THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-96-23/2-PT

IN THE REFERRAL BENCH

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

Registrar: Mr Hans Holthuis

Date Filed: 3 May 2006

THE PROSECUTOR

v.

GOJKO JANKOVIĆ

PROSECUTOR'S SECOND PROGRESS REPORT

The Office of the Prosecutor

Ms. Carla Del Ponte

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-96-23/2-PT

THE PROSECUTOR

v.

GOJKO JANKOVIĆ

PROSECUTOR'S SECOND PROGRESS REPORT

A. INTRODUCTION

1. Pursuant to the Decision on Referral of Case Under Rule 11 *bis* of 22 July 2005 ("Decision on Referral"), the Prosecutor hereby files her second progress report in this case.

2. As stated in the Prosecution's request for an extension of time to file the second progress report,[1] the Decision on Referral ordered:

> the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include the reports of the international organisation monitoring or reporting on the proceedings pursuant to this Decision provided to the Prosecutor.[2]

3. The Prosecutor filed an Initial Progress Report on 18 January 2006.[3]

4. Following the agreement between the Chairman in Office of the Organisation for Security and Co-operation in Europe Mission to Bosnia and Herzegovina (the "OSCE") and the ICTY Prosecutor, the Prosecutor received OSCE's first report on 25

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1 Prosecutor's Request for an Extension of Time to File Second Progress Report, 18 April 2006.

2 *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005, at p. 34.

3 See *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Prosecutor's Initial Progress Report, 18 January 2006.

April 2006.[4] The Report outlines the main findings from trial monitoring activities to date in the *Janković* case, from the perspective of international human rights standards.[5]

5. The OSCE summarises the proceedings in the *Janković* case to date as follows:

> Defendant Gojko Janković was transferred to the BiH Authorities on 8 December 2005. On the same date, a hearing on custody was held pursuant to the BiH Prosecutor's Office motion for custody. The Preliminary Hearing Judge decided to recognise that the ICTY order on detention remained in force until the acceptance of the adapted indictment, and determined that the deadline for submitting the adapted indictment was 65 days. On 14 February 2006, the Prosecution issued the adapted indictment, which contained four adapted counts, four new ones, and a proposal for custody. The charges allege the commission of Crimes against Humanity on the basis of individual and command responsibility. On 20 February, the Preliminary Hearing Judge accepted as adapted and confirmed the respective counts in the indictment, and ordered the Accused detained following a hearing. On 16 March, the Accused entered a plea of not guilty on all counts of the indictment, while his Counsel stated that the Defence had no intention of filing preliminary motions. The main trial is scheduled to commence on 21 April 2006.[6]

6. The OSCE's Report reiterates its recommendation from the *Stanković* report that the Law on Transfer[7] be amended. The OSCE has identified certain procedural issues which relate primarily to the application of international human rights standards. The Prosecutor considers that these issues do not appear to affect Janković's right to a fair trial.[8]

7. The OSCE "intends to share this report with the local government authorities and actors in the justice system, discuss its findings, and follow up on the

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4 OSCE First Report, Case of Defendant Gojko Janković, Transferred to the State Court pursuant to Rule 11*bis*, April 2006 (hereafter "Report").

5 Report, p. 1.

6 Report, p. 1, para. 2.

7 Law on Transfer of Cases from the ICTY to the Prosecutor's Office of Bosnia and Herzegovina and On the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH ("Law on Transfer").

8 *See* Decision on Referral, para. 62.

implementation of its recommendations."[9] The Prosecutor intends discussing issues raised in the report with the OSCE and the BiH State Prosecutor.

8. The OSCE repeats its recommendation from the *Stanković* report that, in future cases, the ICTY Office of the Prosecutor ("OTP") completes the transfer of the case-file to the BiH Prosecutor's Office prior the transfer of an accused.[10] The OSCE also concludes that the OTP has taken into account this recommendation and that a solution has been agreed upon, i.e., identifying and transferring high priority material to the BiH Prosecutor's Office prior to the arrival of the accused. Thus, the BiH Prosecutors Office will have sufficient time to familiarise themselves with the case prior to the initial hearing before the Sate Court.

9. The trial commenced on 21 April 2006 with the Prosecution's opening statement. The trial has been adjourned until 16 May 2006, when the first witness will be called to give evidence.

10. Attached to this report are the following annexes:

(i) Annex A: a copy of the OSCE's Report; and,

(ii) Annex B: a copy of the BiH Prosecutor's Office adapted indictment against Janković filed 14 February 2006, accepted as adapted and confirmed on 20 February 2005.

Word count: 821.

Carla Del Ponte
Prosecutor

Dated this third day of May 2006
At The Hague
The Netherlands

[9] Report, p. 1, last para.
[10] Report, p. 16.

ANNEX A

OSCE

Organization for Security and Co-operation in Europe

Mission to Bosnia and Herzegovina

To:	Mme Carla Del Ponte Prosecutor International Criminal Tribunal for the former Yugoslavia Fax: 00 31 70 512 5358	From:	Ambassador Douglas Davidson Head of Mission
Re:	First Report on the case of defendant Gojko Jankovic transferred to the State Court of BiH pursuant to Rule 11 *bis*	Pages:	24 including this one
CC:	H.E. Karel De Gucht OSCE Chairman in Office Minister of Foreign Affairs of the Kingdom of Belgium Fax: 00 431 505 0388	Date:	25 April 2006

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OSCE

Organization for Security and Co-operation in Europe
Mission to Bosnia and Herzegovina

First Report

Case of Defendant Gojko Janković

Transferred to the State Court pursuant to Rule 11*bis*

April 2006

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EXECUTIVE SUMMARY - INTRODUCTION

The case of Gojko Janković (hereinafter also "Defendant" or "Accused") is the second case transferred from the ICTY to the BiH State Court, pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence. This constitutes the first Report in these criminal proceedings, outlining the main monitoring findings until present from the perspective of international human rights standards. These findings are presented in Part I, while Part II consists of summaries of the principal hearings, decisions, and submissions.

Defendant Gojko Janković was transferred to the BiH Authorities on 8 December 2005. On the same date, a hearing on custody was held pursuant to the BiH Prosecutor's Office motion for custody. The Preliminary Hearing Judge decided to recognise that the ICTY order on detention remained in force until the acceptance of the adapted indictment, and determined that the deadline for submitting the adapted indictment was 65 days. On 14 February 2006, the Prosecution issued the adapted indictment, which contained four adapted counts, four new ones, and a proposal for custody. The charges allege the commission of Crimes against Humanity on the basis of individual and command responsibility. On 20 February, the Preliminary Hearing Judge accepted as adapted and confirmed the respective counts in the indictment, and ordered the Accused detained following a hearing. On 16 March, the Accused entered a plea of not guilty on all counts of the indictment, while his Counsel stated that the Defence had no intention of filing preliminary motions. The main trial is scheduled to commence on 21 April 2006.

In Sections I to III of Part I, this Report reiterates three concerns which were included in the First OSCE Report in the case of Radovan Stanković (hereinafter "[First] Stanković Report"), but is limited to examples from the Janković case. Therefore, in Section I, the OSCE reiterates its findings that the Law on Transfer and the approach the State Court has taken, particularly in connection to pre-trial custody during the pre-adaptation period, lacked foreseeability also in these proceedings. Section II analyses the approach of the State Court to recognise the primacy of the ICTY detention order, concluding that, for the pre-adaptation period, the right of the Defendant to have his custody reviewed by a "court" was breached. Section III considers the fact that the Appellate Panel does not appear to have properly reviewed the arguments of the Defence on appeal according to human rights standards. Furthermore, Section IV assesses the argument of the Defence upon appeal that the Defendant was not given adequate time to prepare his case for the initial hearing on custody. International case law suggests that when such request is not made in a timely fashion, the responsibility does not lie with the judicial authorities, but rather with the defence. Lastly, Section V assesses the justification of the Court in the Janković case when basing his detention on the ground of protecting public and property security. It additionally examines the wording of the relevant provision and its application beyond the specific Rule 11*bis* case. The Mission concludes that the use of this ground for custody is not in compliance with international human rights standards.

At the end of Part I, the OSCE formulates certain recommendations to the legislative authorities and the actors in the justice system. Most of these proposals were first included in the Stanković Report. The recommendation to the ICTY Prosecutor's Office, to complete the transfer of the case-files before that of Rule 11*bis* defendants, is repeated. Nevertheless, the Mission notes the positive response that this recommendation has received by the ICTY Prosecutor's Office.

In its endeavour to present constructive analysis and criticism aimed at making the proceedings more compliant with international standards, the Mission intends to share this Report with the domestic authorities, discuss its findings, and follow-up the implementation of its recommendations.

PART I: ASSESSMENT OF THE PROCEDURE IN RELATION TO HUMAN RIGHTS STANDARDS

I) ASSESSMENT OF THE FORESEEABILITY OF LAW ON TRANSFER AND THE STATE COURT'S PRACTICE IN RELATION TO ARTICLE 5 ECHR

The OSCE reiterates its concerns phrased in the First Stanković Report that certain provisions of the Law on Transfer, and the manner in which this Law and its omissions have been interpreted by the State Court, may not be considered as "law" in the sense envisaged by human rights standards, since they lack the element of foreseeability. Similarly unforeseeable is the practice the State Court has adopted following the interpretation of the provisions and gaps in the Law on Transfer. These concerns relate mainly to provisions regarding the procedure for adapting the ICTY indictment and that for reviewing pre-trial custody during the pre-adaptation period.[1] This lack of legal precision persisted in the case of the Defendant Janković. The relevant legal standards are repeated below, as well as certain examples from the Janković case.

Among the criteria that the European Court of Human Rights (ECtHR) considers in establishing whether a rule is a "law" are its accessibility and "foreseeability." More specifically, the ECtHR has found that, apart from the necessity to be accessible, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.[2] Where deprivation of liberty is concerned, the ECtHR has stressed that it is particularly important that the general principle of legal certainty is satisfied. Therefore it is essential that the conditions for pre-trial detention under domestic law be clearly defined and that the (domestic) law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the European Convention on Human Rights (ECHR). According to the ECtHR, this standard requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[3]

As outlined in more detail in the Stanković Report, the Law on Transfer fails to regulate clearly a number of issues relating to the nature of the procedure for adapting the ICTY indictment, as well as to the procedure for ordering custody during this adaptation period. More specifically, this Law does not clarify which actions the BiH Prosecutor's Office needs to take in order to adapt the indictment: namely, is it restricted to converting the charges, the form of liability, and format of the ICTY indictment to the ones corresponding to domestic law, or is it required/allowed to also conduct further investigating actions into transferred evidence or new evidence pertaining to the ICTY charges?[4] This

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[1] In the Radovan Stanković case, there was also confusion as to whether the defendant could enter a plea in connection to the adapted charges, in addition to the new charges, in the BiH Prosecutor's Office indictment. This issue did not appear in the case of Gojko Janković, who entered a plea on all charges, both adapted and new; this was also in accordance with the relevant OSCE recommendation in the First Stanković Report.

[2] See *The Sunday Times v. UK*, ECtHR judgement, 26 April 1979, para. 49.

[3] See *Jecius v. Lithuania*, ECtHR judgement, 31 July 2000, para. 56.

[4] See the Stanković Report for more details on these alternative considerations, which are referred to as "strict" and "broad understanding" of the term "adaptation". It may be noted that the State Court recognized the existence of this gap in the Law on Transfer both in the Stanković and the Janković cases. For the Janković case, see the 8 December 2005 Decision of the Preliminary Hearing Judge, where it is stated that: "Having regard to the lack of the legal procedure which in more detail governs the actions of the Prosecutor of BiH, as well as of the Court of BiH, in the proceedings of adapting and accepting of the indictment of the International Tribunal, the Preliminary Hearing Judge of the Court of BiH was under the obligation to regulate by his decision the further procedure in this case."

Law also fails to regulate the duration of the adaptation period.[5] Moreover, the relation of the adaptation procedure to the regular investigation procedure under domestic procedure is not specified. Further, although the Law on Transfer provides that pre-trial detention is regulated by the Criminal Procedure Code of BiH (BiH CPC), it does not specify which provisions of the domestic procedure should be applicable. Lastly, this Law does not require that the transfer of the case file be effected before the transfer of the defendant. The fact that both Stanković and Janković were transferred after the transfer of the respective case-files has apparently raised the problem of how to evaluate grounded suspicion for custody, as required by the BiH CPC, in the absence of material evidence available to the BiH Prosecutor's Office at the time of the initial hearing on custody.

In both transferred cases, these uncertainties have led to the State Court adopting an even more controversial stance as to how to order custody during the pre-adaptation period, and how to overcome the lack of time-limits for the adaptation of the indictment. The following are certain examples of the confusion that resulted in the Janković case from the poor drafting of the Law on Transfer, its interpretation by the State Court, and the practice the State Court adopted. These uncertainties relate mainly to (a) the legal basis for detention during the adaptation period, (b) the nature of the adaptation period, and (c) the duration of the adaptation period. These issues, although distinct, are closely interrelated, which has added to the adoption of confusing practices. For instance, as analysed below, it appears that the Court has been prepared to accept that the adaptation phase is an investigative one in connection to the actions the Prosecutor may undertake, but has refused to formally recognise it so particularly for the purposes of pre-trial detention during this period.

a) Examples of uncertainty related to the legal basis for pre-trial custody during the adaptation period

Firstly, as regards the legal basis for pre-trial custody during the adaptation period in the Janković case, it may be pointed out that the Prosecution proposed detention on alternative bases, seeming unsure as to whether the Court would agree with the Prosecution's interpretation of the Law on Transfer as requiring the application of the BiH CPC provisions on custody during the investigation phase. Counsel's oral arguments imply that he expected the Court to review custody on the BiH CPC criteria. The Court diligently asked a number of questions appearing interested in clarifying the bases and consequences of the alternative proposals. However, it chose to recognise the primacy of the ICTY order on detention, because the Defendant's custody could last longer if the BiH CPC applied. In turn, however, the Court's decision has given rise to further complications. The above amply indicate that the Prosecutor and the Defence were not certain as to the procedure that would be applicable in the matter in question.

More specifically, the international Prosecutor in the Janković case filed a written motion on custody only on the grounds of the BiH CPC, as regulated during investigation proceedings.[6] At the initial hearing on custody on 8 December 2005, this Prosecutor stated that the approach the Court took in the Stanković case was not an established one by that point. He sought guidance from the Court as to whether to elaborate upon his written motion or to present arguments in support of the primacy of the ICTY order on detention, as was adopted in the Stanković case. Since the Court left the matter to the Prosecutor's discretion, he chose to develop orally his written motion on custody. Nevertheless, the other Prosecutors present at the hearing made an alternative oral proposal: in case the Judge did not

[5] Similarly, this gap is recognized by the State Court, also in the Janković case; see the 8 December 2005 Decision, where the Preliminary Hearing Judge stated: "The Law on Transfer of Cases did not provide for the time limit within which the Prosecutor of BiH shall adapt the International Tribunal indictment to make it compliant with the CPC of BiH."

[6] See the motion of the BiH Prosecutor's Office requesting custody for Defendant Janković, dated 8 December 2005.

accept the motion on custody on the basis of the BiH CPC, they invited him to follow the approach the Court took in the Stanković case, and thus recognise that the ICTY detention order remained in force until the adaptation of the indictment. Defence Counsel opposed the "Stanković approach" as to pre-trial custody, and stated that the only applicable law on the matter was the BiH CPC. Accordingly, Counsel argued only against the custody proposal that was based on the BiH CPC.

Additionally, to the extent that the Court has refused to examine the merits of custody during the pre-adaptation period, it is still unclear whom a transferred defendant would need to address to consider any applications for release. This is particularly important as the ICTY Appeals Chamber deemed that it did not have the authority to consider the Defendant's detention on remand after the final decision on his transfer to the BiH authorities had been issued.[7]

b) Examples of uncertainty relating to the nature of the adaptation period

Secondly, the nature of the pre-adaptation phase was not ultimately clarified in the Janković case, despite the firm position of the international Prosecutor and the numerous questions of the Judge relating to this issue. It may be noted that the nature of the adaptation period has not explicitly been the issue under discussion; nevertheless, the arguments related to custody indicate the understanding of the actors involved as regards the nature of the adaptation phase. The confusion seemed to be a direct result of the poor drafting of the Law on Transfer, and actually may have been exacerbated by the 8 December 2005 Decision of the Preliminary Hearing Judge in this case. It should be mentioned that the Prosecutor had specifically pointed out that the possibility of expanding the charges would involve further investigating actions, and that in order to adapt the indictment there is an element of investigation also into additional material and allegations. In the said Decision, the Judge gave a deadline to the Prosecution to adapt the indictment, in which he explicitly factored the possibility that the Prosecution would expand the counts of charges. Nevertheless, the Judge rejected the proposal for custody on the basis of the BiH CPC, since this "would result in returning the proceedings to the investigation stage which is not in any case favourable for the accused (pre-trial custody may last up to six months) [...]."[8] Essentially, even though the Judge accepted that the Prosecution can perform investigating actions during the adaptation period, he refused to consider this period as an investigative phase for the purposes of custody.

On a similar note was the rather controversial position of the Prosecution. Initially, it stated that, in order to adapt the ICTY indictment, there is an element of investigation. Moreover, the ICTY indictment was not "confirmed" for the purposes of the BiH CPC, until its acceptance as adapted. Later, however, the Chief Prosecutor replied to the Court that they were not requesting that the case be returned to the investigation phase.

c) Example of uncertainty and lack of legal basis regarding the duration of the adaptation period

Thirdly, as to the duration of the pre-adaptation period, because of the gap in the Law on Transfer, the Judge followed the Court's practice in the Stanković case and deemed it appropriate to provide a deadline for the adaptation of the indictment. However, this deadline has no valid basis in law, is

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[7] See the ICTY Appeals Chamber Decision on Appeal of the Trial Chamber's Decision on Provisional Release in the case of Gojko Janković, dated 30 November 2005.

[8] The OSCE repeats its position phrased in the Stanković Report, namely that the Preliminary Hearing Judge did not perform an overall assessment of whether the application of the BiH CPC provisions on custody would indeed be less favourable than the arguably arbitrary approach the Court chose to follow.

ineffectual, and its starting point was relative. These issues were also analysed in the First Stanković Report, while the Janković case reinforces the findings of the OSCE in that Report.[9]

More specifically, the Court allowed 65 days for the adaptation of the indictment against Janković. Nonetheless, it explicitly contradicted itself when it attempted to find a legal basis for this deadline. It stated that 40 of these days were the identical time given in the European Convention on Extradition and the European Convention on the Transfer of Proceedings in Criminal Matters. Despite the fact that both these Conventions foresee the 40-day period as the absolute maximum length of detention for their purposes, the State Court granted an additional 25 days, as it thought they were necessary because of the complexity of the case. Firstly, the Mission reiterates that there is no workable comparison between a (requested) state in the procedures for extradition or transfer of criminal proceedings on the one hand, and the State Court at the receiving end of an adapted indictment by the BiH Prosecutor's Office on the other. Furthermore, the Court contradicted its own reasoning by granting a longer deadline than the maximum foreseen by the mentioned Conventions.

Additionally, this deadline is merely indicative, since there are no effective sanctions in case it is exceeded, as was initially noted in the Stanković Report.[10] Lastly, this deadline was also relative as to its starting point. In his Decision of 8 December 2005, the Preliminary Hearing Judge counted the deadline of 65 days from 12 December 2005, following the Prosecution's request. It was estimated that the transfer of the case-file would be completed by roughly that time. In its decision of 21 December 2005 on the appeal of the Defence, the Appellate Panel accepted the deadline for the adaptation of the indictment. However, although it was aware that the case-file was transferred to the Prosecutor's Office on 9 December, it did not re-adjust the expiry of the 65-day time-limit.

II) ASSESSMENT OF THE STATE COURT'S APPROACH TO REVIEWING PRE-TRIAL CUSTODY IN RELATION TO ARTICLES 5(3) AND 5(4) ECHR

The OSCE further questions the claim of the Appellate Panel in its Decision of 21 December 2005 that Janković's hearing on 9 December 2005 satisfied the criteria of Article 5(3) ECHR.[11] The reason for this is that, through the recognition of the primacy of the ICTY order on detention, the Preliminary Hearing Judge relinquished his authority to examine the merits of custody and the power to release the Defendant during the pre-adaptation period, if appropriate. Similar concerns are raised by the fact that

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[9] It may be noted that the deadline provided in the Stanković case did not appear to be based on any specific factual considerations; it is unclear what information the Court had at its disposal regarding the intended actions of the Prosecution in order to determine that the deadline it gave for the adaptation was appropriate. As regards the Janković case, the Judge attempted to gather as much information as possible from the Prosecution as to the actions it intended to undertake during the adaptation period. The Court granted only 65 of the 90 days requested by the Prosecution according to its alternative proposal.

[10] For a detailed argument on this point, see the Stanković Report. It may also be of interest that on 8 December 2005, the Court in the Janković case sent a letter in the form of a memo to the Prosecutor's Office where it mentioned the 65-day deadline and concluded: "The Prosecutor's Office of Bosnia and Herzegovina is also under the obligation to make a decision before the expiration of the set time-limit in respect of potential further motion for extending custody against the accused."

[11] It may be noted that in the Janković case, the Prosecutor argued in his 16 December 2005 response to the Defence's Appeal that Articles 5 (1)(c) and 5(4) ECHR were applicable to ICTY on 17 March 2005 when the accused was first heard after his arrest, and that they are not always essential functions where, thereafter, a court is maintaining in force an original decision on Detention. The Appellate Panel, however, in rejecting the appeal of the Defence, it found that Article 5(3) ECHR had been complied when the State Court heard the Defendant after his transfer to BiH.

also the Appellate Panel recognised the primacy of the ICTY order on detention, thereby forfeiting its role as a "court" in the sense of Article 5(4) ECHR.

Article 5(3) ECHR requires that a person arrested under Article 5(1)(c) ECHR be brought before a "judge" or "other similar officer." The ECtHR has found that Article 5(3) ECHR requires such "judicial officer" to consider the *merits* of detention. To do so, a judge must be able to review the circumstances militating for or against detention, and decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons.[12]

Following the "Stanković approach", the Preliminary Hearing Judge in the Janković case considered himself bound by the primacy of the ICTY Order on Detention on Remand,[13] and maintained that it is only after the Court has accepted the adapted indictment that it will be able to examine critically the grounds for custody as per the BiH CPC. As the Mission opined in its First Stanković Report, this argument is inherently contradictory, has no actual basis in law or in the decisions of the ICTY, and places Rule 11*bis* defendants in a state of "limbo."[14] This is reinforced by the Decision of the ICTY Appeals Chamber on Janković's Motion for Provisional Release. This Chamber found that, since the case had been referred to the authorities of BiH, it was no longer seized of the matter; hence the Defendant's Motion was moot.[15] Therefore, the ICTY has recognised that it does not have the authority to consider detention on remand after the final decision on a defendant's transfer to the domestic authorities has been issued.

In examining the State Court's practice through the prism of international human rights standards, it may be concluded that the Defendant's right to have a judicial authority review his detention during the adaptation period according to Article 5(3) ECHR has been breached. By not considering the merits of pre-trial custody and by effectively renouncing the power to release the Defendant, the Preliminary Hearing Judge did not meet all the substantive attributes of a "judge" either according to the domestic law or according to human rights criteria.

Furthermore, by accepting the primacy of the ICTY detention order in its Decision of 21 December 2005, the Appellate Panel similarly relinquished its attribute as a "court." This conduct would also lead to a breach of the Defendant's right under Article 5(4) ECHR, to the extent that the appeals of the defence can be considered as applications for release in the sense of this Article. Article 5(4) ECHR provides that the detained person must have access to a "court" or a body that has a "judicial character," which can decide on the lawfulness of his detention speedily and order his release if the detention is not lawful. For a court to have a judicial character, the ECtHR has found that the body must be independent of the executive, impartial in the performance of its duties, and competent to take a legally binding decision leading to the person's release.[16]

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[12] See *Aquilina v. Malta*, ECtHR judgement, 29 April 1999, para. 47. Also see *Schiesser v. Switzerland*, ECtHR judgement, 4 December 1979, para. 31.

[13] As basis for the primacy of the ICTY decisions, the Court mentioned the Decision of the Referral Bench, the Statute of the ICTY, and the latter's Rules of Procedure and Evidence.

[14] See the Stanković Report, pp. 14 *ff.*

[15] See the ICTY Appeals Chamber Decision on Appeal of the Trial Chamber's Decision on Provisional Release in the case of Gojko Janković, dated 30 November 2005.

[16] Among other cases, see *X v. United Kingdom*, ECtHR judgement, 5 November 1981, para 61.

III) ASSESSMENT OF THE APPELLATE PANEL'S REVIEW OF APPEALS ON DETENTION IN RELATION TO ARTICLE 5(4) ECHR

As in the Stanković case, the Appellate Panel examining appeals on detention for Defendant Janković has not sufficiently addressed all arguments raised by the Defence. The OSCE is concerned with what would appear to be a practice of "rubber-stamping" the first-instance decisions on appeal, as the Appellate Panel failed to provide the judicial review of the scope required by Article 5(4) ECHR.

The ECtHR has deemed that while Article 5(4) ECHR does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness" of detention, in the sense of the ECHR.[17]

In his Appeals of 12 December 2005 and 24 February 2006, Defence Counsel for Janković put forward a number of arguments challenging both the procedure and the merits of pre-trial custody. For instance, in the former appeal, the Defence explicitly challenged the fact that the Preliminary Hearing Judge did not constitute a "court" in the sense of Article 5 ECHR, since he failed to review the circumstances for and against custody. It also argued that the Decision of the Referral Bench, the ICTY Statute, and its Rules of Procedure and Evidence were improperly applied, since they could not serve as grounds for recognising the primacy of the ICTY order on detention on remand.[18] Despite the fact that such arguments do not appear frivolous or irrelevant, the Appellate Panel's Decision of 21 December 2005 seems to disregard them. This Decision simply repeats the reasoning of the Preliminary Hearing Judge and in fact resembles closely the 12 October 2005 Decision of the Appellate Panel in the Stanković case. The same "rubber stamping" practice can be seen in the 10 March 2006 Decision of the Appellate Panel rejecting the 24 February Appeal of Defence Counsel, which also challenged the ground for custody for the protection of public and property security; this issue is explained in more detail under Section (V) of this Report. To this extent, it may be argued that the Appellate Panel has not provided a review of detention in the sense envisaged by international human rights standards.[19]

IV) ASSESSMENT OF THE DEFENCE ARGUMENT FOR VIOLATION OF THE RIGHT TO ADEQUATE TIME TO PREPARE ITS CASE AGAINST THE MOTION FOR DETENTION

The OSCE is concerned by the fact that Defence Counsel failed to request additional time to prepare for the hearing on detention before the hearing took place or during it, but instead alleged a violation of the right to have adequate time and facilities to prepare the defence in his Appeal of 12 December 2005. Relevant international case-law suggests that, in such circumstances, the failure to grant additional time to prepare may not be attributed to the judicial authorities of the state.

More specifically, Article 6(3)(b) ECHR and Article 14(3)(b) of the International Covenant for Civil and Political Rights (ICCPR) foresee that the defendant must have adequate time and facilities to prepare his defence. The defendant must also be allowed adequate time and facilities to prepare his applications for release, since this guarantee also applies to pre-trial custody proceedings under Article

[17] See *Nikolova v. Bulgaria*, ECtHR judgement, 25 March 1999, para. 61.
[18] See Defence Counsel Appeal of 12 December 2005, under point 1.
[19] Also see Section (V) below, where the Appellate Panel appeared to "rubber stamp" the limited reasoning of the Preliminary Hearing Judge in justifying detention after the indictment on Article 132(1)(d) BiH CPC.

5(4) ECHR.[20] However, the ECtHR and the Human Rights Committee have not found violations of the right to adequate time to prepare one's case, when the defendant or his counsel did not request more time to do so.[21] Hence, international case-law would suggest that if the defence considers that it has not had sufficient time and facilities to prepare its case, it is imperative that it notifies the court accordingly and requests an appropriate adjournment of the proceedings.

In the Janković case, at no point during the initial hearing did the Defendant or his Counsel request the adjournment of the proceedings so as to have additional time to prepare their case. It appears that the Defendant only met the Counsel representing him before the State Court a few minutes before the hearing on detention commenced on 8 December 2005. This hearing was indeed held swiftly after the Defendant's arrival to BiH. Immediately before convening the hearing, the Preliminary Hearing Judge asked the Defendant whether there were any problems to hold the session on that date, and whether he was tired. The Defendant replied in the negative. When Counsel took the floor, he did make a point that the Prosecution had not offered any material evidence upon which it based the grounded suspicion required for pre-trial detention. However, the argument was phrased in such terms so as to challenge the existence of grounded suspicion as a prerequisite for detention, rather than in terms of the inability of the Defence to present its application for release in the given time. Despite his omission to orally request further time to prepare the case, Counsel specifically argued in his Appeal of 12 December that the Defendant was rushed into the court with no opportunity to prepare his arguments, and thus played a limited role in the proceedings, which were not truly adversarial.

In view of the aforementioned human rights standards, it is unclear why neither the Defendant nor his Counsel requested additional time to prepare their arguments for release during the hearing of 8 December, but instead only argued this point in their Appeal. To this extent, the Court would not bear responsibility for failing to grant such additional time.

V) ASSESSMENT OF THE REASONING OF THE COURT BASING POST-INDICTMENT DETENTION ON ARTICLE 132(2)(D) BIH CPC

Lastly, the OSCE is concerned with the application and justification of the Defendant's detention on the special ground for custody foreseen under Article 132(1)(d) BiH CPC, namely the risk of threatening public or property security. The Mission is also more generally concerned that the wording of this provision does not clearly define which actual danger it seeks to avert, and whether it is intended to correspond to the protection of public order. The protection of public order, which admittedly also constitutes a vague concept, is accepted in international human rights standards as an exceptional ground for detention. The abstract wording of the domestic provision has been further complicated by the way in which this ground is applied by courts throughout the country. More specifically, apart from being ordered almost automatically in grave cases, it is frequently explained in a stereotypical manner and used to protect interests that are largely already covered by other special grounds for custody.

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[20] See before the ECtHR *Farmakopoulos v. Belgium*, A 235-A (1992), Commission's Report, and *K. v. Austria*, A 255-B (1993), Commission's Report. Both cases were struck out of the list; they are referred to in DJ Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human* Rights (Butterworths, 1995), pp. 150-151.

[21] See, for instance, the Human Rights Committee decisions in *M. Steadman v. Jamaica* (2 April 1997), UN doc. GAOR, A/52/40 (vol II), p. 26, para 10.2.; and *C. Wright v. Jamaica*, (27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4. Also see the case of *Campbell and Fell v. the UK*, ECtHR judgement, 28 June 1984, para. 98.

i) The Relevant Law and International Human Rights Standards

Domestic criminal procedure foresees four main grounds for pre-trial custody: the risk of flight, the fear of interfering with evidence, the risk of re-offending, and the fear of threat to public and property security when especially grave crimes are concerned. More particularly as regards the latter ground, Article 132(1)(d) BiH CPC stipulates that custody may be ordered:

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

The ECtHR has principally accepted four special grounds for refusing bail in criminal cases. Apart from the risk of flight, the risk of continued criminality, and the danger of collusion and of interfering with evidence, the ECtHR has accepted that custody may be ordered on the basis of preserving public order, when domestic law provides for this.[22] As regards the latter ground, the ECtHR has stated:

> "The Court accepts that, by reason of their **particular gravity and public reaction** to them, certain offences may give rise to a **social disturbance** capable of justifying pre-trial detention, **at least for a time. In exceptional circumstances** this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient **only provided that it is based on facts capable of showing that the accused's release would actually disturb public order.** In addition, detention will continue to be legitimate **only if public order actually remains threatened; its continuation cannot be used to anticipate a custodial sentence** [reference omitted].
>
> The above conditions have not been satisfied in the present case, since those of the decisions in issue which go some way towards substantiating this ground **do no more than refer in an abstract manner to the nature of the crime concerned, the circumstances in which it was committed and, occasionally, the reactions of the victim's family."**[23] [Emphasis added].

When considering the protection of public order as a ground for detention, the ECtHR has repeatedly found that it was not properly justified when the authorities assessed the need to continue the deprivation of liberty from a purely abstract point of view, merely referring to the gravity of the offences or noting their effects.

Additionally, the ECtHR has deemed in a variety of cases, even involving terrorism, that although it is reasonable to assume that there was a risk of prejudice to public order at the beginning, it must have disappeared after a certain time.[24]

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[22] The ECtHR has also accepted as relevant for custody the psychological state of the accused and the vulnerability of the victim, as well as the need to protect the applicant; see *Bouchet v. France*, ECtHR judgement, 5 September 2001, paras. 46-47, and *I.A. v. France*, ECtHR judgement, 23 September 1998, para. 108.

[23] See *I.A. v. France*, ibid, para 104. Also see *Letellier v. France*, ECtHR judgement, 26 June 1991, para. 51.

[24] See *Tomasi v. France*, ECtHR judgement, 27 August 1992, para. 91.

ii) The Relevant Facts in the Janković Case

As regards the Janković case, after the confirmation of the BiH indictment and its acceptance as adapted, the Preliminary Hearing Judge held a hearing on custody pursuant to the motion of the Prosecution. In his Decision of 20 February 2006, the Judge ordered custody against the Defendant on the basis of the risk of flight and of the ground in Article 132(1)(d) BiH CPC. The Court rejected the argument that there was a fear that the Defendant would influence witnesses or co-perpetrators, because the Prosecution failed to indicate concrete circumstances for this danger. In connection to the ground of public and property security threat, the Court considered that the objective element in this provision had been fulfilled, since a sentence of at least ten years' imprisonment is prescribed for the alleged criminal act of Crime against Humanity. The Judge further found that:

> "...due to the nature of the criminal offence, manner of commission and consequences, and having in mind that the actions in question are systematic enslavements and rapes of young women and even girls, who suffered physical and mental traumas, the Court considers that releasing of the accused could cause insecurity and anxiety of citizens, especially those who returned to their pre-war homes in the area of the Municipality of Foča, where the accused also resides."

Defence Counsel challenged both grounds for custody on 24 February 2006. As regards the threat of public and property security, he argued that it was insufficiently explained and was not supported by facts, apart from the objective criterion of the prescribed punishment. Defence Counsel continued to quote a relevant decision from another case before the State Court, which states that:

> "...threat to security of citizens must be specified. Abstract threat to public or property security is not sufficient. Therefore, threat to public or property security must be substantiated with facts which allow for evaluation of a manner how the Accused, similarly to his previous behavior, would threaten citizens, primarily injured parties or witnesses or how, based on the presented evidence, there is a great probability that the Suspect will do that."[25]

After quoting this decision, Defence Counsel argued that even these reasons in the challenged Decision in Janković were given in an inadequate and routine manner, and proposed that the Court level its practice to the extent possible.

The Appellate Panel rejected the Appeal of Defence Counsel, and in connection to the issue in question found that it was correctly determined in the challenged decision, because:

> "...considering the nature of the crime, the manner in which it was committed, and its consequences, and taking into account that these are acts of systematic enslavement and rape of young women, even girls, who suffered physical and mental traumas, that these are sufficient arguments that the security of citizens could be imperiled, if the accused is released. This security could be imperiled especially for the returnees in the Foča municipality, as well as for other citizens. For these reasons, the statements in the Appeal that the Preliminary Hearing Judge gave a general explanation of item (d) of Article 132(1) BiH CPC are not correct."

[25] See the 18 January 2006 Decision of the Appellate Panel in the case of Dragan Damjanovic, which (partially) rejects the Appeal of Defence Counsel of the suspect to extend his pre-trial custody.

iii) Assessment of the Use of Article 132(1)(d) BiH CPC in the Janković Case, of the Wording of this Provision, of its Use by Courts throughout BiH

The OSCE is concerned that the detention ground of threat to public and property security was not properly justified in the case of Janković, and that it is applied controversially in general. This may be largely owed to the vagueness of this legal provision. It may be noted that the ground of public order, although accepted by human rights standards as a reason for custody, is confronted with much skepticism by human rights experts and has been abolished in a number of justice systems.[26]

It should be underlined that the OSCE does not evaluate whether or not the decisions on custody are correct on their merits or whether there are indeed circumstances that point to an actual danger to public order or security. Rather, the Mission focuses on whether the decisions in question are properly substantiated in accordance with international human rights standards.

a) Lack of sufficient justification of Janković's detention on the ground of public and property security

Regarding the relevant Decisions in the Janković case, it is indeed unclear which actual danger the Preliminary Hearing Judge and the Appellate Panel intended to avert by applying the ground of public and property security. Both Decisions make reference in standard terms to the nature of the criminal offence, its manner of commission, and its consequences, merely mentioning very generally that the actions in question are the systematic enslavement and rapes of young women and girls who have suffered trauma. The first instance Decision continues that the release of the accused would cause the *insecurity* and *anxiety* of citizens, especially those who have returned to Foča, while the Appellate Decision claims that the security *for* the returnees and the other citizens would be imperiled by the Defendant's release.

The use of the terms "insecurity" and "anxiety" are very vague, and rather correspond to an assumed personal feeling that citizens may have if the accused is released. The finding of the Appellate Panel that the security "for" the citizens, particularly for the returnees, would be imperiled also implies an assumption that it is these citizens who would be at danger if the accused is released. The Court does not specifically mention who will be endangering the citizens' safety, whether the accused or another person. Apart from not providing any actual facts pointing to the continuing threat to public and property security, the Court's assessment in Janković does not necessarily reflect any public order considerations, as least as in the sense of social disturbance envisaged by international human rights standards.[27] Rather, either it gives the impression that the Defendant or another person -unknown who and for which reason- would target the citizens/returnees, after the Defendant's release; or it merely suggests that the citizens/returnees will feel insecure and anxious, if the Defendant is released.

If the Court's assessment implies that the accused would threaten the citizens, then this may be more properly examined under the other special grounds for detention, namely the fear of interfering with evidence or possibly the fear of continued criminality. However, it is important to note that the Court refused the Motion of the Prosecution to order custody on the basis of the fear that the Defendant would influence witnesses, as it deemed that the Prosecutor's Office failed to indicate concrete circumstances that pointed to this danger. If it is implied that the release of the accused would cause feelings of *anxiety* to citizens, the Court should adequately explain what it means by this term.[28]

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[26] For instance, in Italy, Poland, and Kosovo.

[27] One aspect of social disturbance could be the active response of citizens. However, the Preliminary Hearing Judge does not mention whether he considers that the "insecurity" and "anxiety" of citizens could develop into any active reaction of the citizens because of the defendant's release, while the Appellate Panel's wording suggests that it would not be the citizens/returnees who would react to the accused's release.

[28] If anxiety is understood as a fear of intimidation, then the other grounds for custody should be examined.

Lastly, if it is implied that other persons would threaten the security of citizens due to the Defendant's release, then the Court would need to properly substantiate its fears and explain why they could only be countered with keeping the Accused in detention.

Therefore, it appears that the reasons given by the first-instance and appellate Decisions to support the existence of this ground for custody are phrased in such terms that the ECtHR has characterised as insufficient. More specifically, the Court repeats in a stereotyped manner that it considered the gravity of the offences and their consequences, and refers in an abstract manner to the effect the release would have on the citizens, without mentioning any actual facts to support its fears.

It is also noteworthy that the Appellate Panel missed the opportunity to point out that the first-instance Decision should have been better justified as to this ground, and instead appeared merely to "rubber-stamp" it.

b) Problems with the wording and application of the protection of public and property security by courts throughout the country

It is unclear whether the BiH CPC concept of "public and property security" is intended to correspond to the concept of "public order" used by the ECtHR. If these two concepts are similar enough, the ECtHR standards on two key elements must be met when the domestic courts use the ground of public and property security: namely the existence of facts capable of showing that the accused's release would actually disturb public order and that public order actually remains threatened. If the domestic ground of "public and property security" is *not* to be understood in the terms of "public order," then its aim and parameters should be more clearly defined so as to allow the evaluation of whether it falls under the acceptable grounds for refusing bail according to international human rights standards, and whether it overlaps with any other grounds for detention.

The Commentary to the BiH CPC and court practice throughout BiH indicate that the concept of "public and property security" is not always understood as safeguarding public order.[29] Unfortunately, the Commentary provides very poor explanation on the application of this ground for custody. It states that the primary goal of this ground is to preserve safety/security, while its procedural goals are negligible.[30] Thereafter, it primarily makes reference to certain domestic decisions which examined the application of this ground. Nonetheless, most of these decisions appear pre-occupied with the establishment of the objective criterion of whether the alleged crime in question was punishable with 10 or more years' imprisonment, and do not discuss what the term "threat to public and property security" means or how it should be evaluated.

One of these decisions, issued by the Supreme Court of FBiH, indicates that the Court did not consider whether *the release of the accused* would endanger public and property security, but rather whether the manner and consequences of the criminal act endangered public and property security *at the critical time* of committing the alleged criminal act.[31] Irrespective of the circumstances of the

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[29] See Hajrija Sijercic-Colic, Malik Hadziomerovic, Marinko Jurcevic, Damjan Kaurinovic, Miodrag Simovic: *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe/European Commission, Sarajevo, 2005), Article 132, para 1 item d), pp. 428 *ff.*

[30] It is unclear why safeguarding public order is understood outside the concept of securing the proceedings. One may wonder whether apart from detaining a defendant, a court would also find an accused guilty, or not release him from prison after he has served his sentence merely on the ground of safeguarding public order.

[31] See the Decision of the Supreme Court of FBiH, Kz-83/02, 22 February 2002, quoted in the Commentary to the BIH CPC, ibid, p. 427.

particular case,[32] such a line of reasoning falls short of examining at least whether public and property security continues to remain threatened when the release of the accused is contemplated.

In other cases, it seems that the ground of public and property security is actually confused with the dangers that other grounds for custody aim to counter, such as the risk of interference with evidence or continued criminality. Such an example is the Decision to which Defence Counsel in Janković refers in his Appeal of 24 February 2006.[33] This Decision indeed uses certain human rights standards in assessing the application of this ground for custody. For instance, it states that it is an instrument to safeguard public order, and sees it applicable in exceptional circumstances and when the threat is specified. Nevertheless, the said Decision actually confuses the threat to public security with the fear that the accused at liberty would threaten the citizens, especially the injured parties and witnesses, or commit further offences. The Panel added that if the suspect were to contact the victims/witnesses, they would be re-traumatised. It viewed this re-traumatisation as endangering the implementation of the rule of law, and concluded that, particularly in BiH, any obstruction of the implementation of the rule of law brings public security at risk. This causal link between re-traumatisation and the threat to public security is admittedly an interesting one. But again, apart from re-traumatisation pertaining more to the grounds of influencing witnesses or re-offending by harassing victims, the Court would need to explain more persuasively how the release of the accused would actually re-traumatise witnesses solely from the perspective of public security. The Panel also noted that the ground of public security depends only on the commission and penalization of the crime, and not on the perpetrator's behaviour during the proceedings; however, the ECtHR actually examines a variety of other factors and does not assume that a grave offence automatically gives rise to a persistent threat to public order.

The OSCE has also observed that the ground of threat to public and property security, apart from being the most controversially justified, is also the most commonly used ground for ordering custody when grave crimes are concerned.[34] Despite the fact that the law foresees an assumption that public and property security is threatened only when terrorism offences are involved, it appears that the courts in BiH in reality make this assumption and essentially reverse the burden of proof in the majority of cases when a crime punishable by ten or more years' imprisonment is in question. Consequently, it can be argued that this ground is not used on an exceptional basis, but is applied almost automatically when the objective criterion is fulfilled. Such practice runs contrary to the presumption of release during trial that is a fundamental human rights guarantee.

In view of the lack of legal and factual precision in the use of the threat of public and property security as a ground for detention, one may conclude by mentioning the view of the Office of the High Commissioner for Human Rights and of the International Bar Association, expressed in their training manual on human rights for the actors in the justice system. Therein, in relation to the protection of public order as a ground for detention the authors state: "The question arises, however, whether, in a

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[32] This case involved an accused who allegedly stole two crates of beer from a shop and then left the scene, while another person hit the shop guard in the face. The Supreme Court of FBiH opined that the method of perpetrating the criminal act, especially since that accused did not use force, did not at all jeopardize the safety of the citizens, while the consequence itself, the stealing of two crates of beer, was not a sufficient reason to detain the accused. See the Decision of the Supreme Court of FBiH, Kz-83/02, 22 February 2002, quoted in the Commentary to the BIH CPC, ibid, p. 427.

[33] See *supra* footnote 25.

[34] The following statistics concern the use of the custody ground under Article 132(1)(d) BiH CPC, and refer to cases monitored by the Mission throughout the country from 1 January 2004 until present. They are divided according to the offences' range of possible imprisonment: Range 10-20 years' imprisonment: 93.6%; Range 10 years or more: 80%; Range 3-10 years: 81%; Range 3-15 years: 79.5%; Range 3-20 years: 25%; Range 5-15 years: 26%; Range 5-20 years: 60%; Range 5 years or more: 46%; Range 5 to life: 49%.

democratic society governed by the rule of law, pre-trial detention, however brief, can ever be legally justified on the basis of a legal notion so easily abused as that of public order."[35]

VI) RECOMMENDATIONS

Legislative Authorities

- The OSCE reiterates in recommendations included in the First Stanković Report that was shared with the domestic authorities.[36] These may be summarised as follows: The Law on Transfer should be amended urgently with a view to legal precision. To this end, the Ministry of Justice should establish a working group as a matter of high priority to consider the following issues and make a concrete proposal to the legislative authorities:
  - The working group should consider whether to retain the adaptation procedure in the Law on Transfer.
  - If the procedure of adaptation is retained, its nature should be clarified in relation to the BiH CPC. The Law should also set time-limits for this procedure, and regulate the calculation of time-limits in case further investigations are conducted into additional counts or accused.
  - The Law should specify which set of BiH CPC provisions on pre-trial custody are applicable after the transfer of Rule 11*bis* case to the domestic authorities.
  - The Law should require that the transfer of a defendant take place after the transfer of the case-file (or of sufficient evidentiary material).
  - The Law should also clarify that the defendant has the right to enter a plea on the adapted charges and file preliminary motions challenging these before the State Court, regardless of whether the defendant had the opportunity to exercise these rights before the ICTY. Although no problem arose in this regard in the Janković case, it would be useful to include such an amendment to the Law on Transfer, in view of the confusion that was encountered in the Stanković case.
- The OSCE also recommends that the legislative authorities delete from the criminal procedure code Article 132(1)(d) BIH CPC, namely the ground for detention on the basis of threat to public or property security. If this ground is retained, the law-maker should carefully review its wording and establish precise criteria upon which its application may be conditioned, taking into consideration international human rights standards. In any case, the Mission recommends that the

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[35] See OHCHR in cooperation with the IBA, *Human Rights in the Administration of Justice – A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, p.194. It may be worth recounting the submission of Bostjan Penko in a Council of Europe document dated 22 October 2002 entitled "Expert Opinions on the Draft Criminal Procedure Code of Bosnia and Herzegovina (PCRED/DGI/Exp. (2002) 42, where Mr. Penko strongly urged for the deletion of the "public security and property" ground. He wrote: "I have to admit that it is not entirely clear to me exactly how these two expressions have been understood by the drafters. Nevertheless, I am positive that the reason of public security or property could not be anything which is not already incorporated in the three justified grounds, more precisely in the danger of re-offending. It would be useful to see the explanation of this provision, although I am almost sure that it could not be supported by legitimate arguments and my recommendation to the drafters would be to delete it completely. I got the impression here that the draft would like to introduce a certain kind of mandatory detention through the back door, which is of course against the letter and the spirit of the ECHR.

[36] These specific recommendations were not included in the text of the First Stankovic Report that was submitted to the ICTY Office of the Prosecutor, but were added to the Report prior to sharing it with the domestic authorities.

burden of proof to establish facts that indicate a potential disruption of public order/security always rests with the Prosecution.

Judiciary

- The Mission also reiterates its recommendations from the First Stanković Report regarding the judiciary. These may be summarised as follows: Until the Law on Transfer is amended, judges dealing with transferred cases should interpret applicable law in the most foreseeable manner consistent with other domestic provisions and international human rights standards. To this extent:
  - State Court judges should immediately cease the practice of recognising that an ICTY order on detention on remand has primacy and binds the domestic authorities. Instead, they should apply the BiH CPC provisions and international human rights standards relating to pre-trial custody immediately upon a defendant's transfer.
  - State Court judges should always seek to have sufficient information regarding which actions the prosecutor intends to take during the pre-adaptation period. Instead of providing "toothless" and legally unsubstantiated deadlines to the Prosecutor's Office for adapting the indictment, the Court should focus on the time-limits of the defendant's detention, and maintain the defendant's detention only as long as there is a reason and legal basis for it.
  - In case future circumstances demand, the State Court should consider referring the Law on Transfer to the Constitutional Court to determine the compatibility of certain problematic provisions with the Constitution and the ECHR.[37]
- Judges should properly review applications for ordering or extending custody and properly substantiate their decisions on custody. They should also review appeals on custody according to human rights standards, and not merely "rubber stamp" first instance decisions.
- To the extent that Article 132(1)(d) BiH CPC remains applicable, the OSCE also recommends that the courts cease to apply it almost automatically when the objective criterion is met, but use it exceptionally when credible facts point to an actual and persistent threat to public order, in accordance with human rights standards. Judges should particularly refrain from using this ground as a substitute or in overlap with other special grounds for custody.

BiH Prosecutor's Office

- Upon a defendant's transfer, the BiH Prosecutor's Office should base any motion for pre-trial custody during the pre-adaptation period exclusively on the BiH CPC. It should also properly substantiate its proposals for custody, also when it calls for the application of the ground envisaged in Article 132(1)(d) BiH CPC.
- In Rule 11*bis* cases, the BiH Prosecutor's Office should seek to obtain in advance sufficient evidentiary material from the ICTY Prosecutor's Office.

Defence Counsel

[37] See Article VI.3(c) of the BiH Constitution.

- In Rule 11*bis* cases where the defendant is held in detention not in accordance with the procedure prescribed in the BiH CPC, the defence should consider appealing to the Constitutional Court of BiH to review such final decisions on pre-trial custody.[38]

  In case the State Court issues in the future any decisions keeping a transferred defendant in custody based on an ICTY order on detention on remand, it is also advisable for the defence to apply to the Constitutional Court of BiH for the adoption of interim measures.[39]

  It should be reiterated that, in accordance with Article 5(5) ECHR, defendants have the right to seek compensation if they have been detained in violation of the procedure prescribed by law.

- In case counsel feels that the defence has not had sufficient time and facilities to prepare, he/she should make a timely request for the adjournment of proceedings.

ICTY Office of the Prosecutor

- The ICTY Prosecutor's Office should complete the transfer of the case-file to the BiH Prosecutor's Office prior to the defendant's transfer.

This recommendation has apparently already been accepted, as noted in the 20 February 2006 ICTY Prosecutor's Second Progress Report to the Referral Bench in the case of Radovan Stanković, to which the First Stanković Report is annexed. In its submission, the ICTY Office of the Prosecutor took notice of this OSCE recommendation and mentioned that this issue was earlier identified also by the BiH Prosecutor's Office. The ICTY Prosecutor indicated that a solution was agreed upon with the Office of the BiH Prosecutor, i.e. to identify and transfer high priority material to the latter prior to the arrival of the accused.

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[38] See Article VI.3 (b) of the BiH Constitution and the relevant Rules of the Constitutional Court of BiH (BiH Official Gazette 60/05). Both these Rules (i.e. Article 16) and existing case-law of the Constitutional Court suggest that the latter has appellate jurisdiction on issues arising not only out of a judgment, but also of a decision if all effective remedies available under law are exhausted. The OSCE has been informed that such applications to the Constitutional Court have already been filed in the case of Janković. Confirmation of this information and of further details is pending.

[39] Articles 77 *ff.* of the Rules of the Constitutional Court.

PART II: SUMMARIES OF RELEVANT HEARINGS – SUBMISSIONS- DECISIONS

The transfer of the Defendant Gojko Janković from The Hague to BiH took place on 8 December 2005, while the transfer of the case file was completed on 9 December.

i) Prosecution Motion for Ordering Custody dated 8 December 2005

After the arrival of the Defendant to BiH on 8 December 2005, the BiH Prosecutor's Office submitted a written Motion for his custody to last initially for 30 days. The Motion invoked Articles 134 and 135 BiH CPC as the appropriate provisions under which to seek custody, applicable during the investigative phase of a case. To support grounded suspicion, the Prosecution invoked the charges in the confirmed ICTY Indictment, acknowledging that the case-file had not been transferred to the Office of the Prosecutor of BiH by the time the Motion for custody was filed.

As grounds for custody, the Prosecution invoked the risk of flight, the fear of interfering with evidence and influencing witnesses, and the protection of public and property security.

ii) Hearing on Pre-trial Custody dated 8 December 2005

At the commencement of the hearing, the international Prosecutor sought guidance from the Preliminary Hearing Judge on whether to elaborate on his written motion or to develop his proposal for custody based on the approach the Court took in Stanković. He indicated that with the former motion he would initially request custody for one month, while with the latter he would be requesting as much as three months (to adapt the indictment and to investigate further). The Preliminary Hearing Judge left the matter to the discretion of the Prosecutor, who elaborated on his written motion basing custody on the BiH CPC. As to the grounded suspicion, the Prosecution referred to the ICTY indictment, as the case material was expected to be in his possession in within the following two days. As regards the ground of public and property security, the Prosecution left it to the consideration of the Court whether it was possible that members of the public would be outraged by the accused's release.

The Deputy Chief of the BiH Prosecutor's Office submitted an alternative proposal, that in case the Court did not accept the motion on the BiH CPC, it should recognize that the ICTY detention order remained in force. The Prosecution expressly stated that it did not require that the case be referred back to the investigation stage.

Counsel argued that the only applicable law on detention was the BiH CPC, and developed his arguments against the relevant motion for custody. He underlined the non-existence of grounded suspicion, since the Prosecution did not present any material evidence. As regards the risk of flight, he emphasised that the Defendant had surrendered voluntarily to the ICTY, his obtaining citizenship of Serbia and Montenegro was irrelevant, while the assertion that false documents were easy to obtain in BiH was inappropriate. Referring to the possibility that the Accused would receive a high sentence, Counsel argued that the argument was groundless and prejudicial. As for influencing witnesses, he stated there was no reason for the Accused to do so, since the evidence has been obtained, while victims of such crimes would not succumb to pressure. Regarding the risk to public and property security, there were no corroborating facts.

The Defendant agreed with his Counsel and added that he had never been a commander of any police. He denied having been connected to people committing crimes and opposed all charges presented thus far.

Upon persistent questioning by the Preliminary Hearing Judge, the Prosecutor stated that in order to adapt the indictment there is an element of investigation also into additional material and allegations.

The Prosecutor favoured the application of the Law on Transfer which indicated that the BiH CPC is applicable on custody (Article 134). The Preliminary Hearing Judge asked whether the Prosecutor had any evidence to support grounded suspicion if he claimed that the ICTY indictment had not been confirmed. The Prosecutor clarified that he had no material evidence to present, but that the indictment was not confirmed for the purposes of the domestic law; the act of confirmation for domestic purposes was the acceptance of the adapted indictment. The Prosecutor indicated that he would be investigating additional evidence gathered both by the ICTY and by the local authorities.

iii) The Decision of the Preliminary Hearing Judge on detention dated on 8 December 2005

On 8 December, the Preliminary Hearing Judge reached the Decision that the ICTY's order on detention remained in force pending the State Court's acceptance of the adapted indictment. The Court relied on the Referral Bench Decision, the ICTY Statute, and its Rules of Procedure and Evidence to establish the primacy of the ICTY order on detention. It stated that it is only after the acceptance of the adapted indictment and after examining the evidence attached to it that it would be able to render a valid decision on custody according to the BiH CPC. As the Law on Transfer did not foresee any time limit for adapting the indictment, the Court gave a deadline of 65 days to the Prosecutor, starting from 12 December 2005 when the Prosecution was expected to be in possession of the ICTY case-file. This deadline was determined to be identical to the length of provisional arrest that may last up to 40 days according to the European Convention on Extradition and the Convention on Transfer of Proceedings in Criminal Cases. An additional 25 days time were given because of the complexity of the case. The Court explicitly recognized the possibility that the Prosecutor would expand the charges.

iv) Appeal of Defence Counsel against the Decision on detention dated 12 December 2005

Defence Counsel lodged an Appeal where he submitted that the Accused was subject to arbitrary custody in violation of the BiH Constitution and the ECHR, requesting that he be released forthwith. The Defence based his Appeal on the following reasons:

- The Court did not review the merits of custody and thus did not fulfil the functions required by Article 5 ECHR;
- The Defendant did not have access to any documents before the hearing on detention and did not have adequate time to prepare, contrary to Article 5(4) ECHR;
- The Court violated the Law on Transfer in refusing to apply the BiH CPC from the time of transfer;
- The Court failed to apply the BiH CPC on custody; Counsel argued that the Law on Transfer is not simply domestic legislation, but an international agreement between the UN Secretary General and the BiH government.
- The Court misapplied the ICTY detention order by misinterpreting the Referral Bench Decision;
- The Court applied incorrectly the ICTY Statute and its Rules of Procedure and Evidence;
- The Court incorrectly imposed the 65-day limit on detention, as it had rendered itself powerless to release;
- The Prosecutor's allegations as to the special BiH CPC grounds for custody are unfounded.

v) Prosecution's Response to the Defence Appeal– dated 16 December 2005

The Prosecution requested that the Court reject the Defence Appeal for the following reasons:

- Articles 5 (1)(c) and 5(4) ECHR were respected at the initial hearing before the ICTY, and are not always essential for extension of detention hearings;
- The Defence willingly forwent the offer for further time to prepare for the custody hearing. The Accused was provided with all the copies and supporting materials accompanying the ICTY indictment within 30 days of his initial appearance before the Tribunal, while the BiH

CPC does not require full disclosure of the prosecution material at the detention hearing the disclosure in the form of written and verbal summary of the facts and charges as provided by the Prosecutor is sufficient;

- The grounded suspicion is supported by the reception of 20 files of ICTY evidence by the Prosecutor's Office on 9 December 2005.

vi) Appellate Decision on the Appeal against the Decision on custody--27 December 2005

The Appellate Panel refused the Appeal of the Defence as unfounded. In reasoning the Decision, the Court submitted *inter alia* that the requirement from the Article 5(3) ECHR was met, since the Accused was brought before a Preliminary Hearing Judge where he stated his position in respect of his custody the same day the transfer took place. The Court affirmed the primacy of the ICTY decision on detention pending the acceptance of the Indictment, on the bases quoted by the first-instance decision.

vii) Adapted and amended Indictment dated 14 February 2006 and the Proposal for Pre-trial Detention included therein

The Prosecution filed the adapted indictment moving the Court to accept as adapted counts 3, 5, 6, and 9, and to confirm the newly added counts 1, 2, 4, and 8. The charges allege the commission of Crimes against Humanity on the basis of individual (direct) and command responsibility.

This indictment included a proposal to extend the Accused's detention, following the acceptance and confirmation of the indictment, on the basis of the risk of flight, of interfering with evidence, and to protect public and property security.

viii) Summary of the Pre-Trial Detention Hearing before the Preliminary Hearing Judge held on 20 February 2006

The Court accepted as adapted and confirmed the respective counts of the indictment on 20 February 2006. The accepted/confirmed indictment was delivered to the Defence immediately prior to the detention hearing on 20 February, while the Prosecutor was informed at the very hearing.

The Prosecutor stood by his motion included in the indictment. The Defence opposed all of the Prosecutor's arguments and added that they were preparing a defence strategy that was mostly based on an alibi. After a short break, the Court orally pronounced its decision and its reasoning, which were entered in the record.

ix) Decision on Pre-Trial Detention by the Preliminary Hearing Judge dated 20 February 2006

In this Decision, the Court ordered the Accused detained based on Article 137(1) BiH CPC until the end of the main trial, but not longer than one year from the issuance of this Decision. The Court rejected the Prosecution's submission that there was a fear that the Accused would try to influence the witnesses or accomplices and hence hinder the criminal proceedings against him, as no concrete circumstances were presented.

As to the reasons for applying the ground of threat to public and property security, see the relevant part quoted on pages 9-10 of the present Report.

x) Defence Appeal against the Decision on Pre-Trial Detention of 24 February 2006

Counsel lodged an Appeal against the 20 February Decision because it established facts incorrectly and incompletely, and applied erroneously the substantive law. He argued that the Court did not justify the grounds for custody sufficiently. Furthermore, the Accused did not have the citizenship of Serbia

and Montenegro and had no interest in leaving the territory of BiH. Counsel also contested the ground for custody on the basis of protection of public and property security as insufficiently explained. The relevant reasons are quoted on page 10 of this Report.

xi) Appellate Decision dated 10 February 2006 on Defence Appeal

The Appellate Panel rejected the Appeal of the Defence as ungrounded. The Panel considered that the Preliminary Hearing Judge correctly ordered detention against the Accused. The Court reiterated almost identically the argumentation submitted by the first instance court. The reasoning as regards custody on the basis of threat to public security is quoted on page 10 of this Report.

xii) Plea hearing postponed (6 of March 2006)

Gojko Janković's plea hearing, originally scheduled for 6 March 2006, was adjourned due to the absence of defence counsel. This hearing was re-scheduled for 16 March 2006.

xiii) Plea Hearing held on 16 March 2006

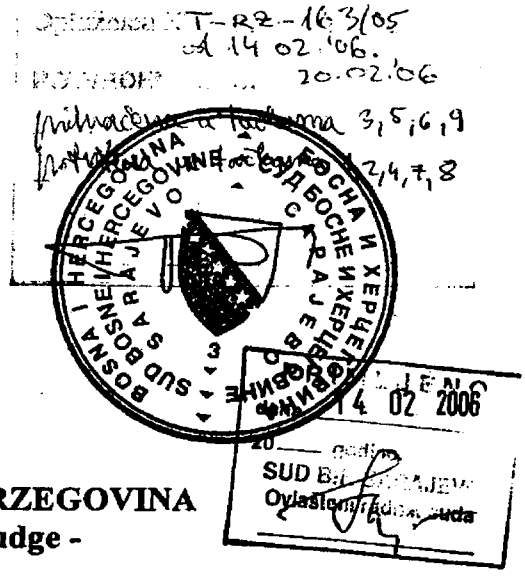
In response to the Preliminary Hearing Judge's questions, the Defendant confirmed that there was no need to read the indictment and that there were no obstacles to entering a plea on this date.

The Judge warned the Accused of the consequences that may arise from entering a plea of guilty or not guilty. The Accused stated that he understood the difference and plead not guilty to all counts of the Indictment.

Counsel indicated that the Defence had no intention of filing preliminary motions.

The Prosecution expressed its request for the main trial to start as soon as possible. The Judge explained that he would promptly refer the case to the main trial panel who would decide when the trial will start.

ANNEX B



BOSNIA AND HERZEGOVINA
PROSECUTOR'S OFFICE OF
S A R A J E V O
No: KT-RZ-163/05
Sarajevo, 14 February 2006

COURT OF BOSNIA AND HERZEGOVINA
- Preliminary Hearing Judge -

Pursuant to Articles 35 (2) (h), 226 (1) and 227 of the *Criminal Procedure Code of Bosnia and Herzegovina* ('BiHCPC') in conjunction with Article 2 (1) and (2) of the *Law on Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected from the International Criminal Tribunal for the Former Yugoslavia in the Proceedings Before the Courts in Bosnia and Herzegovina* ('Law on Transfer') and in accordance with the facts and charges laid out in the Amended Indictment of the International Criminal Tribunal for the Former Yugoslavia Ref. number IT-96-23/2-I against Gojko Janković and the facts stated therein, I hereby file this adapted and, in relation to counts 1, 2, 4, 7, and 8 thereof, extended

INDICTMENT

Against:

Gojko Janković, son of Danilo, mother's name Radojka nee Salamadija, born on 31 October 1954 in the village of Trbušče, municipality of Foča, with permanent residence at Foča, I.G. Kovačića street no.13, last known registered address in the village of Trnovača, municipality of Foča, citizen of Bosnia and Herzegovina, of Serb nationality, married, father of 3 children, literate, secondary school qualifications, no prior convictions, served the army in Kraljevo in 1973 with the rank of Lieutenant, awarded with the medal "Miloš Obilić" in 1993, Personal Identity Number 3110954131530, surrendered to the authorities of Republika Srpska on 13 March 2005, transferred to the ICTY on 14 March 2005, and transferred to the Court of BiH Detention Unit on 8 December 2005, where he is currently detained.

Because :

Between April 1992 and February 1993, within the territory of the Foča municipality, as the leader of a paramilitary group acting in coordination with the Foča Brigade of the Army of the Serb Republic of Bosnia and Herzegovina (hereinafter referred as 'the Army'), he took part in a widespread or systematic attack by the Army, members of the Police and paramilitary formations against the non-Serb civilian population in the wider area of Foča municipality, whereby those civilians were methodically captured, being frequently beaten and killed in the attack, separated according to sex, and detained in several facilities including the Foča Correctional Institute, for the men, and Buk Bijela, the Foča High School, Partizan Sports Hall, a house at Ulica Osmana Đikića no.16, a house in Miljevina known as Karaman's house, a house in Trnovača and other places for the women and girls where they were detained under harsh conditions and subjected to physical, mental and sexual abuse by their captors, while Muslim houses and apartments in Foča and neighboring municipalities were looted, destroyed and burnt down, as more particularly set out below:

1. On 14 April 1992 the accused, Gojko Janković, commanded a group of soldiers who attacked the hamlet of Brežine inhabited by civilians of Muslim nationality, ordering the group that he commanded to open fire with infantry weapons on their houses, and then arresting [redacted] and others, who were then forcefully taken to detention in Brod where they were interrogated and beaten, and then transferred to the KPD camp in Foča.

2. On 3 July 1992 Gojko Janković commanded a group of at least twenty soldiers who attacked Muslim civilians hiding in the woods on the Kremenik hills, wounding several of them and killing some, including [redacted] and also capturing about thirty women and children and seven men, namely [redacted] these captives, particularly the men, were questioned and brutally beaten, then brought to a clearing where Gojko Janković was waiting for them; beatings continued; then the women were walked away whilst Gojko Janković and some of his soldiers remained with the seven male captives who were then shot causing bullet injuries to them, principally head injuries: [redacted]- shattering of the cranial vault bones and bones of the base of the skull, [redacted]–fracture of the cranial vault bones and bones of the base of the skull, upper and lower

mandible, right upper arm, right scapula and right femur, [redacted] – fracture of the cranial vault and the base of the skull, fracture of the upper mandible, right thigh bone, right clavicle, right pubic bone and injury to the right upper arm, [redacted] – fracture of the cranial vault bones and bones of the base of the skull, [redacted] - fracture of the cranial vault bones and bones of the base of the skull, [redacted] - head injury with fractures of the skull bones and [redacted] - head injury with fracture of the temporal-parietal bone, which injuries caused the deaths of all of the seven captured men; all these acts being Gojko Janković's part within a greater attack by the army upon the villages of Trosanj and Mjesaja that day, involving killings of Muslim civilians and the ransacking and burning of their houses.

3. On the same day the captured women and children were forced to walk to Buk Bijela, a temporary detention and interrogation facility, under the escort of some of Gojko Janković's soldiers, where the accused Gojko Janković arrived later with the remainder of his group, and there they questioned the captured women; the accused, together with Dragan Zelenović interrogated female detainee FWS-75 and Gojko Janković threatened to gang-rape her and then kill her if she lied; he then allowed one of the soldiers to take the female detainee in another hut where she was raped by at least ten unidentified soldiers and lost consciousness; also Dragan Zelenović and [redacted] together with another two unidentified soldiers, all being under the effective control of Gojko Janković, interrogated fifteen year old FWS-87; she was then beaten and raped by all four of them which caused her to suffer extreme pain and heavy vaginal bleeding; in one of the rooms at Buk Bijela Janko Janjić, also under the effective control of Gojko Janković interrogated and physically abused female detainee FWS-48, threatening to bring another 10 soldiers if she resisted him and he then raped her twice; he also took female detainee FWS-74 to a room, ordered her to undress and an unidentified soldier who was waiting there raped her vaginally.

4. On the same day, a number of soldiers under the command of the accused Gojko Janković, brought a captured elderly man [redacted] from the village of Trošanj in front of huts at Buk Bijela where he was beaten and the other detainees and the accused Gojko Janković himself could hear his screams; then they took him near the bank of Drina River and shot him dead.

5. From 3 to 13 July 1992, a great number of civilians were detained in two classrooms of the High School in Foča by members of the Army, police

and paramilitary forces, these included the civilians previously detained in Buk Bijela; the accused Gojko Janković at least once took female detainee FWS-95 to other classrooms within the school where he raped her.

6. From 13 July until 13 August 1992, at Partizan Sport Hall in Foča, many Muslim civilians were detained in inhumane conditions, including female detainees FWS-87, FWS-95, FWS-48, FWS-105 and FWS-50,

- the accused, Gojko Janković, raped female detainee FWS-87 on one or more occasions during this time and she became suicidal as a result of this and many other rapes and sexual assaults inflicted upon her; the accused, Gojko Janković also raped female detainee FWS-95 on one or more occasions during this time;

- the accused Gojko Janković, on or about 15 July 1992, took female detainee FWS-48 to a Muslim house in the Aladža area in municipality of Foča where there were around 20 soldiers, including Dragan Zelenović, and he allowed Dragan Zelenović, who threatened to cut her throat, to rape her, and then another 7 soldiers, including Zoran Vuković, also raped her, causing her serious bodily injuries and to lose consciousness;

- on or around 18 July 1992 the accused Gojko Janković took the female detainees FWS-48, FWS-95 and FWS-105 to a house near the bus station in Foča and brought them to Dragoljub Kunarac, who then took FWS-48 to another house where he raped her;

- on 12 August 1992 the accused, Gojko Janković, together with Dragan Zelenović took female detainees FWS-48, FWS-95 and another woman to a house in Donje Polje in the municipality of Foča, where Dragan Zelenović raped female detainee FWS-48 twice.

7. On an unknown date in July or early August 1992 the accused, Gojko Janković, together with Beban Vasiljević took the female detainees FWS-105 and [redacted] from the detention centre at Partizan Sports Hall to a house in the village of Trnovača in the municipality of Foča where the accused Gojko Janković spent the whole night with female detainee FWS-105 and raped her twice, while Beban Vasiljević raped female detainee [redacted] and the next morning, on the order of the accused, they were returned by Beban Vasiljevic to the detention centre at Partizan.

8. On 2 August 1992 Gojko Janković, together with Dragolub Kunarac and Dragutin Vuković (Gaga), removed female detainees FWS-186, FWS-191 and [redacted], all teenagers, from a house in Ulica Osmana Đikića No 16, Foča, where they were being detained and took them to a private house in Trnovača, occupied by Gojko Janković; female detainee [redacted] only remained there a few days but both female detainees FWS-186 and FWS-191 were kept there until 23 January 1993 and throughout that time Gojko Janković raped female detainee FWS-186 many times; Dragolub Kunarac raped female detainee FWS-191 many times during the first two months with Gojko Janković also raping female detainee FWS-191 on one occasion within that period; when female detainees FWS-186 and FWS-191 were moved to another apartment in January 1993 Gojko Janković continued to rape female detainee FWS-186 there until 25 November 1993; both Gojko Janković and Dragolub Kunarac used female detainees FWS-186 and FWS-191 as sexual and general servants at the Trnovača House, treating them as objects and personal possessions and exercising complete control over their lives, both of them were compelled by Gojko Janković to use and answer to Serb names instead of Muslim ones and to eat pork on some occasions.

9. In late October or early November 1992 the accused, Gojko Janković, together with Dragan Zelenović and Janko Janjić removed female detainees FWS-75, FWS-87, [redacted] and twelve year old [redacted] from the detention centre known as „Karaman's house" in Miljevina, and drove them by car to an apartment in Foča near a fish restaurant where Janko Janjić ordered the female detainees FWS-75 and [redacted] to give a bath to the accused Gojko Janković, who raped underage female detainee [redacted] in the bathroom, and that same night also raped female detainee [redacted], while Dragan Zelenović raped female detainee FWS-87 and Janko Janjić raped FWS-75; the following morning they were moved to various apartments in Foča, where they were sexually abused by unknown soldiers.

Thus, as described above, within a widespread or systematic attack directed against a civilian population within the Foča municipality, with knowledge of such attack, participating in it, and knowing by his acts that he was participating in it, by ordering, perpetrating or aiding and abetting, or by superior responsibility where offences were perpetrated by his subordinates over whom he had effective control, when he knew or had reason to know that his subordinates were about to commit such acts, or had done so, and he failed to take necessary and reasonable measures to prevent or punish the

perpetrators thereof; he is responsible for the imprisonment and forcible transfer of civilians at the hamlet of Brežine, the torture, forcible transfer and killings of civilians from the villages of Trošanj and Mešaja at Kremenik, the rapes and torture of female detainees, FWS-48, FWS-74, FWS-75 and FWS-87 and the killing and torture at Buk Bijela, the torture and rape of female detainee FWS-95 at Foča High School, the rape and torture at Partizan, Trnovača or elsewhere of FWS-48, FWS-75, FWS-87, FWS-95, FWS-105, FWS-186, FWS-191, [redacted] and [redacted] and the enslavement of female detainees FWS-186, FWS-191 and [redacted]

Whereby he committed the following offences:

Crimes against humanity under Article 172 (1) of the Criminal Code of Bosnia and Herzegovina as follows:

1. **per sub-clauses d) and e) in respect of Count 1 of the Indictment**
2. **per sub-clauses a) and d, f) in respect of Count 2 of the Indictment**
3. **per sub-clauses f) and g) in respect of Count 3 of the Indictment**
4. **per sub-cluases a) and f) in respect of Count 4 of the Indictment**
5. **per sub-clauses f) and g) in respect of Count 5 of the Indictment**
6. **per sub-clauses f) and g) in respect of Count 6 of the Indictment**
7. **per sub-clauses f) and g) in respect of Count 7 of the Indictment**
8. **per sub-clauses c), f), and g) in respect of Count 8 of the Indictment**
9. **per sub-clauses f) and g) in respect of Count 9 of the Indictment**

All as read with Article 180 (1) of the Criminal Code of BiH and as read with Article 180 (2) in respect of Counts 1, 2, 3 and 4

Therefore,

I hereby move the Court to

I.

Schedule and conduct the main trial and to summon the attendance of the following persons :

The Prosecutor of the Prosecutor's Office of BIH;

The Accused, Gojko Janković, currently in the Detention Unit of the Court of BIH;

Miodrag Stojanović, attorney-at-law from Bijelina, Defence Counsel for the Accused.

II.

Receive Evidence as Follows

a) To hear the following persons as witnesses:

1. **A**
2. **B**
3. [redacted]
4. **FWS 74**
5. **FWS 87**
6. **FWS 96**
7. **FWS 75**
8. **FWS 88**
9. [redacted]
10. **FWS 105**
11. **FWS 95**
12. **FWS 186**
13. **FWS 191**
14. **FWS 33**
15. **FWS 51**

16. **FWS 132**
17. **FWS 175**
18. **FWS 190**
19. **FWS 192**
20. [redacted]
21. **C**
22. **D**
23. [redacted]

[redacted] these witnesses are the subject of protective measures ordered by decisions of the ICTY and of the Court of BiH. [redacted]

b) To inspect the following evidence

24. Record of questioning of the suspect Gojko Janković, No. KT-RZ-163/05 of 2 February 2006 conducted on the premises of the Prosecutor's Office of BiH;
25. ICTY Indictment against Gojko Janković;
26. Final Judgment of the ICTY Trial Chamber in the case of Dragoljub Kunarac et al., Ref. number IT-96-23-T and IT-96-23/1-T dated 22 February 2001;
27. Judgment of the ICTY Appellate Chamber in the case of Dragoljub Kunarac et al., Ref. number IT-96-23-T and IT-96-23/1-T dated 12 June 2001;
28. Letter recommending Gojko Jankovic's appointment as "Vojvoda", ref. no. 01/705-1, dated 13 August 1993;

29. List of military and civilian authorities in Foča;
30. NIN article titled "Guys on the Hague List", by Gordana Igrić, dated 23 August 1996;
31. Oslobodendje article titled "The day when Trošanj fell down";
32. VINS article titled "The war story of Cicmil";
33. Video record of interview with [redacted]
34. Transcript of interview with [redacted]
35. Information report on activities of Srbinje Police Station from April 1992 to April 1994, dated June 1994;
36. Excerpt from Helsinki Watch report titled "War Crimes in Bosnia Hercegovina", dated April 1993;
37. Video of BBC Panorama broadcast on crimes in Foča;
38. Indexed dossier containing photo documentation compiled by the ICTY Investigator R. Schouten dated July 1996 (Partizan Sports Hall, Karaman's house, house at Ulica Osmana Đjikića 16, Ribarski Dom, Lepa Brena block, Foča High School, house in Trnovače);
39. Indexed dossier containing 7 maps of Foča;
40. State Institute for Statistics of the Republic of Bosnia and Herzegovina, National composition of population, results for the Republic by municipalities and inhabited places for 1991;
41. Letter from Federal Commission on Missing Persons concerning exhumation performed in Trošanj on 2 July 2001, Ref. no. 01-41-55/2006, dated 13 January 2006;
42. Record of exhumation performed by Sarajevo Cantonal Court in Trošanj on 2 July 2001, Ref. nos. KRi-151/01, KRi 141/01, Kri-152/01 and Kri 139/01, dated 2 July 2001;
43. CBS Video titled "In Plain Sight", produced by Randall Joyce;

44. Photo documentation compiled by SIPA, dated 31 January 2006;

45. Letter from Foča Police Station, ref no. 13-1-8/02-2-230-3547/04 of 31 January 2005, containing official information concerning Gojko Janković's criminal record and personal details.

Results of Investigation

Following the investigation conducted by the ICTY Office of the Prosecutor and the confirmation of the Amended Indictment against the accused Gojko Janković by the ICTY, it has been established that there is grounded suspicion that the accused Gojko Janković is responsible for the perpetration of criminal offences of Crimes Against Humanity under Article 172 (1) a), c), d), e), f) and g) in conjunction with Article 180 (1) and (2) of the BiH CC. Evidence supporting the charges is primarily from the above-mentioned [redacted] that are charged. In the course of adapting the Indictment and examining new witnesses evidence has been obtained that Gojko Jankovic ordered or perpetrated or committed by superior responsibility, the unlawful transfer of civilians at Brežine and aided and abetted their imprisonment, he ordered, perpetrated, aided and abetted, or committed by superior responsibility, torture, killings and forcible transfer of civilians at the Kremenik Hill and killing and torture at Buk Bijela, he perpetrated rapes upon female detainees [redacted] as well as aiding and abetting the rape of female detainees [redacted] and he perpetrated the enslavement of female detainees [redacted] which additional crimes are all more fully described within the preceding paragraphs. To the extent that these additional charges are supported by statements given to this Prosecutor's Office by injured parties or other witnesses these statements are enclosed herein. The ICTY indictment is the basis of all further evidence supporting these charges.

Material supporting the allegations of the Indictment

1. Record of the statement of protected witness A, dated 15 August 2005;
2. Record of the statement of protected witness A, dated 4 January 2006;

3. Record of the statement of protected witness B, dated 10 August 2005;
4. Record of the statement of protected witness B, dated 6 January 2006:
5. Record of the statement of witness [redacted] dated 23 August 2005;
6. Record of the statement of witness [redacted] dated 6 January 2006;
7. Record of the statement of protected witness FWS-74, dated 15 November 1995;
8. Record of the statement of protected witness FWS-87, dated 20 January 1996;
9. Record of the statement of protected witness FWS-87, dated 5 December 2003;
10. Record of the statement of protected witness FWS-96, dated 13 February 1996;
11. Record of the statement of protected witness FWS-75, dated 18 November 1995;
12. Record of the statement of protected witness FWS-75, dated 6 March 1998;
13. Record of the statement of protected witness FWS-75, dated 22 October 2003;
14. Record of the statement of protected witness FWS-75, dated 30 December 2005;
15. Record of the statement of protected witness FWS-88, dated 21 January 1996;
16. Record of the statement of protected witness [redacted], dated 22 March 2000;

17. Record of the statement of protected witness [redacted], dated 6 December 2003;
18. Record of the statement of protected witness FWS-48, dated 9 September 1995;
19. Record of the statement of protected witness FWS-105, dated 11 February 1996;
20. Record of the statement of protected witness FWS-105, dated 16 January 2005;
21. Record of the statement of protected witness FWS-95, dated 11 February 1996;
22. Record of the statement of protected witness FWS-186, dated 9 May 1998;
23. Record of the statement of protected witness FWS-191, dated 23 September 1998;
24. Record of the statement of protected witness FWS-191, dated 15 June 1998;
25. Record of the statement of protected witness FWS-33, dated 5 July 1995;
26. Record of the statement of protected witness FWS-51, dated 5 September 1995;
27. Record of the statement of protected witness FWS-132, dated 14 June 1996;
28. Record of the statement of protected witness FWS-175, dated 21 August 1997;
29. Record of the statement of protected witness FWS-190, dated 8 June 1998;

30. Record of the statement of protected witness FWS-192, dated 26 September 1998;
31. ICTY Supplemental Information Sheet for witness [redacted], dated 17 March 2000;
32. Record of the statement of protected witness C, dated 11 January 2006;
33. Record of the statement of protected witness D, dated 11 January 2006;
34. Certified transcripts of testimonies in the ICTY case IT-96-23-T and IT-96-23/1-T against Dragoljub Kunarac et al, by witnesses FWS-87, FWS-96, FWS-75, [redacted], FWS-48, FWS-105, FWS-95, FWS-186, FWS-191, FWS-33, FWS-132, FWS-175, FWS-190, FWS-192;
35. Record of questioning of the suspect Gojko Janković, No. KT-RZ-163/05 of 2 February 2006 conducted on the premises of the Prosecutor's Office of BiH;
36. ICTY Indictment against Gojko Janković;
37. Final Judgment of the ICTY Trial Chamber in the case of Dragoljub Kunarac et al., Ref. number IT-96-23-T and IT-96-23/1-T dated 22 February 2001;
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52. Letter from Federal Commission on Missing Persons concerning exhumation performed in Trošanj on 2 July 2001, Ref. no. 01-41-55/2006, dated 13 January 2006;
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54. CBS Video titled "In Plain Sight", produced by Randall Joyce;
55. Photo documentation compiled by SIPA, dated 31 January 2006;

56. Letter from Foča Police Station, ref no. 13-1-8/02-2-230-3547/04 of 31 January 2005, containing official information concerning Gojko Janković's criminal record and personal details;

57. CDs containing audio recording of the testimonies of the following witnesses: FWS-96, [redacted], FWS-105, FWS-95, FWS-186, FWS-191, FWS-51, FWS-190, FWS-192.

Proposal for Pretrial Detention following the Adapted and Confirmed Indictment

Based upon the results of the investigation conducted by the ICTY and the Prosecutor's Office of BiH, and based upon the First Amended Indictment against the accused Gojko Janković, by the ICTY there is grounded suspicion that he committed the criminal offences with which he is charged. By the decision of the Preliminary Hearing Judge of the Court of BiH, Reference Number X-KRO-05/161, dated 8 December 2005 it was decided that the Order for detention of Gojko Janković made by the ICTY on 17 March 2005 in Case IT-96-23/2 should remain in force until the Court of BiH reached a decision on the acceptance of the adopted indictment to be filed by the Prosecutor's Office of BiH and a decision on whether to confirm the same indictment in respect of new counts or new accused persons. The Court granted the Prosecutor's Office of BiH a 65 day deadline from Monday 12 December 2005 within which to adopt the Indictment and to add new counts, if need be. Based upon the Decision referred to above the Prosecutor's Office of BiH is obliged to state its position regarding the continued detention before the expiry of the said deadline.

Pursuant to Articles 227 (3) and 137 (1) of the BiH CPC the Prosecutor's Office of BiH proposes that, following the adoption and confirmation of the Indictment, the detention of the Accused Gojko Janković be extended as provided for in Article 132 (1) a), b) and d) of the BiH CPC.

As regards the legal grounds for detention prescribed under Article 132 (1) a) of the BiH CPC we would like to emphasize that the Accused, Gojko Janković, surrendered to the Tribunal almost 9 years after an indictment was filed against him and his surrender was result of lengthy internal and international pressures upon the Republika Srpska authorities to make more efforts to deprive of liberty war crimes suspects residing within

its territory and to aim at more efficient cooperation with the Tribunal. These arguments, inter alia, were reasons for the decision of the ICTY to refuse the request of the accused to be out on pretrial release. The accused Gojko Janković firmly opposed the transfer of his case to the Prosecutor's Office of BiH claiming that he might not receive a fair and impartial hearing before the Court of BiH. The submission of the accused dated 19 May 2005 should specially be taken into account, in which the accused claims that he meets the requirements for citizenship of Serbia and Montenegro where the accused has worked and has close ties. The foregoing allegations lead to the conclusion that there are circumstances and valid reasons to fear that the accused, if released, might not voluntarily respond to the Court's summons and that he could easily cross the border to Serbia and Montenegro and thus become unavailable to the Court of BiH during this criminal procedure. Therefore, the Prosecutor's Office of BiH submits that the grounds for detention under Article 132 (1) (a) of the CPC of BiH exist.

The Prosecutor's Office of BiH further submits that the grounds for detention under Article 132 (1) (b) of the CPC of BiH exist because there are valid reasons to fear that the accused, if released, might hinder the proceedings by influencing the witnesses. In regard to that, the Prosecutor's Office of BiH would like to note that the Indictment is mainly based on the [redacted] if released, could easily influence the witnesses mentioned above and contact the other co-perpetrators, some of which are still at large, and in those ways hinder further criminal proceedings. It is also necessary to mention the fact that the Tribunal considered the threat that the accused could direct to the witnesses-victims, if at large, and that was the reason why the ICTY postponed revealing identity of some of the witnesses in Kunarac case.

In addition to that, the Prosecutor's Office of BiH would like to note that the accused Gojko Janković's detention is necessary for the reasons stipulated under Article 132 (1) (d) of the CPC of BiH given the fact that the accused is charged with criminal offences of Crimes Against Humanity under Article 172 of the CC of BiH which carry a minimum penalty of ten years or long term imprisonment. The gravity of these offences, as well as their consequences; especially because they involve systematic enslavement and

rape of women, even young girls, most of whom come [redacted] region and also involve pronounced and constant infliction of psychological and physical suffering that resulted in severe trauma and in some cases even tragic outcomes that destroyed the youth of the above persons and inflicted severe suffering upon the families of victims and their close and distant relatives; and further taking into account that the indictment is based on [redacted] For the reason stated above and pursuant to Article 132 (1) (d) of the CPC of BiH, detention is necessary in order to protect the safety of the citizens.

Based on the foregoing, the Prosecutor's Office of BiH moves the Preliminary Hearing Judge of the Court of BiH to accept counts 3, 5, 6 and 9 of this adapted Indictment of the ICTY Office of the Prosecutor pursuant to Article 2 (1) of the Law on Transfer and to confirm counts 1, 2, 4, 7 and 8 pursuant to Article 2 (2) of the cited Law and Article 228 (1) of the CPC of BiH, since these represent new counts of the Indictment.

Prosecutor
Prosecutor's Office of BiH

Philip King Alcock