal Brief, para. 11.

³⁸ See Response, para. 2.4.

³⁹ Response, para. 2.5.

⁴⁰ *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11bis.1, Decision on Rule 11bis Referral, 23 February 2006 (“*Todović* Decision of 23 February 2006”), paras 12-14, 18-19; *Todović* Decision of 4 September 2006, paras 3-4, 6, 13.

⁴¹ *Todović* Decision of 23 February 2006, paras 18-19 (ordering the Referral Bench to suspend its proceedings until the Trial Chamber had resolved whether to accept proposed amendments to the indictment); Decision of 4 September 2006, paras 4, 6, 13 (seeming to view the most recently confirmed indictment as the relevant one for the Rule 11bis proceedings, but accepting that the differences between this indictment and the prior one were not material enough to justify a revised analysis based on this indictment).

⁴² The crimes charged in the two versions of the Indictment remain the same, although the Second Amended Indictment provides more details with regard to the factual allegations supporting these charges. While the Second Amended Indictment does provide more specific dates with regard to the factual allegations and does limit the geographic location of the crimes to within the municipality of Višegrad, these changes do not give rise to an inference of manipulation. In this regard, the Appeals Chamber notes that (1) the changes with respect to dates and geographic location primarily clarify rather than limit the specific factual allegations, as the only reference in the specific charges of the Indictment to events outside the Višegrad municipality occurred in the very general allegation of persecution, see Indictment, paras 19-20; and (2) the Second Amended Indictment provides more information with regard to the Appellant’s leadership role in the White Eagles, see Second Amended Indictment paras 1, 31, a point which cuts against the Appellant’s claim that the Second Amended Indictment sought to minimize his level of responsibility. The Appeals Chamber also notes that the Trial Chamber rejected a claim by Sredoje Lukić that similar amendments to the Indictment implied manipulation. See Decision Granting Prosecution’s Motion to Amend Indictment and Scheduling Further Appearance, 11 February 2006, para. 13.

Prosecution would not seek to influence the proceedings in such a way that by [changing] the charges alleged, this Tribunal would have decided the referral request differently.”⁴³

B. Second Ground of Appeal

14. In his second ground of appeal, the Appellant objects to the Referral Bench’s exclusive reliance on the Second Amended Indictment in assessing his alleged level of responsibility pursuant to Rule 11bis (C) of the Rules. Although acknowledging that precedent supports this approach,⁴⁴ the Appellant considers that “neither the pronouncements of the Security Council, nor the Tribunal’s Rules of Procedure anywhere declare that the operative indictment is the *sole* source of the facts” that the Referral Bench should use for such determinations.⁴⁵ He considers that in this case the Referral Bench should have made use of extrinsic evidence. In particular, he points to statements made at various times by the Prosecution (either in the course of his case or in other cases before the Tribunal) suggesting (1) that the Appellant’s “paramilitary unit was one of the most feared and notorious during the conflict” and the Appellant himself “is considered to be perhaps the person who killed more people with his own hands than any other during the course of the Bosnian conflict”;⁴⁶ (2) that the ethnic cleansing in Višegrad constituted “one of the most brutal campaigns of ethnic cleansing in the Bosnian conflict”;⁴⁷ and (3) that the Appellant was also involved in the events of Srebrenica.⁴⁸

15. The Prosecution responds that the “Referral Bench did not only look at the indictment but took into account all the factors relevant for a determination under Rule 11bis.”⁴⁹

16. In reply, the Appellant asserts that the “Prosecution is simply incorrect in its response that, as to level of responsibility, the Referral Bench did not limit its inquiry to the Second Amended Indictment.”⁵⁰ In the Appellant’s view, the Referral Bench committed a legal error in looking only

⁴³ *Prosecutor v. Gojko Janković*, Case No. IT-96-23/3-AR11bis.2, Decision on Rule 11bis Referral, 15 November 2005 (“*Janković* Appeal Decision on Referral”), para. 25.

⁴⁴ Appeal Brief, para. 12 & fn. 17.

⁴⁵ Appeal Brief, para. 6.

⁴⁶ Appeal Brief, para. 13 (quoting Request of 1 February 2005, para. 17) (emphasis omitted); *see also Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002, para. 72.

⁴⁷ Appeal Brief, para. 15 (quoting *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Transcript of 10 September 2001, p. 105); *see also ibid.*, para. 16.

⁴⁸ Appeal Brief, paras 17-19 (citing various filings by the Prosecution and alleged testimony from a BiH proceeding). Neither the Indictment nor the Second Amended Indictment charges the Appellant with crimes in relation to the events of Srebrenica. *Cf.* Motion of 1 February 2005, para. 23 (stating that “Milan LUKIĆ’s crimes extended to his alleged involvement in some of the massacres arising out of the fall of Srebrenica in July of 1995”).

⁴⁹ Response, para. 2.7.

⁵⁰ Reply, para. 2.

to the Second Amended Indictment in assessing the level of responsibility, and this legal error led it to make a factual error in its findings on the level of responsibility.⁵¹

17. The Appeals Chamber agrees with the Appellant that, in assessing the Appellant's level of responsibility, the Referral Bench relied solely on the factual allegations made in the Second Amended Indictment.⁵² But the Appeals Chamber disagrees with the Appellant's suggestion that this approach was wrong. Existing case law clearly endorses the approach taken by the Referral Bench.⁵³ Indeed, in *Prosecutor v. Gojko Janković*, the Appeals Chamber explicitly rejected the accused's argument that the Trial Chamber should have considered allegations that were not in the indictment in assessing the gravity of his alleged crimes.⁵⁴ The Appeals Chamber declines to revisit its existing approach, which is supported both by the text of the Rules and by sound policy reasons. Rule 11bis (C) of the Rules speaks of the "charge[s]", not of possible future charges. The ultimate case brought against an accused (whether in the Tribunal or in BiH State Court following a referral) may include additional charges, not present in the operative indictment at the time of referral,⁵⁵ that affect ultimate findings with regard to gravity and level of responsibility. But this is not sufficient justification to abandon the existing approach. Were the Referral Bench required to look beyond the four corners of an indictment, it would find itself in the untenable position of making speculation upon speculation with regard to whether there are other possible charges that could be brought against the accused, whether these charges may in fact be brought, and how these possible charges might relate to the issues of gravity and level of responsibility. Thus, at least in the absence of a showing that the Prosecution has withheld charges against an accused in order to promote the possibility of referral, the Referral Bench appropriately assesses gravity and level of responsibility solely in light of the allegations in the operative indictment. Accordingly, the Referral Bench had no obligation in this case to consider extrinsic evidence with regard to the Appellant's notoriety or to his possible involvement in criminal acts other than those charged in the Second Amended Indictment. In the present case, the Appeals Chamber is of the view that the fact that the Prosecution may now possess some evidence suggesting that the Appellant was also involved in the events of Srebrenica is not enough, standing alone, to raise concerns that the Prosecution has withheld charges against the Appellant in order to promote referral.

⁵¹ Reply, para. 2.

⁵² See Referral Decision, paras 16, 26-31.

⁵³ *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 on Referral"), para. 22 ("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").

⁵⁴ *Janković* Appeal Decision on Referral, para. 21.

⁵⁵ See *Todović* Decision of 23 February 2006, paras 15-16.

C. Third Ground of Appeal

18. In his third ground of Appeal, the Appellant claims that the Referral Bench erred in concluding that the Appellant could not be characterized as one of the “most senior leaders” with regard to level of responsibility. In this regard, the Appellant cites a statement made by the President of the Security Council that the “Security Council recognizes ... that the ICTY should concentrate its work on the prosecution and trial of the civilian, military, and paramilitary leaders ... rather than on minor actors.”⁵⁶ In the Appellant’s view, this statement implies that paramilitary leaders are not suitable for referral.⁵⁷ Since he is alleged to be a paramilitary leader, he considers that his case accordingly should not be referred.⁵⁸ He also points out that in its decision in *Prosecutor v. Dragomir Milošević*, the Referral Bench stated that the phrase “most senior leaders” did not merely apply to leaders at the highest policy-making levels.⁵⁹

19. The Prosecution responds that the Referral Bench considered and rejected these arguments in the Referral Decision; that the “findings of the Referral Bench taken in their entirety do not place [the Appellant] in the category of ‘most senior leaders’”; and that the Appellant has not shown how these findings are unreasonable.⁶⁰

20. To begin with, the Appeals Chamber rejects the Appellant’s suggestion that the statement by the President of the Security Council precludes the referral of paramilitary leaders as a matter of law. The Appeals Chamber does not read this statement to bar referral of *all* cases involving civilian, military, and paramilitary leaders. Were that to be the case, then the Security Council would not have referenced “most senior leaders” in Resolutions 1503 (2003) and 1534 (2004), but would instead have spoken of *all* leaders. Instead, the Appeals Chamber understands the statement of the President of the Security Council simply to indicate that “most senior leaders” may come from positions of civilian, military, or paramilitary leadership (rather than simply from military leadership positions, for example). The reasoning of the Referral Bench was in keeping with this approach, as it plainly recognized that paramilitary leaders could fall within the category of “most senior leaders”.

⁵⁶ United Nations Security Council, Statement by the President of the Security Council, 23 July 2002, S/PRST/2002/21, cited in Appeal Brief, para. 14.

⁵⁷ Appeal Brief, para. 23.

⁵⁸ Appeal Brief, para. 23.

⁵⁹ Appeal Brief, para. 22 (citing *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005, para. 22).

⁶⁰ Response, paras 2.9-2.11.

21. The Appeals Chamber finds more merit in the Appellant's contention that the Referral Bench erred in its factual assessment of whether he amounted to a "most senior leader". The Referral Bench set out the following standard for considering his level of responsibility:

The level of responsibility of an accused relates both to the role of the accused in the commission of the alleged offences and to the position and rank of the accused in the civil, political, or military hierarchy [A] high level of responsibility may arise from the alleged level of participation in the commission of the crimes charged in the indictment. A person holding a high rank or position may have the authority to orchestrate the actions of other people: because he may inflict more damage than he would be able to inflict absent such a rank or position, he therefore bears a higher level of responsibility. The accused must have exercised such a significant degree of authority that it is appropriate to refer to him as being among the 'most senior', rather than 'intermediate' [leaders]. The notion of 'most senior leaders' is, however, not limited to the architects of an overall policy forming the basis of the alleged crimes.⁶¹

Yet the Referral Bench's application of this standard was sparse. The Referral Bench simply stated that "[i]rrespective of the alleged local notoriety of Milan Lukić and his paramilitary group, neither of the Accused can sensibly be characterised as one of the 'most senior leaders', as envisioned by the Security Council in Resolution 1534."⁶² This conclusory statement appears to presume that a "local" paramilitary leader can never constitute a "most senior leader". In doing so, it fails to take into account the "alleged level of participation in the commission of the crimes charged in the indictment."⁶³ The Second Amended Indictment not only alleges that the Appellant directly "committed" the crimes charged, but also suggests that he was a leader and orchestrator of these crimes⁶⁴ – which were part of "one of the most notorious campaigns of ethnic cleansing in the conflict".⁶⁵ There is no suggestion in the Second Amended Indictment that the Appellant was acting under the orders of others, although he may have coordinated with others in carrying out a "reign of terror upon the local Muslim population."⁶⁶ Rather, it seems that within his own sphere, he was a dominant presence.

22. The Appeals Chamber also considers that the Referral Bench placed too much stress on the local character of the Appellant's crimes. Of course, this is a relevant factor and in some situations can be a significant one.⁶⁷ But while, as discussed above, the President of the Security Council's statement did not show an intent for the Tribunal to retain all paramilitary leaders, it certainly gives rise to the inference that the cases of at least some paramilitary leaders should be retained rather

⁶¹ Referral Decision, para. 28.

⁶² Referral Decision, para. 30.

⁶³ Referral Decision, para. 28.

⁶⁴ See Second Amended Indictment, para. 31 (describing the Appellant as "form[ing] a group of paramilitaries which worked with local police and military units in exacting a reign of terror upon the local Muslim population").

⁶⁵ Second Amended Indictment, paras 1, 27; see also para. 14 (suggesting that the beatings were done by the Appellant and "other members of [the Appellant's] group of paramilitaries").

⁶⁶ Second Amended Indictment, para. 31.

⁶⁷ See *Todović* Decision of 4 September 2006, para. 16.

than referred.⁶⁸ Since the criminal acts of paramilitary leaders are likely to be limited to a municipal (or at most regional) scope, an undue emphasis on geographic scope might thwart the intent of the Security Council that the Tribunal retain jurisdiction over at least the most significant paramilitary leaders. There is no necessary nexus between, on the one hand, leadership responsibility for the most serious crimes and, on the other hand, a broad geographic area. In light of the number and nature of his alleged criminal acts, and given the absence of any suggestion in the Indictment that the Appellant answered to a higher authority, the Appeals Chamber considers the Appellant's case falls into this category of most significant paramilitary leaders. The Appeals Chamber also takes note of the fact that the Appellant's paramilitary group appears to have operated for at least two years.⁶⁹ In light of these facts, the Appeals Chamber considers that the Referral Bench underestimated the level of responsibility allegedly held by the Appellant. The Appeals Chamber will consider the effect of this error in the next section.

D. Fourth Ground of Appeal

23. In his fourth ground of appeal, the Appellant claims that the Referral Bench erred "in finding that the gravity of the crimes charged, in combination with the level of responsibility, does not demand trial before the Tribunal."⁷⁰ This assertion appears to rest on the claim⁷¹ that had the Referral Bench properly evaluated the Appellant's level of responsibility (discussed in regard to the third ground of appeal), it would have come to a different conclusion overall with regard to the criteria set forth in Rule 11bis of the Rules, namely "the gravity of the crimes charged and the level of responsibility of the accused".⁷²

24. The Prosecution does not address whether, if the Appellant is correct in identifying an error with regard to the level of responsibility, this will materially affect the overall assessment for purposes of Rule 11bis(C) of the Rules.

25. The Appeals Chamber grants this ground of appeal. As the Referral Bench found, the crimes allegedly committed by the Appellant were grave indeed. They included a number of horrific incidents that resulted in the deaths of a total of more than 150 people – namely, two incidents where Bosnian Muslim men, women, and children were forcibly barricaded into houses that were then set on fire,⁷³ two incidents in which Bosnian Muslim men were seized and then

⁶⁸ See United Nations Security Council, Statement by the President of the Security Council, 23 July 2002, S/PRST/2002/21 (also cited in Security Council Resolutions 1503 (2003) and 1534 (2004)).

⁶⁹ See Second Amended Indictment, paras 3, 5-7, 11-13, and 17.

⁷⁰ Appeal Brief, p. 2.

⁷¹ See Appeal Brief, para. 23.

⁷² See Rule 11bis (C) of the Rules.

⁷³ Second Amended Indictment, paras 7-11.

gunned down along the banks of a river,⁷⁴ one incident in which a Bosnian Muslim woman was questioned and then shot repeatedly,⁷⁵ and repeated incidents of inhumane acts and cruel treatment aimed at Bosnian Muslim men held at a detention camp.⁷⁶ Of course, gravity alone is not dispositive. The alleged crimes in this case are comparable to those alleged with regard to Paško Ljubičić, an intermediate-level military leader whose case was referred by the Tribunal pursuant to Rule 11bis.⁷⁷ But when the Appellant's alleged crimes are taken in conjunction with the earlier-discussed role allegedly played by him as a paramilitary leader, this case becomes too significant to be appropriate for referral. As noted earlier, the Security Council intended for the Tribunal to try top paramilitary leaders⁷⁸ and the allegations against the Appellant put him into this category. In this regard, his case differs substantially from that of Gojko Janković ("Janković"), another paramilitary leader whose case was referred pursuant to Rule 11bis of the Rules. Although a paramilitary leader, Janković was also acting at an intermediate level within the military hierarchy as a sub-commander of the military police.⁷⁹ Moreover, Janković was charged with crimes in relation to a series of rapes and sexual assaults which, while serious indeed, involved far fewer victims and fewer varied incidents than the charges set out against the Appellant in the Second Amended Indictment.⁸⁰

26. Indeed, the Prosecution has not identified any paramilitary leader indicted by the Tribunal in whose case the gravity of crimes charged and the level of responsibility of the accused are, when taken in conjunction, as significant as those in the present case. Nor is the Appeals Chamber aware of any such case, with the possible exception of the indictment issued against the now-deceased Željko Ražnjatović (also known as "Arkan").⁸¹ In light of the notorious role played by paramilitary organizations and their leaders during the conflict in the former Yugoslavia, and in light of the Security Council's recognition that the Tribunal should try at least some of these leaders, the Appeals Chamber considers that the Appellant's case should be retained by the Tribunal. Based on

⁷⁴ Second Amended Indictment, paras 5-6.

⁷⁵ Second Amended Indictment, para. 12.

⁷⁶ Second Amended Indictment, paras 13-15.

⁷⁷ See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral under Rule 11bis, para. 3 (noting that the Indictment alleged that he had a role in crimes committed over a three-month period in a town and neighboring villages resulting in to the deaths of over 100 civilians, the detention and abuse of many more, and the destruction of Muslim property).

⁷⁸ See *supra* footnote 68 and accompanying text.

⁷⁹ See *Janković* Appeal Decision on Referral, paras 4, 20.

⁸⁰ See *Janković* Appeal Decision on Referral, para. 4 (describing the changes); see also *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Rule 11bis Referral, 15 November 2005, para. 19 (considering the alleged "incidents of torture and rape involving sixteen females and within a time frame of four months" to be limited in terms of the number of victims).

⁸¹ *Prosecutor v. Željko Ražnjatović*, Case No. IT-97-27, Indictment, 26 September 1997 (charging that Željko Ražnjatović, a notable paramilitary leader, bore responsibility for a series of crimes committed in September 1995, including the detention and cruel treatment of roughly 70 individuals, the murder of roughly 80 individuals, the rape of another individual, and several related crimes).

the allegations set forth in the Second Amended Indictment, the Appellant will be perhaps the most significant paramilitary leader tried by the Tribunal to date.

26. Accordingly, the Appeals Chamber reverses the Referral Decision and instructs that the Trial Chamber proceed with the trial in this case. Since the remaining grounds of appeal are rendered moot in light of this reversal, the Appeals Chamber declines to address them.


27. In light of this decision of the Appeals Chamber, it would be open to the Referral Bench to reconsider its decision relating to Sredoje Lukić, after giving him and the Prosecution an opportunity to be heard, on the ground that it would be judicially more appropriate for both cases to be heard by the same judicial body.

IV. DISPOSITION

28. For the foregoing reasons, the Appeals Chamber **GRANTS** the Appellant's appeal.

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

Dated this 11th day of July 2007,
At The Hague, The Netherlands.



Theodor Meron
Presiding Judge

[Seal of the Tribunal]