IT-98-32/1-PT
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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-98-32/1-PT
	Date:	5 April 2007
	Original:	English

BEFORE THE REFERRAL BENCH

Before: **Judge Alphons Orie, Presiding**
Judge Kevin Parker
Judge O-Gon Kwon

Registrar: **Mr. Hans Holthuis**

Decision of: **5 April 2007**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

DECISION ON REFERRAL OF CASE PURSUANT TO RULE 11 *BIS* WITH CONFIDENTIAL ANNEX A AND ANNEX B

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I. INTRODUCTION

1. The Referral Bench 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 ("Tribunal") is seised of the "Request by the Prosecutor Under Rule 11 *bis*" ("Motion for Referral"), filed on 1 February 2005, in which the Office of the Prosecutor ("Prosecution") requests the referral of the case against Milan Lukić and Sredoje Lukić (collectively, "Accused") to the authorities of Bosnia and Herzegovina.[1] The Bench hereby renders its decision on the Motion for Referral.

2. Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), entitled "Referral of the Indictment to Another Court", was adopted on 12 November 1997 and revised on 30 September 2002.[2] Such a revision was necessary in order to give effect to the broad strategy endorsed by the Security Council for the completion of all Tribunal trial activities at first instance by 2008.[3] Security Council Resolution 1503 characterised this completion strategy as "concentrating on the prosecution of the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate".[4]

3. Since the 30 September 2002 revision of Rule 11 *bis*, there have been three amendments: on 10 June 2004,[5] 28 July 2004,[6] and 11 February 2005.[7] In its current form, the Rule provides as follows:

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1 *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Request by the Prosecutor Under Rule 11 *bis*, 1 February 2005 ("Motion for Referral"), para. 45.

2 In its original form, Rule 11 *bis* provided for transfer of an accused from the Tribunal to the authorities of the state in which the accused was arrested. Transfer required an order from the Trial Chamber suspending the indictment pending the proceedings before the national courts. Such an order necessitated findings by the Trial Chamber that state authorities were prepared to prosecute the accused in their own courts, and that it was appropriate in the circumstances for the courts of that state to exercise jurisdiction over the accused. *See* Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.12 (12 November 1997), Rule 11 *bis*. *See also* Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.25 (30 September 2002), Rule 11 *bis*.

3 *See* Statement by the President of the Security Council, UN Doc. S/PRST/2002/21 (2002); Security Council Resolution 1329, UN Doc. S/RES/1329 (2000).

4 Security Council Resolution 1503, UN Doc. S/RES/1503 (2003) ("Security Council Resolution 1503"), preambular para. 7.

5 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.31 (17 June 2004), Rule 11 *bis* (enshrining the amendments adopted at the 10 June 2004 plenary session).

6 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.32 (12 August 2004), Rule 11 *bis* (enshrining the amendments adopted at the 28 July 2004 plenary session).

7 Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.34 (22 February 2005), Rule 11 *bis* (enshrining the amendments adopted at the 11 February 2005 plenary session).

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the 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,

so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004) , consider the gravity of the crimes charged and the level of responsibility of the accused.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused.

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules.

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.[8]

[8] Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.39 (22 September 2006), Rule 11 *bis*. All subsequent citations to Rules of Procedure and Evidence in the present Decision are to this version of the Rules.

II. PROCEDURAL HISTORY

4. The initial indictment of 21 October 1998 against Milan Lukić and Sredoje Lukić included a third accused, Mitar Vasiljević,[9] and was confirmed on 26 October 1998.[10] This indictment was amended on 12 July 2001.[11] The Prosecution filed the Second Amended Indictment on 17 November 2005,[12] and a slightly modified version on 27 February 2006 still bearing the title "Second Amended Indictment".[13] On 11 May 2006, Trial Chamber III rejected further challenges to the Second Amended Indictment raised by Sredoje Lukić, and acknowledged it as operative against both Accused.[14] Milan Lukić did not file any challenges to the Second Amended Indictment.

5. Sredoje Lukić surrendered voluntarily and on 16 September 2005, he was transferred to the United Nations Detention Unit ("UNDU"). His initial appearance was held on 20 September 2005. A further appearance was held on 13 February 2006, during which Sredoje Lukić entered a plea of not guilty. On 13 December 2006, Trial Chamber III denied Sredoje Lukić's motion for provisional release.[15]

6. Milan Lukić remained at large until 8 August 2005, when he was apprehended by agents of the Argentine federal police.[16] He remained in detention in Argentina until 21 February 2006, when he was transferred to the UNDU pursuant to a decision of Argentine Federal National Criminal and Correctional Court No. 8 ("Argentine court") of 10 January 2006. The decision authorised his surrender to the Tribunal under Argentine extradition law.[17] Milan Lukić's initial appearance was held on 24 February 2006, and on 31 March 2006 he entered a plea of not guilty.

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[9] Mitar Vasiljević was tried before the Tribunal and proceedings have concluded in relation to him. *See Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004.

[10] *Prosecutor v. Milan Lukić, Sredoje Lukić and Mitar Vasiljević*, Case No. IT-98-32-I, Indictment, 21 October 1998. This version of the Indictment was confirmed on 26 October 1998. *See Prosecutor v. Milan Lukić, Sredoje Lukić, and Mitar Vasiljević*, Case No. IT-98-32-I, Confidential Review of the Indictment, 26 October 1998, p. 3.

[11] *Prosecutor v. Milan Lukić, Sredoje Lukić, and Mitar Vasiljević*, Case No. IT-98-32-PT, Amended Indictment, 12 July 2001 ("Amended Indictment").

[12] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 17 November 2005.

[13] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Second Amended Indictment, 27 February 2006 ("Second Amended Indictment"). In the 27 February 2006 version, the Prosecution incorporated two words it had inadvertently omitted in the Second Amended Indictment of 17 November 2005. The Referral Bench has also acknowledged the Second Amended Indictment as operative. *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order on Operative Indictment and Further Filings ("Order on Operative Indictment"), 30 June 2006, p. 3.

[14] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on the Form of the Indictment, 11 May 2006 ("Decision on the Form of the Indictment"), paras 1, 10.

[15] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Sredoje Lukić's Motion for Provisional Release, 13 December 2006, para. 34.

[16] *See infra* note 207 and accompanying text.

[17] *See infra* text accompanying notes 207–211 (discussing the decision of the Argentine court in greater detail).

7. On 21 November 2005, Sredoje Lukić filed a response to the Motion for Referral, requesting that the Referral Bench deny the Prosecution's request to refer his case to the authorities of Bosnia and Herzegovina, and instead order referral to the authorities of the Republic of Serbia ("Sredoje Lukić Response").[18] The Referral Bench recognised this response as validly filed pursuant to Rule 127.[19] On 15 December 2005, the Referral Bench suspended Rule 11 *bis* proceedings in this case pending the transfer of Milan Lukić to the Tribunal from Argentina.[20] With the transfer of Milan Lukić on 21 February 2006, the Rule 11 *bis* proceedings resumed.[21] Milan Lukić responded to the Motion for Referral on 26 May 2006, requesting that the Referral Bench deny it ("Milan Lukić Response").[22]

8. On 30 June 2006, the Referral Bench ordered the parties and invited the Government of Bosnia and Herzegovina ("Bosnia and Herzegovina") to submit written responses to specific questions in advance of the hearing on the Motion for Referral ("Motion Hearing").[23] It also invited the Government of Argentina ("Argentina") to attend the hearing and comment on the Referral Bench's provisional interpretation of the decision of the Argentine court that granted Milan Lukić's surrender to the Tribunal.[24] Sredoje Lukić filed his responses to the Bench's questions on 17 July 2006 ("Sredoje Lukić Further Submissions"),[25] and the Prosecution filed their submissions on 28 July 2006 ("Prosecution's Further Submissions").[26] Milan Lukić filed his responses in an untimely manner on 4 September 2006 ("Milan Lukić Further Submissions");[27] despite their untimeliness, the Referral Bench granted leave under Rule 127 for these submissions to be filed.[28]

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[18] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Defence Counsel's Response to Request by the Prosecutor Under Rule 11 *bis*, 21 November 2005 ("Sredoje Lukić Response").

[19] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order for Written Submissions and Scheduling Order for Hearing, 30 June 2006 ("Order for Written Submissions"), pp. 3, 5.

[20] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecutor's Motion to Suspend Consideration of Rule 11 *bis* Request, 15 December 2005.

[21] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order on Defence Request for Certain Documents, 30 June 2006, p. 1 (acknowledging that "Rule 11 *bis* proceedings in this case therefore resumed on 21 February 2006").

[22] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Response of Defence Counsel for Milan Lukić to Request by Prosecutor Under Rule 11 *bis*, 26 May 2006 ("Milan Lukić Response").

[23] Order for Written Submissions, *supra* note 19, p. 4.

[24] *Ibid.*, p. 3 (setting forth the Bench's provisional interpretation of the decision); *ibid.*, p. 4 (inviting Argentina to attend).

[25] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Sredoje Lukić's Defence Written Submission Pursuant to Referral Bench's Order of 30 June 2006, 17 July 2006 ("Sredoje Lukić Further Submissions").

[26] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecutor's Submissions Pursuant to Order of 30 June 2006, 28 July 2006 ("Prosecution Further Submissions").

[27] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Submission of Defence Counsel for Milan Lukić Pursuant to Order of 30 June 2006, 4 September 2006 ("Milan Lukić Further Submissions"). This submission was filed nearly one month after the expiration of the 9 August 2006 time limit.

[28] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Order on Pending Submissions and on Use of Time During Motion Hearing, 12 September 2006 ("Order on Pending Submissions"), p. 2.

Bosnia and Herzegovina filed its responses to the Bench's questions on 9 August 2006 and 4 September 2006 ("First BiH Submissions").[29]

9. Acting on its own initiative, the Government of Serbia ("Serbia") filed a submission before the Referral Bench on 5 September 2006 requesting the referral of this case to its authorities ("Serbia Submissions").[30] On 12 September 2006, Milan Lukić filed a request to invite Serbia to attend the Motion Hearing to make submissions on the merits of the Motion for Referral.[31] On 12 September 2006, the Bench issued an order allowing Serbia to attend the hearing to make oral submissions, and accepted those already made in writing.[32]

10. The Motion Hearing was held on 15 September 2006.[33] The Prosecution, the Accused and their counsel, and representatives of Serbia and Argentina were present, and representatives of Bosnia and Herzegovina participated via video-link from Sarajevo. Subsequent to the hearing, Argentina filed two sets of written submissions, the first on 18 September 2006 ("First Argentina Submissions"),[34] and the second on 14 November 2006 ("Second Argentina Submissions").[35] The Bench will discuss these submissions below in a section entitled "The Proper Scope of the Exercise of Jurisdiction of the State of Referral".[36] On 2 October 2006, Bosnia and Herzegovina filed a response to certain additional questions posed by the Referral Bench at the Motion Hearing ("Second BiH Submissions").[37]

11. On 22 January 2007, Milan Lukić filed a motion for leave to submit a supplemental response relating to the fairness requirement in Rule 11 *bis*(B), and for an evidentiary hearing on the "functional fairness" of the State Court of Bosnia and Herzegovina ("BiH State Court").[38] On

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[29] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Response of the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Referral Bench in Its Order of 30 June 2006, 9 August 2006 and 4 September 2006 ("First BiH Submissions"). The 4 September 2006 version of the First BiH Submissions contains additional information in the section entitled "Other Issues of Relevance".

[30] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Serbia's Submission in the Proceedings Under Rule 11 *bis*, 5 September 2006 ("Serbia Submissions").

[31] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Request of Milan Lukić to Invite State of Serbia to Attend 11 *bis* Hearing, 12 September 2006.

[32] Order on Pending Submissions, *supra* note 28, p. 3.

[33] *See generally* Motion Hearing, T. 50–102 (15 September 2006).

[34] Note OI 105/2006, 18 September 2006 ("First Argentina Submissions") (English translation; original Spanish signed 15 September 2006).

[35] Note OI 126/2006, 14 November 2006 ("Second Argentina Submissions") (English translation; original Spanish signed 7 November 2006).

[36] *See infra* text accompanying notes 206–274.

[37] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Referral Bench at the Hearing on 15 September 2006, 2 October 2006 ("Second BiH Submissions") (English translation; original signed 20 September 2006).

[38] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Motion of Defence Counsel for Milan Lukić for Leave to Submit Supplemental Response to Prosecutor's Request Under Rule 11*bis* and for an Evidentiary Hearing, 22 January 2007 ("January 2007 Motion for Leave to File Supplemental Response"). The Referral Bench will address this motion in a later section of this Decision. *See infra* text accompanying notes 185–190.

1 March 2007, Milan Lukić and Sredoje Lukić filed a joint motion for leave to submit yet another supplemental response, and repeated the request for an evidentiary hearing.[39]

III. THE ACCUSED AND THE CHARGES

12. According to the Second Amended Indictment, Milan Lukić was born on 6 September 1967 in Foča. Sredoje Lukić was born on 5 April 1961 in the village of Rujište, approximately 15 kilometres from Višegrad.[40] Both locations are in eastern Bosnia and Herzegovina.

13. The Second Amended Indictment alleges that Milan Lukić set up a group of local paramilitaries in Višegrad in 1992; these paramilitaries were sometimes referred to as the "White Eagles" or the "Avengers".[41] Sredoje Lukić is alleged to have joined Milan Lukić's paramilitary group.[42] According to the Second Amended Indictment, between 7 June 1992 and 10 October 1994, Milan Lukić and Sredoje Lukić, acting in concert with Mitar Vasiljević and other individuals, committed and aided and abetted persecutions of Bosnian Muslim and other non-Serb civilians on political, racial, or religious grounds in the municipality of Višegrad.[43] It is alleged that both Accused participated in the murder; cruel and inhumane treatment (severe beating); unlawful detention; confinement and harassment; humiliation; terrorisation; and psychological abuse of Bosnian Muslim and other non-Serb civilians, as well as the theft of property and the destruction of houses of Bosnian Muslims and other non-Serb civilians.[44]

14. On or about 14 June 1992, both Accused, acting together with others, allegedly barricaded a group of approximately 70 persons in a house in Višegrad after having stripped and robbed them; they then set the house alight and shot at people trying to escape through the windows. As a result, 70 individuals died and several people were seriously injured.[45] Further, on or about 27 June 1992, both Accused, acting together with others, allegedly barricaded another 70 persons in a house near Višegrad and threw several explosive devices into the house, igniting it. As a result, approximately 70 individuals died, and only one person survived.[46] The Second Amended Indictment additionally

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[39] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Joint Motion of Defense Counsel for Milan and Sredoje Lukić for Leave to Submit Supplemental Response to Prosecutor's Request Under Rule 11*bis* and for an Evidentiary Hearing, 1 March 2007 ("March 2007 Motion for Leave to File a Supplemental Response"). The Referral Bench will address this motion in a later section of this Decision. *See infra* text accompanying notes 120–125.

[40] Second Amended Indictment, *supra* note 13, paras 1, 2.

[41] *Ibid.*, para. 1.

[42] *Ibid.*, para. 2.

[43] *Ibid.*, para. 3.

[44] *Ibid.*, para. 4.

[45] *Ibid.*, paras 4, 7–10. These 70 persons are named in an annex to the Second Amended Indictment. *See ibid.*, Annex A.

[46] *Ibid.*, paras 4, 11. Some of these 70 persons are named in another annex to the Second Amended Indictment. *See ibid.*, Annex B.

alleges that, on multiple occasions between August 1992 and 10 October 1994, both Accused beat Bosnian Muslim men who were detained in the Uzamnica military barracks in Višegrad, thereby causing serious and permanent injuries,[47] and that Milan Lukić, acting together with others, killed another 13 persons and injured two in three other incidents.[48]

15. For these actions, Milan Lukić is charged with one count of persecution, two counts of extermination, five counts of murder, and four counts of inhumane acts as crimes against humanity; he is also charged with five counts of murder and four counts of cruel treatment as violations of the laws or customs of war.[49] Sredoje Lukić is charged with one count of persecution, two counts of extermination, two counts of murder, and three counts of inhumane acts as crimes against humanity; he is also charged with two counts of murder and three counts of cruel treatment as violations of the laws or customs of war.[50] The Second Amended Indictment avers that both Accused incur responsibility for these crimes through the forms of responsibility "committing" and "aiding and abetting" in Article 7(1) of the Statute of the Tribunal ("Statute").[51]

IV. REFERRAL OF THE CASE PURSUANT TO RULE 11 *BIS*

A. Gravity of the Crimes Charged and Level of Responsibility of the Accused

1. Preliminary Consideration: Operative Indictment in this case

16. As the Appeals Chamber has held, the Referral Bench must base its determinations in respect of a request for referral on the operative indictment, unless there remain pending challenges to this indictment pursuant to Rule 72(A)(ii).[52] The facts alleged in the operative indictment constitute the essential case raised by the Prosecution for trial. Milan Lukić contends that the Second Amended Indictment, in its corrected form of 27 February 2006, is not the operative indictment because it constitutes an amended version of the indictment that was operative at the time the Motion for Referral was filed.[53]

17. According to Rules 50 and 72, an accused has the right to file (preliminary) motions relating to the indictment and its amendments before the Trial Chamber seised of the case. The Referral Bench is not the competent authority to hear challenges to the indictment. It determines whether the

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[47] *Ibid.*, paras 4, 13–14.
[48] *Ibid.*, paras 4–6, 12.
[49] *Ibid.*, para. 4, counts 1–21.
[50] *Ibid.*, para. 4, counts 1, 8–17, 20–21.
[51] *Ibid.*, counts 1–21.
[52] *Prosecutor v Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Rule 11*bis* Referral, 23 February 2006, para. 14.

case should be referred pursuant to Rule 11 *bis*, and thereby bases its considerations on the indictment declared or rendered operative by the decisions of the Trial Chamber.

18. As noted above,[54] in the present case no further challenges to the Second Amended Indictment are pending. On 1 February 2006, Trial Chamber III denied a motion filed by Sredoje Lukić, rejecting in particular the argument that the indictment would unfairly prejudice the Accused and give the Prosecution an improper tactical advantage by increasing the chances of the case being transferred to Bosnia and Herzegovina.[55] On 11 May 2006, the Trial Chamber also denied Sredoje Lukić's preliminary motion pursuant to Rule 72 alleging other defects in the Second Amended Indictment.[56] Milan Lukić did not challenge the Second Amended Indictment.

19. The Referral Bench therefore rejects this submission of Milan Lukić. It also recalls that on 30 June 2006, it acknowledged that the Second Amended Indictment of 27 February 2006 was operative in respect of both Accused for the purpose of considering whether this case should be referred under Rule 11 *bis*.[57]

2. Submissions

20. The Prosecution submits that Rule 11 *bis*(C) requires consideration of both the gravity of the crimes charged and the level of responsibility of the accused, and that a case is suitable for referral if it "qualifies on either criterion".[58] With regard to the instant case, the Prosecution submits that, while the crimes allegedly committed by Milan Lukić and Sredoje Lukić are "obviously grave", they are limited geographically and temporally. It concludes that the crimes are not so serious as to preclude the possibility of trial before a national court.[59]

21. The Prosecution argues additionally that the responsibility of Sredoje Lukić is at a lower to intermediate level, similar to that of Radovan Stanković,[60] whose case has already been referred under Rule 11 *bis*.[61] With respect to Milan Lukić, the Prosecution contends that his level of responsibility is comparable to that of other intermediate-level accused, such as Gojko Janković,

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[53] Milan Lukić Response, *supra* note 22, paras 12–19; Milan Lukić Further Submissions, *supra* note 27, para.17.
[54] *See supra* text accompanying note 14.
[55] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision Granting Prosecution's Motion to Amend Indictment and Scheduling Further Appearances, 1 February 2006, para. 13.
[56] Decision on the Form of the Indictment, *supra* note 14.
[57] Order on Operative Indictment, *supra* note 13, p. 3.
[58] Motion for Referral, *supra* note 1, para. 9.
[59] Prosecution Further Submissions, *supra* note 26, para. 3.
[60] On 17 May 2005, the Referral Bench decided to refer the case against Radovan Stanković to the authorities of Bosnia and Herzegovina. *Prosecutor v Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis* ("*Stanković* Rule 11 *bis* Decision").
[61] Prosecution Further Submissions, *supra* note 26, paras 10–11.

Željko Mejakić, and Paško Ljubičić,[62] whose cases have also been referred.[63] The Prosecution further submits that, while Milan Lukić was one of the paramilitary leaders in Višegrad, he had no significant political role. The fact that he may have been in command of others on a local level is not a sufficient basis on which to characterise him as a "most senior leader" for the purposes of Rule 11 *bis*.[64]

22. Milan Lukić submits that the crimes charged in the Second Amended Indictment are serious.[65] He contends that the Prosecution downplayed the gravity of the crimes by tailoring the indictment subsequent to the Motion for Referral and narrowing the geographic scope of the alleged crimes.[66] Milan Lukić also argues that an accused's level of responsibility should not be determined by reference to the operative indictment alone, but that the role the accused played in the broader conflict has to be taken into account as well.[67] He notes that he is widely known in Bosnia and Herzegovina, and asserts that he falls within the group of paramilitary leaders the Security Council contemplated being tried before the Tribunal.[68]

23. At the Motion Hearing, the Prosecution responded to Milan Lukić's allegation that it tailored the indictment in this case to make the alleged criminal conduct seem less serious and thus more appropriate for referral. It submits that the indictment was not amended for this purpose, but instead to give greater detail and specificity to existing allegations against Sredoje Lukić in the context of a preliminary motion filed by him challenging the form of the indictment.[69]

24. Sredoje Lukić rejects the Prosecution's suggestion that a case is suitable for referral if it fulfils either of the criteria in Rule 11 *bis*(C), and argues that both criteria must be met.[70] He also submits that the gravity of the crimes cannot be assessed only by reference to their geographic or temporal scope.[71] As concerns the gravity of the crimes and level of responsibility charged in this

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[62] The Referral Bench referred the cases against all of these accused to the authorities of Bosnia and Herzegovina. *See Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005 ("*Janković* Rule 11 *bis* Decision"); *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2006 ("*Mejakić et al.* Rule 11 *bis* Decision"); *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, 12 April 2006 ("*Ljubičić* Rule 11 *bis* Decision").

[63] Prosecution Further Submissions, *supra* note 26, paras 6–7.

[64] *Ibid.*, paras 8–9.

[65] Milan Lukić Response, *supra* note 22, para. 25.

[66] *Ibid.*, paras 12–19; Milan Lukić Further Submissions, *supra* note 27, para. 17; Motion Hearing, T. 70 (15 September 2006).

[67] Milan Lukić Response, *supra* note 22, paras 7, 16; Milan Lukić Further Submissions, *supra* note 27, paras 12, 24; Motion Hearing, T. 71 (15 September 2006).

[68] Milan Lukić Response, *supra* note 22, paras 24-28; Milan Lukić Further Submissions, *supra* note 27, paras 18, 29–30.

[69] Motion Hearing, T. 82–83 (15 September 2006).

[70] Sredoje Lukić Further Submissions, *supra* note 25, paras 17, 28.

[71] Sredoje Lukić Response, *supra* note 18, para. 17.

case, Sredoje Lukić contends that they are incompatible with referral:[72] the crimes are among the most serious, and both Accused—while not at the apex of either the civilian or military authority—were not minor actors, but bore a significant role in the conflict.[73]

25. Bosnia and Herzegovina submits that the case is suitable for trial before the BiH State Court. It asserts that the gravity of the crimes charged cannot be determined in the abstract, but must instead be assessed in relation to the events and crimes committed in other parts of eastern Bosnia, and in the context of other cases tried before the Tribunal. Bosnia and Herzegovina submits that under this interpretation, the gravity of the crimes charged makes the present case suitable for referral under Rule 11 *bis*, and that the limited temporal and geographic scope of the crimes also renders the case appropriate for referral.[74] With respect to the alleged level of responsibility of the Accused, Bosnia and Herzegovina argues that, by comparison with other accused whose indictments deal with events in eastern Bosnia, both Accused fall within the category of intermediate or lower-level accused.[75]

3. Discussion

26. It must be appreciated that any decision to refer a case under Rule 11 *bis*(A) is discretionary (once sub-paragraphs (A)(i), (A)(ii), (A)(iii), and (B) are satisfied). In the exercise of this discretion, the Referral Bench is required, in particular, to consider (1) the gravity of the crimes charged, and (2) the level of responsibility of the accused. Rule 11 *bis*(C) is intended to ensure that, in deciding whether to exercise its discretion in favour of or against referring a case—a decision which necessarily is reached having regard to all the relevant circumstances of the case—the Referral Bench must take into account, *inter alia*, the gravity of the crimes charged and the level of responsibility of the accused. These two considerations are not exclusive of other relevant circumstances. Neither of them is necessarily determinative. Either of these considerations, or both in combination, may, in a particular case, persuade the Referral Bench that it should refer the case, or that it should not do so. The major purpose of the rule is to enable the Referral Bench, where it is in the interests of justice to do so, to give effect to the policy of the Security Council, as reflected in Resolution 1534, that the efforts of the Tribunal should be concentrated on trying the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction.[76]

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[72] *Ibid.*, para. 12; Sredoje Lukić Further Submissions, *supra* note 25, paras 24, 27.
[73] Sredoje Lukić Response, *supra* note 18, para. 16; Sredoje Lukić Further Submissions, *supra* note 25, paras 25, 27.
[74] First BiH Submissions, *supra* note 29, p. 2.
[75] *Ibid.*, p. 3.
[76] Security Council Resolution 1534, UN Doc. S/RES/1534 (2004) ("Security Council Resolution 1534"), paras. 4–5.

27. The gravity of the crimes charged cannot be assessed only by reference to their legal qualification as genocide, crimes against humanity, or war crimes under Articles 2 to 5 of the Statute. When determining the gravity of the crimes, the Referral Bench may consider, among other circumstances, the number of victims[77] and the time frame and geographic area in which they were allegedly committed.[78] The Bench may also consider in how many separate incidents an accused is charged, and the way in which the criminal conduct was allegedly realised. It may also consider other circumstances of the alleged crime.

28. 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, based on his *de facto* or *de jure* authority. The Referral Bench holds that 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 be alleged to 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". The notion "most senior leaders" is, however, not limited to the architects of an overall policy forming the basis of the alleged crimes.[79] The same considerations apply as far as paramilitary leaders are concerned.[80]

29. Both Accused are charged with crimes allegedly committed in the municipality of Višegrad in June 1992, with the exception of the severe beatings in the Uzamnica barracks. The factual basis is limited, both as regards the geographic area and the time period. On the other hand, they are charged with having brutally killed some 140 persons and having severely injured others in two incidents by barricading them in houses and setting the houses on fire. Milan Lukić is additionally charged with having killed another 13 persons in three incidents. Considering the high number of victims affected and the brutality of the method of committing the alleged crimes, the Referral Bench finds that these crimes are very serious.

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[77] *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-AR11*bis*, Decision on Savo Todović's Appeals Against Decisions on Referral Under Rule 11 *bis*, 4 September 2006 ("*Rašević and Todović* Appeal Decision"), para. 25.

[78] *Ibid.*, para. 16.

[79] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, 8 July 2005, para. 22; *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-AR11*bis*.2, Decision on Rule 11*bis* Referral ("*Janković* Appeal Decision"), 15 November 2005, para. 20.

[80] *See Janković* Rule 11 *bis* Decision, *supra* note 62, para. 19; *Janković* Appeal Decision, *supra* note 79, paras 19–20.

30. As to the level of responsibility, the Second Amended Indictment alleges that Milan Lukić was the leader of a local paramilitary group in Višegrad in 1992, and that Sredoje Lukić was a member of that paramilitary group. Irrespective 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.

4. Conclusion

31. Having considered the gravity of the crimes charged in combination with the level of responsibility, the Referral Bench concludes that the case against the two Accused does not demand trial before the Tribunal. The Bench is satisfied that the case is not *ipso facto* incompatible with referral to the authorities of a state which meets the requirements of Rule 11 *bis*, including those in Rules 11 *bis*(A) and (B).

B. Determination of the State of Referral

1. Submissions

32. The Prosecution submits that, where possible, a case should be referred to the authorities of the state where the crimes allegedly took place, so that justice can be rendered as closely as possible to the victims; it accordingly requests that this case be referred to the authorities of Bosnia and Herzegovina.[81] The Prosecution also draws the Bench's attention to the fact that the Belgrade District Court has sentenced Milan Lukić *in absentia* to 20 years' imprisonment for participation in a killing incident unrelated to the Second Amended Indictment; that this judgement was annulled by the Supreme Court of Serbia due to several shortcomings; and that the case is due to be retried.[82]

33. Milan Lukić invokes concerns raised by the Organisation for Security and Cooperation in Europe ("OSCE") Mission to Bosnia and Herzegovina, as set forth in progress reports relating to other cases referred to Bosnia and Herzegovina. He contends that the question of the BiH State Court's ability to provide a fair trial is "far from settled".[83] He further submits that, in addition to the authorities of Bosnia and Herzegovina, both Serbia and Argentina are available venues for referral under Rule 11 *bis*, but that the Referral Bench should exercise its discretion and retain the case for trial before the Tribunal.[84]

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[81] Motion for Referral, *supra* note 1, paras 6, 26.
[82] *Ibid.*, paras 33–36.
[83] Milan Lukić Response, *supra* note 22, para. 45; Milan Lukić Further Submissions, *supra* note 27, paras 35–37.
[84] Milan Lukić Response, *supra* note 22, paras 48–51.

34. Sredoje Lukić requests that, if the Referral Bench determines that this case is suitable for referral, it order referral to a state other than Bosnia and Herzegovina, preferably Serbia or Argentina.[85] He argues that the ability of BiH State Court to provide a fair trial is questionable,[86] and he disagrees with the Prosecution that trial should take place as closely as possible to the victims.[87] He submits additionally that the nexus of this case with Serbia is much stronger than the nexus with Bosnia and Herzegovina on account of pending trials in Serbia involving Milan Lukić.[88]

35. Bosnia and Herzegovina submits that the case is suitable for trial before the BiH State Court.[89] For its part, Serbia asserts that it fulfils the conditions set forth in Rule 11 *bis* and is willing and adequately prepared for a referral of this case to its judiciary. It refers specifically to the Prosecution motion to refer the case *Prosecutor v. Vladimir Kovačević* to the authorities of Serbia, in which the Prosecution recognised the capability of Serbian courts to prosecute and try cases involving war crimes.[90] Serbia further submits that the good administration of justice and judicial economy require that all charges against Milan Lukić be tried simultaneously before one court, and the charges against the co-Accused Sredoje Lukić should be tried in the same proceeding.[91] In this respect it notes that, in addition to the conviction of Milan Lukić *in absentia* by the Belgrade District Court, there are ongoing investigations against Milan Lukić in another case in Serbia—that is, the *Štrpci* case.[92]

36. In the context of a possible referral of this case to the authorities of Bosnia and Herzegovina, Argentina notes that Bosnia and Herzegovina did not request the extradition of Milan Lukić from its authorities. By contrast, Serbia did submit a formal request, which was granted subject to the completion of Milan Lukić's trial before the Tribunal.[93]

2. Discussion

37. As a preliminary matter, the Referral Bench reiterates that neither the Prosecution's request to refer the case to the authorities of Bosnia and Herzegovina nor the requests by the Accused or the interested states, are binding on it. Instead, the Bench exercises its discretion in determining the

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[85] Sredoje Lukić Response, *supra* note 18, paras 21, 50(b); Sredoje Lukić Further Submissions, *supra* note 25, para. 56.
[86] Sredoje Lukić Further Submissions, *supra* note 25, paras 49.
[87] Sredoje Lukić Further Submissions, *supra* note 25, para. 45-46.
[88] Sredoje Lukić Response, *supra* note 18, paras 22, 24.
[89] First BiH Submissions, *supra* note 29, p. 3; Motion Hearing, T. 61 (15 September 2006).
[90] Serbia Submissions, *supra* note 30, para. 4. *See also Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, 17 November 2006 ("*Kovačević* Rule 11 *bis* Decision"), para. 25.
[91] Motion Hearing. T. 63 (15 September 2006).
[92] Serbia Submissions, *supra* note 30, para. 5; Motion Hearing, T. 63, 67, 101 (15 September 2006) (referring to the *Sjeverin* case, K.br. 1242/04, and the *Štrpci* case, Ki.br. 12/05).

state of referral guided by the criteria in Rule 11 *bis*(A). Furthermore, as the Bench has recognised in the past, there is no hierarchy among the criteria in Rule 11 *bis*(A).[94]

38. In the present case, the crimes described in the Second Amended Indictment were allegedly committed in the municipality of Višegrad in Bosnia and Herzegovina, and the victims were allegedly Bosnian Muslims and other non-Serb nationals or residents of Bosnia and Herzegovina.[95] With regard to the Prosecution's submission that justice should be rendered as closely as possible to the victims, the Bench considers that, although this principle is not mentioned anywhere in Rule 11 *bis*, it can be taken into account as an additional discretionary factor in determining the appropriate state of referral.

39. Apart from Bosnia and Herzegovina, there may be other available venues for the referral of this case. The Referral Bench specifically acknowledges Serbia's willingness to accept the case for trial before its national courts. The Bench notes in this respect that Milan Lukić took residence in Belgrade, and it acknowledges the principle of judicial economy invoked by Serbia in its submissions. Nevertheless, the Bench considers that such a principle does not occupy a prominent place in Rule 11 *bis*(A), and may thus serve only as another additional discretionary factor.[96] Moreover, the mere fact that there are criminal proceedings in Serbia concerning other charges against Milan Lukić does not necessitate a referral of the case against him and Sredoje Lukić to Serbia. The Referral Bench therefore considers the nexus of this case with Bosnia and Herzegovina to be stronger than that with Serbia.

40. As concerns Argentina's complaint that Bosnia and Herzegovina made no formal request to it for Milan Lukić's extradition, the Bench does not regard this fact as constituting an obstacle to referral to the authorities of Bosnia and Herzegovina. The Bench will discuss various issues surrounding Milan Lukić's surrender by Argentina below in the section entitled "The Proper Scope of the Exercise of Jurisdiction of the State of Referral".[97]

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[93] First Argentina Submissions, *supra* note 34, p. 2; Motion Hearing, T. 58 (15 September 2006).

[94] *See Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 39; *Ljubičić* Rule 11 *bis* Decision, *supra* note 62, para. 28.

[95] *See supra* text accompanying notes 43–48 (describing these allegations in the Second Amended Indictment).

[96] In determining the state of referral in the *Ljubičić* Rule 11 *bis* Decision, the Referral Bench likewise did not give a prominent place to the fact that criminal proceedings had been initiated against Ljubičić in a certain state. *See ibid.*, para. 29.

[97] *See infra* text accompanying notes 206–274.

3. Conclusion

41. Guided by the criteria in Rule 11 *bis*(A) and in exercise of its discretion in the determination of the state of referral, the Referral Bench considers that the most appropriate state for the referral of the present case is Bosnia and Herzegovina. The Bench accordingly turns to an examination of whether referral to the authorities of Bosnia and Herzegovina would be appropriate in light of the other requirements of Rule 11 *bis*.

C. Applicable Substantive Law

1. Submissions

42. Sredoje Lukić argues that the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code")[98] would be applicable to the case. He claims that the BiH State Court erred in recent decisions in holding that the applicable law to war-crimes cases was the Criminal Code of Bosnia and Herzegovina ("BiH Criminal Code"),[99] because the Court excluded the application of the *lex mitior* principle as a result of its incorrect understanding of the European Convention on Human Rights ("ECHR").[100]

43. In indicating the legal provisions that would be applied by the BiH State Court if this case were referred to its authorities, Bosnia and Herzegovina points to its submissions in previous cases.[101] There, Bosnia and Herzegovina took the position that the BiH Criminal Code, rather than the SFRY Criminal Code, is applicable to referred cases.[102] It also drew the Bench's attention to recent decisions of the BiH State Court applying provisions of the BiH Criminal Code to war crimes committed in 1992 and 1993.[103]

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[98] *See* Criminal Code of the Socialist Federal Republic of Yugoslavia, Official Gazette of the Socialist Federal Republic of Yugoslavia No. 44/76 (English translation) ("SFRY Criminal Code").

[99] *See* Criminal Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina Nos. 37/03, 54/04, and 61/04 (English translation) ("BiH Criminal Code").

[100] Motion Hearing, T. 74–80 (15 September 2006).

[101] First BiH Submissions, *supra* note 29, p. 4.

[102] *See Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Response of Government of Bosnia and Herzegovina to the Questions of Specially Appointed Chamber of ICTY, 25 February 2005; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Government of Bosnia and Herzegovina Response to the Additional Questions Requested by the Referral Bench in a Letter Dated 11 March, 22 March 2005; *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević*, 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.

[103] *See Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-PT, Response by the Government of Bosnia and Herzegovina (BiH) to Questions Posed by the Referral Bench in Its Decision of 17 August 2006, 10 October 2006 (dated 20 September 2006). Bosnia and Herzegovina pointed in particular to the decision of the Appellate Panel of the Court of Bosnia and Herzegovina in the case of Abduladhim Maktouf. *See Abduladhim Maktouf*, Case No. KPŽ 32/05, Final Verdict, 4 April 2006 ("*Maktouf* Verdict") (attached as Annex A to the BiH submissions). It also cited

2. Discussion

44. The Referral Bench reiterates that it is not the competent authority to decide in any binding way which law is to be applied in this case if it is referred to the authorities of Bosnia and Herzegovina. That is a matter for the competent national court, initially the BiH State Court, to decide.[104]

45. Nonetheless, the Referral Bench must be satisfied that, if this case were referred to Bosnia and Herzegovina, there would exist in that state an adequate legal framework which not only criminalises the alleged conduct of the Accused so that the allegations against them can be duly tried and determined, but which also provides for appropriate punishment in the event the conduct is proven to be criminal. The Bench must therefore consider whether the laws applicable in proceedings before a national court in Bosnia and Herzegovina would permit the prosecution and trial of the Accused and, if they are found guilty, appropriate punishment for offences of the type currently charged in the Second Amended Indictment. In situations where there is more than one set of laws that may possibly be applied, the Referral Bench must consider each of set of laws to determine whether there is any significant deficiency that may impede or prevent the prosecution, trial and, if appropriate, punishment of the accused for the criminal conduct charged in the indictment.[105]

46. For the purposes of determining the present Motion for Referral, the Referral Bench need not presume to reach any decision on the submissions relating to this question advanced by the parties and the interested states. Rather, the Bench refers generally to its analysis of the different possibly applicable sets of laws in its previous decisions on referral to the authorities of Bosnia and Herzegovina. These sets of laws are the SFRY Criminal Code on the one hand, and the BiH Criminal Code on the other.[106]

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three subsequent decisions of the State Court of Bosnia and Herzegovina (first instance): *Dragoje Paunović*, Case No. X-KR-05/16, Verdict, 26 May 2006 ("*Paunović* Verdict") (Annex B of the BiH submissions); *Neđo Samardžić*, Case No. X-KR-05/49, Verdict, 7 April 2006 ("*Samardžić* Verdict") (Annex C of the BiH submissions); *Boban Šimšić*, Case No. X-KR-05/04, Verdict, 11 July 2006 ("*Šimšić* Verdict") (Annex D of the BiH submissions).

[104] *Stanković* Rule 11 *bis* Decision, *supra* note 60, para. 32; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 43; *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 27; *Kovačević* Rule 11 *bis* Decision, *supra* note 90, para. 25.

[105] *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 27; *Mejakić et al.* Rule 11 *bis*, Decision, *supra* note 62, para. 43; *Stanković* Rule 11 *bis* Decision, *supra* note 60, para. 32; *Ljubičić* Rule 11 *bis* Decision, *supra* note 62, paras 31–32; *Kovačević* Rule 11 *bis* Decision, *supra* note 90, para. 25.

[106] *Stanković* Rule 11 *bis* Decision, *supra* note 60, paras 36–46; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, paras 48–63; *Janković* Rule 11 *bis* Decision, *supra* note 62, paras 31–44; see also *Ljubičić* Rule 11 *bis* Decision, *supra* note 62, paras 33, 35.

(a) SFRY Criminal Code

47. The crimes in the Second Amended Indictment are alleged to have occurred between 7 June 1992 and 10 October 1994. The SFRY Criminal Code, having been enacted in 1977, was in force at the time of the alleged conduct of the Accused. The SFRY Criminal Code included a provision which proscribed war crimes against the civilian population. Article 142(1) provided as follows:

> Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack against the civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health; an indiscriminate attack without selecting a target, by which the civilian population is injured; that the civilian population be subject to killings, torture, inhuman treatment, biological or other scientific experiments, taking of tissue or organs for the purpose of transplantation, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of an enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, taking an illegal or disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.[107]

48. Article 142(1) of the SFRY Criminal Code, if applicable to the present case, would appear to cover the conduct charged in the Second Amended Indictment as murder, inhumane acts, and cruel treatment as violations of the laws or customs of war. It would also appear to cover the killings, cruel and inhumane treatment, unlawful detention, confinement and harassment, humiliation, terrorisation, and psychological abuse, as well as the theft of property and the destruction of houses of Bosnian Muslims and other non-Serb civilians, which are charged in the Second Amended Indictment as various forms of crimes against humanity.[108]

49. With respect to the penalty structure provided by the SFRY Criminal Code, the maximum authorised punishment for acts in violation of Article 142(1) was the death penalty, which has since been abolished in Bosnia and Herzegovina.[109] As the Referral Bench has found in previous

[107] SFRY Criminal Code, *supra* note 98, Art. 142(1).

[108] *See supra* text accompanying notes 43–51 (describing the criminal conduct charged in the Second Amended Indictment).

[109] On 29 July 2003, Bosnia and Herzegovina ratified Protocol 13 to the ECHR, which abolishes the death penalty in all circumstances, and the Protocol entered into force in that state on 1 November 2003. *See* Convention on the Protection of Human Rights and Fundamental Freedoms, *entered into force* 3 September 1953 ("ECHR"), 213 U.N.T.S. 221, Protocol 13, *entry into force* 7 July 2003, Eur. T.S. 187, Art. 1 ("The death penalty shall be abolished. No one shall be condemned to such penalty or executed."); *see also* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=7&DF=3/25/2007&CL=ENG (showing the dates of ratification of the Protocol by states parties and the dates of its entry into force in each state). *See also infra*, text accompanying notes 126–127 (discussing whether Bosnia and Herzegovina fulfils Rule 11 *bis*(B)'s requirement that the death penalty not be imposed or carried out by the authorities of the state of referral).

Rule 11 *bis* decisions, Article 38(2) of the SFRY Criminal Code permitted a court, as an alternative punishment, to impose imprisonment for a term of 20 years for criminal acts eligible for the death penalty. Moreover, Article 48 provided a system for combining punishments in the event an accused was found to have committed several criminal acts. It provided, *inter alia*, that where a court has decided upon a punishment of 20 years' imprisonment for one of several criminal acts, the court shall impose that punishment only. Therefore, 20 years' imprisonment was, at the time of the alleged conduct of the Accused in this case, the maximum authorised non-capital penalty which could be imposed under the SFRY Criminal Code.[110]

50. The Referral Bench has also noted in previous decisions that the SFRY Criminal Code contained a statute of limitations applicable to the crimes at issue. Article 95(1)(1) provided for a bar to prosecution after 25 years had transpired from the commission of a criminal act for which the law provided capital punishment or the punishment of 20 years' imprisonment. Hence, offences committed in 1991 in violation of Article 142(1), for example, would not be barred until 2016.[111] The crimes charged in the Second Amended Indictment, which are alleged to have been committed between 1992 and 1994, would not be barred until at least 2017.

51. The Referral Bench is thus satisfied that the SFRY Criminal Code, were it held to be the applicable law, would constitute an adequate legal framework for duly trying and determining the allegations in this case, and for providing for appropriate punishment in the event that the alleged conduct is proven to be criminal.

(b) Criminal Code of Bosnia and Herzegovina

52. The BiH Criminal Code entered into force on 1 March 2003, and proscribes crimes against humanity in Article 172 and war crimes against civilians in Article 173. If the BiH Criminal Code were held to apply in this case, as Bosnia and Herzegovina has submitted that it would, this code would apparently cover all the acts alleged in the Second Amended Indictment. In pertinent part, Articles 172 and 173 provide as follows:

[110] *Stanković* Rule 11 *bis* Decision, *supra* note 60, para. 40; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 54; *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 35; *Kovačević* Rule 11 *bis* Decision, *supra* note 90, para. 38.

[111] Article 96(2) also provided that this limitation period would be suspended for any time during which prosecution could not be initiated or continued for reasons provided by law. SFRY Criminal Code, *supra* note 98, Art. 96(2). *See also Stanković* Rule 11 *bis* Decision, *supra* note 60, para. 41; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 55; *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 36.

Article 172 (Crimes against Humanity)

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:

a) Depriving another person of his life (murder);

b) Extermination;

[...]

e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

f) Torture;

h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognised as impermissible under international law, in connection with any offence listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina;

[...]

k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health,

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.[112]

Article 173 (War Crimes against Civilians)

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;

[...]

c) Killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment, [...] immense suffering or violation of bodily integrity or health;

d) Dislocation or displacement [...];

e) [A]pplication of measures of intimidation and terror, [...] unlawful bringing in concentration camps and other illegal arrests and detention, [...];

f) [P]illaging, illegal and self-willed destruction and stealing on large scale of property that is not justified by military needs, [...]

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment. [...][113]

53. Article 173 BiH Criminal Code, if applicable here, would appear to encompass the conduct charged in the Second Amended Indictment as murder, inhumane acts, and cruel treatment as violations of the law or customs of war. Articles 172 and 173 of the BiH Criminal Code would also appear to criminalise the killings, cruel and inhumane treatment, unlawful detention, confinement and harassment, humiliation, terrorisation, and psychological abuse, as well as the theft of property

[112] BiH Criminal Code, *supra* note 99, Art. 172.
[113] *Ibid.*, Art. 173.

and the destruction of houses of Bosnian Muslims and other non-Serb civilians, charged in the Second Amended Indictment as various forms of crimes against humanity.

54. The term "long-term imprisonment" is defined under Article 42(2) BiH Criminal Code as a period of 20 to 45 years. This would constitute the maximum range of authorised punishment if the BiH Criminal Code were applicable in this case. If less than long-term imprisonment were held to be appropriate, then under a system of compounding punishment for concurrent offences, the maximum penalty could not exceed a term of imprisonment of 20 years.[114] Furthermore, under the BiH Criminal Code, the statute of limitations for an offence for which a punishment of long-term imprisonment is authorised is 35 years.[115] The crimes charged in the Second Amended Indictment would accordingly not be barred from prosecution until at least 2027.

55. The Referral Bench notes that the BiH State Court recently determined that Articles 172 and 173 of the BiH Criminal Code are applicable to criminal acts committed in Bosnia and Herzegovina in 1992 and 1993.[116] The Appellate Panel of the State Court has held that Article 4 a of the BiH Criminal Code—which states that the principles of *nullum crimen sine lege* and *lex mitior* shall not prejudice the trial and punishment of a person for conduct that, at the time of its commission, was criminal under general principles of international law[117]—provides for "an exceptional departure" from the mandatory application of the more lenient of available laws, and that Article 4 a is in conformity with Article 7(2) of the ECHR.[118] The Appellate Panel also noted that the application of the 2003 BiH Criminal Code entails the imposition of a more lenient penalty than the one prescribed by Article 142 of the SFRY Criminal Code—that is, the death penalty—and is thereby in conformity with even a strict application of Article 7(1) of the ECHR.[119]

56. The Referral Bench is thus satisfied that the BiH Criminal Code, were it held by the BiH State Court apply to the present case, would constitute an adequate legal framework for duly trying the Accused and determining the allegations against them, and would provide for appropriate punishment in the event the conduct is proven to be criminal.

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[114] *Ibid.*, Art. 53(2)(b).
[115] *Ibid.*, Art. 14(1)(a).
[116] *See Maktouf* Verdict, *supra* note 103 (Article 173(1)(e) of the BiH Criminal Code); *Paunović* Verdict, *supra* note 103; *Samardžić* Verdict, *supra* note 103; *Šimšić* Verdict, *supra* note 103.
[117] Article 4 a provides that "Articles 3 and 4 of this code shall not prejudice the trial and punishment of any person for any act of omission, which at the time when it was committed, was criminal according to the general principles of international law.", Official Gazette of Bosnia and Herzegovina Nos. 37/03, 54/04, and 61/04 (English translation).
[118] *Maktouf* Verdict, *supra* note 103, pp. 17–18. *See also* ECHR, *supra* note 109, Art. 7(2) (providing that Article 7(1), which sets forth the principles of *nullum crimen* and *nulla poena sine lege*, "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations").
[119] *Maktouf* Verdict, *supra* note 103, p. 17.

3. Further Submissions on the BiH State Court's Imposition of Punishments

57. On 1 March 2007, Milan Lukić and Sredoje Lukić filed a joint motion for leave to submit a supplemental response and for an evidentiary hearing ("March 2007 Motion for Leave to File a Supplemental Response").[120] They referred to the judgement rendered by the BiH State Court in the case of Gojko Janković, which was referred by this Bench pursuant to Rule 11 *bis*.[121] The Accused submit that the BiH State Court's application of the BiH Criminal Code in *Janković* was erroneous, as the SFRY Criminal Code constituted the more lenient of the available applicable laws.[122] They argue additionally that the current sentencing practice of the BiH State Court is "inappropriate", given that the sentence of 34 years' imprisonment imposed on Janković is the highest that has been handed down thus far.[123] In its response of 15 March 2007, the Prosecution requested that the motion be denied.[124]

58. As noted above, the task before the Referral Bench is to consider whether the laws applicable in proceedings before a national court in Bosnia and Herzegovina would permit the prosecution and trial of the Accused, and whether they would provide appropriate punishment if the court finds the Accused guilty, although the Bench is not competent to decide which criminal code must be applied.[125] The Bench has concluded that the penalty structure of the BiH Criminal Code, which includes imprisonment up to 45 years, is adequate. It is also of the view that the sentence of 34 years' imprisonment imposed on Janković is *prima facie* in accordance with this provision of the code. The fact that this sentence is the highest ever handed down by the BiH State Court does not compel the conclusion that the BiH State Court engages in "inappropriate" sentencing practices. The Bench also notes that the *Janković* judgement has not yet become final.

59. The Referral Bench therefore finds that the imposition of a relatively high sentence in the *Janković* judgement of the BiH State Court does not warrant any supplemental submissions or an evidentiary hearing. The Bench accordingly denies the March 2007 Motion for Leave to File a Supplemental Response in its entirety.

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[120] *See* March 2007 Motion for Leave to File a Supplemental Response, *supra* note 39, para. 17.
[121] *See generally Janković* Rule 11 *bis* Decision, *supra* note 62.
[122] March 2007 Motion for Leave to File a Supplemental Response, *supra* note 39, para. 15.
[123] *Ibid.*, paras 15–16 (quotation at para. 16).
[124] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecutor's Response to "Joint Motion of Defense Counsel for Milan Lukić and Sredoje Lukić for Leave to Submit Supplemental Response to Prosecutor's Request Under Rule 11 *bis* and for an Evidentiary Hearing, 15 March 2007, para. 5.
[125] *See supra* text accompanying notes 104–105.

4. Conclusion

60. In summary, it appears that the BiH Criminal Code is likely to be applied to the alleged criminal conduct of the Accused should this case be referred. While it will be for the competent national court to determine the law applicable to such conduct, the Referral Bench has been able to satisfy itself that, within the possible legal frameworks which could be applied, there are appropriate provisions to address the conduct of the Accused alleged in the Second Amended Indictment, and that there exists an adequate penalty structure.

D. Non-Imposition of the Death Penalty and Fair Trial

61. Rule 11 *bis*(B) requires that the Referral Bench be satisfied that the death penalty will not be imposed or carried out, and that the accused will receive a fair trial if his case is referred. The Bench will now proceed to evaluate the submissions of the parties and the interested states in relation to the requirements of Rule 11 *bis*(B).

1. Non-Imposition of the Death Penalty

62. None of the parties or interested states has suggested that the death penalty could be imposed if this case were referred to the authorities of Bosnia and Herzegovina. On 29 July 2003, Bosnia and Herzegovina ratified Protocol 13 to the ECHR—which abolishes the death penalty in all circumstances—and the Protocol entered into force in that state on 1 November 2003.[126] The Referral Bench recalls its observation above that the law in effect at the time of the criminal conduct alleged against the Accused authorised the death penalty for the most serious criminal acts, including war crimes against the civilian population in violation of Article 142(1) of the SFRY Criminal Code.[127] Yet even if this law were held to be applicable, the national court in Bosnia and Herzegovina would certainly preclude the death penalty as contrary to Protocol 13. The Bench has no reason to believe that Bosnia and Herzegovina would choose to ignore this international obligation, and accordingly concludes that the death penalty will not be imposed or carried out against either of the Accused.

[126] *See supra* note 109 and the sources cited therein.
[127] SFRY Criminal Code, *supra* note 98, Arts. 37(1), 142(1). *See also supra* text accompanying notes 107–109 (discussing these provisions of the SFRY Criminal Code).

2. Security of Milan Lukić in Bosnia and Herzegovina

63. Notwithstanding the absence of the death penalty as a punishment that may be imposed by the authorities of Bosnia and Herzegovina, Milan Lukić argues that the Referral Bench must also be satisfied that he will not face a general risk of death by virtue of his transfer to that state. He points specifically to the death of his brother during a police raid of his house in April 2004, and additionally claims he was threatened by a Republika Srpska police director while in detention in Argentina. Milan Lukić asserts on the basis of these incidents that he would be in mortal danger if this case were referred to Bosnia and Herzegovina, and that his transfer to Bosnia and Herzegovina would be, in effect, a death sentence.[128]

64. The Referral Bench acknowledges that an accused may face the risk of death not only by the possible imposition of the death penalty, but also by attacks on him by private individuals. Although this issue is not *prima facie* one to be considered under the first prong of the test in Rule 11 *bis*(B), the Bench will nevertheless consider it, since the security of an accused "touches upon the fairness of [Bosnia and Herzegovina's] criminal justice system", and is therefore always a matter of concern when determining whether a case should be referred pursuant to Rule 11 *bis*.[129] The Bench therefore has to examine whether the threats alleged by Milan Lukić are substantiated and based on facts. If so, the Bench must then examine whether the authorities of the state of referral would be able to effectively safeguard him against any attacks on his life and limb.

65. As noted above, Milan Lukić invokes two events as proof that his life would be in danger if he were transferred to Bosnia and Herzegovina. First, he contends that on 18 April 2004, special police forces raided his house in Višegrad and "executed" his brother, Novica Lukić, because they mistook his brother for him.[130] Second, Milan Lukić contends that while in detention in Argentina, he was threatened by a Republika Srpska police director, who gained "unauthorized and improper" access to the Argentine prison and who allegedly said that he would "no longer be protected" if transferred to Bosnia and Herzegovina.[131] He further requests the Referral Bench to issue orders directing the state authorities of both Bosnia and Herzegovina and Argentina to produce complete files of any investigations they have conducted into the described incidents.[132]

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[128] Milan Lukić Further Submissions, *supra* note 27, para. 39; Milan Lukić Response, *supra* note 22, paras 31–41.
[129] *Cf. Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11*bis*, Decision on Rule 11*bis* Referral, 1 September 2005 ("*Stanković* Appeal Decision"), para. 34 ("The 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 that is an inquiry squarely within the Referral Bench's mandate.").
[130] Milan Lukić Response, *supra* note 22, paras 32–33.
[131] *Ibid.*, paras 35–36 (quotation at para. 35).
[132] *Ibid.*, paras 34, 38, 40.

66. With regard to the first incident, the Referral Bench can neither confirm nor deny any misconduct of the police forces during the mission that resulted in the death of Milan Lukić's brother. In the Bench's view, however, the allegation that the forces intended to kill Milan Lukić and instead killed his brother by mistake is not sufficiently substantiated. With regard to the second incident—that is, the visit of the police director to Milan Lukić in Argentina—the Referral Bench is similarly not convinced that these allegations are based on actual fact. Moreover, even if such threats were made by the police director, the Bench does not regard them as specific enough to indicate that a real danger to the life of Milan Lukić would exist if he were transferred to Bosnia and Herzegovina. The Bench is thus not satisfied that these assertions necessitate further consideration.

67. Nevertheless, the Referral Bench will briefly examine whether the authorities of Bosnia and Herzegovina would be able to effectively safeguard Milan Lukić against attacks by private individuals if the threats alleged by him were substantiated. The Referral Bench recalls its findings in its referral decision in *Mejakic et al.* 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 referral. A high security detention unit has been established and [...] it is expected to be in operation under the guidance of international experts. In addition, detainee and prisoner treatment is appropriately regulated by statute.[133]

68. Moreover, according to the Law on the BiH State Court ("BiH Law on State Court"), any crime in the BiH Criminal Code perpetrated against a detained accused or convicted person would fall within the competence of the State Court.[134] The Criminal Investigative Department of the State Information Protection Agency bears responsibility for investigating threats of such crimes and preventing them from coming to fruition.[135] The Referral Bench is therefore satisfied that the authorities of Bosnia and Herzegovina would be able to effectively protect Milan Lukić if a private individual attempted to cause him injury.[136]

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[133] *Cf. Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 108 (footnotes removed; referring to Law of Bosnia and Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures, Official Gazette of Bosnia and Herzegovina No. 13/05 (English translation)). *See also Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fustar, and Duško Knežević*, Case No. IT-02-65-AR11*bis*, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11*bis*, 7 April 2006 ("*Mejakić et al.* April 2006 Appeal Decision"), para. 58 ("[T]he Appeals Chamber finds that the Appellants have not demonstrated that the Referral Bench erred in law 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.").

[134] Law on the State Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina Nos. 16/02, 42/03, 9/04, 4/04, 35/04, 61/04 (English translation) ("BiH Law on State Court"), Art. 13.

[135] Law on the State Information and Protection Agency, Official Gazette of Bosnia and Herzegovina No. 27/04 (English translation), Art. 12.

[136] *Cf. Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *bis*, 8 July 2005, para. 34 (determining that an adequate legal structure existed in Bosnia and Herzegovina to ensure that

3. Fair Trial

(a) Fair Trial: Generally

69. The Prosecution submits that Bosnia and Herzegovina provides all necessary legal and technical conditions for fair trials,[137] and that the legal system of that state has been found by the Appeals Chamber to be compatible with Rule 11 *bis*(B).[138] Sredoje Lukić argues that his rights, as set forth in Article 21 of the Statute, would not be guaranteed if this case were referred to the authorities of Bosnia and Herzegovina;[139] he also makes several specific submissions examined in detail below.[140] Milan Lukić, for his part, contends that the information upon which the Referral Bench relied in past cases when considering the fairness of trials in Bosnia and Herzegovina was inaccurate and unreliable. He submits that OSCE reports on proceedings in that state raise concerns with regard to legislation on the adaptation of the indictment, pre-trial custody, the entering of pleas, preliminary motions, and the transfer of case files; according to him, the reports also express concerns in respect of the judiciary's interpretation of the applicable law, pre-trial custody, and the right of review.[141] In Milan Lukić's view, the ability of the BiH State Court to provide a fair trial is for these reasons "far from being settled".[142]

70. Bosnia and Herzegovina submits that its legal system conforms with the two criteria set forth in Rule 11 *bis*(B), and that both the Referral Bench and the Appeals Chamber have confirmed that accused referred to that state will receive a fair trial.[143] It points to the second report of the OSCE in *Janković* of July 2006, in which the OSCE states that it had not identified any issue of concern that could be assessed as infringing upon the accused's right to a fair trial.[144]

71. The Referral Bench considers that, for present purposes, it can be accepted that the requirement of a fair criminal trial includes the following:

a. the equality of all persons before the court;
b. a fair and public hearing by a competent, independent, and impartial tribunal established by law;
c. the presumption of innocence until guilt is proven according to the law;

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the operation of the detention unit associated with the BiH State Court accords with internationally recognised standards); *Rašević and Todović* Appeal Decision, *supra* note 77, para. 98 (upholding this determination).
[137] Motion for Referral, *supra* note 1, para. 28.
[138] Prosecution Further Submissions, *supra* note 26, para. 12.
[139] Sredoje Lukić Response, *supra* note 18, paras 30, 33, 41.
[140] *See infra* text accompanying notes 152–184.
[141] Milan Lukić Further Submissions, *supra* note 27, para. 35; Milan Lukić Response, *supra* note 22, para 44.
[142] Milan Lukić Response, *supra* note 22, para. 45.
[143] First BiH Submissions, *supra* note 29, pp. 4–5.
[144] Second BiH Submissions, *supra* note 37, p. 3.

d. the right of an accused to be informed promptly and in detail in a language he understands of the nature and cause of the charges against him;

e. the right of an accused to be tried without undue delay;

f. the right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

g. the right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;

h. the right of an accused to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

i. the right of an accused to examine, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

j. the right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings; and

k. the right of an accused not to be compelled to testify against himself or to confess guilt.[145]

72. In comparing these requirements of a fair trial with those provided under the laws of Bosnia and Herzegovina, the Constitution of Bosnia and Herzegovina ("BiH Constitution") provides a foundation. Article II in particular guarantees the right to a fair hearing in criminal matters, along with other rights relating to criminal proceedings.[146] The enjoyment of these rights is guaranteed to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.[147]

73. In furtherance of the guarantees provided by the BiH Constitution, the Criminal Procedure Code of Bosnia and Herzegovina ("BiH Criminal Procedure Code")[148] and the Law on the State Court of Bosnia and Herzegovina ("BiH Law on State Court")[149] make more detailed provisions, in particular the following:

a. Article 234(1) of the BiH Criminal Procedure Code (right of an accused to a public hearing);

b. Article 3(1) of the BiH Criminal Procedure Code and Article 33 of the BiH Law on State Court (presumption of innocence of an accused);

c. Articles 5(1), 6(1), 8, and 78(2)(e) of the BiH Criminal Procedure Code and Articles 9 and 34(3) of the BiH Law on State Court (information of the suspect, on first questioning, about the charged offences and grounds for suspicion);

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[145] *See, e.g.*, Statute, Art. 21; International Covenant on Civil and Political Rights, *entered into force* 23 March 1976, 999 U.N.T.S. 171, Art. 14; ECHR, *supra* note 109, Art. 6.
[146] Constitution of Bosnia and Herzegovina, Art. II(3)(e).
[147] *Ibid.*, Art. II(4).
[148] Bosnia and Herzegovina Code of Criminal Procedure, Official Gazette of Bosnia and Herzegovina Nos. 36/03, 26/04, 63/04, 13/05 (English translation) ("BiH Criminal Procedure Code"),
[149] BiH Law on State Court, *supra* note 134.

d. Articles 7, 39(1), 46, 48(1), and 78(2)(b) of the BiH Criminal Procedure Code and Articles 34(2) and 34(3) of the BiH Law on State Court (right to defence counsel);

e. Article 13 of the BiH Criminal Procedure Code (right to be brought before the court in the shortest reasonable time period and to be tried without delay);

f. Articles 7, 236(1), and 242(2) of the BiH Criminal Procedure Code (right of an accused to present his own defence and be tried in his presence);

g. Article 78(2)(a) of the BiH Criminal Procedure Code and Article 34(4) and of the BiH Law on State Court (prohibition of compelled confession or any other statement from a suspect or accused); and

h. Articles 78(2)(d), 259, and 261(1) of the BiH Criminal Code (right of an accused to present favourable witnesses and evidence, and to examine or have examined witnesses against him).[150]

74. Furthermore, Bosnia and Herzegovina is bound by its obligations under the ECHR, Article 6(1) of which guarantees a fair trial and an independent and impartial tribunal established by law.[151] The Referral Bench also takes note of Art. II(2) of the BiH Constitution, which provides that the rights and freedoms set forth in the ECHR and its Protocols shall apply directly in Bosnia and Herzegovina, and shall have priority over all other law. The Bench has no reason to believe that Bosnia and Herzegovina would not abide by its legal obligations under the ECHR and the other international human rights treaties to which it is a party.

75. The Referral Bench will now turn to a consideration of the specific submissions of the parties and Bosnia and Herzegovina relating to the requirement of a fair trial.

(b) Adequate Time and Facilities and Trial Without Undue Delay

76. Sredoje Lukić submits that time and facilities made available to him under the legislation of Bosnia and Herzegovina are insufficient and inadequate, as he and his counsel would have only 60 days to prepare for trial, and that the legislation is uncertain with respect to communication between counsel and accused.[152] He contends that ambiguities also exist regarding the composition and funding of defence teams in domestic proceedings, and that counsel in other referred cases have also complained of these ambiguities.[153] In addition, Sredoje Lukić draws the Bench's attention to the BiH State Court's denial of the request of Gojko Janković for the assignment of co-counsel despite the complexity of that case and the volume of the case files, and submits that such a denial

[150] *Stanković* Rule 11 *bis* Decision, *supra* note 60, paras 58–65; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, paras 71–78; *Janković* Rule 11 *bis* Decision, *supra* note 62, paras 65–72.
[151] ECHR, *supra* note 109, Art. 6(1) ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").
[152] Sredoje Lukić Further Submissions, *supra* note 25, paras 34, 37–38.
[153] *Ibid.*, para. 36.

of co-counsel violates the rights of the accused to a fair trial and to counsel of his own choosing.[154] Finally, Sredoje Lukić asserts that there would be a considerable delay in the proceedings, because the majority of the material concerning his case is only available in English, and indeed the referral process itself would bring about an additional delay.[155]

77. According to Article 229(4) BiH Criminal Procedure Code, the preliminary judge shall refer a case to the judge of the panel of the BiH State Court that has been assigned to try the case, so that the State Court judge can schedule the trial no later than 60 days from the day when the accused entered his plea; this deadline may be extended for an additional 30 days.[156] The Referral Bench does not, *a priori*, consider this time to be insufficient to prepare the present case. It also notes that, if the case were referred, the Accused and their counsel would have some additional time before the "acceptance" of the indictment by the State Court, as detailed in Article 2 of the Law on Transfer of Cases from the ICTY and the Use of Evidence Collected by the ICTY in Proceedings Before Courts in BiH ("Law on Transfer of Cases").[157] Moreover, Sredoje Lukić concedes that he has already received a vast amount of both public and confidential material relating to the case.[158]

78. As to the issue of communication between counsel and accused, the Referral Bench takes note of Article 48(1) of the BiH Criminal Procedure Code, which provides that a suspect or an accused in custody is immediately entitled to communicate with defence counsel, orally or in writing.[159] In addition, Article 3 of the Law on Detention of Bosnia and Herzegovina provides that detainees shall retain all rights other than those necessarily restricted for the purpose for which they were ordered and in accordance with this Law and international agreements.[160] Article 68(1) of that law specifically permits detainees and prisoners to communicate confidentially with counsel of their choice.[161]

79. Current counsel for Sredoje Lukić does not indicate whether he would be able to represent Sredoje Lukić in proceedings before the BiH State Court. With regard to the assignment of

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[154] *Ibid.*, para. 39.
[155] *Ibid.*, paras 42–44.
[156] BiH Criminal Procedure Code, *supra* note 148, Art. 229(4).
[157] Law on Transfer of Cases from the ICTY and the Use of Evidence Collected by the ICTY in Proceedings before Courts in BiH, Official Gazette of Bosnia and Herzegovina Nos. 37/03, 54/04, 61/04 (English translation) ("Law on Transfer of Cases"), Art. 2:

> If the ICTY transfers a case with a confirmed indictment according to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY. The BiH Prosecutor shall adapt the ICTY indictment in order to make it compliant with the BiH CPC, following which the indictment shall be forwarded to the Court of the BiH. The Court of BiH shall accept the indictment if it ensured that the ICTY indictment has been adequately adapted and that the indictment fulfils the formal requirements of the BiH CPC.

[158] Sredoje Lukić Further Submissions, *supra* note 25, para. 35.
[159] BiH Criminal Procedure Code, *supra* note 148, Art. 48(1).
[160] Law on Detention of Bosnia and Herzegovina, Art. 3.
[161] *Ibid.*, Art. 68(1).

co-counsel, Article 40(2) of the BiH Criminal Procedure Code allows an accused to have more than one defence counsel, but only one of them can have the status of lead counsel.[162] As far as the remuneration system for defence counsel is concerned, the Referral Bench refers to its decision in the case of *Prosecutor v. Željko Mejakić et al.*, where it observed that the system of remuneration of counsel in Bosnia and Herzegovina is similar to the one applied at the Tribunal, and that the Bench was not required to make a finding on whether the funding of the accused's defence would be appropriate.[163]

80. The Referral Bench is therefore satisfied that both Milan Lukić and Sredoje Lukić would have adequate time and facilities to prepare their respective defences and that there would not be undue delay if this case were referred to the authorities of Bosnia and Herzegovina.

(c) Detention

81. The Referral Bench recalls the Appeals Chamber's holding that the condition of detention units in a national jurisdiction, whether pre- or post-trial, is a matter that touches upon the fairness of that jurisdiction's criminal justice system and is therefore "squarely within the Referral Bench's mandate".[164]

82. With respect to pre-trial detention and post-trial custody Sredoje Lukić submits that, in light of a newspaper article critical of the conditions of detention in Bosnia and Herzegovina, the Referral Bench should investigate the issue in a more careful manner than it has done in previous Rule 11 *bis* decisions.[165] Bosnia and Herzegovina submits that ambiguities in the interpretation of the Law on Transfer of Cases have been resolved, and that that Law now clearly states that custody shall be regulated according to the BiH Criminal Procedure Code.[166]

83. According to Article 2(4) of the Law on Transfer of Cases, the custody and detention of persons is regulated according to the BiH Criminal Procedure Code.[167] The Referral Bench considers that the relevant articles in the BiH Criminal Procedure Code provide adequate regulation of custody prior to, during, and after the conclusion of trial. The Bench further notes an amendment to Article 2 of the Law on Transfer of Cases: according to a new paragraph 5 in Article 2, the court

[162] BiH Criminal Procedure Code, *supra* note 148, Art. 40(2).
[163] *See Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 111. *See also Mejakić et al.* April 2006 Appeal Decision, *supra* note 133, para. 70; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11*bis*.1, Decision on Appeal Against Referral Under Rule 11*bis*, 4 July 2006 ("*Ljubičić* Appeal Decision"), para. 25.
[164] *Stanković* Appeal Decision, *supra* note 129, para. 34; *Ljubičić* Appeal Decision, *supra* note 163, para. 43.
[165] Sredoje Lukić Response, *supra* note 18, paras 43–45 (citing an article by Meddzida Kreso in the newspaper *Monitor* dated 23 March 2005).
[166] Second BiH Submissions, *supra* note 37, pp. 1–3. *See also* BiH Criminal Procedure Code, *supra* note 148.
[167] Law on Transfer of Cases, *supra* note 157, Art. 2(4).

shall decide no later than 48 hours from the time of the Prosecutor's filing of the request for custody whether the transferred person will be kept in custody or released.[168] Thus, it is also guaranteed that the court will determine without undue delay whether custody of the transferred accused is necessary. Furthermore, the Referral Bench additionally recalls its previous determination that detainee and prisoner treatment is appropriately regulated by statute in Bosnia and Herzegovina.[169]

84. The Referral Bench therefore concludes that no custody- or detention-related issues have been identified that would preclude the referral of this case to the authorities of Bosnia and Herzegovina.

(d) Witness Availability

85. Sredoje Lukić argues that potential defence witnesses from Serbia and Bosnia and Herzegovina would be reluctant to testify in his trial before the BiH State Court out of fear of arrest or prosecution.[170] The Referral Bench recalls that both Bosnia and Herzegovina and Serbia are parties to the European Convention on Mutual Assistance in Criminal Matters.[171] Legal means consequently exist to facilitate the appearance of witnesses residing in Serbia for trial in Bosnia and Herzegovina, either through travel or by other instruments, such as letters rogatory. For witnesses residing in Bosnia and Herzegovina, including Republika Srpska, attendance to give trial testimony when summoned is obligatory.[172] In any event, any disadvantage to the Accused by virtue of this national procedure—which reflects the generally accepted direct-enforcement mechanism for ensuring witness presence—cannot be properly regarded as prejudicial to the right to a fair trial.[173]

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[168] Decision Enacting the Law on Amendment to the Law on 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, 16 June 2006 (English translation), Art. 2(5). This provision is an exemption from those of Article 2(4) and also from Article 139(4) of the BiH Criminal Procedure Code. Article 2(4) of the Law on Transfer of Cases provides that custody and detention shall be regulated according to the BiH Criminal Procedure Code. Law on Transfer of Cases, *supra* note 157, Art. 2(4). Article 139(4) of the BiH Criminal Procedure Code stipulates that the judge shall immediately, and in any event no later than 24 hours, issue a decision on custody or on releasing of the apprehended person. BiH Criminal Procedure Code, *supra* note 148, Art. 139(f).

[169] *See Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, paras 108–109.

[170] Sredoje Lukić Response, *supra* note 18, para. 42.

[171] *See* European Convention on Mutual Assistance in Criminal Matters, *entered into force* 12 June 1962, Council of Europe T.S. No. 30. *See also* Official Gazette of Bosnia and Herzegovina No. 3/05, International Agreements (English translation); http://www.uhdigm.adalet.gov.tr/guncelleme/aksoz/30l.doc (showing a list of states parties to the convention and dates of ratification and entry into force for each state).

[172] The BiH State Court can order compulsory apprehension of a witness, pursuant to Art. 81(5) BiH Criminal Procedure Code, *supra* note 148, and Art. 5(1) of the Law on the Judicial Police of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 3/03).

[173] *Janković* Rule 11 *bis* Decision, *supra* note 62, paras 85–86.

(e) Right to Examine or Have Witnesses Examined

86. Sredoje Lukić also submits that various provisions in Bosnia and Herzegovina's Law on Protection of Witnesses Under Threat and Vulnerable Witnesses ("Law on Protection of Vulnerable Witnesses")[174] are in direct contravention of the accused's right to attend trial and to examine or have examined the witnesses against him.[175]

87. The Referral Bench has examined the relevant provisions of the Law on Protection of Vulnerable Witnesses in previous Rule 11 *bis* referral decisions. There, it determined that the provisions of the Law on Protection of Vulnerable Witnesses do not violate the rights of the accused.[176] In particular, Article 11 of the Law does not limit the right of the accused to examine a witness. Instead it provides that, in exceptional circumstances, a protected witness need not personally appear at the public hearing, but it allows for cross-examination by other means, such as in proceedings held *in camera*.[177] In addition, Article 13 of the Law provides for measures protecting the witness from public identification and consequential risks.[178] There is nothing to suggest that Articles 11 and 13 would unduly restrict the right of an accused to examine witnesses.

88. The Referral Bench further recalls its observations in previous jurisprudence in relation to Articles 19, 21, and 22 of the Law on Protection of Vulnerable Witnesses, which concern a type of proceeding known as a "witness protection hearing".[179] This hearing is conducted in the absence of the parties;[180] thereafter, the record of the proceeding is read at the main trial. If there are any additional questions for the witness, upon motion of a party or *ex officio* the court can decide that such questions may be asked at a further witness protection hearing.[181] The circumstances in which such a hearing can be held are limited,[182] and it is clear that the hearing is intended to provide adequate protection for a particular group of vulnerable witnesses.[183] Furthermore, there is nothing in these provisions that would deny the right of an accused to examine witnesses; on the contrary, the provisions specifically allow additional questions to be posed.

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[174] Law on Protection of Vulnerable Witnesses and Witnesses Under Threat, Official Gazette of Bosnia and Herzegovina Nos. 21/03, 61/04 (English translation) ("Law on Protection of Vulnerable Witnesses").
[175] Sredoje Lukić Further Submissions, *supra* note 25, paras 40–41.
[176] *Janković* Rule 11 *bis* Decision, *supra* note 62, paras 81–83.
[177] Law on Protection of Vulnerable Witnesses, *supra* note 174, Art. 11.
[178] *Ibid.*, Art. 13.
[179] *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 83.
[180] Law on Protection of Vulnerable Witnesses, *supra* note 174, Art. 19. Only the witness, the court, and the minute taker are present.
[181] *Ibid.*, Arts 21–22.
[182] *Ibid.*, Art. 14. These circumstances are where there is a "manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony". *Ibid.*
[183] *Ibid.*, Arts 14–15.

89. Lastly, Articles 78(2)(d), 259, and 261(1) of the BiH Criminal Procedure Code also guarantee the right of an accused to present favourable witnesses and evidence, and to examine or have examined the witnesses against him.[184]

(f) Milan Lukić Motion to File a Supplemental Response on the Fairness of Proceedings

90. On 22 January 2007, Milan Lukić requested leave from the Referral Bench to file a supplemental response relating to the fairness requirement in Rule 11 *bis*(B), as well as an evidentiary hearing on the "functional fairness" of the BiH State Court ("January 2007 Motion for Leave to File a Supplemental Response").[185] Attached to the motion was a letter from Senada Mirojević, of the Criminal Defence Section of the BiH State Court, to the Tribunal's Association of Defence Counsel informing the latter of an alleged insufficient allocation of means for the preparation of the defence in cases before the BiH State Court.[186] In the letter, Mirojević states that, at a general hearing of the BiH State Court, the Criminal Defence Section pointed to the lack of compensation available for expenses made by the defence during investigation, and suggested the appointment of a "defence investigator".[187] According to Mirojević, due to the limited human resources of the Criminal Defence Section, there are no current plans to improve this situation for the defence.[188] Milan Lukić contends that, in view of the substantial difference between the resources available to the prosecution and those available to the defence, the principle of equality of arms is currently being violated at the BiH State Court.[189] In response, the Prosecution argues that the Bench should deny this motion .[190]

91. The Referral Bench does not consider that the purported insufficient compensation for expenses made by the defence during investigations is an issue that, as such, renders the proceedings before the BiH State Court unfair and thereby militates against a referral of this case. The Bench also notes that the Mirojević letter was written by Ms. Mirojević in her private capacity. It is therefore no more than a personal opinion. Furthermore, the Bench receives regular reports

[184] BiH Criminal Procedure Code, *supra* note 148, Arts 8(2)(d), 259, 261(1). *See also Stanković* Rule 11 *bis* Decision, *supra* note 60, paras 58-65; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 77; *Janković* Rule 11 *bis* Decision, *supra* note 62, paras 65–72.

[185] January 2007 Motion for Leave to File Supplemental Response, *supra* note 38, para. 13.

[186] *See ibid.*, Annex B (containing the English translation of the Mirojević letter). On 6 February 2007, Milan Lukić filed a substitute annex to the January 2007 Motion for Leave to File Supplemental Response. *See Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Substitute Annex A to Motion of Defence Counsel for Milan Lukić for Leave to File Supplemental Response, 6 February 2007. This substitute annex contains the BCS original of the letter, dated 3 January 2007.

[187] January 2007 Motion for Leave to File Supplemental Response, *supra* note 38, Annex B.

[188] *See ibid.*, Annex B.

[189] *Ibid.*, para. 11.

[190] *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Prosecutor's Response to Motion of Defence Counsel for Milan Lukić for Leave to Submit Supplemental Response to Prosecutor's Request Under Rule 11 *bis* and for an Evidentiary Hearing, 23 January 2007.

from institutions monitoring the proceedings of cases in Bosnia and Herzegovina that have already been referred pursuant to Rule 11 *bis*, and the insufficient allocation of means has not been the subject of these reports.

92. The Referral Bench therefore considers that the content of the supplements of the January 2007 Motion for Leave to File a Supplemental Response does not necessitate any further hearing, and the motion is denied in its entirety.

4. Conclusion

93. In sum, the Referral Bench is satisfied that the laws applicable to proceedings against the Accused in Bosnia and Herzegovina provide an adequate basis to ensure compliance with the requirements for a fair trial.

E. Witness Protection

1. Submissions

94. The Prosecution requests that, if the Referral Bench orders the referral of this case, it also order that the protective measures granted to victims and witnesses—as set forth in the confidential and Annex II(A&B) to the Motion for Referral—apply and remain in force pursuant to Rule 11 *bis*(D)(ii).[191] It stresses the importance of extending the protective measures to domestic proceedings because Milan Lukić allegedly interfered with a witness in a prosecution by the Serbian authorities.[192] Sredoje Lukić does not oppose this request of the Prosecution, and submits that the Bench should deliver its decision in accordance with the Trial Chamber's decision on protective measures of 2 November 2005.[193]

2. Discussion

95. Rule 11 *bis*(D)(ii) empowers the Referral Bench to order that protective measures granted by the Tribunal for certain witnesses or victims remain in force. Protective measures have been granted to a total of 26 witnesses in the case of *Prosecutor v. Mitar Vasiljević*.[194] These protective measures have been partly varied in accordance with an Appeals Chamber decision pursuant to

[191] Motion for Referral, *supra* note 1, para. 45(c).
[192] *Ibid.*, para. 43.
[193] Sredoje Lukić Response, *supra* note 18, para. 49 (referring to *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-I, Decision on Prosecutor's Motion for Order on Protective Measures, 2 November 2005 ("Protective Measures Decision")).
[194] *See* Motion for Referral, *supra* note 1, Confidential Annex II (A & B).

Rule 75 and a decision of the Trial Chamber in *Vasiljević*.[195] On 2 November 2005, Trial Chamber III held that the general and specific protective measures granted in *Vasiljević* remain in force in the proceedings against both Accused pursuant to Rules 75(F) and (G).[196] The Bench finds it appropriate to grant the Prosecution's request and to order that the protective measures—as reproduced in the confidential Annex A and Annex B of the present Decision—take effect in any proceedings before the competent national court in Bosnia and Herzegovina.[197]

96. The Referral Bench also notes that Bosnia and Herzegovina has enacted a Law on Protection of Vulnerable Witnesses,[198] and that the Witness Protection Programme Law of Bosnia and Herzegovina provides for a variety of protective measures for witnesses, such as change of identity and the issuance of cover documents.[199] Under Article 267(4) of the BiH Criminal Procedure Code, either party to the proceedings may request such protective measures.[200]

3. Conclusion

97. The Referral Bench is satisfied that adequate provisions exist within the law of Bosnia and Herzegovina for the protection of witnesses, and concludes that no witness–protection issues have been identified which would preclude the referral of this case. It also finds it appropriate to order that the protective measures granted to victims and witnesses in other proceedings before this Tribunal, as set forth in the confidential Annex A and Annex B attached to the present Decision, apply and remain in force pursuant to Rule 11 *bis*(D)(ii).

F. Monitoring of Proceedings

98. The Referral Bench reiterates that the referral of a case implies that the proceedings in relation to an accused become the primary responsibility of the authorities of the state of referral, including its investigative, prosecutorial, and judicial organs.[201] Rule 11 *bis*(D)(iv), which provides for the monitoring of proceedings in cases referred by the Bench, serves as a precaution against the

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[195] Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-PT, Prosecutor's Motion Pursuant to Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain in Force and Vary Protective Measures, 5 October 2005, Confidential and *Ex Parte* Annex B (describing these variations).

[196] Protective Measures Decision, *supra* note 193, para. 11. The Chamber clarified that protective measures ordered in *Vasiljević* automatically continue to have effect in the proceedings pursuant to Rule 75(G), and that the Prosecution motion was therefore unnecessary because it did not seek a variation of the protective measures. *Ibid.*, para. 10.

[197] The Protective Measures Decision is attached as Annex B of the present decision.

[198] *See* Law on Protection of Vulnerable Witnesses, *supra* note 174. This law entered into force on 1 March 2003.

[199] *See* Witness Protection Programme Law of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 29/04 (English translation), Art. 7.

[200] BiH Criminal Procedure Code, *supra* note 148, Art. 267(4).

[201] *Stanković* Rule 11 *bis* Decision, *supra* note 60, para. 93; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 134; *Janković* Rule 11 *bis* Decision, *supra* note 62, para. 102; *Kovačević* Rule 11 *bis* Decision, *supra* note 90, para. 89.

failure to diligently prosecute a referred case or to conduct a fair trial. Under this rule, the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.[202] Furthermore Rule 11 *bis*(F), in conjunction with Rule 10, enables the Referral Bench, at the request of the Prosecutor, to revoke a referral order at any time before an accused is convicted or acquitted by the national court. In such a circumstance, the Bench may order the re-transfer of the accused to the seat of the Tribunal in The Hague pursuant to Rule 11 *bis*(G).

99. As the Appeals Chamber has held, the Referral Bench also has the inherent authority to order the Prosecution to report back on the progress of a case referred to national authorities, provided such an order reasonably aids the Bench in discharging its duties under Rule 11 *bis*.[203] Whatever information the Bench reasonably feels it needs, and whatever orders it reasonably finds necessary, are within its authority, so long as they assist it in determining whether the proceedings following referral are fair.[204]

100. The Referral Bench notes that on 19 May 2005, an agreement was concluded between the Office of the Prosecutor and the OSCE for the monitoring of and reporting on the proceedings of referred cases.[205] The Bench is satisfied that the standing of the OSCE and the neutrality of its approach will ensure that the reports it provides adequately reflect not only those concerns raised by the Prosecution, but also those of the Defence and any additional matters that should be brought to the Bench's attention.

G. The Proper Scope of the Exercise of Jurisdiction of the State of Referral

1. Argentina's Surrender of Milan Lukić to the Tribunal

101. As noted above,[206] Milan Lukić remained at large until 8 August 2005, when he was apprehended by agents of the Argentine federal police.[207] In response to a request by the Tribunal for Milan Lukić's surrender pursuant to Article 29 of the Statute,[208] Judge Jorge Urso of the

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[202] *Stanković* Appeal Decision, *supra* note 129, para. 53.
[203] *Ibid*, para. 59.
[204] *Ibid*, para. 50.
[205] *See* Organization for Security and Co-Operation in Europe Permanent Council, Decision No. 673: Co-Operation Between the Organization for Security and Co-Operation in Europe and the International Criminal Tribunal for the former Yugoslavia, Doc. No. PC.DEC/673 (19 May 2005).
[206] *See supra* text accompanying note 16.
[207] 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 ("July 2006 Registry Submission"), Annex, Decision of the Federal Court of Argentina, Case No. 11.807/05, 10 January 2006 ("Argentine Decision") (English translation), p. 1 (recalling Milan Lukić's arrest by federal police agents).
[208] *See* Registry Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Referral Bench's Further Order on Access to Certain Documents with Confidential Annex, partly confidential, 14 July 2006

Argentine court issued a decision on 10 January 2006 to surrender him to the Tribunal ("Argentine Decision").[209] The key language in the Argentine Decision is in paragraph I of the disposition:

> I hereby decide [...] to grant the request for the transfer of and surrender of Milan Lukić [...] in order for him to be tried at the seat [of the Tribunal], prohibiting that he be sent, without prior authorisation of the State of Argentina, to another hereby unauthorized place in order to be charged, prosecuted or harassed for previous acts that are different from those constituting the crimes for which his surrender has been requested.[210]

102. In the same decision, the Argentine court granted a simultaneous request by Serbia for Milan Lukić to be extradited to that state to stand trial for certain crimes allegedly committed in October 1992, but made such extradition subject to the completion of Milan Lukić's trial before the Tribunal. Paragraph II of the disposition reads as follows:

> I hereby decide [to] grant, under the same conditions as stated in the previous item, to the Government of Serbia and Montenegro the extradition of Milan Lukić, as requested by a judge of the Belgrade Court of First Instance, but his extradition shall be subject to the completion of his trial before the International Criminal Tribunal for the Former Yugoslavia.[211]

103. In accordance with the Argentine Decision, Milan Lukić was transferred into the Tribunal's custody on 21 February 2006,[212] where he has remained until the present day. The crimes for which the Tribunal requested his surrender were, at the time the Argentine Decision was rendered, those in the Amended Indictment of 12 July 2001.[213] This indictment has since been superseded by the Second Amended Indictment of 27 February 2006,[214] which became operative on 11 May 2006.[215]

2. Submissions of the Parties and Argentina on Whether the Argentine Decision Limits Milan Lukić's Referral

104. In light of the possible restrictions imposed by the Argentine Decision on Milan Lukić's referral to the authorities of another state pursuant to Rule 11 *bis*, the Referral Bench invited Argentina to attend the Motion Hearing to give its views on the intended effect of the Argentine

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(confidential annexes containing the correspondence sent by the Tribunal to Argentina requesting Milan Lukić's surrender pursuant to Article 29).

[209] *See generally* Argentine Decision, *supra* note 207. *See also* First Argentine Submissions, *supra* note 34, p. 1 (stating that the Argentine Decision was rendered by Federal National Criminal and Correctional Court No. 8).

[210] Argentine Decision, *supra* note 207, p. 9.

[211] *Ibid. See also ibid.*, p. 4 (describing the criminal conduct for which Serbia sought the extradition of Milan Lukić).

[212] Order for Detention on Remand, 21 February 2006, p. 2.

[213] *See* Argentine Decision, *supra* note 207, pp. 2–4 (discussing the counts of the Amended Indictment of 12 July 2001). *See also generally* Amended Indictment, *supra* note 11.

[214] *See generally* Second Amended Indictment, *supra* note 13.

[215] Decision on the Form of the Indictment, *supra* note 14, para. 1. *See also* Order on Operative Indictment, *supra* note 13, p. 3 (Referral Bench acknowledging that the Second Amended Indictment is the operative one in this case).

Decision.[216] At the hearing, the Argentine Ambassador to the Netherlands addressed the Bench on this question,[217] as did the Prosecution[218] and Counsel for Milan Lukić.[219] With the advance leave of the Referral Bench,[220] Argentina filed the Ambassador's remarks as a written submission,[221] and subsequently filed an additional written submission in response to specific questioning from the Bench at the hearing.[222] Milan Lukić also made arguments relevant to this question in the Milan Lukić Response to the Motion for Referral.[223]

105. Emphasising its willingness to fully cooperate with the Tribunal,[224] Argentina explains that "the Argentine Decision granted the transfer and surrender of Lukić to ICTY in order for him to be tried there for the crimes with which he was charged in the indictment."[225] Argentina accepts the Referral Bench's competence to refer the case of Milan Lukić to the authorities of Bosnia and Herzegovina,[226] and that "referral procedures cannot exactly be considered as extradition".[227] Nevertheless, it contends that certain aspects of extradition law are still relevant in the present circumstances, since the *de facto* result of referral would be the transfer of Milan Lukić for trial in a national court that does not enjoy "supremacy of jurisdiction" over the courts of Argentina.[228] Specifically, regard must be had to Article 18 of Law 24.767, which provides that a person extradited from Argentina cannot be re-extradited to another state without the person's consent or Argentina's prior authorisation.[229] Argentina submits on the basis of this legislation that, if the Tribunal decides to refer the case to a national court and that court intends to try Milan Lukić "for previous acts that are different from the crimes for which he was surrendered to the ICTY", the Tribunal must request and receive authorisation from Argentina before transferring the accused to the state of referral.[230]

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[216] *See* Order for Written Submissions, *supra* note 19, p. 3; Order on Pending Submissions, *supra* note 28, p. 3.
[217] Motion Hearing, T. 54–60 (15 September 2006).
[218] *Ibid.*, T. 91–94 (15 September 2006).
[219] *Ibid.*, T. 69–70, 96–97, 102 (15 September 2006).
[220] *Ibid.*, T. 90 (15 September 2006) (Referral Bench granting advance leave to Argentina to file a written response explaining its views on whether referral under Rule 11 *bis* is tantamount to extradition); *ibid.*, T. 100 (Bench granting advance leave for Argentina to file the Ambassador's remarks in writing).
[221] *See generally* First Argentina Submissions, *supra* note 34.
[222] *See generally* Second Argentina Submissions, *supra* note 35.
[223] Milan Lukić Response, *supra* note 22, paras 52–58.
[224] First Argentina Submissions, *supra* note 34, p. 3. Milan Lukić also argues that his referral to the authorities of Bosnia and Herzegovina is tantamount to extradition: "[I]f it walks like a duck, if it quacks like a duck, if it has feathers like a duck, it's probably a duck." Motion Hearing, T. 96 (15 September 2006).
[225] First Argentina Submissions, *supra* note 34, p. 2; Second Argentina Submissions, *supra* note 35, p. 2.
[226] First Argentina Submissions, *supra* note 34, p. 3 (admitting that "it would be inappropriate to attempt to hinder the Tribunal from exercising its powers for referral" to the authorities Bosnia and Herzegovina).
[227] Second Argentina Submissions, *supra* note 35, p. 2.
[228] *Ibid.*
[229] First Argentina Submissions, *supra* note 34, p. 3.
[230] Second Argentina Submissions, *supra* note 35, pp. 1–2. *See also* First Argentina Submissions, *supra* note 34, p. 3 ("[T]he Tribunal may exercise its powers to refer Milan Lukić for trial to an appropriate national court, but he should not be referred without prior authorisation of the State of Argentina."); Argentine Decision, *supra* note 207,

106. Milan Lukić agrees that the Argentine Decision prohibits his referral to be tried in a national court without Argentina's prior authorisation.[231] He also observes that Bosnia and Herzegovina lodged no request with the authorities of Argentina for his extradition while he was still in their custody, and argues that "[i]t is inappropriate for this Tribunal to allow itself to be used as a pass-through to avoid the legitimate interests and procedures put in place by the law of Argentina."[232] Although he acknowledges Appeals Chamber jurisprudence holding that national law cannot prevent an accused's referral under Rule 11 *bis*, he submits that "where [...] the proposed action is not mandated, but discretionary, the Tribunal should forebear from exercising that discretion in a fashion that circumvents the decision of a [n]ational [c]ourt and results in a baseless flouting of that [n]ation's laws."[233]

107. For its part, the Prosecution stresses that the referral of a case under Rule 11 *bis* is not extradition.[234] It contends that a state surrendering an accused to the Tribunal does so in compliance with obligations under Article 29 of the Statute, Rule 58, and Chapter VII of the United Nations Charter, and cannot place any condition on how the Tribunal then conducts proceedings in respect of that accused.[235] As a consequence, any conditions imposed by the Argentine Decision on Milan Lukić's referral should be declared null and void.[236]

3. The Primacy of the Tribunal and the Obligation of State Cooperation

108. The Tribunal has the competence to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[237] As a judicial body created by the Security Council pursuant to Chapter VII of the UN Charter, the Tribunal occupies a unique position in the international legal hierarchy.[238] The rules governing the horizontal relationship between sovereign and co-equal states, including those concerning interstate cooperation in criminal matters, do not apply to the distinctive vertical relationship between the

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p. 9 (prohibiting that Milan Lukić "be sent, without prior authorisation of the State of Argentina, to another hereby unauthorized place" to be charged or prosecuted for different crimes).

[231] Milan Lukić Response, *supra* note 22, para. 53; Motion Hearing, T. 70 (15 September 2006).

[232] Milan Lukić Response, *supra* note 22, para. 54. *See also* Motion Hearing, T. 69 (15 September 2006) (Counsel for Milan Lukić arguing that "this Court would be serving as a mere conduit for the nation of Bosnia-Herzegovina[,] which did not see fit to make a request of Argentina to transfer"); Motion Hearing, T. 96 (same).

[233] Milan Lukić Response, *supra* note 22, para. 56 (referring to *Mejakić et al.* April 2006 Appeal Decision, *supra* note 133, para. 31).

[234] Motion Hearing, T. 91 (15 September 2006).

[235] *Ibid.*, T. 91–93 (15 September 2006).

[236] *Ibid.*, T. 93 (15 September 2006).

[237] Security Council Resolution 827, UN Doc. S/RES/827 (1993), para. 2; Statute, Art. 1.

[238] *See Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Appeal Decision"), para. 47.

Tribunal, on the one hand, and the member states of the United Nations, on the other.[239] A number of provisions in the Statute and the Rules confirm the primacy of the Tribunal over national courts. Pursuant to Article 9(1) of the Statute, the Tribunal and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. Article 9(2) of the Statute, however, specifies that the Tribunal has primacy over national courts. The Tribunal may, at any stage of that court's proceedings, compel the deferral of the case to the Tribunal.[240]

109. Article 29 of the Statute, in turn, obliges states to lend cooperation in the prosecution of persons before the Tribunal.[241] This obligation includes the surrender, upon request, of an accused in the state's custody[242] and, pursuant to Rule 58, such obligation prevails over any impediment that may exist in the state's national law or in the treaties to which it is a party.[243] Furthermore, Rule 12 provides that determinations of national courts are not binding on the Tribunal.

110. With these considerations in mind, and in light of the present circumstances in which referral is sought to the authorities of Bosnia and Herzegovina, the Referral Bench will now address whether the conditions imposed in the Argentine Decision are binding on the Tribunal or on the authorities of Bosnia and Herzegovina as the determined state of referral,[244] and whether they limit that state in the exercise of its jurisdiction.

4. Impact of the Argentine Decision on the Trial and Referral of this Case

(a) Impact on the Tribunal's Ability to Try Milan Lukić

111. One corollary of the Tribunal's primacy over national courts and the obligation of the states to cooperate with the Tribunal is that ordinary principles of extradition law, such as the rules of

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[239] *Blaškić* Appeal Decision, *supra* note 238, para. 47. *See also Prosecutor v. Nikolić*, Case No. IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 100:

> As national jurisdictions function concurrently on an equal level, it is of utmost importance that any exercise of such national jurisdiction be exercised in full respect of other national jurisdictions. [...] [S]overeignty and equality between States go hand in hand. The role of the Tribunal, as an enforcement measure under Chapter VII of the UN Charter, is from that perspective[] fundamentally different. Consequently, in this vertical relationship, sovereignty by definition cannot play the same role.

[240] Statute, Art. 9(2).

[241] *Ibid.*, Art. 29(1). *See also Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR108*bis*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, 9 September 1999, para. 16; *Blaškić* Appeal Decision, *supra* note 238, para. 26; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents, 21 July 1998, Separate Opinion of Judge Mohamed Shahabuddeen, p. 10 ("Article 29(1) of the Statute is neither hortatory nor gesticulatory: it forms part of an instrument which was adopted by the Security Council under Chapter VII of the Chapter of the United Nations. [...] [T]he *requirement* to cooperate is an obligation, and that obligation has to be obeyed.") (emphasis in original).

[242] Statute, Art. 29(2)(e).

[243] Rule 58.

speciality and non-transfer of nationals, do not apply.[245] Under the rule of speciality, a person extradited shall not be proceeded against, sentenced, detained, re-extradited to a third state, or subjected to any other restriction of personal liberty in the territory of the requesting state for any offence committed before surrender other than an offence for which extradition was granted, unless the requested state consents.[246] The Argentine court appears to have invoked the rule of speciality when it ordered that Milan Lukić not be "charged, prosecuted or harassed for previous acts that are different from those constituting the crimes for which his surrender has been requested".[247]

112. As held by the Referral Bench in previous cases and confirmed by the Appeals Chamber, the initial transfer of an accused to the Tribunal does not amount to extradition.[248] The relationship between the requested and the requesting state in extradition law has "no counterpart in the arrangements relating to the International Tribunal".[249] Thus, when a state complies with its Article 29 duty to surrender an accused to the Tribunal, it may not place conditions on his transfer or on how the Tribunal conducts proceedings in relation to him.[250] The Tribunal may try the accused for charges constituting any of the crimes within its jurisdiction, notwithstanding conditions to the contrary formulated by the surrendering state.

113. Although the Argentine Decision itself contains no express limitation on the crimes for which Milan Lukić may be prosecuted before a Trial Chamber of the Tribunal, Argentina in its submissions states as follows: "[I]t is of interest to clarify that the Argentine [D]ecision must not be interpreted as a condition for exercising the powers of the ICTY. The said decision granted the unconditional surrender of Lukić to the ICTY for him to be tried *for the deeds mentioned in the indictment*".[251] This assertion may be understood as interpreting the decision as preventing trial for any crime other than the crimes with which Milan Lukić was charged in the Amended Indictment of

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[244] *See supra* text accompanying notes 81–97 (Section IV(B) of the present Decision).

[245] *Mejakić et al.* April 2006 Appeal Decision, *supra* note 133, para. 31 (footnotes removed):

> [A] State cannot impose conditions on the transfer of an accused, or invoke the rule of speciality or non-transfer concerning its nationals. The referral procedure envisaged in Rule 11 *bis* is implemented pursuant to [...] Security Council [R]esolution [1503 (2003)], which, under the United Nations Charter, overrides any state's extradition requirements under treaty or national law.

See also Ljubičić Appeal Decision, *supra* note 163, para. 8; *Prosecutor v. Mejakić, Gruban, Fuštar, and Knežević*, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* November 2005 Appeal Decision"), para. 39; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, paras 31–32.

[246] *See* Model Treaty on Extradition, UN Doc. A/RES/45/116 (1990), Art. 14(1); European Convention on Extradition, *entered into force* 18 April 1960, 359 U.N.T.S. 273, Art. 14(1).

[247] Argentine Decision, *supra* note 207, p. 9.

[248] *See supra* note 246.

[249] *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.

[250] *Mejakić et al.* April 2006 Appeal Decision, *supra* note 133, para. 31; *Mejakić et al.* November 2005 Appeal Decision, *supra* note 245, para. 39; *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 31.

[251] Second Argentina Submissions, *supra* note 35, p. 2 (emphasis added). *Accord* First Argentina Submissions, *supra* note 34, p. 2 ("It should be stressed that the Argentine Decision granted the transfer and surrender of Lukić to the ICTY in order for him to be tried there for the crimes with which he was charged in the indictment.").

12 July 2001, which was the version under consideration by the Argentine court when it took its decision.[252] As mentioned above, the rule of speciality does not apply to a state's surrender of an accused to the Tribunal under Article 29 of the Statute.[253] Therefore, to the extent that the Argentine Decision may be understood as setting forth such a condition, the Referral Bench cannot give it effect. Argentina is not in a position to prevent the Tribunal from trying Milan Lukić for the charges in the Second Amended Indictment of 27 February 2006—which differ in some respects from those in the Amended Indictment[254]—or indeed for any other criminal conduct over which it has jurisdiction.

(b) Impact on the Tribunal's Ability to Refer the Case of Milan Lukić

114. Another corollary of the Tribunal's primacy over national courts and the obligation of the states to cooperate with the Tribunal is that the prohibition to re-extradite a person under extradition law is inapplicable to the Rule 11 *bis* referral process. The transfer of an accused to the state of referral pursuant to Rule 11 *bis*(D)(i) is not the result of an agreement between a state and the Tribunal or the decision of a national authority to grant a request for extradition.[255] The Tribunal's power to refer the trial of low- and mid-level accused to national authorities derives from Article 9 of the Statute and is supported by two resolutions issued by the Security Council pursuant to its Chapter VII authority.[256] That body has actively endorsed the referral process as an essential mechanism for achieving the Tribunal's completion strategy.[257] Rule 11 *bis* itself sets forth two express criteria the Referral Bench must take into account before it may sanction the referral of a case to national authorities: the Bench must be satisfied that the accused will receive a fair trial, and that the death penalty will not be imposed or carried out.[258] The Bench retains the power to revoke any referral previously ordered in any circumstances which concern it, including where either of

[252] *See supra* text accompanying notes 213–215.
[253] *See supra* text accompanying note 246.
[254] For example, the Second Amended Indictment charges Milan Lukić and Sredoje Lukić with two new counts of extermination as a crime against humanity for their alleged roles in the burning of houses on Pionirska Street in Višegrad and in the settlement of Bikavac, resulting in the death of approximately 140 persons. Extermination was not charged for these incidents in the Amended Indictment. *Compare* Second Amended Indictment, *supra* note 13, paras 7–11 & pp. 5–7 (counts 8–17) *with* Amended Indictment, *supra* note 11, paras 16–22 & pp. 5–6 (counts 10–17).
[255] *Mejakić et al.* Rule 11 *bis* Decision, *supra* note 62, para. 31.
[256] *See* Security Council Resolution 1503, *supra* note 4; Security Council Resolution 1534, *supra* note 76. *See also Stanković* Appeal Decision, *supra* note 129, paras 14–15.
[257] *See* Security Council Resolution 1503, *supra* note 4, preambular para. 7 (reaffirming the Tribunal's plan to "transfer[] cases involving those who may not [be the most responsible for crimes within its jurisdiction] to competent national jurisdictions, as appropriate"); *ibid.*, preambular para. 11 (noting that an "essential prerequisite" to fulfilling the Tribunal's completion strategy is the referral of lower- to intermediate-ranked accused to the war-crimes chamber of the State Court of Bosnia and Herzegovina); Security Council Resolution 1534, *supra* note 76, paras 4–5 (calling upon the Prosecutor to review the Tribunal's case load with a view to determining which cases should be transferred to competent national jurisdictions, and calling on the Tribunal to ensure that indictments "concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal").

these conditions may be placed in jeopardy by the state of referral.[259] An individual state surrendering an accused to the Tribunal may not place additional restrictions on this process, or on the Tribunal's freedom to take such action as it deems necessary and proper with respect to it. Furthermore, when the Referral Bench considers a request for the referral of an accused surrendered to the Tribunal by a state, it need not seek the authorisation of that state before it orders referral.

115. The Referral Bench recalls that the Argentine Decision "prohibit[s] that [Milan Lukić] be sent, without prior authorisation of the State of Argentina, to another hereby unauthorized place in order to be charged, prosecuted or harassed for previous acts that are different from those constituting the crimes for which his surrender has been requested."[260] Insofar as this clause may be understood as requiring Argentina's prior authorisation before the Bench may refer Milan Lukić to the authorities of Bosnia and Herzegovina at all, it encroaches on the Bench's mandate. Moreover, this clause cannot be given effect inasmuch as it requires Argentina's prior authorisation before the Bench allows the Bosnian authorities to try Milan Lukić for crimes within the Tribunal's jurisdiction that are different from those in the Amended Indictment of 12 July 2001. In the following sections, the Referral Bench will elucidate the reasoning that has led it to this latter conclusion.

(c) The Ability of the State of Referral to Try Milan Lukić

116. The jurisdiction of the Tribunal under its Statute to try persons for grave breaches of the Geneva Conventions of 1949 (Article 2 of the Statute), violations of the laws or customs of war (Article 3 of the Statute), genocide (Article 4 of the Statute), and crimes against humanity (Article 5) is concurrent with the jurisdiction of national courts, as provided in Article 9(1) of the Statute. Yet as discussed above,[261] the Tribunal has primacy over national courts. Where the Tribunal refers a case to the authorities of a state for trial by a national court, that court exercises its own jurisdiction in trying the case, and not jurisdiction delegated to it by the Tribunal. By referring the case, the Tribunal refrains from exercising its concurrent, but primary, jurisdiction. The Tribunal is not, however, divested of its jurisdiction to try the case through such referral. On the contrary, its primacy remains and may be exercised by formally requesting that the national authorities defer to the competence of the Tribunal (Rules 10 and 11) and return the accused to the seat of the Tribunal (Rules 11 *bis*(F) and (G)).

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[258] *See* Rule 11 *bis*(B).
[259] *See* Rule 11 *bis*(F).
[260] Argentine Decision, *supra* note 207, p. 9.
[261] *See supra* para. 108.

117. The Statute and related resolutions of the Security Council issued pursuant to the Charter of the United Nations, along with the Tribunal's Rules seeking to give effect to those resolutions,[262] are less than explicit as to the scope of the national jurisdiction that is intended to be exercised by a state to which the Tribunal refers a case pursuant to Rule 11 *bis*. The referral scheme of the Security Council and Rule 11 *bis* ("referral scheme") necessarily imply that the state should exercise its national jurisdiction to try the referred case. In a situation where a citizen of a state has been transferred by the state to the Tribunal, and the case of that citizen is then referred back to that same state for trial under Rule 11 *bis*, laws relating to the exercise of criminal jurisdiction would appear to offer no obstacle to the state also being able to prosecute the citizen for other crimes,[263] even though they may be outside the jurisdiction of the Tribunal. As discussed above, this position is of course subject to any subsequent formal request of the Tribunal for deferral of the trial of the citizen on charges within the jurisdiction of this Tribunal, including the referred case, and his return to the Tribunal; this process would usually interrupt any exercise of national jurisdiction by the courts of the state in respect of offences outside the jurisdiction of this Tribunal.

118. It cannot be said, however, that the position is so clear in other cases. For example, where a citizen of State A has been transferred by State A to this Tribunal, and his case is then referred to State B for trial under Rule 11 *bis*, despite any opposition of State A, the nature and object of the referral scheme would suggest that the scope of the national jurisdiction which the Security Council contemplated that State B could exercise should be limited to the trial of the case referred and the trial of any other crimes within the jurisdiction of this Tribunal. This is because the intended object of the referral scheme is only to enable the trial by appropriate courts of those types of international crimes that are within the jurisdiction of this Tribunal. Indeed this Tribunal was established solely to better enable the prosecution of such offences. On that view, the purpose of the referral scheme is necessarily limited to offences that are triable by this Tribunal—that is, that are within the jurisdiction of this Tribunal.

119. The Referral Bench is well aware that a narrower position might possibly be taken, by which the referral scheme can be seen as intended, in situations such as that postulated, to enable no more than the trial of the actual case referred under Rule 11 *bis*. While this position is arguable, the Referral Bench is persuaded that it takes too narrow a view of the intention of the Statute

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[262] *See especially* Security Council Resolution 1503, *supra* note 4; Security Council Resolution 1534, *supra* note 76.

[263] This has occurred in at least two cases referred thus far under Rule 11 *bis*—*Stanković* and *Janković*—in which the Prosecutor's Office of Bosnia and Herzegovina added new charges amounting to crimes against humanity for incidents occurring in Bosnia in 1992 and 1993. *See Prosecutor v. Stanković*, Case No. KT-RZ-45/05, Indictment, 2 December 2005, paras 5–6 (Prosecutor's Office of Bosnia and Herzegovina adding new allegations of rapes in Foča as underlying offences of crimes against humanity); *Prosecutor v. Janković*, Case No. KT-RZ-163/05, Indictment, 14 February 2006, paras 1–2, 4, 8 (Prosecutor's Office of Bosnia and Herzegovina adding new charges of rape,

promulgated by the Security Council, that body's resolutions, and the Tribunal's Rules. These indicate to the Bench an intention to make better provision for the trial of those international crimes that were committed in the territory of the former Yugoslavia since 1991 and which are the subject of the express conferral of primacy of jurisdiction on this Tribunal by Articles 1 and 9 of the Statute. In rejecting the more narrow approach, the Referral Bench is also mindful that the Security Council only vested the Tribunal with jurisdiction over crimes which are beyond any doubt part of customary international law.[264] Moreover, the monitoring system provided for by Rule 11 *bis*, combined with the Referral Bench's power to revoke an order for referral, are significant instruments contributing to the fairness of the proceedings in the state of referral on the entirety of the charges against the accused.

120. Yet in this Decision, the Referral Bench is dealing with an Accused whose situation differs from each of the scenarios outlined in the reasoning above. Milan Lukić appears to be a citizen of Bosnia and Herzegovina, where he was born and lived until recent years. He then fled from there and was arrested in Argentina pursuant to a warrant of this Tribunal, and was transferred from Argentina to the Tribunal. It is only by virtue of the Rule 11 *bis* referral of this case to the authorities of Bosnia and Herzegovina that Milan Lukić will come to be physically within the territory of that state, and this transfer has only been made possible by virtue of an order of this Tribunal for the purposes of the trial of crimes within the jurisdiction of the Tribunal. In the unique circumstances of this case, however, Argentina appears to have placed a restriction on the ability of other jurisdictions to try him "for previous acts that are different from those constituting the crimes for which his surrender has been requested."[265] In light of all these factors and having particular regard to this order in the Argentine Decision, the capacity of Bosnia and Herzegovina to exercise its national jurisdiction in respect of Milan Lukić for crimes not within the jurisdiction of the Tribunal may be inhibited, even though he may still be a citizen of that state.

121. The law of Bosnia and Herzegovina enables other proceedings under its national jurisdiction where a case is referred pursuant to Rule 11 *bis*.[266] While these laws are no doubt of value in many situations, they cannot prevail to extend Bosnia and Herzegovina's capacity to exercise its national jurisdiction in respect of a person referred to that state by the Tribunal in a situation such as the present, if they are inconsistent with the international legal obligations of Bosnia and Herzegovina.

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beating, killing, and enslavement as crimes against humanity). *See also Stanković* Rule 11 *bis* Decision, *supra* note 60; *Janković* Rule 11 *bis* Decision, *supra* note 62.

[264] *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), para. 34.

[265] Argentine Decision, *supra* note 207, p. 9.

[266] BiH Law on Transfer of Cases, *supra* note 157, Art. 2.

122. The Referral Bench recalls once again the key language of the Argentine Decision: it is "prohibit[ed] that [Milan Lukić] be sent, without prior authorisation of the State of Argentina, to another hereby unauthorized place in order to be charged, prosecuted or harassed for previous acts that are different from those constituting the crimes for which his surrender has been requested."[267] Taking all the above considerations into account in light of this language, the Referral Bench arrives at two conclusions. First, to the extent the Argentine Decision might be understood as having the effect of restricting Bosnia and Herzegovina's ability to try Milan Lukić for criminal conduct over which the Tribunal would also have jurisdiction, including where such conduct differs from that charged in the Amended Indictment of 12 July 2001, it cannot be given effect. Second, insofar as the Argentine Decision may be seen to be a valid exercise of Argentina's capacity, as a sovereign co-equal state, in the present circumstances, to place restrictions on the prosecution of Milan Lukić in Bosnia and Herzegovina for crimes over which the Tribunal does not have jurisdiction, it would appear necessary for Bosnia and Herzegovina to enter into diplomatic discussions with Argentina before acting to try Milan Lukić for crimes over which the Tribunal would not have jurisdiction.[268]

5. Order for Extradition of Milan Lukić to Serbia

123. As noted above,[269] the Argentine court has also made an order for the extradition of Milan Lukić to Serbia to stand trial on different offences committed in what is now Bosnia and Herzegovina, but has made that extradition subject to the completion of his trial before this Tribunal.[270] Although it is left unclear, this deferral may well have been intended to extend until he had also completed any appeal processes and served any punishment that might be imposed. Whatever was intended, such is the effect of this Tribunal's primacy of jurisdiction. In this respect, the Referral Bench notes that it is contended before us that Bosnia and Herzegovina could and should have sought the extradition of Milan Lukić from Argentina, as did Serbia, if it wished to exercise its national jurisdiction against him.[271] The Bench observes, however, that Bosnia and Herzegovina may well have acted as it did because it recognised that this Tribunal had primacy of jurisdiction and that any attempt by it to secure extradition would not prevail against the surrender of Milan Lukić to this Tribunal.

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[267] Argentine Decision, *supra* note 207, p. 9.
[268] *Cf. Stanković* Appeal Decision, *supra* note 129, para. 51 (Appeals Chamber holding that "judges have the inherent authority to render orders that are reasonably related to the task before them and that derive[] automatically from the exercise of the judicial function", and that this principle "is no less true under Rule 11 *bis*") (internal quotation marks removed).
[269] *See supra* text accompanying note 209.
[270] Argentine Decision, *supra* note 207, p. 9.
[271] Milan Lukić Response, *supra* note 22, para. 54; Motion Hearing, T. 69 (15 September 2006).

124. While the Argentine Decision contains the order granting extradition and the reasons of the court, it does not deal with issues such as how, and under whose responsibility, Milan Lukić is to be transferred to Serbia.[272] It is not clear whether the court contemplated that Argentina should be responsible for this task, or Serbia, or this Tribunal. Whatever may have been contemplated, the matter can now be expected to be further complicated by the referral of this case to the authorities of Bosnia and Herzegovina, an event not anticipated in the Argentine Decision.

125. The referral of this case to those authorities will, therefore, give rise to a number of issues which may affect the extradition to Serbia granted by Argentina. These are matters for resolution by the interested states and parties, and the Referral Bench is confident that they will find the appropriate diplomatic and procedural avenues to solve the matters.

6. Conclusions

126. By way of a summary of its views on these complex issues, the Referral Bench reiterates the following matters:

(a) the Argentine Decision has no effect insofar as it may purport to restrict the international crimes for which Milan Lukić may be prosecuted before this Tribunal;

(b) the Argentine Decision has no effect insofar as it may purport to require this Tribunal to receive prior authorisation from Argentina before it may refer the case against Milan Lukić to the authorities of Bosnia and Herzegovina for trial;

(c) by virtue of the referral of the case against Milan Lukić to Bosnia and Herzegovina by this Tribunal, the relevant authorities of Bosnia and Herzegovina may try Milan Lukić for any international crime that is within the jurisdiction of this Tribunal without seeking Argentina's prior authorisation; and

(d) it appears necessary for Bosnia and Herzegovina to enter into diplomatic discussions with Argentina before acting to try Milan Lukić for crimes over which the Tribunal would not have jurisdiction.

The Registry has already transmitted both the Spanish original and the English translation of the Argentine Decision to the authorities of Bosnia and Herzegovina.[273] Consequently, there is no need to order its retransmission, as has been requested by Argentina in one of its written submissions.[274]

V. CONCLUSION

127. Having thoroughly considered the matters raised in relation to the Motion for Referral, in particular the gravity of the criminal conduct alleged against the Accused in the Second Amended

[272] *See generally* Argentine Decision, *supra* note 207.
[273] July 2006 Registry Submission, *supra* note 207 (containing the Argentine Decision in an annex and listing Bosnia and Herzegovina among the submission's recipients on the cover page).
[274] Second Argentina Submissions, *supra* note 35, p. 2.

Indictment and the Accused's alleged level of responsibility, and being satisfied on the information presently available that they will receive a fair trial and that the death penalty will not be imposed or carried out, the Referral Bench concludes that referral of the case of *Prosecutor v. Milan Lukić and Sredoje Lukić* to the authorities of Bosnia and Herzegovina should be ordered.

VI. DISPOSITION

128. For the foregoing reasons, pursuant to Rules 11 *bis* and 54 of the Rules, the Referral Bench grants the Motion for Referral and orders as follows:

a. The case of *Prosecutor v. Milan Lukić and Sredoje Lukić* is hereby referred to the authorities of Bosnia and Herzegovina, so that those authorities should forthwith refer the case to the appropriate national court for trial within Bosnia and Herzegovina.

b. The referral of this case shall not have the effect of revoking the previous orders and decisions of the Tribunal in this case. It will be for the appropriate court or the competent national authorities of Bosnia and Herzegovina to determine whether further or different provision should be made for the purposes of the trial of this case in Bosnia and Herzegovina.

c. The Registrar shall arrange for the transport of Milan Lukić and Sredoje Lukić, along with their personal belongings, within 30 days of this Decision becoming final, to Bosnia and Herzegovina in accordance with the procedures applicable to transfer of convicted persons to states for service of sentence.

d. The Prosecution shall hand over to the Prosecutor's Office of Bosnia and Herzegovina, as soon as possible after this Decision has become final and no later than the date on which the Accused is transferred, the material supporting the Second Amended Indictment. It shall hand over all other appropriate evidentiary material no later than 30 days after the date on which the Accused is transferred.

e. The Prosecution shall continue its efforts to ensure the monitoring and reporting on the proceedings of this case before the competent national court in Bosnia and Herzegovina.

f. The Prosecution shall file an initial report to the Referral Bench on the progress made by the Prosecutor's Office of Bosnia and Herzegovina in this case six weeks after transfer of the evidentiary material. Thereafter, the Prosecution shall file a report every three months. These reports shall include information on the course of the proceedings before the competent national court after commencement of trial, and shall comprise or include any reports received by the Prosecution from the international organisation monitoring or reporting on the proceedings.

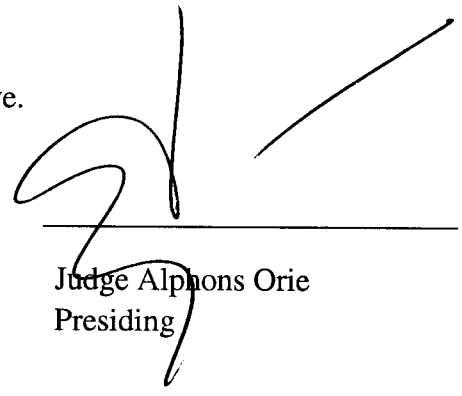
g. The existing protective measures for victims and witness in this case shall remain in force. These measures are detailed in the confidential Annex A and Annex B attached to this Decision.

129. The Referral Bench further orders as follows, pursuant to Rules 54 and 127 of the Rules:

a. The January 2007 Motion for Leave to File a Supplemental Response is denied.

b. The March 2007 Motion for Leave to File a Supplemental Response is denied.

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



Judge Alphons Orie
Presiding

Dated this fifth day of April 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX B

IT-98-32/1-PT
~~D83 - D'97~~
~~02 NOVEMBER 2005~~

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UNITED NATIONS

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

Case No.: IT-98-32/1-PT
Date: 2 November 2005
Original: English

IN THE TRIAL CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: **Mr. Hans Holthuis**

Decision of: **2 November 2005**

THE PROSECUTOR

v.

Milan LUKIĆ &
Sredoje LUKIĆ

DECISION ON PROSECUTOR'S MOTION FOR ORDER ON PROTECTIVE MEASURES

Office of the Prosecutor:
Mr. Mark Harmon

Counsel for the Accused:
Mr. Stevo Bezbradica

THIS TRIAL 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 (the "Tribunal") is seized of a motion from the Office of the Prosecutor ("Prosecution") concerning protective measures for victims and witnesses, and hereby renders a decision thereon.

A. Submissions of the Parties

1. On 5 October 2005, the Prosecution filed a partly confidential, partly *ex parte* "Prosecutor's Motion Pursuant to Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain Inforce [*sic*] and Vary Protective Measures" ("Motion"). In its Motion, the Prosecution requests three forms of relief:

> (a) an order from the Trial Chamber that general and specific protective measures granted by Trial Chamber II in the case *Prosecutor v. Mitar Vasiljević* ("*Vasiljević* case") remain in force;
>
> (b) that these protective measures be extended in their entirety to cover the accused Milan Lukić and Sredoje Lukić; and
>
> (c) that the Trial Chamber note the Prosecution's right, at any stage of proceedings in this case, to file any further motion requesting protective measures for additional victims and witnesses, and to file any further motion seeking to rescind, vary or augment existing protective measures.

The protective measures that the Prosecution seeks to have applied in the present case were granted by Trial Chamber II in the *Vasiljević* case in a Decision of 8 September 2000,[1] an Order of 26 September 2000,[2] and an Order of 24 July 2001.[3]

2. On 17 October 2005, the Defence for Sredoje Lukić ("Defence") filed a "Defence Counsel's Response to Prosecutor's Motion purusant [*sic*] Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain in Force and Vary Protective Measures" ("Response"). In its Response, the Defence agrees that the protective measures granted by Trial Chamber II in the *Vasiljević* case in its Decision of 8 September and Order of 26 September 2000 should be applied in the present case. The Defence does not, however, agree that the measures granted in the Order of 24 July 2001

[1] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Decision on Motion by Prosecution for Protective Measures, 8 September 2000.
[2] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Order, 26 September 2000.

should remain in force and be extended to Sredoje Lukić.[4] In particular, these measures are that certain witnesses identified by pseudonym should be referred to at all times by their pseudonym, and that these witnesses identified by pseudonym should be shielded from public view when testifying before the International Tribunal. The Defence argues that the Prosecution has not demonstrated the exceptional circumstances required to justify the non-disclosure of the identities of these witnesses.[5] The Defence further argues that the trial of Sredoje Lukić cannot be fair if the accused cannot see the statements of witnesses against him with knowledge of their identity.[6] The Defence concludes that the Trial Chamber should order the Prosecution to comply with its obligation under Rule 66(A) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to supply each of the accused with unredacted copies of witness statements supporting the indictment.[7]

3. On 25 October the Prosecution filed a "Prosecutor's Application for Leave to Reply and Reply to the Defence Counsel's Response to Prosecutor's Motion pursuant to Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain in Force and Vary Protective Measures" ("Reply"). The Reply asserts that the Response "contains misconceptions as to the effect of the several orders for protective measures" and that, as a result of Rule 75(F), the protective measures contained in the Order of 24 July 2001 remain in force in the present case.[8] The Prosecution argues that the Order of 24 July 2001 is directed at the protection of witnesses *vis-à-vis* the public, and does not preclude disclosure to the Defence of their identities.[9] It further clarifies that it has disclosed to the Defence material supporting the indictment in the present case, but that this material has been redacted to remove the names and identifying information of witnesses.[10] The Prosecution seeks, by its Motion, an order from the Trial Chamber putting in place the same protective measures as were contained in the Order of 8 September 2000, before it will disclose to the Defence the material supporting the indictment in unredacted form.[11]

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[3] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Order on Protective Measures for Witnesses at Trial, 24 July 2001.
[4] Response at para. 7.
[5] Response at para. 10.
[6] Response at para. 18.
[7] Response at para. 19.
[8] Reply at paras. 2 and 4.
[9] Reply at para. 5.
[10] Reply at para. 7.

B. Discussion

4. The submissions of the Prosecution and the Defence demonstrate some confusion over the protective measures granted in the *Vasiljević* case and the effect of Rule 75(F) and (G). Indeed, the Motion itself is not sufficiently specific as to the exact nature of the protective measures that the Prosecution seeks to have applied in the present case, generating the "misconception" on the part of the Defence, which it asserts in its Reply.

5. As noted above, Trial Chamber II granted certain protective measures in the *Vasiljević* case in the following decisions:

(a) In its Decision On Motion by Prosecution for Protective Measures, of 8 September 2000, the Trial Chamber ordered that the Prosecution should provide the defence in that case with copies in unredacted form of material supporting the indictment, pursuant to Rule 66(A)(i) within a certain time-period (several months later than the 30-day time-limit specified in Rule 66(A)(i)), provided that, should the Prosecution file a motion for protective measures with regard to particular witnesses or particular statements, it need not supply unredacted copies of that material until the motion for protective measures is disposed of. The Trial Chamber further ordered the defence in that case, *inter alia*, not to disclose to the public the names, identifying information or whereabouts of any witnesses, or potential witnesses, identified to it by the Prosecution, or any evidence or written statement of a witness or potential witness;

(b) In its Order of 26 September 2000, the Trial Chamber varied the Decision of 8 September to the extent that the order to disclose material supporting the indictment to the defence in that case in unredacted form was stayed until further order;

(c) In its Order on Protective Measures for Witnesses at Trial, issued on 24 July 2001, the Trial Chamber granted a motion from the Prosecution that certain witnesses should be referred to at all times in the course of their testimony, or whenever referred to in the course of proceedings, by pseudonym. The Trial Chamber also ordered that these witnesses be shielded from public view when testifying before the International Tribunal.

6. It is therefore clear that Trial Chamber II ordered two forms of protective measures in the *Vasiljević* case. One of these was the protection of witnesses from public identification. The other was the delayed disclosure of unredacted material supporting the indictment to the defence in that

[11] Reply at para. 10.

case, such that the identities of certain witnesses whose statements were part of the material supporting the indictment was not made known to the defence until a later date.

7. Rule 75(F) provides that:

> Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
> (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
> (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

By virtue of this provision, the Trial Chamber finds that any protective measures granted in the *Vasiljević* case automatically continue to have effect in the present case, insofar as those protective measures relate to the protection of witnesses from public identification. The Prosecution's Motion is unnecessary unless it seeks in some way to rescind, vary, or augment these protective measures, triggering the application of Rule 75(G). The majority of the Trial Chamber, Judge Kwon dissenting, also finds that the delayed disclosure of unredacted Rule 66(A)(i) material is also a form of protective measure to which Rule 75(F) applies, and the Prosecution's Motion is similarly unnecessary. [12]

8. The Prosecution seems to take the view that by seeking to have the protective measures granted in the *Vasiljević* case extended to the present case, this constitutes a variation of their terms. However, the effect of the term "*mutatis mutandis*" in Rule 75(F)(i) is to render a motion for variation unnecessary when the only variation sought is to ensure that the substance of the protective measures granted in one case continues to apply in another case.

9. The appropriate action for the Prosecution to have taken would have been to disclose redacted Rule 66(A)(i) material to the Defence, while informing it of the existence of the protective

[12] Judge Kwon dissenting on the application of Rule 75(F) to delayed disclosure of Rule 66(A) material. *See* "Dissenting Opinion of Judge O-Gon Kwon", appended to *Prosecutor v. Lazarević & Lukić*, Case No. IT-03-70-PT, "Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures," 19 May 2005.

measures ordered in the *Vasiljević* case and reminding it of their continued application. However, it would appear from the Reply that the Prosecution has disclosed the Rule 66(A)(i) material to the Defence in a redacted form, but that it is willing to provide all of that material in unredacted form once the protective measures contained in the 8 September 2000 Order are in place. Given that these protective measures are automatically carried over to the present case by virtue of Rule 75(F), it would therefore appear that the delayed disclosure of Rule 66(A)(i) material in unredacted form was unnecessary.

10. The Trial Chamber therefore finds that the first two forms of relief sought in the Motion are unnecessary insofar as they relate to the protection of witnesses from public identification, in that the protective measures granted in the *Vasiljević* case continue in effect in the present case, until such time as they are rescinded, varied or augmented. For the same reason, the majority of the Trial Chamber, Judge Kwon dissenting, also finds that the first two forms of relief sought in the Motion are unnecessary insofar as they relate to delayed disclosure of unredacted Rule 66(A)(i) material.[13] The Trial Chamber further notes that the Prosecution may file a motion at any time in the present proceedings requesting additional protective measures, or the rescission, variation or augmentation of existing protective measures, and that, therefore, the third form of relief sought in the Motion is also unnecessary.

11. For these reasons, pursuant to Rule 126 *bis* and Rule 54 of the Rules, the Trial Chamber **HEREBY UNANIMOUSLY**:

GRANTS LEAVE to the Prosecution to file its Reply;

REMINDS the Defence that it must comply with the directions contained in the Order issued by Trial Chamber II on 8 September 2000, in the *Vasiljević* case; and

DENIES the Motion insofar as it relates to measures protecting witnesses from public identification,

and also, **BY A MAJORITY**, Judge Kwon dissenting,[14]

DENIES the Motion insofar as it relates to delayed disclosure of Rule 66(A)(i) material.

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

Judge Robinson
Presiding

Done this second day of November 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

[13] *Ibid.*
[14] *Ibid.*