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: 20 February 2006

THE PROSECUTOR

v.

RADOVAN STANKOVIĆ

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.

RADOVAN STANKOVIĆ

PROSECUTOR'S SECOND PROGRESS REPORT

A. INTRODUCTION

1. Pursuant to the Decision on Referral of Case Under Rule 11 *bis* of 17 May 2005 ("Decision on Referral") and the Referral Bench's Order of 16 February 2006,[1] 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,[2] 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.[3]

3. The Prosecutor filed an Initial Progress Report on 14 November 2005.[4]

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 13

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1 *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Order On Prosecutor's Request For An Extension Of Time To File Second Progress Report, 16 February 2006.

2 Prosecutor's Request for an Extension of Time to File Second Progress Report, 14 February 2006.

3 *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 17 May 2005, at p. 34.

4 See *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Prosecutor's Initial Progress Report, 14 November 2005.

February 2006.[5] The Report outlines the main findings from trial monitoring activities to date in the *Stanković* case, from the perspective of international human rights standards.[6]

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

> Mr. Stanković was transferred to the State Court on 29 September 2005, while the case-file was transferred to the BiH Prosecutor's Office on 1 October 2005. Upon arrival, the Defendant was brought before the Preliminary Hearing Judge, who, after a hearing, gave a deadline of 40 days to the BiH Prosecutor's Office to adapt the ICTY Indictment to domestic law, and decided that the ICTY Order on Detention on Remand remained in force until the Court accepted the indictment as adapted. Subsequently, the Court extended the deadline for adapting the indictment for a further 15 days. The adapted indictment was filed on 28 November 2005. It contained four adapted counts and two new ones. On 2 December 2005, the Court held a hearing on custody and, after having accepted the indictment as adapted and confirmed, issued its decision, ordering custody on the grounds of domestic procedure on 7 December. On 23 December 2005, the Accused was called to enter a plea on the two new counts in the indictment. After he refused to do so, the Court entered *ex officio* a plea of not guilty on his behalf. All appeals of the Defence during the reporting period were rejected as ungrounded, while the preliminary motions challenging the 28 November Indictment were rejected as untimely. The main trial is scheduled to start on 23 February 2006.[7]

6. The main thrust of the OSCE's Report is the recommendation that the Law on Transfer[8] 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 Stanković's right to a fair trial.[9]

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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5 OSCE First Report, Case of Defendant Radovan Stanković, Transferred to the State Court pursuant to Rue 11*bis*, February 2006 (hereafter "Report").

6 Report, para. 1.

7 Report, p. 1, para. 3.

8 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").

9 *See* Decision on Referral, para. 55.

implementation of its recommendations."[10] The Prosecutor intends discussing issues raised in the report with OSCE and the BiH State Prosecutor.

8. The OSCE recommends 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.[11] This issue was identified earlier and discussions were held with the BiH Prosecutor's Office, and 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. As stated above, the trial has been scheduled to commence on 23 February 2006. It is the intention of the Prosecutor to send members of her office to attend the opening of the trial.

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 Stanković filed 28 November, accepted as adapted and confirmed on 7 December 2005.

Word count: 900.

Carla Del Ponte
Prosecutor

ICTY TPIY
Bureau du Procureur
Office of the Prosecutor

Dated this twentieth day of February 2006
At The Hague
The Netherlands

[10] Report, p. 2, last para.
[11] Report, p. 14, para. 3.

ANNEX A

OSCE

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

First Report

Case of Defendant Radovan Stanković

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

February 2006

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EXECUTIVE SUMMARY

The case of Mr. Radovan Stanković is the first case transferred from the International Criminal Tribunal for the former Yugoslavia ("ICTY") to the Authorities of Bosnia and Herzegovina ("BiH") for trial before the State Court, pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence. Following the agreement between the OSCE Chairman in Office and the ICTY Prosecutor, this constitutes the first report submitted by the OSCE Mission to Bosnia and Herzegovina ("OSCE") to the Prosecutor's Office at The Hague. It outlines the main findings from trial monitoring activities until present in this case, from the perspective of international human rights standards.

Section I of this Report addresses certain seemingly vague provisions and apparent *lacunae* in the Law on Transfer,[1] which the BiH CPC does not satisfactorily clarify regarding the procedural actions during the period from the transfer of the Defendant to BiH until the acceptance of the adaptation of the ICTY Indictment to domestic law. (Hereinafter this period of time is referred to as the "pre-adaptation period.") This Section also considers the practice of the State Court in countering some of these gaps. Section II considers problems relating to pre-trial custody in Rule 11*bis* cases during the pre-adaptation period. These include the poor drafting of the Law on Transfer in the relevant parts, as well as the approach the State Court has taken in connection with the Defendant's custody during the pre-adaptation period.[2] In Section III, the OSCE makes an assessment of the Law on Transfer and of the State Court approach regarding pre-trial custody in relation to international human rights standards. Section IV outlines certain issues regarding the review of the Defendant's pre-trial custody after the issuance of the BiH Prosecutor's Indictment. Section V makes a brief reference to certain problems with the Defence Counsel submissions. Lastly, Section VI refers to the plea hearing of the Defendant that took place on 23 December 2005, which reveals further problems with the Law on Transfer.

Mr. Stanković was transferred to the State Court on 29 September 2005, while the case-file was transferred to the BiH Prosecutor's Office on 1 October 2005. Upon arrival, the Defendant was brought before the Preliminary Hearing Judge, who, after a hearing, gave a deadline of 40 days to the BiH Prosecutor's Office to adapt the ICTY Indictment to domestic law, and decided that the ICTY Order on Detention on Remand remained in force until the Court accepted the indictment as adapted. Subsequently, the Court extended the deadline for adapting the indictment for a further 15 days. The adapted indictment was filed on 28 November 2005. It contained four adapted counts and two new ones. On 2 December 2005, the Court held a hearing on custody and, after having accepted the indictment as adapted and confirmed, issued its decision, ordering custody on the grounds of domestic procedure on 7 December. On 23 December 2005, the Accused was called to enter a plea on the two new counts in the indictment. After he refused to do so, the Court entered *ex officio* a plea of not guilty on his behalf. All appeals of the Defence during the reporting period were rejected as ungrounded, while the preliminary motions challenging the 28 November Indictment were rejected as untimely. The main trial is scheduled to start on 23 February 2006.

The OSCE Mission to Bosnia and Herzegovina, as a result of its monitoring, has grown concerned about certain aspects of the handling of this case to date. These are discussed in the first part of this report. These concerns relate mainly to what this Mission considers the poor drafting of the Law on Transfer, to the State Court's interpretation of some provisions in the Law on Transfer, and to the State Court's approach in connection with pre-trial custody of defendants during the period from their transfer until the acceptance of the adapted indictment.

In this Mission's view, the Law on Transfer contains unclear provisions and does not address all important issues particular to transferred cases. This lack of clarity may serve to deprive these

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[1] The Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH is herein referred to as the "Law on Transfer."

[2] The OSCE Mission to Bosnia and Herzegovina refers to the term "State Court approach" as the practice of the State Court to determine that, in Rule 11*bis* cases, the BiH CPC provisions on pre-trial custody are not applicable during the pre-adaptation period, but instead to recognize that the ICTY Order on Detention on Remand remain in force throughout the pre-adaptation period. A corollary of this is that the State Court gives a deadline to the Prosecutor's Office to adapt the ICTY Indictment to domestic law.

provisions of their quality as "law" in the sense that they lack foreseeability and legal precision, as required by international human rights standards. In particular, the Law on Transfer is vague or silent regarding the nature of the adaptation of indictment phase, the procedural actions that this adaptation consists of, its duration, and its relation to regular investigative actions. The Law on Transfer also lacks sufficient clarity regarding the manner in which pre-trial custody should be reviewed after the transfer of a defendant to the State Court and does not specifically regulate whether the defendant may enter a plea on the adapted charges. Similarly, certain rules applied by the State Court, sometimes in the attempt to fill in gaps in applicable law, were also not reasonably foreseeable in the circumstances.

The State Court's interpretation and application of the Law on Transfer provisions has further complicated matters. The Mission is concerned that the State Court has misinterpreted the Law on Transfer and deemed that pre-trial custody should be regulated according to the BiH Criminal Procedure Code ("BiH CPC") only after the acceptance of the indictment. The State Court recognised that the ICTY Order on Detention on Remand remained in force for the period from the transfer of defendants until the acceptance of the adapted indictment. In doing so, the State Court relinquished its authority to review the merits of detention and to release transferred defendants, if necessary. Consequently, the State Court arguably did not constitute a "court" in the sense envisaged in international human rights standards.

Moreover, the Appellate Panel reviewing the appeals did not sufficiently consider all arguments raised by the Defence as regards the lawfulness of pre-trial custody. To this extent, it is doubtful whether the Appellate Panel provided a sufficient judicial review of the lawfulness of detention as enshrined in international human rights standards.
This Mission also believes that the hearing of 2 December 2005 was held prematurely. This is because it called upon the Defence to provide arguments on the motion on custody included in the Indictment filed by the BiH Prosecutor's Office, although at that time the said Indictment had not been reviewed by the Court and had not been served to the Defence. Holding this hearing prematurely arguably deprived the Defence of the right to have necessary facilities to prepare its case and thus breached the principle of equality of arms. It may also have had adverse implications for the appearance of the Court's impartiality.

The OSCE Mission to Bosnia and Herzegovina further notes problems with the submissions of Defence Counsel, in the context of the defendant's right to effective counsel. Certain submissions were not entirely clear or were rejected as untimely. To this extent, they may not have properly invited the Court to address all issues of concern.

In this report, the Mission therefore recommends to the ICTY Prosecutor's Office that it completes the transfer of the case-files to the BiH Prosecutor's Office at a sufficient time before the transfer of the defendants is effected. A number of other recommendations included herein are addressed to local actors. The OSCE Mission to Bosnia and Herzegovina remains committed to aiding the domestic justice system in developing human rights compliant practices. To this effect, it intends to share this report with the local governmental authorities and actors in the justice system, discuss its findings, and follow up on the implementation of its recommendations.

PART 1: ISSUES OF CONCERN

In the following Sections of Part 1 of this report, the OSCE Mission to Bosnia and Herzegovina outlines a number of concerns that have been noted in the Rule 11*bis* case of Radovan Stanković.[3] Part 2 contains the summaries of relevant decisions, submissions, and hearings in this case.

Although this report focuses on the case of Radovan Stanković, itt also makes references to the case of Gojko Janković, who was subsequently transferred to the BiH authorities pursuant to Rule 11*bis*. The purpose of these references is to shed light on certain unclear practices of the State Court in transferred cases. The Preliminary Hearing Judge in the case of Radovan Stanković was the Presiding Judge in the "out-of-trial" panel[4] in the case of Gojko Janković and *vice versa*; the other members of the "out-of-trial" panel for both cases were the same. Hence, since the findings in both cases were made mostly by the same judges,[5] considering the decisions in both cases can assist in achieving a better comprehension of the approach that was followed.

Certain issues observed during the proceedings are not included in this report, either because they do not raise concerns as to the procedure and international human rights standards or because the OSCE Mission to Bosnia and Herzegovina (hereinafter referred to as "the OSCE," though these views do not necessarily represent those of the organization as a whole) needs to research and evaluate further the relevant circumstances or because of necessary restrictions imposed by the reporting time-limit. In this report, too, the OSCE does not examine whether the pre-trial custody of the Defendants is substantially correct in the circumstances.[6] This report only addresses the procedure applied and the reasoning of the Court in its decisions in relation to domestic law and international human rights standards.

I) *Lacunae* in Domestic Law Relating to the Pre-Adaptation Period

The first transfers of Rule 11*bis* cases, namely those of Radovan Stanković and Gojko Janković, have shown that the Law on Transfer has not been carefully drafted. Despite the provisions in the Law on Transfer to use the BiH CPC as an auxiliary in case special provisions are not provided in the former, the combined system of rules remains incomplete and frequently unforeseeable by all those involved in the transferred cases. The legal vacuums of the Law on Transfer and its lack of foreseeability in certain procedural matters related to the pre-adaptation of indictment period arguably deprive the Law on Transfer of its quality as "law" in the related parts, in the sense that it lacks legal certainty and foreseeability, as stipulated by international human rights and rule of law standards.

Article 2(1) of the Law on Transfer foresees that:

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

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[3] Hereinafter also referred to as "Defendant" or "Accused," unless these terms are meant in the context to relate to Gojko Janković.

[4] See Article 24(6) BIH CPC.

[5] In the out-of-court panel that reached their decision on 19 (registered 21) December 2005, one of the members of the Panel was different than the member normally assigned to that panel. The OSCE Mission to Bosnia and Herzegovina was informed by the Court Management Section of the State Court that in both the Stanković and Janković cases the rotational system of selecting judges was followed.

[6] Also, the report does not consider the stated preference of the Defendant Stanković to remain in custody until his name is cleared.

As can be seen from this provision, apart from generally describing the term "adaptation" as making an ICTY indictment compliant with the BiH CPC or fulfilling the formal requirements of the BiH CPC, the Law on Transfer does not provide any further specific information as to the procedural action of "adaptation." Nor does this Law does define the nature of the pre-adaptation period in relation to the BiH CPC. Article 1(2) of the Law on Transfer foresees that in case it (the Law on Transfer) does not provide for special provisions to regulate the transfer of cases, then other relevant provisions of the BiH CPC (or the other criminal procedure codes) shall apply. Nevertheless, the non-regulated matters mentioned below are not addressed *per se* in the BiH CPC, since the BiH CPC does not foresee the concept of "adaptation" of the ICTY indictments.

The fact that the Law on Transfer has not been drafted in sufficient detail gives rise to the following problems:

a) The Law on Transfer does not sufficiently provide which actions are necessary for the adaptation of an ICTY indictment

The Law on Transfer does not address the specific actions that may or should be taken in order to adapt an ICTY indictment. The State Court has recognised the existence of this gap.[7] However, the State Court practice is confusing, since it has accepted that the Prosecutor's Office needs to conduct investigative-type actions in order to adapt the indictment, but has refused to accept that the pre-adaptation period is an investigation phase.

A *lato sensu* understanding of the term "adaptation" would apparently permit the BiH Prosecutor's Office to conduct investigative-type actions into evidence transferred from the ICTY or into additional evidence pertaining to the charges in the ICTY indictment. Such an understanding apparently takes into consideration that the ICTY indictments were drafted several years before the transfer of the cases, as well as the possibility that the evidence may have changed over the course of time or, for any reason, be inadequate to support charges according to the domestic law. This interpretation would also allow for the gathering of additional evidence to support the counts in an ICTY indictment. This perception has been put forward by the BiH Prosecutor's Office.[8] The State Court eventually accepted this position as well, although it did not appear to consider the issue initially.[9]

A *stricto sensu* interpretation would limit the actions for adaptation to converting the charges and the form of liability contained in the ICTY indictment to the corresponding domestic provisions, listing the evidence provided by the ICTY, and generally giving it the form of a domestic indictment.[10] This interpretation would entail the assumption that the evidence gathered by the ICTY in support of its indictment can be used in trial before the BiH Court in its form when transferred. The strict concept of adaptation has been put forward by the Defence in the Stanković case.[11]

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[7] In the 12 October (registered 19) 2005 Decision on the Appeal the Appellate Panel states: "The Preliminary Hearing Judge of the Court of Bosnia and Herzegovina had the duty to regulate the procedure for the proceedings in this case, bearing in mind the deficiency in legal procedure that would in detail provide for the actions undertaken by the Prosecutor of Bosnia and Herzegovina in the course of adapting and accepting the Indictment of the International Tribunal."

[8] The Prosecutor in the Stanković case indicated in his 31 October 2005 Motion that he was re-hearing witnesses for the purpose of adapting the ICTY Indictment.

[9] The 29 September Decision of the Preliminary Hearing Judge has not touched upon what actions it expects the Prosecutor's Office to undertake in order to adapt the indictment, apart from recognising that the Prosecution would need time to adapt the Indictment since there was extensive evidentiary material; neither has the Appellate Court's Decision dated 12 October touched upon the issue. The Preliminary Hearing Judge in his Decision of 9 November 2005 accepted that the Prosecutor was (re)-interviewing witnesses in the process of adapting the indictment.

[10] For the formal contents of an indictment according to domestic law, see Article 227 BiH CPC. As first differences one may note that the ICTY indictments do not contain a list of the evidence proposed for trial, and do not incorporate proposals for detention of the defendant.

[11] Defence Counsel in the Stanković case argued in his Appeal received on 19 November 2005 that the adaptation of the Indictment is a formal adaptation. This is also the understanding of the Defendant himself expressed in his Appeal of 10 November (registered 15 November) 2005. Furthermore, the ICTY Referral Bench's Decision on Referral of Case Under Rule 11*bis* of 17 May 2005 states in paragraph 74 that "...the

Interestingly, the arguments in the Gojko Janković case were phrased with more clarity. In the custody hearing of 7 December 2005, the BiH Prosecutor's Office stated that, in order to adapt the indictment, there is an element of investigation; he further argued that the ICTY indictment was not "confirmed" for the purposes of the BiH CPC, but the procedural action of "adaptation" is essentially the "confirmation" of the indictment for the CPC purposes. The Court in the Janković case, although it refused to return the case to the investigation stage, nevertheless accepted in its 8 December Decision the possibility of the Prosecutor expanding the counts of charges and did not oppose the intention of the Prosecutor to conduct investigative-type actions in the course of adapting the indictment.

Conclusion-Recommendations: In view of the above, the OSCE recommends that the Law on Transfer be amended to clarify whether the adaptation of the indictment should be understood in its strict sense or whether it should encompass an element of investigation, as has been accepted in practice. If indeed there is an element of investigation in adapting the indictment, the law should clarify whether there are any differences to regular investigative actions. If there are no substantial differences, it is recommended that the Law on Transfer clarify the nature of the pre-adaptation period as an investigative phase for the purposes of the BiH CPC.

b) The Law on Transfer does not foresee the maximum duration of the pre-adaptation period

Actions that need to be taken for the adaptation of the indictment would determine the duration of the pre-adaptation period. However, the Law on Transfer fails to provide for the maximum duration of the process of adaptation. Likewise, it does not include whether, how, and by whom the duration of adaptation can be reviewed.[12] And since there are no time-limits prescribed, there is no sanction envisaged for exceeding them. In fact, at least in theory and based on the letter of the Law on Transfer as at present, the pre-adaptation period could last indefinitely. The State Court's solution to this gap is contentious.

The State Court, recognising the existence of this gap, deemed it to be the duty of the Preliminary Hearing Judge to regulate the proceedings in this case.[13] The Preliminary Hearing Judge initially gave 40 days to the Prosecution to adapt the indictment and thereafter extended this time-limit for a further 15 days. In extending the time-limit, the Preliminary Hearing Judge opined that the time needed to adapt the indictment was a factual issue that needed to be considered according the circumstances of the concrete case.[14] Defence Counsel argued in his Appeal that this was a "rather legal issue."[15] The Appellate Panel on this matter rejected the Counsel's view and found that: "...the deadline given by the Preliminary Hearing Judge is not a legal deadline, but a judicial instructive deadline, hence exceeding this deadline does not result in the loss of rights[16] nor, in this case, the release of the accused from custody."[17]

Consequently, it is recognised even by the Court that the time-limits provided by the Preliminary Hearing Judge were "toothless" and merely indicative, since they entailed no sanction for the Prosecution in the event they were not complied with. As will be discussed below in Section II, the Court refrained from reviewing the defendant's detention according to the BiH CPC until after the acceptance of the adapted indictment. By recognising that the detention of the defendant would in any case not seize before the acceptance of the indictment, the Court forfeited the sole effective means of

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proceedings could continue before the [State] Court in their current stage, subject to the potential for some delay [...] as the Indictment must be adapted. [...] The nature of what is contemplated by [Article 2(1) of the Law on Transfer] suggests that the procedure should not be lengthy."

[12] Also see the Appeal of Defence Counsel received by Court on 19 November 2005, which argues that there is no legal ground for extending the period adaptation period.

[13] See the Appellate Panel's Decision on the Appeal against custody, dated 12 October 2005 (registered 19 October).

[14] See the 9 November 2005 Decision of the Preliminary Judge in the Stanković case.

[15] See the Appeal of 12 (registered 18) November 2005 of Defence Counsel in the Stanković case.

[16] The OSCE Mission to Bosnia and Herzegovina finds the expression "loss of rights" in this context unclear.

[17] Unofficial translation. See *supra* footnote 13.

exercising pressure on the Prosecution to adapt the indictment promptly, in case the defendant is in custody.

Moreover, the 29 September Decision does not explain how the Preliminary Hearing Judge arrived at the conclusion that 40 days[18] would be adequate for the adaptation of the indictment, since this Judge did not hear any concrete proposal as to the actions that needed to be taken within this time, did not inquire about what these envisaged actions were, and, more importantly, did not set them out in his decision. The Preliminary Hearing Judge's Decision to extend the duration of the adaptation period by 15 days raises similar concerns, since no further details were given as to how many witnesses remained to be questioned by the Prosecution and under which circumstances.[19]

The determination of whether the authorities, in this case the Prosecutor, are acting with due diligence and with particular urgency is a factor in assessing compliance with the right of a detained defendant under Article 5(3) ECHR[20] to be tried within a reasonable time or be released pending trial.[21] Additionally, during a regular investigation, domestic law requires the Prosecutor to submit a substantiated motion when requesting the extension of custody.[22] If further extension is needed in grave cases, the Prosecutor must demonstrate particularly important reasons.[23] It is unclear how the Court could make an informed assessment of whether the competent authorities were acting with due diligence during the pre-adaptation period while the defendant was in custody, given that actions to be taken were not sufficiently defined and the Court did not pursue further clarification from the Prosecutor's Office.

Furthermore, the Law on Transfer does not foresee whether the judiciary actually has the authority to issue a direct instruction to the Prosecution as to the duration of the adaptation period. If such authority is indeed meant to be vested in the judiciary, the law-maker, or the State Court following this practice, may be required to justify this rationale further, since this practice would arguably denote a departure from the BiH CPC provisions, which are more adversarial in nature than the previous procedure. Under the BiH CPC, the investigation is under the direction of the Prosecutor[24] and it is the Collegium of the Prosecutor's Office that is authorised to undertake the necessary measures in order to complete the investigation, if this is not completed within the period prescribed by law.[25] Neither the Law on Transfer nor the BiH CPC provides that the judiciary can intervene in the duration of the investigation, save indirectly by its authority to review and extend pre-trial custody within the limits of the law and to the extent necessary when a suspect is detained.

It is mostly from the commencement of the main trial that the judge or presiding judge asserts a certain amount of control over the prosecution's actions, since he/she directs the main trial.[26] Article 148(3) BiH CPC prescribes that "[u]nless otherwise determined by this Code, the person filing a submission that is incomprehensible or does not contain all that is necessary for action on the submission, shall be summoned by the Court to correct or supplement the submission; should he not do so within a specified period, the Court shall reject the submission." This provision envisages the Court giving

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[18] It is also curious that on 29 September 2005, the Court established the starting point of the deadline of 40 days from a future point in time, namely the 4th of October 2005, based on the estimation by the Prosecutor's Office of when it would be receiving the transferred case-file.

[19] The Appellate Panel's Decisions on the Appeals against the previous first instance Decisions providing time-limits did not appear to give any consideration to the lack of information as to which actions were to be taken within those periods.

[20] The European Convention of Human Rights is herein referred to as "ECHR."

[21] See Articles 131(2) and 13(3) BiH CPC. Regarding the length of pre-trial detention, the European Court of Human Rights has ruled that even when relevant and sufficient grounds continue to justify detention during the entire pre-trial period, Article 5(3) ECHR may still be infringed if the defendant's detention is prolonged beyond a reasonable time, because the proceedings have not been conducted with the required expedition; see, for instance, the judgements of the European Court of Human Rights in the cases *Tomasi v. France*, 27 August 1992, para. 102, and *Abdoella v. The Netherlands*, 25 November 1992, para 14.

[22] See Article 135(2) BiH CPC.

[23] See Article 135(3) BIH CPC.

[24] See Article 35 BiH CPC.

[25] See Article 225(3) BiH CPC.

[26] See Article 239 (1) BiH CPC.

deadlines even before the main trial so that submissions can be corrected. Nevertheless it cannot be applied as such to the situation in question, because, during the pre-adaptation period, the Prosecution has not yet filed the adapted indictment.

An additional issue that has no solid legal basis is the State Court's arbitrary application of the 40-day deadline, which is foreseen as an absolute maximum in an international convention irrelevant to this situation. The Appellate Panel accepted the decision of the Preliminary Hearing Judge to give a deadline of 40 days for the adaptation of the indictment and noted that it is identical in its length to the provisional arrest set forth in Article 16(4) of the European Convention on Extradition.[27] In actual fact, it should be noted that the relevant provision of the Convention on Extradition assigns 40 days as the absolute maximum duration of provisional arrest by the requested state before it receives a request for extradition;[28] this deadline does not refer directly to the maximum time for receiving the request for extradition.[29] It is unclear why the Court made this analogy in the first place, especially to the extent that there appears to be no workable comparison between the State Court at the receiving end of an adapted indictment (or of a transferred case) and the position of a requested State in extradition proceedings.

In any case, on 9 November 2005 the Preliminary Hearing Judge extended this period of 40 days for a further 15 days, which breaches the letter of the Convention on Extradition and confirms suspicions that the analogical application of its deadline was irrelevant in the first place.[30]

Conclusion-Recommendations: In view of the problematic issues outlined above, the OSCE recommends that the Law on Transfer be amended to clarify the duration of the period within which the indictment should be adapted. Even before the amendment of the law however, it is recommended that the State Court refrain from providing a deadline to the Prosecutor to adapt the indictment, as this action has no basis in the law and lacks an effective sanction mechanism. Instead, if the defendant is in custody, the Court may use the authority provided to it by law to keep a defendant in custody for as long a period as the Court deems appropriate, within legal time limits. The issue of custody is further elaborated in the following Sections.

c) The Law on Transfer does not clarify the relation between the adaptation actions and those which would constitute regular investigations into additional charges and accused

In relation to point (a) above, the Law on Transfer does not sufficiently clarify the interplay between the actions needed for the adaptation of the charges in the ICTY indictment on the one hand, and the actions needed according to the BiH CPC for a regular investigation into additional charges or accused on the other hand. In theory, this gap could lead to the Prosecutor investigating additional charges or defendants indefinitely under the pretext of adapting the indictment.

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[27] See the Appellate Panel's Decision of 12 October in the Stanković case. Also see the European Convention on Extradition, dated 13 December 1957.

[28] Article 16 (4) of the European Convention on Extradition (Paris, 13 December 1957) reads: "Provisional arrest may be determined if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought."

[29] Receiving the request for extradition would be the only logical, although actually irrelevant, equivalent to receiving the adapted indictment.

[30] The same approach was followed in the case of Janković, where the Court's Decision of 8 December 2005 granted 65 days for the adaptation of the indictment, claiming that 40 of these were the identical time as in the Convention on Extradition and adding "i.e. [sic] the detention period laid down in Article 29(5) of the European Convention on the Transfer of Proceedings in Criminal Matters dated 22 February 2005." [Official translation]. Despite the fact that both these Conventions foresee the 40 days period as the maximum length of detention, the State Court granted an additional 25 days since, in its opinion, they were necessary because of the complexity of the case. It may be noted that, again, there appears to be no workable comparison between, on the one hand, the Requested State in the transfer of criminal proceedings, and on the other hand the State Court at the receiving end of an adapted indictment by the BiH Prosecutor's Office.

Article 2(2) of the Law on Transfer foresees that if the BiH Prosecutor adds charges or accused to the indictment, the Court shall confirm the indictment in accordance with the BiH CPC, but only in relation to the additional charges or accused. By this provision, the Law on Transfer appears to foresee that the adapted charges and any new counts or additional accused can be included in a single indictment, which would be submitted to the Court to accept and confirm possibly at the same time.

The question arising from this provision is the following: Can or should the Prosecutor use the time prescribed for the adaptation of the ICTY indictment to conduct actions that would otherwise constitute a regular investigation into any additional charges or defendants? Or should the Prosecutor's Office initiate an investigation according to the regular BiH CPC procedure if it intends to investigate such additional charges or accused? This question is most interesting in case the evidence investigated is not among the material transferred from the ICTY.

As previously mentioned, the Law on Transfer does not provide any deadline for the adaptation of the indictment and the State Court has refused to recognise the pre-adaptation period as an investigation phase. However, the duration of a regular investigation according to the BiH CPC can be controlled to the necessary extent by the Collegium of Prosecutors and indirectly by the judicial authorities when the suspect is in pre-trial custody. Consequently, it could be argued that the Law on Transfer does not provide any safeguards against a Prosecutor carrying out actions that would essentially constitute a regular investigation, while using the time allocated for the adaptation of the indictment to do so. In this sense, the Prosecutor could avoid the limitations provided by the BiH CPC for the duration of a regular investigation, especially when the defendant is in custody.

The State Court found in its 9 November 2005 Decision that the intent to join the case of Radovan Stanković with that of another defendant did not have the significance of a decisive reason for approving the additional deadline for the adaptation of the indictment, since this would be to the detriment of the accused. Arguably, the State Court thus implied that the pre-adaptation period should not be used for investigating the involvement of other defendants in the same criminal acts; nonetheless, no effective sanction exists to prevent the Prosecutor from doing so in reality.

Two additional charges against Mr. Stanković were included for confirmation in the 28 November 2005 Indictment. It is unclear, though, how much of the time granted for the adaptation of the indictment was consumed by the investigation of other criminal acts against Radovan Stanković or other defendants. And in the Janković case, the State Court implicitly accepted as a factor in determining the adaptation time the Prosecutor's intention to expand the counts of the charges.[31] It is interesting that the Court does not perceive the investigation into additional counts to be to the detriment of a transferred defendant.

Conclusion-Recommendations: Consequently, the Court appears to accept that an investigation into additional counts can take place during the adaptation period, but not an investigation into additional accused. Nonetheless, this is not reflected in the Law on Transfer.

In addition to clarifying which actions pertain to the procedure of adaptation, the OSCE recommends that the Law on Transfer clarify how the adaptation procedure relates to the regular investigation into additional counts or accused, and the purposes for which the time granted for adaptation can be used. The OSCE also recommends that the State Court properly review the reasons provided by the Prosecution in requesting the continuation of the defendant's custody and that it properly evaluate whether the competent authorities, namely the Prosecution, have been acting with due diligence and particular urgency in adapting the indictment, when the defendant is in custody.

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[31] See the 8 December 2005 (received by Court 12 December 2005) Decision of the Preliminary Hearing Judge in the case of Gojko Jankovic, in which the Court stated: "In determining of this time limit the Court had regards to the complexity of this case, number of counts, as well as the *possibility of expanding the counts of charges, as indicated by the Prosecutor's Office in BiH*." [Emphasis added] [unofficial translation].

d) Question on the reasons for introducing the concept of adaptation instead of requiring that the BiH Prosecutor's indictment be confirmed in Rule 11bis cases

The aforementioned points indicate that the concept of adaptation of the ICTY indictment has not been adequately regulated in the Law on Transfer. This raises the question why the Law on Transfer introduced the procedure of adaptation instead of following the BiH CPC procedure and require that the BiH Prosecutor's indictment in Rule 11*bis* cases be confirmed.

The OSCE is not privy to the reasons that may have prompted the law-maker to opt for the procedure of adaptation. However, the most logical conclusion appears to be the fear of bias on the part of the BiH Prosecutor's Office or of the State Court in favour of the defendant. Such a conclusion would derive from the fact that the Law on Transfer does not provide the possibility for the BiH Prosecutor to drop a charge or charges, or withdraw the ICTY indictment. Nor does it provide the possibility for the State Court to discharge the counts in an adapted indictment if the supporting evidence is insufficient, as it would be called to do during the BiH CPC process of confirming an indictment.

Nevertheless, in practice, the concept of adaptation has been interpreted broadly to allow the BiH Prosecutor's Office to re-hear witnesses already interviewed by the ICTY Prosecutor. In the course of re-examining this evidence there is a possibility that the evidence that initially supported an ICTY charge no longer exists. Even if the BiH Prosecutor gains knowledge of this during the pre-adaptation period, it appears that he would still be bound to include an unsubstantiated charge in the adapted indictment. And since the Court cannot examine the grounded suspicion for this charge, but only review if it has been adequately adapted to domestic law, the Court would be obliged to accept a charge that is no longer substantiated.

Arguably, two remedies would appear relevant to such a problem: (i) The Defence could file preliminary motions challenging the adapted indictment; (ii) the BiH Prosecutor could amend the indictment during the main trial and drop the unsubstantiated charge or charges. If these options can indeed be effective, then the law-maker has not totally eliminated the hypothetical danger of a biased State Court or Prosecutor. If these options cannot be considered effective, then there would appear to be no remedy against holding a main trial for an unsubstantiated charge; this would result from the fact that the crucial opportunity to review the grounded suspicion through the confirmation of indictment process is not provided for the adapted charges.

Conclusion-Recommendations: The issues discussed above, and those outlined in the following Sections, demonstrate the confusion that has ensued from the ill-defined concept of adaptation of the indictment. It would be advisable for the law-maker to consider replacing the procedure of adaptation with the regular procedure of confirming an indictment issued by the BiH Prosecutor in Rule 11*bis* cases. If the law-maker clarifies that investigative(-type) actions can be conducted during the pre-adaptation period, the easiest amendment to the Law on Transfer would be to dispense with the notion of adapting the ICTY Indictment. Instead the Law could require that the evidence gathered by the ICTY Prosecutor and the ICTY indictment are used by the BiH Prosecutor's Office during an investigative phase, officially recognised as such, to formulate an indictment according to domestic law. Such an indictment would then be submitted for confirmation before the Court of BiH. An amended Law on Transfer could take notice of any specific concerns regarding the investigation time in such cases or other issues that may need to be regulated differently in Rule 11*bis* cases, but in keeping in line with the BiH CPC.

II) Problems with Pre-trial Custody in Rule 11*bis* Cases

Apart from the gaps regarding the adaptation of the ICTY indictment, the Law on Transfer and the BiH CPC do not regulate with sufficient clarity the procedure for reviewing pre-trial custody particularly during the pre-adaptation period. This Section first analyses the vague drafting of the Law on Transfer on the pre-trial custody matters and then the approach taken by the State Court in finding that the ICTY Order on Detention on Remand remained in force during the pre-adaptation period until the acceptance of the adapted indictment.

i) Domestic law does not regulate with sufficient clarity pre-trial custody issues during the pre-adaptation period

Article 2(4) of the Law on Transfer foresees that:

> "The custody and detention of persons shall be regulated according to the BiH CPC. For the purpose of calculating the custody under the BiH CPC, the time that a person has spent in custody at the ICTY shall not be considered, but it shall be considered for the calculation of the sentence pursuant to the provisions of the BiH Criminal Code."

Additionally, Article 1(2) of the Law on Transfer foresees that in case the Law on Transfer does not provide for special provisions to regulate the transfer of cases, then other relevant provisions of the BiH CPC (or the other criminal procedure codes) shall apply. Therefore, pre-trial custody in Rule 11*bis* cases is to be primarily regulated by the BiH CPC through direct reference to this in the Law on Transfer.

Nevertheless, the OSCE considers that this set of rules may not adequately cover the particularities of Rule 11*bis* cases during the pre-adaptation period. The following constitute the principal omissions in the Law on Transfer in connection to pre-trial custody during the pre-adaptation period:

a) Issue regarding the starting point of applying the BiH CPC on pre-trial custody

The Law on Transfer does not specifically state from which point in time the BiH CPC provisions on pre-trial custody are to be applied. Although the letter of Article 2 of the Law on Transfer would clearly imply that the BiH CPC is applicable from the moment of transfer, the State Court's opinion has complicated matters, rather unnecessarily and with significant consequences.

In the cases of Stanković and Janković, the State Court took the stance that the BiH CPC regulates the custody of the Defendant only from the acceptance of the adapted indictment. The Stanković case Decisions[32] 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 stipulated in the provisions of the BiH CPC. In the Janković case, the Appellate Court repeated the position adopted in the Stanković case.[33] This Panel additionally observed that:

> "...paragraph 1 of Article 137 of the BiH CPC stipulates that custody may be ordered, extended or terminated even after the confirmation of the indictment, which, bearing in mind the provision of Article 2 of the Law on the Transfer of Cases, *implicitly* includes formal adaptation of the indictment pursuant to the provisions of the BiH CPC. The conclusion to be inferred from the above is that custody against the accused Gojko Janković may be ordered, extended or terminated in conformity with the respective provisions of the BiH CPC only after an adapted indictment was previously accepted" [Emphasis added].

The Court does not clarify which paragraph/s of Article 2 of the Law on Transfer it refers to. In this context, it may be understood that paragraph (4) would be read together with paragraph (1) to construe the conclusion of the Court.

Nonetheless, the plain reading of Article 2(4) of the Law on Transfer clearly indicates that the intention of the law-maker was to regulate the custody of the defendant according to the BiH CPC from the moment he was transferred to the national authorities. Even the combined reading of the paragraphs in Article 2 of the Law on Transfer does not logically lead to the conclusion reached by the

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[32] This opinion is reflected in at least three Decisions of the State Court: the Decision of the Preliminary Hearing Judge of 29 September 2005, the Appellate Panel's Decision on 12 October 2005 (registered 19 October 2005), and the Preliminary Hearing Judge's Decision dated 9 November 2005 extending the time limit for the adaptation of the indictment.

[33] See the Appellate Panel's Decision dated 21 December 2005 (registered with the Court on 28 December 2005).

Court. Indeed, if the law-maker of the Law on Transfer had envisaged such a substantial departure from the letter of the law and from the BiH CPC as the interpretation of the State Court signifies, this would have been outlined in sufficient detail in the Law on Transfer, and would not have been left to the discretion and interpretation of the Court. If the Law on Transfer is applied from the moment of the defendant's transfer, then the BiH CPC provisions on pre-trial custody are also applicable from the moment of transfer, since no limitations are expressly envisaged in the Law on Transfer. If the Law on Transfer is not applicable at least from the moment of transfer of Rule 11*bis* cases, then it is this Law itself that should clarify the starting point of its application as a whole or at least of the application of its Article 2(4).

Conclusion-Recommendation: In view of the above, the OSCE is of the opinion that the letter of the Law on Transfer is sufficiently clear in that pre-trial custody must be regulated according to the BiH CPC from the moment of the defendant's transfer. By not reviewing the Defendant's custody according to the BiH CPC from the moment of transfer, the State Court has acted in contradiction with the Law on Transfer and the BiH CPC.

Article 5(5) ECHR foresees an enforceable right to compensation when the applicant has been arrested or detained in contravention of Article 5 paragraphs from (1) to (4) ECHR. Article 5(1) requires that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law."[34] To the extent that the State Court failed to review the Defendant's detention in accordance with the procedure prescribed by domestic law, namely the BiH CPC, during the pre-adaptation period, the Defendant may be entitled to a remedy as envisaged in Article 5(5) ECHR for his detention during this period.

b) The Law on Transfer does not clarify which set of BiH CPC provisions on custody is applicable upon transfer

In any case, should it be accepted that the application of the Law on Transfer and of the BiH CPC begins from the moment of transfer, the existing provisions in the Law on Transfer do not provide which set of BiH CPC rules on pre-trial custody should be applied during the pre-adaptation period, whether by analogy or otherwise.[35] Should it be (i) those applicable during the investigative phase,[36] (ii) those applicable after the confirmation of the indictment,[37] or (iii) a combined or different set of rules altogether? The application of either set of BiH CPC provisions is arguably more favourable to the accused than the approach the State Court has taken in both Rule 11*bis* transferred cases. This issue should be clarified for the sake of legal certainty.

Both the Law on Transfer and the State Court decisions recognise the indictment confirmed by the ICTY as confirmed also for the purposes of the domestic jurisdiction from the moment of transfer. However, the State Court issued a Decision ordering pre-trial custody based on Article 137 BiH CPC, which regulates custody after the confirmation of an indictment, not from the moment of transfer, but only after the acceptance of the adapted charges and the confirmation of the new charges in the indictment. Counsel's Appeal[38] also demonstrates that it was not clear which set of provisions regulated the custody of the Defendant Stanković during the pre-adaptation period.

At this point, it is worth mentioning the arguments in the case of Gojko Janković. At the 8 December 2005 hearing on custody after this Defendant's transfer, the BiH Prosecutor's Office showed a clear preference, both in his written Motion and orally, for basing pre-trial custody on the BiH CPC from

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[34] For instance see the judgement in the case of *Winterwerp v. the Netherlands*, European Court of Human Rights, 1979, para. 45, where the Court indicated that the requirement meant that the procedure followed must be in conformity with the applicable municipal law.

[35] This question would relate, for instance, to issues such as the maximum length of pre-trial custody during the pre-adaptation period, the point of commencement of the maximum of one-year custody pending trial, the manner in which pre-trial detention is to be reviewed after the acceptance of the adapted indictment, etc.

[36] Especially Articles 134, 135, as read with 132 BiH CPC.

[37] Article 137 as read with Article 132 BiH CPC.

[38] See Defence Counsel Appeal of 3 October 2005 against the 29 September 2005 Decision in the Stanković case.

the moment of transfer.[39] The Prosecutor specifically stated that the rules on pre-trial custody during investigation should be applicable. Defence Counsel also clearly opposed the State Court approach in the Stanković case and stated that there is no dispute that the BiH CPC should be applied from the moment of transfer. Counsel did not, however, elaborate which set of provisions he saw as applicable. Of particular interest is the Decision of the Preliminary Hearing Judge in the Janković case, where he states that he did not accept the Motion of the Prosecutor, but instead recognised that the ICTY Order remained in force, because:

> "...the Indictment was confirmed by the International Tribunal and the acceptance of such Motion of the Prosecutor's Office of BiH would result in returning the proceedings to the investigation stage which is not in any case favorable for the accused (pre-trial custody may last up to six months), given that the accused was deprived of liberty on 14 March 2005, the Court is therefore of the opinion that this decision is more favorable for the accused..."[40]

It is not known whether the Preliminary Hearing Judge's reasoning in the Janković case was also shared by the Court in the Stanković case. Nevertheless, the reasoning given by the Preliminary Hearing Judge in the Janković case raises the question whether the application of the BiH CPC's provisions relating to custody during the investigative proceedings would indeed be less favourable to the accused than the approach taken by the Court to recognise the primacy of the ICTY Order. In answering this, one would need to consider the arbitrariness entailed in the approach taken by the Court and its effect on the Defendant's rights to challenge the merits of pre-trial custody before the State Court, as discussed under Part (ii) of this Section. Moreover, even in regular investigations the Court is not compelled to extend the custody of the suspect for the full six-month maximum, but instead it can and should order custody for as long a time within that limit as there is a reason for it. Therefore, in the given cases, if the Court believed that the adaptation of the indictment would be completed in far less time than six months, it would be the Court's duty only to order custody for that period.

In view of the State Court's consideration of what would be more favourable to the accused, it could also be argued that the application of Article 137 BiH CPC from the moment of transfer would also be less detrimental to the accused than the State Court approach. In this way, the one-year maximum custody period pending trial would commence at the latest from the transfer of the defendant and not from the acceptance of the adapted indictment, while custody would be regulated by the BiH CPC's guarantees. It may be noted that Defendant Stanković argued in his Appeal against the 7 December Decision of the Preliminary Hearing Judge that this time-limit of one-year pre-trial custody pending trial should have been calculated from the day of his transfer on 29 September 2005. This view was nevertheless rejected by the Court in its Decision of 19 December.[41]

Conclusion- Recommendations: In conclusion, the Law on Transfer fails to clarify which set of BiH CPC provisions apply in relation to the pre-trial custody upon the Defendant's transfer. In the Janković case, the Preliminary Hearing Judge expressly rejected the application of the BiH CPC's provisions relating to the investigative phase, because the 6-month maximum duration was not favourable to the

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[39] Unlike the Stanković case, where the BiH Prosecutor's Office only proposed that the Court recognize that the ICTY Order on Detention on Remand remained in force until the indictment was accepted as adapted, the Prosecutor's Office in the Janković case placed its proposal in the alternative: Although it showed a clear preference for the application of the BiH CPC, it orally stated that if the Court did not accept its preferred position, it proposed that the Court follow the approach it took in the Stanković case to recognize that the ICTY Order on Detention on Remand remained in force until the indictment was accepted as adapted.

[40] Official translation; see the Decision of the Preliminary Hearing Judge in the Jankovic case, dated 8 December 2005.

[41] The Panel's reasoning, as quoted above in the relevant Decision of 19 December, appears to rely on the confirmation of the two new counts in the 28 November Indictment as the starting point for the detention time limit, while also mentioning the acceptance of the adapted indictment. From the wording of the Decision, it still remains unclear to the OSCE Mission to Bosnia and Herzegovina whether the Panel equates the acceptance of the adapted indictment with the procedural action of confirmation, at least in connection to the application of this custody time-limit. It would be interesting to see whether the same approach would have been followed, had there been no new counts included in the indictment for confirmation.

accused. It is unfortunate that this Preliminary Hearing Judge did not include in his Decision a more thorough comparison between the State Court approach, the application of the CPC detention provisions during investigation, and those provisions applicable after the confirmation of a regular indictment. In such comparison, the application of either set of BiH CPC provisions would be more favourable to the Defendant than the approach the State Court followed. As to the choice between the two sets of the BiH CPC provisions, one could argue that if the adaptation procedure is to be understood broadly, as is currently the case, then the provisions applicable to investigative proceedings would be more relevant; if instead adaptation is to be interpreted strictly, then the Court should apply the provisions relating to the post-confirmation period from the moment of the Defendant's transfer.

The OSCE recommends that the Law on Transfer be amended to clarify which set of BiH CPC provisions on pre-trial custody is applicable upon the transfer of defendants in Rule 11*bis* cases. But, even prior to the amendment of this Law, the State Court should apply the BiH CPC provisions on custody. To the extent that the State Court currently accepts that the Prosecutor's Office conducts investigative-type actions during the pre-adaptation period, the OSCE recommends that the Court reviews detention according to the BiH CPC provisions pertaining to the investigation stage. It is also recommended that the BiH Prosecutor's Office base any motions for pre-trial custody against transferred defendants exclusively on the BiH CPC.

c) The Law on Transfer does not require that the transfer of the case-file is effected before the transfer of an accused – and related problems with establishing grounded suspicion for pre-trial custody

The Law on Transfer does not specifically demand that the transfer of the file takes place before the transfer of the defendant in Rule 11*bis* cases. If the file is transferred after the defendant, there may be important implications for the establishment of grounded suspicion when custody is reviewed according to the BiH CPC at a hearing upon transfer. This may have been a basic reason why the Court did not apply the BiH CPC at the first hearing on custody in the two transferred cases.

Article 132(1) of the BiH CPC foresees the establishment of grounded suspicion as the necessary pre-condition for pre-trial custody. Hence, in proposing custody, the Prosecutor would need to produce sufficient evidence to convince the Court as to the existence of such suspicion at the relevant stage of the proceedings. However, in the Stanković case, the Defendant was transferred on 29 September 2005, while the file was transferred to the BiH Prosecutor's Office on 1 October 2005. The Prosecutor's Office did not at all touch upon the issue of grounded suspicion, since it did not base its motion on custody on the BiH CPC. The Preliminary Hearing Judge did not inquire about the substantiation of grounded suspicion either and instead accepted to recognise the ICTY Detention Order. The Appellate Panel stated that the Court cannot render a valid decision based on the reasons foreseen in the BiH CPC, before it accepts the adapted indictment. It continued that it is only after reviewing the evidence attached to the adapted indictment that it would have a possibility to review critically the reasons for custody pursuant to the BiH CPC.[42] Hence, it may be inferred that the Court was indeed concerned about how to evaluate grounded suspicion before the transfer of the file. However, it is unclear why the State Court thus raised the standard of what evidence would constitute grounded suspicion in Rule 11*bis* cases. In regular criminal cases, the Court can order custody even during the investigative phase, namely before the indictment is confirmed, if evidence available at that time indicates grounded suspicion.

In the Janković case, the Defendant was transferred on 8 December 2005, while the file was apparently transferred the following day. At the initial hearing on 8 December, the Prosecutor pointed to the ICTY confirmed Indictment as the basis for grounded suspicion. The Defence objected arguing that no supporting material was presented to substantiate the suspicion. In his Appeal,[43] Defence Counsel claimed that no documents were disclosed to the Defendant before the detention hearing at

[42] See the Decision of the Appellate Panel dated 12 October 2005.
[43] See the Appeal of Defence Counsel in the Janković case against the 8 December 2005 Decision of the Preliminary Hearing Judge.

the State Court, hence the proceedings were not truly adversarial. Responding to this Appeal,[44] the Prosecutor argued that the material supporting the ICTY Indictment would have been disclosed to the Defendant within 30 days of his initial appearance before the ICTY and that that material was the same as the transferred material. The Preliminary Hearing Judge eventually recognised that the ICTY Order remained in force; he therefore refrained from evaluating whether the ICTY Indictment was adequate basis for grounded suspicion at the first hearing. If the Prosecutor's argument that the material was accessible to the Defendant already at the ICTY is accepted, this would still only address part of the problem. The issue of what kind of documents should have been made available to the Preliminary Hearing Judge upon the Defendant's transfer, so as to enable him to assess the suspicion, remains an issue unaddressed by the Court.

In the given cases, where the body was transferred before the material, the Court did not explore the possibility of briefly postponing the hearing and allowing the Prosecutor to obtain any necessary material from the transferred file, which would have been at the ICTY Liaison Office in Sarajevo, in order to present it at the hearing. Nor did the BiH Prosecutor's Office obtain a sufficient amount of evidence from the ICTY Prosecutor in advance, so as to be able to demonstrate the existence of grounded suspicion before the Preliminary Hearing Judge.

Conclusion- Recommendations: The easiest solution to the problem raised above regarding the evaluation of grounded suspicion at the initial hearing would be for the ICTY Prosecutor's Office to complete the transfer of the case-file to the BiH Prosecutor's Office before a defendant is transferred to the domestic authorities. In any case, the BiH Prosecutor's Office should actively seek to obtain in advance sufficient material in order be able to support motions on custody in case of transferred defendants. It would also be useful to include a provision in the Law on Transfer requiring the transfer of the files before the defendants.

ii) Problems with the State Court Decisions on pre-trial custody during the pre-adaptation period

All the actors in the justice system dealing with Rule 11*bis* cases are placed at a disadvantage, since they are faced with a type of case completely novel for any jurisdiction and based on a domestic law that fails to regulate in sufficient detail a number of important legal issues specific to these transferred cases. This is especially true in the case of Mr. Stanković, the first case transferred to the jurisdiction of the State Court. Under these circumstances, it could be argued that the State Court decisions have attempted to fill certain gaps in the applicable law. But it is doubtful whether they have satisfactorily addressed all *lacunae*; it appears that instead they have created greater confusion. The Court's decisions lack solid legal grounds and reasoning on a number of matters, and do not consider all relevant arguments raised by the Defence.

Before addressing the decisions of the State Court in the case of Mr. Stanković, one needs to refer briefly to the Order for Detention of Remand of the ICTY. Taking into consideration the confirmed Indictment against the Defendant and its amendments, as well as the arrest warrants against him, the Trial Chamber ordered the Defendant detained on remand and enjoined the Commanding Officer of the United Nations Detention Unit in The Hague to detain the Accused "until further order." The system that regulates detention on remand before the ICTY is beyond the scope of this report. It may only be noted that there are fundamental differences between the ICTY justice system regulating pre-trial custody and the domestic one applicable at the State Court of BiH read together with international human rights standards.[45] In fact, it could be argued that the ICTY Order on Detention on Remand in the case of Radovan Stanković would not meet the typical requirements stipulated by the BiH CPC.

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[44] See the 16 December 2005 Response of the Prosecutor's Office to the Appeal of Defence Counsel in the Janković case.

[45] For a more extensive review of the regime on pre-trial detention before the ICTY in relation to international human rights standards see Gabrielle MacIntyre, "Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY", in Gideon Boas & William A. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY*, in Vol. 6 of the International Humanitarian Law Series (Leiden/Boston, Martinus Nijhoff Publishers, 2003), pp. 193 *ff*, at 202 *ff*.

In at least three decisions[46] the State Court found that the ICTY Order on Detention on Remand in the case of Radovan Stanković had primacy over and binds the national courts. The State Court derived this finding from the Decision of the Referral Bench, the Statute of the ICTY, and from the latter's Rules of Procedure and Evidence. [47] The State Court in all three of its Decisions ruled that the ICTY Order on Detention on Remand remained in force, nevertheless, until the adapted indictment is accepted. The same approach was adopted by the State Court in the Gojko Janković case.

The OSCE finds this argument of the State Court inherently contradictory. If the State Court regarded the ICTY Order as truly superior and binding on domestic jurisdiction, then the Court should have recognised that it is not authorised to determine that the ICTY order remains in force until the adapted indictment is accepted, but that it is binding until the ICTY issues a new order. Therefore, it appears that the State Court has misconceived the notion of primacy of the ICTY decisions and has instead founded its approach on a "conditional" primacy, over which the State Court itself retains selective control. In either case, the determination that another criminal procedure and jurisdiction has primacy over the domestic one in pre-trial custody matters at the post-transfer phase directly contravenes the BiH CPC and the Law on Transfer.[48]

In fact, it is entirely disputable whether the Referral Bench's Decision, the ICTY Statute, and its Rules of Procedure and Evidence were indeed intended to bind the domestic jurisdiction regarding pre-trial custody after the transfer of a Rule 11*bis* case to the domestic authorities:

First of all, no such explicit reference is made in any of these documents. Neither Article 9(2) nor 29(2) of the ICTY Statute are relevant or were intended to regulate the issue of pre-trial custody after the transfer of a case to the domestic jurisdiction.[49] Moreover, the Referral Bench's Decision in fact stipulates that, although the referral of the case does not have the effect of revoking the previous Orders and Decision of the ICTY, it is nevertheless for the State Court to determine whether different provision should be made for the purposes of trial in BiH.

Second, true compliance with the interpretation that these documents indeed bind the national authorities as regards post-transfer pre-trial custody would lead to the following incongruous and unlawful situation: The defendant's pre-trial custody would remain, in essence, within the jurisdiction of the ICTY, since the latter would be the only authority to consider the merits of any applications for release and the termination of custody, even though the entire case would have been transferred for trial to the State Court's jurisdiction. Apart from being illogical, this interpretation would also be contrary to the Law on Transfer and the BiH CPC.[50]

Third, the ICTY has actually rejected such an interpretation in a recent decision in the Janković case.[51] The ICTY Appeals Chamber considered that, since the case had been referred to the authorities of Bosnia and Herzegovina, it was no longer seized of the case and that the Appellant's Motion for

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[46] See the Decision of the Preliminary Hearing Judge of 29 September 2005, the Appellate Panel's Decision on 12 October 2005 (registered 19 October 2005), and the Preliminary Hearing Judge's Decision dated 9 November 2005 extending the time limit for the adaptation of the indictment.

[47] The Appellate Court mentions in its 12 October 2005 Decision Article 9(2) and Article 29(2) of the Statute of the ICTY, as well as "other provisions" set forth in the Statute of the ICTY and its Rules of Procedure and Evidence; however, these "other provisions" are not mentioned at any point. Similarly, the same Articles of the ICTY Statute, and the vague wording of "other provisions" of the ICTY Statute and Rules of Procedure and Evidence are used by the Preliminary Hearing Judge and the Appellate Panel in their Decisions dated 8 December and 21 December, respectively, in the Gojko Jankovic case.

[48] See Article 2(4) of the Law on Transfer and Article 131(1) BiH CPC. Article 131(1) BiH CPC states that "[c]ustody may be ordered only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure."

[49] The "other provisions" of the ICTY Statute and Rules of Procedure and Evidence (see footnote 47 above) are not discussed herein, since they are not specified by the State Court. However, the OSCE Mission to Bosnia and Herzegovina has not come across any other provision in the ICTY Statute or Rules of Procedure and Evidence to contradict its views.

[50] See *supra* footnote 48.

[51] 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.

Provisional Release was moot. Therefore, the ICTY recognised that it did not have the authority to consider the detention on remand of Mr. Janković after the final decision on his transfer to the BiH authorities had been issued.

With these points in mind, it appears that the State Court's approach in fact places detained defendants transferred to the BiH authorities in a state of "limbo," as it implies that their detention on remand is within no one's jurisdiction after the defendant is transferred. This limbo would in theory last indefinitely, were it not for the State Court to declare that it would assume jurisdiction after the acceptance of the indictment, according to its rather arbitrary rationale of "conditional" primacy.[52] In view of the above, it is of great concern that the State Court relinquished, in a very controversial manner, part of its powers vested in it by law, and what is more, to the detriment of the Defendant's right to liberty [as discussed in Section III (ii)].

Conclusion-Recommendation: As the above arguments demonstrate, there is no valid legal basis for the State Court's decisions that the ICTY Order on Detention on Remand should remain in force during the pre-adaptation period. Additionally, this approach is to the detriment of transferred defendants. To the extent that their custody is not reviewed in accordance with the BiH CPC during the pre-adaptation period they are being deprived of the guarantees that domestic law provides. The OSCE strongly recommends that the State Court apply the BiH CPC provisions on custody from the moment of a defendant's transfer.

III) Assessment of the Law on Transfer, the State Court Approach, and the Appellate Decisions in relation to International Human Rights Standards

i) Assessment of the Law on Transfer as "law"

The vague provisions described above in applicable law relating to the adaptation of the indictment and to pre-trial custody during the pre-adaptation period, as well as the manner in which the State Court has interpreted such provisions, invite the question whether the relevant rules can be considered as "law" in the sense envisaged by the European Court of Human Rights. Similarly questionable from the perspective of international human rights standards is the State Court's approach regarding pre-trial custody. It may be argued that a number of rules applied in the Rule 11*bis* case of Radovan Stanković were either novel or confusing and therefore lacked the element of foreseeability.

Among the criteria that the European Court of Human Rights considers in establishing whether a rule is a "law" are the accessibility and the "foreseeability" of the law. More specifically, the European Court of Human Rights has deemed that:

> "Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct..."[53]

Especially in relation to pre-trial custody, the European Court of Human Rights has stated:

> "[...] the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to allow the person –

[52] Strictly legally speaking, it could also be argued that the ICTY Order on Detention on Remand pertains only to the Commanding Officer of the United Nations Detention Unit in The Hague, since this Office is the only mentioned recipient. Therefore, despite the claim that the Orders and Decisions of the ICTY are not revoked by the Referral Bench's Decision on transfer, it may be upheld that the ICTY Detention Order cannot bind the BiH Authorities, since they are not the recipients named in this Order. In fact, from the time the UN Detention Authorities completed the hand-over the Defendant, this ICTY Order arguably ceased to be binding.

[53] See *The Sunday Times v. UK* judgement, European Court of Human Rights, 26 April 1979, para. 49.

> 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..."[54]

As discussed in the previous Sections, applicable law and practice have hindered the ability, not only of the Defendant, but also of other actors to foresee to a reasonable degree the consequences which procedural actions entailed. Particularly in relation to pre-trial custody, the novel approach followed by the State Court evidently confused not only the Defence, but also the Prosecutor's Office. For instance, in his first appeal, Counsel for Radovan Stanković objected to the novel approach of the State Court and thereafter attempted to plead on both sets of BiH CPC provisions on custody that could have been applicable after the Defendant's transfer. Furthermore, the Prosecutor's Office in Janković stated that the approach the Court took in Stanković was not an established practice by that point and elaborated its Motion on custody on the CPC; however, as the Prosecutor's Office appeared to be unsure whether the Court would follow the CPC, it also proposed, in the alternative, the recognition of the ICTY Detention Order. The Defence in the Janković case orally elaborated its challenge to the Prosecutor's Motion only on the basis of BiH CPC. This may indicate that the Defence did not expect the Court to follow the approach it chose in Stanković, after the Prosecutor motioned primarily on the BiH CPC. Furthermore, since the State Court approach postpones the examination of the merits of detention until the acceptance of the adapted indictment, it is still unclear and unforeseeable whom the Defence would need to address to challenge the merits of pre-trial custody. As will be explained below under Section VI, there also appeared to be confusion among the Parties and the Court as to whether the Defendant was called to enter his plea only in relation to the new counts in the 28 November Indictment or also on the counts adapted to domestic law.

Conclusion-Recommendations: The confusion that has resulted among the actors in the justice system as to the correct procedure to be followed when dealing with Rule 11bis cases is another example in which the amendment of the Law on Transfer would help to clarify problematic issues. Additionally, the OSCE recommends that the State Court changes its practice in relation to the custody of transferred defendants during the pre-adaptation period, and, in case a rule remains unclear at present, that the State Court apply, by analogy if necessary, the most foreseeable and relevant existing rule of domestic procedure.

ii) Assessment of the State Court approach in reviewing the pre-trial custody of Rule 11*bis* Defendants

The OSCE respectfully questions the claim of the Court that the hearing of 29 September 2005 satisfied the criteria of Article 5(3) ECHR, to the extent that the Preliminary Hearing Judge's approach deprived him of the power to examine the merits of detention and the power to release if necessary. Similar concerns are raised by the fact that the Appellate Panel followed the same approach.

While the State Court claimed to have given the oral opportunity to the Defendant to plead on his custody, its approach actually deprives the Defendant of the effective right to challenge his custody at any time during the pre-adaptation period. One may recall that the Appellate Panel claimed that upon his handover to the Court of BiH, "[t]he accused was brought before the Preliminary Hearing Judge of the Court of Bosnia and Herzegovina on the same day, and the accused pleaded on the custody during the hearing. Thus, the Court proceeded pursuant to Article 5, paragraph 3 of the European Convention on Human Rights and Fundamental Freedoms."[55] 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 European Court of Human Rights has found that:

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[54] See the judgement in *Jecius v. Lithuania*, European Court of Human Rights, 31 July 2000, Application No. 34578/97, para. 56. Also see para. 59 of this judgement, where the European Court of Human Rights noted that a provision applied for the pre-trial detention of the applicant was shown to have been vague enough to cause confusion even amongst the competent State authorities, and was therefore incompatible with the requirements of "lawfulness" under Article 5(1) ECHR.

[55] See the Decision of the Appellate Panel dated 12 (registered 19) October 2005. The same was argued by the Court in the Gojko Janković case.

> "...The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons [reference omitted] In other words, *Article 5 § 3 requires the judicial officer to consider the merits of the detention.*"[56] [Emphasis added]

The European Court has further found that:

> "...under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him [reference omitted]; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons [reference omitted]."[57]

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 according to Article 5(3) ECHR has been breached. [58] In the given case, the Preliminary Hearing Judge considered himself bound by the primacy of the ICTY Order on Detention on Remand. 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 international human rights criteria.

Furthermore, by accepting the primacy of the ICTY Detention Order and thereby rendering itself powerless to order the Defendant's release if appropriate, 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. It may be argued that the Appeals of the Defence can be considered as applications for release in the sense of Article 5(4) ECHR. Article 5(4) ECHR prescribes 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 European Court of Human Rights 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.[59]

Conclusion-Recommendations: The OSCE agrees that there should be a hearing on custody upon the transfer of a Rule 11*bis* defendant. However, this hearing should not be a merely typical hearing, but it should meet all the requirements provided by domestic law and international human rights standards. Among others other requirements, the Court should also have the authority to consider the merits of detention and the power to release the detained person if appropriate. Similarly, the review of the appeals against custody should meet all requirements of domestic law and international human rights standards. The current practice of the Court denies transferred defendants the effective right to have a

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[56] See the European Court of Human Rights judgement in *Aquilina v. Malta* (29 April 1999), Application No. 25642/94, Reports 1999-III, para. 47.

[57] See the judgement *Schiesser v. Switzerland*, European Court of Human Rights, 4 December 1979, para 31.

[58] It may be noted that in the Gojko Jankovic case, the Prosecutor's Office in BiH argued in his 16 December 2005 response to the Defence's Appeal that "...Article 5 (1)(c) and Article 5(4) of the European Convention of Human Rights and the functions inherent for a fair hearing set out in the judgement of the Strasbourg Court in Schiesser v. Switzerland [reference omitted] properly apply to the Court that dealt with the Accused at his initial detention hearing [footnote omitted] when he was first arrested, namely the ICTY on 17 March 2005 and that they are not always essential functions where, thereafter, a court is maintaining in force an original decision on Detention." The OSCE Mission to Bosnia and Herzegovina will not discuss this view point further at this stage, but notes that the Appellate Panel in the Jankovic case considered that the requirement of Article 5(3) ECHR was met since the accused was brought before the Preliminary Hearing Judge at the State Court.

[59] Among other cases, see the judgement in the case of *X v. United Kingdom*, European Court of Human Rights, 5 November 1981, para 61.

judicial review of their custody, thereby depriving them of the full protection of the law. These issues may bring into question the right of the defendant to compensation, as envisaged in Article 5(5) ECHR. To redress this situation, the OSCE strongly recommends that the State Court immediately abandon their practice of relinquishing their power to examine the merits of pre-trial custody and to order the release of defendants during the pre-adaptation period if necessary.

iii) State Court decisions did not sufficiently address all relevant issues challenging the lawfulness of custody

The State Court did not address, or did not address sufficiently, all arguments raised by the Defence in its appeals, although certain arguments challenging the lawfulness of custody did not appear implausible or frivolous. By essentially "rubber-stamping" the first instance decisions, the Appellate Panel may have failed to provide the judicial review of the scope and nature required by Article 5(4) ECHR.

The Court did not appear to address satisfactorily the arguments of the Defence challenging the practice of keeping in force the ICTY Order on Detention on Remand. For example, among other points, Defence Counsel specifically argued that none of the ICTY documents or decisions quoted by the Court indicated that the ICTY order on detention should be binding on the State Court, and that this was against the BiH CPC. However, the Appellate Panel did not appear to re-examine substantially the finding of the Preliminary Hearing Judge, but instead practically "rubber stamped" the first instance decisions.

Other arguments of the Defence were not properly examined either. For instance, in several instances, the Defence argued essentially on the basis of the right of the defendant to be tried within a reasonable time or to be released pending trial. The 3 October 2005 Appeal appeared to challenge the lawfulness of Article 2(4) of the Law on Transfer, wherein it prescribes that the time spent in custody at the ICTY shall not be included for the purpose of calculating custody under the BiH CPC. It also called upon the Court to consider the total time of three years that the Defendant has spent in custody at the ICTY and thereby release him. However, the Appellate Panel neither noted this issue nor addressed it in an adequate fashion.[60] Rather, the Panel made only a brief and vague reference to the fact that the proceedings before the Preliminary Hearing Judge were in accordance with Article 6 ECHR and that the deadline given for the adaptation of the indictment would secure that the proceedings were conducted within a reasonable time. It omitted discussion of the Defence argument on the unlawfulness of this provision of the Law on Transfer, did not refer to the custody's compliance with specific requirements of Article 5 ECHR, and did not examine whether the time in detention at the ICTY could be considered in assessing the reasonableness of the total length of the detention.[61]

Furthermore, in the Appeal challenging the Decision extending the adaptation time, Defence Counsel claimed that the Court had erroneously and incompletely established the state of facts.[62] Counsel essentially challenged the Decision in that it did not properly examine whether the Prosecutor was acting with due diligence to meet the Court's original deadline for adapting the indictment, and in that

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[60] See the Appellate Panel's Decision of 12 October 2005 in the Stanković case.

[61] It may be noted that the OSCE does not make an assessment on whether or not the time spent in detention at the ICTY should be considered for calculating pre-trial custody in BiH. The OSCE only notes that this Defence argument would have merited appropriate consideration by the State Court. To this effect, the following is an interesting opinion expressed in P. van Dijk and G.J.H. van Hood, *Theory and Practice of European Convention on Human Rights* (The Hague, Kluwer Law International, 3rd edition, 1998), p. 380:

> "Finally, mention may be made of the Commission's decision in X. v. Federal Republic of Germany to the effect that the period which the accused had spent in detention in Italy pending a decision on the request of the Federal Republic of Germany to extradite him could not be brought under the responsibility of the Federal Republic of Germany, and consequently could not be included in the assessment of the reasonableness of the detention in Germany. [footnote omitted] The reasoning of the Commission is incorrect in our view. Although the Republic of Germany is not responsible for what happens in Italy, the detention undergone in another country may quite well constitute one of the circumstances which have to be taken into consideration in assessing the reasonableness of the total length of the detention, even if that other detention does not fall under the category of paragraph 1(c) and accordingly has to be judged as a separate detention."

[62] See Defence Counsel Appeal of 10 (registered 15) November 2005 and the Decision of 9 November 2005.

it did not provide sufficient justification for granting the additional time. This was because the Prosecutor had failed to give the names or number of the witnesses required for interview.[63] The Appellate Panel merely stated that the Preliminary Hearing Judge had properly assessed the significance of conducting additional interviews of witnesses who are abroad. Hence, the Panel did not address how the Court reached its decision to extend the deadline for a specific time when it had no additional information allowing for an informed assessment.[64]

It should be mentioned that the European Court of Human Rights has found that:

> "While Article 5, paragraph 4, of the Convention 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", in the sense of the Convention, of deprivation of liberty."[65]

Conclusion-Recommendations: On several occasions the Defence put forward arguments challenging the decisions on detention, particularly on procedural grounds. As described above, it does not appear that the Appellate Panel seriously took these submissions into account. A number of these arguments could have been regarded as capable of putting into doubt the lawfulness of pre-trial custody, at least on the aspect of procedure during the pre-adaptation period. To this extent, it may be argued that the Defendant was not granted a judicial review of his pre-trial custody during this period, as envisaged by the ECHR.

The OSCE recommends that the Court conducts a judicial review of any appeals and applications for release of the nature envisaged in domestic and international human rights standards.

IV) Problems with the Review of Pre-Trial Custody after the filing of the 28 November 2005 Indictment

The OSCE is concerned with the manner in which the pre-trial custody of Defendant Radovan Stanković was reviewed after the BiH Prosecutor's Office submitted its Indictment to the State Court on 28 November 2005 [hereinafter "BiH Prosecutor's Indictment" or "28 November Indictment"].

The procedural actions relevant to this Section's analysis bear recounting: On 28 November 2005, the BiH Prosecutor's Office submitted its Indictment to the State Court. This Indictment included four counts of charges contained in the ICTY Indictment to be accepted as adapted to the BiH CPC, two new counts to be confirmed by the State Court, as well as a motion to extend the custody of the Defendant. The BiH Prosecutor's Indictment was received by the Court on 29 November. Apparently on 30 November 2005, Defence Counsel received summons to appear before the Court for a hearing on 2 December 2005, together with the Motion of the Prosecutor on custody.[66] On 2 December 2005, the Preliminary Hearing Judge convened a hearing to hear the arguments of the Parties on pre-trial custody. At the 2 December 2005 hearing, the Defence opposed holding the hearing prematurely, since the Defence had not received the 28 November Indictment, which had not yet been accepted or confirmed. On 7 December 2005, the Preliminary Hearing Judge issued a Decision ordering custody against the Accused. To the knowledge of the OSCE, Defence Counsel did not appeal the 7 December 2005 Decision. Nonetheless, the Accused appealed said Decision on 9 December. The Appellate Panel rejected the Defendant's Appeal as ungrounded on 19 December 2005.

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[63] Counsel did not specifically mention that the number of witnesses still to be interviewed was not provided, although it was not.
[64] See Appellate Panel's Decision of 14 (registered 21) November 2005.
[65] See the judgement in the case of *Nikolova v. Bulgaria*, European Court of Human Rights, 25 March 1999, para. 61.
[66] This is according to the oral statement of Defence Counsel at the 2 December 2005 hearing.

Below, the OSCE argues, first, that the hearing of 2 December 2005 was held prematurely, since the BiH Prosecutor's Indictment had not yet been reviewed by the Court, and, second, that the Preliminary Hearing Judge disregarded the Defendant's right to necessary facilities to prepare his case for release and the principle of equality of arms to the detriment of the Defence. This is because the Defence was called to present arguments on pre-trial custody without having been previously served with the BiH Prosecutor's Indictment. Finally, the OSCE argues that the 7 December Decision of the Preliminary Hearing Judge lacked a solid rationale in rejecting the procedural objection of the Defence, while the Appellate Panel Decision of 19 December 2005 did not appear to consider seriously whether the rights of the Defence had been infringed and sustained the questionable rationale of the Preliminary Hearing Judge as to the procedural objections of the Defendant.

i) The hearing of 2 December 2005 was held prematurely

Upon convening the hearing of 2 December 2005, the Preliminary Hearing Judge orally stated that: "The Court at this point, in accordance with the provisions of the CPC, cannot decide with regard to the motion of the Prosecutor. The Judge will do so only when he decides as to whether the indictment will adapt [sic], will be confirmed."[67] Following this, the Defence objected that they could not provide their arguments at that point because the indictment was not accepted as adapted and confirmed and because they had not received the BiH Prosecutor's Indictment, but only the Motion on custody. Towards the end of the hearing, the Preliminary Hearing Judge made the clarification that the only reason why the hearing was set on this date was because there would not be sufficient room to hear the Motion of the Prosecutor on custody between 5 and 8 December, when the term to evaluate the indictment would expire, since the courtrooms were taken for other whole-day trials.

The OSCE is of the opinion that the Preliminary Hearing Judge should not have held the hearing prior to reaching his decision on the BiH Prosecutor's Indictment. The Prosecutor's Motion to extend custody is logically and legally dependant upon the acceptance and confirmation of the indictment. Considering this Motion without having reached a decision on the indictment gives rise to at least two considerations. First, the Defence is called to present arguments in relation to a hypothetical situation – that is, what their position would be on custody in the event the indictment were accepted as adapted and confirmed. Second, and more worryingly, it may even be argued that the Preliminary Hearing Judge's approach puts at stake his impartiality, at least in its objective sense. This is because scheduling the hearing prematurely could give the impression that the Judge perceived the BiH Prosecutor's Indictment as adapted and confirmed prior to having reviewed the adapted charges and the evidence supporting the new counts.

Conclusion-Recommendations: The OSCE recommends that the State Court convene hearings on custody at their proper time. More particularly, at the stage of the proceedings in question, the hearing on any motion to order or extend custody should be held after the Court issues a decision on the indictment accepting it as adapted and confirming any additional counts or accused, as logic and law would require.

ii) The Preliminary Hearing Judge disregarded the right of the Defendant to adequate facilities to prepare his case and the principle of equality of arms

The OSCE believes that the defendant's right to have adequate facilities to prepare his case and his related right to truly adversarial proceedings may have been breached at the hearing of 2 December 2005. This is to the extent that the Court did not provide the Defence with the BiH Prosecutor's Indictment or equivalent information, while at the same time it expected them to position themselves on the issue of pre-trial custody at the hearing in question.

During the 2 December hearing, the Defence made it amply clear that they had not received the BiH Prosecutor's Indictment in full, but only its last part containing the Motion on Custody. Defence Counsel specifically stated that he was not aware of what the charges against his client were, which prevented him from arguing on the issue of custody.[68] At no point during this hearing was the BiH

[67] Unofficial transcript from the official audio-recording in English.
[68] However, he briefly argued, in general terms, against the fear of influencing witnesses.

Prosecutor's Indictment, or equivalent information contained therein, provided to the Defence. Furthermore, no other hearing was held after the Defence had been served with the adapted and confirmed 28 November Indictment.

To the extent that this hearing was intended to provide the Defence with an opportunity to challenge the lawfulness of pre-trial custody, the principles incorporated in Article 5(4) ECHR would have been applicable. Article 5(4) ECHR foresees that a detained person must be allowed the necessary time[69] and facilities to prepare his case. As to the requirement of necessary facilities, the European Court of Human Rights has found that the detained person must be told the reasons for his detention because this is information which is essential in order to challenge its legality.[70]

It should be reiterated that Article 132(1) BiH CPC considers the existence of a grounded suspicion as the essential pre-condition for ordering custody. Similarly, the European Court of Human Rights has repeatedly stated in its judgements that the existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of continued detention.[71] Both domestic law and international human rights standards also foresee that grounded suspicion is not enough for the continued detention, but that other relevant and sufficient grounds must also exist.[72]

At the stage of the proceedings in question, it can be expected that the grounded suspicion and proposed evidence against the Defendant would be outlined in the BiH Prosecutor's Indictment. It is therefore understandable that the Defence would not be able to challenge effectively pre-trial custody without having at their disposal the BiH Prosecutor's Indictment or equivalent information, which included the charges, their description, and the evidence basing grounded suspicion at that stage time. This information could allow the Defence to formulate any arguments not only against the grounded suspicion as a basis for custody, but also against the other proposed grounds for custody, such as the fear of hindering the proceedings by influencing witnesses.

Furthermore, since the Prosecution evidently had knowledge of the charges and the evidence proposed in the 28 November Indictment, whereas the Defence did not, the latter was placed at a disadvantage *vis a vis* the former. Consequently, the procedural right of "equality of arms,"[73] which can be subsumed under the general principle of adversarial proceedings incorporated in Article 5(4) ECHR, was breached to the detriment of the Defence during the 2 December hearing.[74] Moreover, the justification given by the Preliminary Hearing Judge as to the lack of available courtroom space to consider the Motion on custody at the appropriate time is not convincing, especially when one balances it against the infringement of the Defendant's rights and the possibility of the Judge appearing to be prejudiced.[75]

Conclusion-Recommendations: The OSCE reiterates its recommendation that the hearing on custody be held after the indictment is accepted as adapted and/or confirmed. In this particular instance, the

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[69] As to the requirement of necessary time, the European Court of Human Rights has found that a detained person must be allowed a reasonable period of time to present his application. See the case of *Farmakopoulos v. Belgium*, before the Commission, as stated in D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 150-151. It should be noted that the Defendant claimed in his Appeal against the 7 December Decision that he was not duly and timely informed about that hearing. Nevertheless, at the 2 December hearing, in answering to the PHJ if he was saying that he was not adequately prepared for that hearing, he replied that if he obtained his laptop he would be.

[70] See the judgement in the case of *X v. United Kingdom*, *supra* footnote 59, para 66.

[71] See, for instance, the judgement in *Tomasi v. France*, *supra* footnote 21, para. 84.

[72] See Article 132(1) items (a) through (d) BiH CPC, and the judgement in *Tomasi v. France*, ibid.

[73] For the principle of equality of arms in the context of Article 5(4) ECHR, see, for instance, the case of *Weeks v. United Kingdom*, European Court of Human Rights, 2 March 1987, para. 66.

[74] In case in were argued that the Defence had access to the evidentiary material after the issuance of the 28 Indictment pursuant to Article 226(2) BiH CPC, although they were not served with the actual Indictment, there could be an issue of having adequate time to prepare for the hearing of 2 December, since the Defence typically gained knowledge of the issuance of the Indictment on 30 November 2005.

[75] It may be interesting information that, since that hearing, several more courtrooms have been inaugurated at the State Court.

issue that arose during the 2 December 2005 hearing would not have existed had this taken place at its proper time and after the indictment had been served to the Defence. Further, the Court should give serious consideration to valid arguments of the Defence relating to their rights – i.e., the right of the accused to adversarial proceedings and to have adequate time and facilities to prepare a case.

iii) The 7 December and 19 December Decisions on custody suffer in their rationale when rejecting the procedural objection of the Defence

This point is directly related to the previous ones. The Preliminary Hearing Judge's Decision rejected the oral claims of the Defence that they were not in position to argue on the issue of custody before the indictment had been accepted as adapted and confirmed and before it was served to them. This Judge's justification does not appear to have taken into account the procedural error of holding the hearing on custody prematurely or to have fully considered the importance of providing the Defence with the necessary facilities to challenge pre-trial custody. The same concern relates to the Appellate Panel's Decision rejecting the Appeal of the Defendant where these issues were raised.

In his Decision of 7 December, the Preliminary Hearing Judge stated:

> "The objections of the procedural nature filed by the Defence counsel were not acceptable when he explained that he could not have provided his opinion on the Prosecutor's Motion given that the Indictment was not previously adapted/confirmed. The Court noted that the distinction should be made between the situation in which it is decided on the custody, which is, in terms of the order, after the Indictment was confirmed (Article 137, paragraph 1 of the CPC BiH) and the situation when there is a hearing pertaining to providing oral argumentation on the Prosecutor's Motion to order custody (pursuant to Article 5 of the ECHR), which precedes the confirmation of the Indictment previously brought by the Prosecutor."

This perception appears to be shared also by the Appellate Panel found that:

> "Regarding the objection that the Preliminary Hearing Judge first ordered detention, and only after that confirmed the indictment, the Court notes that a procedural error was not committed by the Preliminary Hearing Judge and that the Judge followed the procedure of the CPC BiH, considering that the accused first had the opportunity to state his opinion regarding the grounded suspicion and the special grounds for detention. For the accused to state his opinion on grounded suspicion after the confirmation of the indictment would be pointless and unpurposeful ["без предметно [sic] и несвсисходно"], therefore the Court deems that this objection of the accused is ungrounded as well."[76]

In this rationale that the Preliminary Hearing Judge and the Panel apparently perceive that holding a hearing on custody before the indictment is confirmed is actually the correct procedure in general and that it would be pointless and purposeless to call the accused to give his opinion on the grounded suspicion for detention after the indictment is confirmed.

OSCE reiterates its reasoning, under points (i) and (ii) above, that it is only logical that the Motion on custody be argued upon and evaluated only after an indictment is confirmed. It would be pointless to follow the sequence of procedural actions proposed by the Court, since in this way it would be possible to hear arguments on custody and then eventually not accept the ICTY indictment counts as adapted and discharge any new counts. The reasoning of the Preliminary Hearing Judge that the correct procedure is to hear the arguments on custody before the confirmation of the indictment directly contradicts his oral statement at the hearing where he claimed that the only reason for which the hearing was held before deciding on the indictment was because of lack of courtroom space. Moreover, it is unclear whether the Preliminary Hearing Judge and the Panel actually confuse the challenge against grounded suspicion as a condition for pre-trial custody with the preliminary motions that may be filed after the delivery of the indictment.

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[76] See the Appellate Panel's Decision of 19 December rejecting the Appeal of the Defendant against the 7 December Decision on custody.

Finally, it is of concern that the Appellate Panel considered in its decision that the Accused had the opportunity to state his opinion on the grounded suspicion. The Panel appears to have disregarded the fact, mentioned by the Defence at the hearing and in the Defendant's Appeal, that the Accused was not able to challenge effectively the grounded suspicion against him because the 28 November Indictment had not been delivered to him and he was unaware of the charges according to the domestic law.[77]

Conclusion-Recommendation: OSCE reiterates its recommendation that the Court hold custody hearings at the appropriate time and that in such hearings the Defence have at its disposal all necessary information to be able to challenge a motion on custody.

V) Problems with the Submissions of the Defence

OSCE finds that a number of submissions by the Defence lack clarity and sufficient argumentation as to all important issues.

For instance, the structure and wording of the 3 October 2005 Appeal of the Defence Counsel against the 29 September Decision was often repetitive, unclear, and without proper substantiation of its general arguments. Counsel does not clearly substantiate his argument that the Decision's wording contradicted certain grounds and legal provisions and that the Court improperly applied Article 137 BIH CPC. Moreover, Defence Counsel appealed the 9 November Decision of the Preliminary Hearing Judge to extend the deadline for adapting the indictment; therein, Counsel did not appear to object to the fact that the Defence was not given the opportunity to express their opinion on the Motion of the Prosecutor before the Court reached its Decision.[78] To a great degree, however, the omissions in the Defence Counsel submissions may be due to the fact that the challenged Decisions applied unforeseeable and confusing rules, as discussed in the previous parts of this report.

Furthermore, it is unclear why Defence Counsel did not appeal the 7 December 2005 Decision on custody, although during the hearing he had specifically argued against the Motion of the Prosecutor and the premature scheduling of the hearing. Counsel filed his Preliminary Motions against the 28 November 2005 Indictment after the 30-day deadline prescribed by applicable law, which resulted in the Court rejecting them as untimely. Counsel appealed said decision based upon grounds that he should have clarified during the plea hearing. This appeal was not considered, apparently because no appeal can be filed on the decision on the preliminary motion. Consequently, Defence Counsel missed the basic opportunity to challenge the 28 November Indictment.

Conclusion-Recommendations: OSCE strongly suggests that Defence Counsel endeavour to improve the drafting of his submissions and to timely present all his arguments before the Court. In this way, he would properly invite the Court to address all important issues and be able to provide the most effective legal assistance possible, as the right of the accused to effective defence counsel requires.

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[77] In case it were argued that the Defendant could challenge the grounded suspicion against him based on the ICTY Indictment and the material that he had available from the ICTY, one could counter-argue that in that case double standards would be applied, since the Defence would be called to consider the ICTY Indictment and evidence, while the Court repeatedly declared during the pre-adaptation period Decisions that it could not render a valid decision on the reasons for custody pursuant to the CPC until it reviewed the evidence in the adapted indictment. Any such argument would not pertain to the new counts added in the 28 November 2005 Indictment.

[78] To the knowledge of the OSCE this Motion was not served to the Defence in advance and they were not called to present their arguments in advance. Additionally, the 9 November Decision of the Court does not make any reference to the contrary.

VI) Issues Raised at the Plea Hearing of 23 December 2005

Three additional issues of interest were raised in the plea hearing of 23 December. From these, a further question arises as to the clarity of the Law on Transfer in connection to the defendant's plea on the counts of the indictment.

First, the Defendant claimed that the documents served to him were not in Cyrillic and contained terms not used in the Serbian language. The OSCE notes that, at the 29 September hearing, the Preliminary Hearing Judge had recorded his order that the Serbian language and Cyrillic script be used. At the plea hearing, he stated that he would personally examine any non-compliance with this order.

Second, the Court and the Parties had different views and appeared confused regarding the Defendant's plea to the 28 November Indictment. It was unclear whether the Defendant should have been called to enter a plea on all counts in the 28 November Indictment or only on the new ones contained therein. Eventually, the conclusion of the Preliminary Hearing Judge was that the Defendant was called to enter a plea only in relation to the new counts, since he already had the opportunity to do so before the ICTY in relation to those counts which had now been adapted.

The Law on Transfer does not contain any reference to this issue, so the BiH CPC would be applicable. The latter, however, does not address the issue of entering a plea to the adapted charges. It may be logical to arrive at the Court's conclusion if the adapted charges have not been altered during the harmonisation process and if the evidence remains the same as at the plea hearing before the ICTY. In view of the adaptation process, however, there is a possibility that both the charges and the evidence change. Furthermore, the jurisdiction changes in transferred cases, and substantial time may pass between the time of entering a plea before the ICTY and the time the accused enters his plea before the State Court. In view of these circumstances, one cannot be absolutely certain that the accused wouldl not wish to change his plea in connection to the counts before the State Court. Additionally, since the Law on Transfer does not explicitly preclude entering a plea on the adapted counts, one can validly argue that the general principle of the BiH CPC to enter a plea on all counts of the indictment should be applicable. Had the law-maker intended otherwise, it would have been precisely stated in the Law on Transfer.

Consequently, the OSCE is of the opinion that the silence of the Law on Transfer should rather be interpreted to grant the accused the right to enter a plea also on the adapted counts. An opportunity to enter a plea on the adapted charges does not only take into consideration the factual and possible substantive changes in circumstances, but it may also contribute to the efficiency of the proceedings in case a transferred accused decides to plead guilty on the adapted charges.

Third, Defence Counsel made a connection between the plea to the counts in the indictment and the right to file preliminary motions against all counts in the indictment. Despite the fact that the Preliminary Hearing Judge called the accused to enter his plea only on the new counts, he nonetheless replied to Counsel that the Court would not deny the Defence that right. This would be understood as recognising the Defence's right to challenge all counts in the 28 November Indictment. Article 2(3) of the Law on Transfer provides that: "The deadlines for the submission of the preliminary objections prescribed in paragraph 4 of article 228 and paragraph 2 of article 233 of the BiH CPC shall be 30 days." This provision does not limit its application only to any new counts, but is clearly meant to apply to adapted as well as new charges. Hence, there appears to be no issue of concern in this regard, since the Preliminary Hearing Judge did not make an adverse interpretation of this provision. However, it is interesting to juxtapose the decision of the Court not to allow the Defendant to enter a plea on the adapted counts, but to allow the Defence to file preliminary motions also against the adapted counts. No explanation has been given by the Court regarding the different treatment of these procedural actions, especially since the Defendant, apart from entering a plea before the ICTY, also had the opportunity to challenge the ICTY Indictment before that Tribunal.

Conclusion-Recommendations: In view of the above, it appears that the intention of the law-maker was to allow the accused the opportunity to enter a plea on all counts in an adapted and possibly confirmed indictment, while preliminary motions are meant to pertain to all charges, both adapted and new. OSCE recommends that the Law on Transfer be amended to clarify that the defendant can enter his plea both on adapted and new counts. In case this is not sufficiently clear in connection with preliminary motions, the Law on Transfer should also clarify that such motions can be filed against both adapted and new charges. OSCE also recommends that the State Court follow a logical and uniform approach, by interpreting the current silence of the Law on Transfer as requiring the Court to hear the plea of transferred defendants also on the adapted counts.

PART 2: DESCRIPTION OF MAIN DECISIONS AND SUBMISSIONS

I) Order for Detention on Remand by ICTY Trial Chamber, 12 July 2002

Upon Mr. Stanković's transfer to the seat of the ICTY, the Trial Chamber ordered him detained on remand and enjoined the Commanding Officer of the United Nations Detention Unit in The Hague to detain the Accused "until further order."[79]

To the knowledge of the OSCE, no application for release was filed by the Defendant before the ICTY.

II) Summary of the Hearing before the Preliminary Hearing Judge on 29 September 2005

[Summary based on the audio record of the hearing- OSCE did not attend]

Upon his transfer to BiH, the Defendant was brought before the State Court. The Preliminary Hearing Judge explained that this hearing was scheduled pursuant to the order of the Trial Panel of ICTY relating to the transfer of the Accused Radovan Stanković from the Detention Unit of the UN Court in The Hague to the Detention Unit of the Court of BiH. He further established that the Defendant was represented *ex officio* by Mr. Milovan Radović, Defence Counsel from Foča, who was selected by the Accused from the list of Defence Counsel.

The Defendant stated that he wished the trial to begin as soon as possible, considering that he already served four years at The Hague where three indictments against him were issued, while now he had to wait for the issuance of yet another indictment [by the BiH Prosecutor]. He expressed his fear that the trial would be a never ending story since there was still a possibility that his case be deferred back to The Hague pursuant to Rule 11*bis*.

The Judge explained that the confirmed ICTY Indictment would be adapted by the BiH Prosecutor's Office in accordance with the BiH CPC, and the main trial would be scheduled as soon as the indictment is confirmed in its adapted form by the Court of BiH. The Judge emphasised that the Court of BiH would strictly bear in mind the deadlines; however, due to the extensive evidentiary material in this case, the BiH Prosecutor's Office would most certainly require a certain period of time for the adaptation of the indictment. With regard to deferring his case to the ICTY, the Preliminary Hearing Judge reassured the Defendant that the Court of BiH would do everything in its power to provide a fair trial with full respect of the procedural rights of the Accused.

The Defendant highlighted that he would not accept being released before he cleared his name, and added that, if released, there was a danger that he would be executed.

The Judge confirmed that the Accused understood the language of the Court [Serbian] and stated that all documents would be sent to the Accused in the Serbian language and Cyrillic script, as requested.

With regard to the motion for detention, the Deputy Chief Prosecutor of BiH noted that the Referral Bench's Decision stated that the referral of this case did not revoke the previously issued orders and decisions of the ICTY. Therefore, he proposed that the Court issue a procedural decision ordering that the ICTY decision remain in force until the indictment was adapted by the Prosecutor's Office of BiH. He further asked the Court to give the Prosecution a reasonable time to adapt the indictment.

Defence Counsel argued that there were no grounds in accordance with the BiH CPC to order custody against the Defendant. He continued that the provisions of the Law on Transfer on custody were in contradiction with the BiH CPC provisions. He concluded that the BiH CPC was *lex specialis* and that

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[79] In its Decision, the Trial Chamber stated that it acted pursuant to Rule 64 of the Rules of Procedure and Evidence of the ICTY, and after considering the indictment and its amendments, the arrest warrants issued, the fact that the accused was arrested and brought to the detention unit of the ICTY, and the fact that at his initial appearance the accused stated that he would file a motion concerning his deprivation of liberty with the assistance of Defence Counsel.

any further detention of his client would constitute a violation of Article 5(3) ECHR, since his client had been in custody for more than four years.

Pending the written Decision, the Preliminary Hearing Judge stated orally that the sanction (custody) against the Defendant would remain in force pending the State Court's Decision on the adapted indictment. Considering the extensive evidentiary material, he further noted that the BiH Prosecutor's Office was under the obligation to adapt the indictment within 40 days.

The BiH Prosecutor requested the Court to consider as the starting date of this deadline the date when the Prosecutor's Office would actually receive the case material. He stated that he had some assurance that this material would be provided within four days.

The Judge granted the Prosecution's request.

III) Decision of Preliminary Hearing Judge of State Court, 29 September 2005

After the hearing of 29 September 2005, the Preliminary Hearing Judge of the State Court issued a decision pertaining to the custody of Mr. Stanković, in the enacting clause of which he stated that: "Custody ordered against the accused Radovan Stanković by the Trial Chamber II of the International Tribunal in the case Janković et. al (IT-96-23/2) remain in force pending the ruling of the Court of Bosnia and Herzegovina on the acceptance of the adjusted Indictment of the Prosecutor's Office in Bosnia and Herzegovina."[80]

In the reasoning part of this Decision, the Preliminary Hearing Judge referred to the fact that the accused was charged by the Third Amended Indictment of the Prosecutor of the ICTY, on the ground of his individual responsibility, with four counts of crimes against humanity and four counts for the violation of the laws and customs of war.

The Decision continues to summarise the main points of the 29 September 2005 hearing.

In admitting the proposal made by the Prosecutor that the Order for Custody issued by the Trial Panel of the ICTY "remain in force," the Court gave the following reasons and arguments:

- "Paragraph 2 of the Decision on Referral of the Case under the 11*bis* Rule, specifies that the transfer of this case does not imply revoking previously issued orders and decisions made by the International Tribunal, which relate to this case, including the Order for Pre-trial Custody, issued by the Trial Panel II of the International Criminal Tribunal in the Hague, which has been in force since 12 July 2002 and shall remain in force until further notice."[81]

- The Court recalled Article 2 of the Law on the Transfer and found that: "After analyzing the provisions of the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Rules on Procedure and Evidence, it may be concluded that decisions issued by the International Criminal Tribunal shall supersede decisions made by national courts. [...][82] Taking into account the fact that this Court is bound by decisions made by the International Criminal Tribunal, which also applies to the Order for Custody issued against the accused Radovan Stanković, which has been upheld by this Court and which shall be in force until adapted indictment be admitted and final decision on ordering custody against the accused be issued, in keeping with provisions of the CPC of BiH."[83]

- The Court further decided in the reasoning of the Decision, that the BiH Prosecutor's Office should bring the Indictment issued by the ICTY in line with relevant provisions of the CPC of BiH, no later than 40 days starting from 3 October 2005. It concluded that, pursuant to the

[80] Official translation.
[81] Official translation.
[82] The Court recalled Rule 11*bis* item (f) of the ICTY Rules of Procedure and Evidence.
[83] Official translation.

provision of Section 6 (Articles 131 to 139) of the BiH CPC, the appeal against this decision shall not stay its execution.

IV) Appeal by Defence Counsel against the 29 September Decision (drafted 3 October 2005)

On 3 October 2005, Defence Counsel of the accused Radovan Stanković filed an appeal against the 29 September 2005 Decision of the BiH Court arguing that the Decision had essential violations of provisions of criminal procedure, that the state of facts was erroneously or incompletely established and because of violations of the criminal procedure. Counsel requested that the contested Decision be revoked and the case be referred to the relevant judge for reconsideration, or that it be revised and the custody ordered against the Defendant be terminated and that he be released immediately.

In the understanding of the OSCE,[84] Defence Counsel argued that:

- Mr. Stanković does not have the status of an accused person before the Court of BiH, since the indictment has not been accepted by the Court of BiH.

- By rendering the contested decision, the Preliminary Hearing Judge made essential violations of the criminal procedure [Article 297(1) item (k), and (2) BiH CPC], since the wording contradicts the grounds of the Decision, and since he has improperly applied the provision of Article 137 BiH CPC, which affected the rendering of a lawful and proper Decision.

- Neither the BiH CPC nor the Law on Transfer nor the ICTY Rules of Procedure and Evidence stipulate that any ICTY decision "shall remain in force." On the contrary the Law on Transfer reads that "[t]he custody and detention of persons shall be regulated according to the BiH CPC." Later in his appeal, Counsel argued that the Court did not establish on what legal grounds the ICTY decision remained in force.

  Defence Counsel further referred to the Decision of the Referral Bench of the ICTY, arguing that it clearly provides that the competent court should render a Decision on the basis of the BiH CPC provisions. Counsel also argued that the Preliminary Hearing Judge misinterpreted said decision (of the Referral Bench) and even considered that he is bound by the ICTY decision relevant to custody, thereby improperly applying the CPC provisions.

- The Court should have ordered or extended custody pursuant to Articles 131 and 132 BiH CPC and taking into account the deadlines prescribed in Article 132[85] and/or Article 137 BiH CPC. Counsel continued to analyse alternative considerations, concluding that the accused should have been released because the maximum time limits prescribed in the BiH CPC for pre-trial custody had expired, whether or not the Court considered that the indictment had been confirmed before the Court of BiH. In support of this conclusion, Counsel submitted that the provision included in the Law on Transfer, namely that the time a person has spent in custody at the ICTY shall not be included when calculating custody under the CPC, directly contradicts the provisions of the BIH CPC, because no law other than the CPC may resolve the issue of custody.

  In connection to these arguments, Counsel argued that since the BiH CPC and Article 5 (3) ECHR foresee that custody has to be reduced to a minimum, no law can justify further keeping Mr. Stanković in custody for more than three years, nor is it possible for any law to exclude from the time spent in custody the calculation of the three years already spent in ICTY pre-trial custody.

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[84] See Section V of this report regarding the problems with the submissions of Defence Counsel.
[85] Sic in the official translation.

V) Appellate Panel's Decision on the Appeal, (drafted 12 October 2005 - registered on 19 October 2005)

On 12 October 2005, the Appellate Panel refused the Appeal of Defence Counsel as unfounded and confirmed the first instance Decision. The Panel recognised that the Prosecutor's Office did not submit their response to the Appeal within the legal time, and continued to review the first instance Decision in the part contested in the Appeal.

As reasons for its Decision, the Panel stated that:

- Upon his hand-over to the Court of BiH, "[t]he accused was brought before the Preliminary Hearing Judge of the Court of Bosnia and Herzegovina on the same day, and the accused pleaded on the custody during the hearing. Thus, the Court proceeded pursuant to Article 5, paragraph 3 of the European Convention on Human Rights and Fundamental Freedoms."[86]

- On the basis of the provisions of the ICTY Statute and Rules on Procedure and Evidence, the ICTY Decisions have primacy over the national courts and the States shall abide by them." The Panel also referred to the ICTY Decision on the referral, which stated that the referral of the case does not revoke orders and decisions previously issued by the ICTY in this case. The Court perceived that this included the ICTY Decision on Detention on Remand of 12 July 2002, which it recognised to be still in force.

- Mr. Stanković had acquired the status of the accused, because of the primacy of the ICTY over the national courts, the duty of the latter to comply with the former's decisions and orders, and fact that the indictment against Mr. Stanković was confirmed by the ICTY.

- The Law on Transfer does not provide for the time period within which the Prosecutor of Bosnia and Herzegovina has the duty to adapt the indictment of the ICTY based on the BiH CPC. Hence the Preliminary Hearing Judge "had the duty to regulate the procedure for the proceedings in this case, bearing in mind the deficiency in legal procedure that would in detail provide for the actions undertaken by the Prosecutor of Bosnia and Herzegovina in the course of adapting and accepting the Indictment of the International Tribunal."[87]

- Therefore, the Panel continued: "The Court cannot render a valid decision as to the reasons for ordering custody, as referred to in article 132 of the CPC BiH, before the Court accepts the adapted Indictment. It is only after the Court accepts the adapted Indictment and reviews the evidence attached to the adapted Indictment that it will have a possibility to review critically the reasons for custody listed pursuant to the CPC BiH. Thus the Preliminary Hearing Judge proceeded correctly in the first instance decision when he decided to keep the accused in custody pending the decision of the Court of Bosnia and Herzegovina on the acceptance of the adapted Indictment, bearing constantly in mind the primacy of the International Tribunal's decision over the national court's decisions and the duty of the national courts to respect the International Tribunal's decision, as listed in the paragraph 2 of the Decision of the International Tribunal to transfer the case against Radovan Stanković pursuant to Article 11 bis of the Rules on Procedure and Evidence of the International Tribunal."[88]

- Related to this, the Panel further found that: "The Preliminary Hearing Judge of the Court of Bosnia and Herzegovina also proceeded correctly when he ordered the Prosecutor of Bosnia and Herzegovina to adapt the Indictment of the International Tribunal, not later than 40 days from the receipt of the file. This clearly implies that the custody ordered by the Trial Chamber II of the International Tribunal can continue pending the Decision of the Court on the acceptance of the adapted Indictment, and then the Court of Bosnia and Herzegovina will be able to decide on custody against the accused pursuant to the CPC BiH, bearing in mind that

[86] Official translation.
[87] Official translation.
[88] Official translation.

the custody of the accused pursuant to Article 137 of the CPC BiH, may last one year maximum. In case that the first instance verdict is not pronounced within that period, the custody shall be terminated and the accused will be released. The deadline of 40 days, decided by the Preliminary Hearing Judge of the Court of Bosnia and Herzegovina is acceptable for this Panel and is identical in its length to the provisional arrest set forth in Article 16 (4) of the European Convention on Extradition dated 13 December 1957."[89]

- Regarding the fact that the accused is in custody since 12 July 2002, the Panel stated that: "the proceedings of the Preliminary Hearing Judge of the Court of Bosnia and Herzegovina in the first instance decision was in accordance with article 6 of the European Convention on Human Rights and Fundamental Freedoms, and the deadline given to adapt the Indictment will secure that the proceedings against this accused will be conducted within reasonable time."[90]

VI) Motion of the Prosecutor for the extension of the deadline for adapting the indictment – 31 October 2005

On 31 October 2005, the BiH Prosecutor's Office moved for the extension of the deadline for adapting the ICTY Indictment for an additional 30 days as of 14 November 2005 and considered it was obliged to declare itself regarding the potential further motion on the extension of the detention within the given deadline.

The Prosecutor's Office stated that, in the course of the procedure of adapting the indictment, more than 30 witnesses were questioned and extensive evidence material received from the ICTY Prosecutor's office was examined. However, key witnesses who are not in BiH had to be summoned for a hearing, since the majority gave statements before the ICTY several years ago. The Prosecutor claimed that they did not have the capacity to ensure the arrival of these witnesses within the given time limit for the adaptation of the indictment. Additionally, since these witnesses are protected by ICTY Order, the Prosecutor would need additional time to hold hearings with protective measures. For these reasons, he proposed the extension of the deadline for the adaptation of the indictment.

In the process of questioning the aforementioned witnesses, the Prosecutor's Office concluded that the witnesses and victims were the same as those involved in the criminal case/s against another defendant,[91] and that both the latter and Radovan Stanković were charged with the same criminal acts. Hence, it stated its intention to request the joining of these cases, so as to avoid having the same witnesses-victims testify more than once, which would represent a serious psychological trauma for them. Therefore, the Prosecutor expressed the need for additional time to prepare the case and to adapt the indictment against Radovan Stanković.

Finally, the Prosecutor's Office proposed that the detention of Radovan Stanković ordered by the ICTY remain in force until the acceptance of the adapted indictment.

VII) Decision of the Court on the Motion of the BiH Prosecutor's Office (9 November 2005)

On 9 November 2005, the Preliminary Hearing Judge partially sustained the Prosecutor's Motion of 31 October, by extending the deadline for adapting the indictment against Radovan Stanković for an additional 15 days as of 14 November 2005, and decided that the Order for detention of the ICTY remain in force until the decision on accepting the adapted indictment by the State Court.

In its reasoning for this decision, the Court recognised that the Law on Transfer does not prescribe the time limit within which the Prosecutor is obliged to adapt the ICTY indictment, which the Court found

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[89] Official translation.
[90] Official translation.
[91] At that time, the other defendant faced one confirmed indictment by District Prosecutor's Office in Trebinje, which case has been taken over by the State Court, and was also under investigation by the State Court Prosecutor for a second case.

to be "a factual issue which needs to be considered according the circumstances of the concrete case."[92] Continuing, in connection to the statement of the Prosecutor's Office regarding the inability to ensure the questioning of the protected witnesses who are abroad, the Court found that it was "so far realistically significant, but not to the extent, viewed objectively, that it would call for the additional time for adapting the indictment for 30 days. Therefore the opinion of this court [is] that the Prosecutor's Office can formally adapt the confirmed indictment against Radovan Stanković in the new 15 days deadline, [...] and that that deadline implies the length of detention for the accused, up until the moment when, depending on the acceptance of the adapted indictment, the BiH Court will be able to evaluate the further existence of detention in accordance with Article 137 BiH CPC."[93]

The Court stated that it "did not especially go into considering the part of the statement in regards to the intentions of the Prosecutor's Office to request the joining of the two proceedings together, because the time needed for harmonising the different phases of the proceeding in [the other Defendant's] case to the level of joining the indictments together firstly in the cases of that accused, and then with the case of the accused Stanković, in the context of approving the additional time for adapting the indictment cannot be at the detriment of the latter at all, all the more because this is a detention case which requires special urgency."[94] The Court thereby concluded that the latter statement was not a decisive reason for approving the extension of the deadline to adapt the indictment.

VIII) Defendant Radovan Stanković's Appeal against the 9 November Decision (Appeal drafted on 10 November 2005 - registered on 15 November 2005)

In his Appeal against the 9 November Decision, the Defendant objected to the validity of the indictment raised against him. He also argued that the procedure prior to and after his transfer to BiH Court was conducted illegally and with unnecessary delays, claiming that if things had been done legally the BiH Prosecutor's Office would have adapted the indictment prior to the Defendant's transfer. This is because the BiH Prosecutor's Office had six months to adapt the indictment, counting from the date the ICTY Decision on his transfer was rendered. Since this was not done, the Defendant claimed that it should not have taken more than three days to adapt the ICTY Indictment to the BiH CPC. He alleged that the Prosecutor's Office consciously and intentionally prolonged the harmonization of the false indictment and knowingly obstructed and sabotaged the commencement of the trial. Furthermore, the Defendant objected to the proceedings against him being merged with any other proceedings, as well as to the Prosecutor's Office conducting any new investigative actions. Therefore, the Accused requested that the contested Decision be revoked and that the Court issue an order to the Prosecutor's Office to adapt the indictment by 14th November 2005, as initially ordered.

IX) Defence Counsel Appeal against 9 November Decision (drafted 12–registered 18- November)

In his Appeal, Defence Counsel challenged the 9 November Decision on the grounds of having erroneously and incompletely established the state of facts and on having breached the Criminal Code [sic].

Defence Counsel submitted that the reason given by the Court, namely that the deadline to adapt the indictment was extended to give time to the BiH Prosecutor's Office to re-interview witnesses, was unacceptable. He claimed that neither the names nor the number of witnesses who had been re-interviewed, nor the names of the ones who still needed to be re-interviewed, was given, hence one could not assess if any additional time was required. In relation to this, he also argued that the ICTY Decision on referral is clear in terms of the possibility to use before the State Court all evidence already gathered; therefore the repeated questioning was redundant. Furthermore, Defence Counsel deemed as legally unsustainable the opinion of the Court that the time for adapting the indictment is a "factual" issue that needs to be considered in the circumstances of the concrete case. Counsel instead upheld that this was "rather a legal issue". He argued that if no time limit exists in the law for the Prosecutor to adapt the indictment, custody could last indefinitely, considering that there is no

[92] Unofficial translation.
[93] Unofficial translation.
[94] Unofficial translation.

limitation of the duration of custody based on the ICTY rules. The stance that there is no time-limit to adapt the indictment would contradict the duty to limit custody to the least possible time.

Moreover, Counsel submitted that it was not clear which provision gave the power to the Preliminary Hearing Judge to extend the time limit for the adaptation of the indictment. He argued that such a situation created legal uncertainty for the defendants since "their criminal-legal position would depend on the arbitrary court's decisions and not the regulations which have to be clearly defined."[95] Counsel concluded by stating that "[i]f this is only the formal adapting of the indictment, and it is, considering the phase in which the case against the accused Radovan Stanković was before the ICTY when everything was ready to start the trial, then it is clear that it is not necessary to grant any additional time to the Prosecutor's Office, given that 40 days was quite sufficient period to adapt the ICTY indictment to the form provided for in the BiH legislation."[96]

X) Appellate Panel's Decision of 14 November 2005 (registered on 21 November 2005) on the Defendant's Appeal

On 14 November 2005 the Appellate Panel rejected the Defendant's Appeal as unfounded, and confirmed the first-instance Decision of BiH Court of 9 November 2005. In its reasoning, the Panel stated that it would not indulge in considering the validity of the indictment against the accused and the objections pertaining to the possible merging of the proceedings. The Panel found that the Preliminary Hearing Judge correctly considered the importance of the examination of additional witnesses who are located abroad and accepted that it was justified to believe that this would require additional time. In view of the fact that the Defendant was held in custody, the Panel believed that the Preliminary Hearing Judge had considered this circumstance and for this reason did not accommodate the request of the Prosecution for an additional 30 days, since the deadline to adapt the indictment should be reduced to the shortest time possible.

XI) Appellate Panel's Decision of 21 November 2005 (registered on 22 November 2005) on Defence Counsel Appeal

With its Decision, the Appellate Panel rejected as unfounded the Appeal of the Defence Counsel against the 9 November Decision extending the deadline for adapting the indictment. In its reasoning, the Panel found that the Preliminary Hearing Judge correctly considered the importance of the examination of protected witnesses and concluded that it was justified to believe that this would require additional time, since they were located abroad. Moreover, the Panel stated that it took into consideration the fact that this was a complex case, which influenced the time given for the adaptation of the indictment. It addition, it deemed the Preliminary Hearing Judge also to have appreciated the fact that the accused was in detention and so did not meet the Prosecution's request for 30 additional days in full.

Referring to Counsel's objection regarding the legal uncertainty for the defendants created through the arbitrariness of the court, the Panel stated that: "[t]he deadline given by the Preliminary Hearing Judge is not a legal time limit, but a judicial instructive time limit and exceeding this deadline does not have, as a consequence, the loss of rights nor, in this case, releasing the accused from custody." The Panel concluded that "it is necessary to carry out the adaptation of the indictment in the shortest time possible, and that the Court expects that the BiH Prosecutor's Office will observe given deadline as ordered by the Preliminary Hearing Judge".[97]

XII) BiH Prosecutor's Office Indictment of 28 November 2005 and the Proposal for Pre-trial Detention included therein[98]

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[95] Official translation.
[96] Official translation.
[97] Unofficial translations.
[98] The Preliminary Hearing Judge accepted the ICTY counts as adapted in this Indictment and confirmed the new counts on 7 December 2005.

On 29 November 2005, the Prosecutor filed the adapted Indictment against Radovan Stanković. The Indictment consisted of four counts adapted from the ICTY Indictment, and two new ones (counts 5 and 6). The Indictment alleges that there is grounded suspicion that the Accused perpetrated, and abetted and aided as a part, a widespread and systematic attack targeting the civilian population in Foča municipality, being aware of such an attack and partaking in enslavement, torture, rape and other forms of sexual abuse of two female persons, one of whom was underage, who were held in a women's detention center referred to as "Karaman's house," in the village Miljevina in Foča municipality. The Accused also raped another two female persons – one detainee at Miljevina Motel detention center and the other patient at Foča hospital. Thereby, Radovan Stanković is accused of having committed the following criminal offences qualified as Crimes Against Humanity:

- Count 1 - enslavement, torture and rape and other forms of sexual abuse, as per Article 172 (1) (c), (f) and (g) BiH CC;
- Count 2 - enslavement and torture, as per Article 172 (1) (c) and (f) BiH CC;
- Count 3 - imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture and rape and other forms of sexual abuse , as per Article 172 (1) (e), (f) and (g) BiH CC;
- Count 4 - torture and rape and other forms of sexual abuse, as per Article 172 (1) (f) and (g) BiH CC;
- Counts 5 and 6 - rape and other forms of sexual abuse, as per Article 172 (1) (g) BiH CC.

The Indictment also contains the list of proposed witnesses to be questioned and evidence to be inspected at the main trial, as well as a proposal for the Court to accept as proven facts which have been established by the first instance and appellate judgements of the ICTY in the case of the Prosecutor v. Dragoljub Kunarac and al.

The Indictment also contains a proposal to exclude the public from the entire main trial, in order to protect the intimate life of the injured parties and witnesses.

Additionally, the Indictment includes a proposal for pre-trial detention. This proposal commences by stating that: "Based on the results of the investigation conducted by the ICTY and the Prosecutor's Office of BiH and based on the confirmation of the Third Amended Indictment against the accused Radovan Stanković by ICTY, there is grounded suspicion that the accused Radovan Stanković has committed the criminal offence he is charged with." After outlining State Court decisions on detention until that time, the Prosecutor's Office proposed that pursuant to Article 227(3) and 137(1) BiH CPC, and following the adaptation and confirmation of the Indictment, the Defendant's detention be extended pursuant to Article 132(1) items (a), (b), and (d) BiH CPC.

With regard to the legal grounds for detention under Article 132(1) item (a) BiH CPC (pertaining to the risk of flight), the Prosecution noted that the Defendant did not surrender voluntarily, but instead was apprehended by SFOR members on 9 July 2002. Furthermore, it was noted that the Defendant had reiterated on many occasions that he did not believe that the State Court would try his case independently, objectively, and without bias. Additionally, the Defendant, while in detention, refused to respond to the Prosecutor's summons and Court's Order to appear on 17 November 2005.

Regarding the legal grounds for detention under Article 132(1)(b) BiH CPC (fear of influencing witnesses), the Prosecutor's Office noted that the Indictment was based on victims of rapes perpetrated by the Accused and his co-perpetrators. Since the Accused is well familiar with the victims-witnesses' identity, if released he could easily influence the witnesses and contact co-perpetrators, some of whom are at large.

In justifying the legal grounds for detention under Article 132(1)(d) BiH CPC, the Prosecutor's Office stated that the Accused is charged with Crimes Against Humanity under Article 172 BiH CC, which carry a minimum penalty of ten years' or longer term imprisonment. The gravity of the offence and its consequences in inflicting severe trauma and even tragic outcome to victims and their relatives, as well as the previous conduct of the Accused provided, according to the Prosecutor, valid reasons to

believe that, if released, the Accused would reveal the identity of the victims-protected witnesses not only to his co-perpetrators, but also to the general public. Therefore, the Prosecutor deemed detention necessary in order to protect the safety of the citizens.

XIII) Summary of the Hearing before Preliminary Hearing Judge held on 2 December 2005[99]

On 2 December, the Preliminary Hearing Judge convened a hearing pursuant to the Motion for custody included in the 28 November Indictment.

The Defendant complained that he was not duly informed about this day's hearing and had therefore no time to prepare his material, while he had not been allowed to take his laptop to the Court. He requested to be allowed to obtain his material and laptop; otherwise he and his Counsel would leave the hearing. He replied to the Preliminary Hearing Judge that he would be prepared to present his case if he were allowed to obtain his material.

The Preliminary Hearing Judge stated that, to his knowledge, the adapted Indictment was delivered to the Defence in the part regarding the Motion for detention. He continued that this hearing was convened in order to hear the Defendant's views regarding the Motion for custody, but clarified that the Court would not be able to issue a Decision in accordance with the BiH CPC before the Indictment was accepted as adapted and confirmed. The Defendant reiterated the absence of notification for this hearing, while Counsel complained that it was contrary to the BiH CPC not to allow the Defendant to bring his material to the hearing. The Defendant claimed that the Judge was violating Article 144 BiH CPC with regard to limiting the time of his visits to 20 minutes, while Article 59 of the Rules on Detention provides for visits to last no less than 30 minutes.

The court recessed for 10 minutes to allow the Defendant to obtain his laptop. Upon reconvening, the Prosecution stood by their Motion for custody.

Defence Counsel noted that together with the summons for this hearing he also received a letter with the Prosecutor's Office Motion for pre-trial custody following the adapted and confirmed indictment. He emphasised, however, that he had not received such an adapted and confirmed indictment. Therefore, he was not able to present his arguments on this day, since he did not know what the charges and legal qualifications of the criminal offences against the Defendant were. Nevertheless, with regard to the possibility for bail, Counsel stated that the Defendant had never sought to influence witnesses, that he was not aware of their whereabouts and could not identify them [while being in] detention. Counsel further objected at length to the proposal of the Prosecutor to the Court to accept as proven the facts established by the ICTY in the Kunarac case.[100]

The Preliminary Hearing Judge clarified that, with a view to the efficiency of proceedings, he had called this hearing on custody on this day, because the following week, when the time limit for reviewing the Indictment was to expire, all courtrooms were reserved for whole-day trials.

Defence Counsel reiterated that he could not discuss the motion when he was unaware of the content of the adapted indictment and before the Court decided on it.

The Defendant began a lengthy comment regarding the language that would be used in Court, demanding that he receive oral translation in case anyone used a language other than Serbian. As the Defendant refused to finish his comment, the Preliminary Hearing Judge left the courtroom, thus ending the hearing.

XIV) Decision of the Preliminary Hearing Judge dated 7 December 2005

On 7 December 2005 the Preliminary Hearing Judge accepted the Motion of the Prosecutor and ordered custody against the Accused, pursuant to Article 137(1) BiH CPC. In the enacting clause, the

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[99] Based on the audio recording of the hearing and the attendance of the OSCE.
[100] This proposal is included in the 28 November Indictment and immediately precedes in the document the Motion on custody.

Judge added that "...this custody, pursuant to this decision, may last by the end of main trial, and not longer than one year..."[101]

In its reasoning, the Court stated that:

> "The objections of the procedural nature filed by the Defence Counsel were not acceptable when he explained that he could not have provided his opinion on the Prosecutor's Motion given that the Indictment was not previously adapted/confirmed. The Court noted that the distinction should be made between the situation in which it is decided on the custody, which is, in terms of the order, after the Indictment was confirmed (Article 137, paragraph 1 of the CPC BiH) and the situation when there is a hearing pertaining to providing oral argumentation on the Prosecutor's Motion to order custody (pursuant to Article 5 of the ECHR), which precedes the confirmation of the Indictment previously brought by the Prosecutor."[102]

As to reasons for custody, the Court considered "...that the grounded suspicion as the basic condition for custody still stands, and as to the particular conditions set forth in Article 132, paragraph 1 of the CPC of BiH, the Motion of the Prosecutor is justified based on grounds specified under items a), b), and d)."[103] The Court then continued to outline the circumstances that it considered indicating the existence of the grounds for detention under Article 132(1) items (a), (b), and (d).

XIV) Appeal of Radovan Stanković against Decision of 7 December 2005 (drafted on 9 December)

In his Appeal against the 7 December Decision, the Defendant raised the following main issues:

- The documents served to him at the Detention Unit were not sealed in an envelope, hence they could be read (and, he implied, were being read) by the guards.
- He did not have permanent residence in Miljevina as recorded in the Decision.
- The indictment should have been adapted before he was transferred to BiH.
- The maximum time-limit of one year custody prescribed in Article 137(2) BiH CPC should be calculated from the day of his transfer on 29 September 2005.
- He was not duly informed in a timely fashion of the hearing on custody held on 2 December 2005. Further, in this way, it was impossible to hold a hearing on custody after the indictment had been confirmed and accepted as adapted. The Defendant added that his detention, essentially during the pre-adaptation period, was unlawful since it was not based on the BiH CPC. He continued that neither he nor his Counsel had received the adapted and confirmed Indictment (apparently until the date of the Appeal, on 9 December), while by 2 December (the date of the hearing) this had not yet been accepted as adapted and confirmed. He objected to the fact that the media nevertheless had received it. The Defendant stated it was inconceivable that the Preliminary Hearing Judge had requested the Defence to state their opinion on an indictment that had not been confirmed or received by the Defence, and instead claimed that the Preliminary Hearing Judge should first have confirmed the adapted indictment, then should have provided a time limit for the Defence to appeal, and only after that should have held a hearing for the Defence to state their position on the confirmed indictment. Defendant added that these illegal activities and mistakes indicated that the judges, the prosecution, and accompanying offices were part of the same criminal organisation.
- The Defendant objected to the application of the BiH Criminal Code (BiH CC), because it could not be retroactively applied, and demanded that the SFRY CC be applied in his case.
- He further disputed the other grounds for custody: Regarding the possibility of influencing witnesses, he stated that he already had detailed information on the witnesses even before his surrender, but did not need to contact anyone. He stressed that he had voluntarily surrendered, as could be evidenced by police records.
- The Defendant highlighted that he never asked to be released before he cleared his name of the charges.
- He objected to the trial being closed to the public.

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[101] Official translation.
[102] Official translation.
[103] Official translation.

- Furthermore, he demanded that the Defence witnesses be also protected, and that he be not limited as to the number of witnesses he would call.
- The Defendant demanded the urgent commencement of his trial.

XV) Decision of Appellate Panel of 19 December 2005 on Defendant's Appeal

On 19 December 2005, the Appellate Panel rejected as ungrounded the Defendant's Appeal against the 7 December Decision on custody.

The Appellate Panel perceived the Defendant's Appeal to challenge the grounded suspicion against him, the existence of circumstances indicating a risk of flight, and the existence of circumstances indicating a fear of influencing witnesses. The Court also understood that the Defendant submitted objections of a procedural nature claiming, first, that the time-limit on his detention should be calculated from the time of his transfer, and, second, that the Preliminary Hearing Judge had acted erroneously by making a decision on detention before the confirmation of the indictment. The Panel pointed out that the Defendant did not dispute the ground for custody as per Article 132(1) item (d) BiH CPC.

The Appellate Panel decided that the Preliminary Hearing Judge correctly concluded that there was a grounded suspicion based on the evidence presented by the BiH Prosecutor's Office, which fulfilled the basic element for ordering detention under Article 132(1) BIH CPC. It also found that the Preliminary Hearing Judge had assessed correctly the existence of the other special grounds for custody, namely the risk of flight and of influencing witnesses, and had outlined the circumstances for believing so.

Regarding the procedural objections relating to the calculation of detention time, the Court pointed out that "this is legal institute of detention after the confirmation of indictment under the Article 137, paragraph 1 of CPC BiH, and pursuant to that Article the calculation of detention starts from the moment of the confirmation of indictment, which was, in this case, confirmed on 07/12/05 in regards to the two additional counts of indictment, and in regards to the other counts it was accepted when the Prosecutors' Office BiH adapted it according to CPC BiH, at which point detention was ordered within the meaning of this stipulation. Therefore, the Court deems that this objection in the Appeal is ungrounded and that the Preliminary Hearing Judge correctly applied the aforementioned legal regulation."[104]

Regarding the objection that the Preliminary Hearing Judge first ordered detention and only after that confirmed the indictment, the Panel noted that "a procedural error was not committed by the Preliminary Hearing Judge and that the Judge followed the procedure of CPC BiH, considering that the accused first had the opportunity to state his opinion regarding the grounded suspicion and the special grounds for detention. For the accused to state his opinion on grounded suspicion after the confirmation of the indictment would be pointless and unpurposeful ["без предметно [sic] и несвсисходно], therefore the Court deems that this objection of the accused is ungrounded as well."[105]

XVI) Summary of the Plea Hearing held on 23 December 2005

A hearing was held on 23 December 2005 in order for the Accused to enter his plea before the Preliminary Hearing Judge, pursuant to Article 229 BiH CPC.

The Accused complained that contrary to Article 8 of the BiH CPC, he kept receiving documents, particularly from the BiH Prosecutor's Office, in Latin script with words uncommon in the Serbian language. The Preliminary Hearing Judge reiterated the order he had given regarding language and stated he would personally examine the issue.

The Preliminary Hearing Judge explained that the purpose of the hearing was for the Accused to enter a plea with regard to the Indictment. Despite the request of the Accused to have the entire Indictment read to him, eventually the Prosecutor read aloud the part pertaining to the new counts.

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[104] Official translation.
[105] Official translation.

Defence Counsel inquired whether the Accused had to plea on all six counts (four adapted and two new ones) of the Indictment. He argued that if the Accused pleaded only in regard to the two new counts, the Defence would be deprived of their right to submit preliminary motions against the entire document. A discussion ensued between the Parties and the Court as regards this issue. Eventually, the Preliminary Hearing Judge stated that the ICTY Indictment had been incorporated in the present Indictment and that the Defendant had already had the opportunity to enter his plea before the ICTY in connection to the charges in the ICTY Indictment. Therefore, the Preliminary Hearing Judge asked the Defendant to enter his plea only in relation to the two additional counts. As regards the question of Defence Counsel on the right to submit preliminary motions on the entire Indictment, the Preliminary Hearing Judge stated that the Court would not deprive him of that right.

The Defendant responded that he did not wish to enter a plea, claiming that the indictment was fabricated by AID (Muslim Intelligence Agency) and aimed at humiliating him. Consequently, pursuant to Article 229(1) BIH CPC, the Preliminary Hearing Judge recorded *ex officio* that the Accused entered a plea of not guilty.

Defence Counsel reiterated that he had the right to file preliminary motions against the Indictment as a whole. To the inquiry of Defence Counsel regarding the unclear deadline for submitting preliminary motions, the Preliminary Hearing Judge responded that the deadline is 30 days.

The Defendant requested that the main trial be scheduled as soon as possible. To the remark of the Court that the Defendant and his Counsel were making contradictory statements, the Defendant replied that he was being tried by criminals and that he had documents certified by the ICTY Prosecutor that the Chief Prosecutor of the Prosecutor's Office of BiH is a war criminal. The Court switched off the Defendant's microphone. Subsequently, Defence Counsel announced that he would ask for a status conference regarding the Defence fees, considering that this was a case from the ICTY.

XVII) Preliminary Motions by Defence Counsel against the Indictment accepted as adapted and confirmed on 7 December 2005 (drafted on 17– registered on 19 January 2006)

Defence Counsel belatedly filed his preliminary motions against the 28 November Indictment. Very briefly, he stated that his objections submitted before the ICTY remained unchanged in relation to the adapted charges. He argued that the charges were not properly adapted. He claimed that the new fifth count was not sufficiently specified, which impeded the Defence to prepare their case. Finally, he objected to the retroactive application of the BiH CC, since crimes against humanity were not foreseen in the previous criminal law, which was also more lenient.

XVIII) Preliminary Motions of the Defendant Radovan Stanković against the Indictment accepted as adapted and confirmed on 7 December 2005 (Motion drafted on 7 January 2006- received for consideration by the Court on 20 January 2006].

[The OSCE has been informed that no written Decision was issued rejecting the preliminary motions filed by the Defendant as untimely]

The preliminary motions against the 28 November Indictment filed by the Defendant contained the following arguments:

- Issues regarding the use of Serbian and Cyrillic script.
- Denial of a proper hearing and proper consideration of all submissions.
- The alleged criminal acts lack precision and concrete description.
- His transfer from the ICTY to the State Court was unlawful.
- Improper notification of the Defendant for scheduled meetings.
- The case was unlawfully returned from the final stages to the investigative phase.
- The BiH Court scheduled the plea hearing and the hearing on the detention on 02/12/05 without serving the accused with the Indictment.
- The BiH Court continuously thwarts Defence Council to present his case.
- The BiH Court erred in law regarding his detention.

- The Defendant denied forming, or participating in the forming of, any detention centre; that there were no detention centres in the Miljevina area; and that the alleged incriminating incidents ever took place.
- He objected that he had no proper hearing about the four adapted charges.
- He demanded that the main trial be scheduled promptly.
- He criticised the President of the State Court for not visiting the detainees as provided in 146 of BiH CPC BiH.
- He objected to the retroactive application of the BiH CC to acts that allegedly took place n 1992. He stated that the procedure should be conducted according to BiH CPC, while the alleged criminal responsibility has to be sought through the SFRY CC.
- He objected to the fact that at the plea hearing the Indictment was not read to him in full, so he could not enter a plea on it.
- He argued that allegedly proven facts from the Kunarac case are inadmissible in his case.
- He claimed that the BiH Court persistently violated his rights to a fair trial, which rights he specifically outlined.
- He demanded that the one-year maximum period for detention during trial be calculated from 29 September 2005.
- And that the unlawfully adapted and unlawfully confirmed ICTY Indictment be revoked and that it be adapted and confirmed in accordance with the legal regulations.

XIX) 20 January 2006 Decision of Preliminary Hearing Judge rejecting as untimely the preliminary motions

On 20 January 2006, the Preliminary Hearing Judge rejected as untimely the preliminary motions filed by Defence Counsel through the post office on 17 January 2006. Since Defence Counsel received the adapted and confirmed BiH Prosecutor's Indictment on 9 December 2005 [the original Decision misquotes the date as 9 January 2006), the deadline for submitting such Motions expired on 9 January 2006.

[Defence Counsel appealed this Decision on 27 –registered 29- January 2006]

ANNEX B

Sud BiH / Суд БиХ
Krivično odjeljenje I Apelaciono odjeljenje/
Кривично одјељење и Апелационо одјељење
Odjel I i Odjel II / Одјел I и Одјел II
Odsjek za sudsku upravu/Одсјек за судску управу
X- KRO/05/170

BOSNIA AND HERZEGOVINA
PROSECUTOR'S OFFICE OF BiH
S A R A J E V O
Number: KT-RZ-45/05
Sarajevo, 28 November 2005

Primljeno / Примљено
02 -12- 2005
12:15 Maluvić

INDICTMENT
Optužnica KT-RZ-45/05
CONFIRMED
POTVRĐENA DANA 07.12.2005.
in counts 5. and 6., and
dismissed in counts 1-4.
Sudija,

PREVOD PRILOGA 1 OD 9 DOKUMENATA 12

COURT OF BOSNIA AND HERZEGOVINA IN SARAJEVO
- Preliminary Hearing Judge -

Pursuant to Articles 35 (2) (h), 226 (1) and 227 (1) of the Criminal Procedure Code of Bosnia and Herzegovina 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 and in accordance with the counts of the Third Amended Indictment of the International Criminal Tribunal for the Former Yugoslavia Ref. number IT-96-23/2-PT against Radovan Stanković and the facts stated therein, I hereby file the adapted

I N D I C T M E N T

Against:

RADOVAN STANKOVIĆ aka "Rašo", son of Todor, mother's name Joka neè Đorem, born on 10 March 1969 in the village of Trebičina, municipality of Foča, permanent resident of Miljevina, citizen of Serbia and Monte Negro, married, father of three minor children, literate, secondary school qualifications, served the army in Ljubljana in 1988/89, Personal Identity Number: 1003969131547, no prior convictions, apprehended by SFOR on 9 July 2002, taken to the ICTY Detention Unit in the Hague on 10 July 2002 and transferred to the Court of BiH Detention Unit on 29 September 2005, where he is currently detained.

STALNI SUDSKI TUMAČ ZA ENGLESKI
DANIELA SMILJIĆ

Because

Between August and October 1992, in Miljevina area and the town of Foča itself, as a member of the Miljevina Battalion commanded by Pero Elez and subordinated to Foča Tactical Brigade, as part of a systematic and widespread attack of the Army of the Serb Republic of Bosnia and Herzegovina (hereinafter "soldiers"), members of Police and paramilitary formations against the non-Serb civilian population in the wider area of Foča municipality, which lasted from April 1992 to February 1993, when those civilians were being killed, detained – men mostly in a camp – Foča Correctional Facility and other civilians in detention centers such as Miljevina Motel, Buk Bijela, Foča High School and Partizan Sports Hall, where they were subjected to physical and psychological abuse and many women often to sexual abuse, by the acts described bellow[1]:

1. After Dragoljub Kunarac aka "Žaga" brought to Miljevina four girls, specifically FWS-75, FWS-87, FWS-190 and D.B., who had previously been detained and abused in an apartment at Osmana Đikića 16 Street in Foča, and handed them over to the Battalion Commander Pero Elez, following Elez's order, the accused Radovan Stanković together with Neđo Samardžić, Zoran Samardžić and Nikola Brčić established a women's detention center, which was referred to by the soldiers as Brothel, at the Karaman's house, a house belonging to Nusret Karaman, located in the village of Miljevina, municipality of Foča, in the immediate vicinity of the Miljevina Battalion Headquarters, where they brought and detained[2] and supervised the detention center, where at least nine female persons were detained, specifically: FWS-75, FWS-87, FWS-132, FWS 190, AS., AB., JB., JG., DB., most of whom were underage, while AB. and JG. were 12 year old girls, and AB. had been removed in Foča from a bus going to Goražde by the accused while her mother was with her and taken to the detention center and she has been missing since that time, they also incited other soldiers, who occasionally visited the detention center, to rape and abuse the detainees, having full control over their lives and bodies, after the Commander Pero Elez assigned FWS 190 to him, who he forced to sleep in the same bed with him but did not rape her because he did not like her, the accused claimed DB. for his own; JG. was claimed by Nikola Brčić; JB. by Neđo Samardžić, while two detainees FWS-87 and FWS-75 were claimed by Pero Elez and like AS.; FWS-132 and AB. were raped by other soldiers who occasionally visited the detention center, including soldiers and civilians who were allowed in the house by the accused Radovan Stanković, Neđo Samardžić, Zoran Samardžić and Nikola Brčić, specifically: Duško Pržulj, Miško Savić, Dragan Zelenović, Miki Živanović, Momir Skakavac, certain persons called Roko, Mlađo, Pižon

[1] Translation of this section faithfully reflects the language and structure of the relevant section in the original text which appears to be incomplete – translator's note.

[2] This segment appears to be missing a noun which should function as the object of the two verbs used h... translator's note.

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and Papro, the accused himself brought some persons such as Cicmil and Radivoje Marković to the detention center whom he assigned the following detainees to rape, AS. who was raped by Cicmil and FWS-75 who was raped by Radivoje Marković.

2. At the same detention center he compelled the detainees, specifically: FWS- 75, FWS-87, FWS-132, FWS 190, AS., AB., JB., JG., DB., to forced labor which included cooking for the soldiers, cleaning the house, washing uniforms and bathing soldiers, he also ordered three detainees FWS-75, FWS-87 and DB. to do physical labor outside the detention center, which included cleaning apartments and rooms and painting window-frames in apartment blocks and apartments in Miljevina, including the cleaning of the apartment used by the accused Radovan Stanković, who would, during that time, verbally insult the detainees and call them „Bule" or other derogatory names and threaten to have them converted to Christianity, which caused the detainees fear and great phychological suffering.

3. During the same time period, at the same detention center, from among the detainees: FWS-75, FWS-87, FWS-132, FWS 190, AS., AB., JB., JG., DB., the accused claimed the detainee DB. for his own and forcibly engaged in sexual intercourse (vaginal, oral and anal) with her in the living room, often in the presence of other people, and also in the bathroom, every night, except for a couple of days when he was wounded, on one occasion, in the presence of D.B., he raped her underage sister FWS-87 and then, in the month of October 1992, he took her from the detention center to an apartment in the center of Miljevina, where he kept her in detention for about 10 days and then moved her to an apartment in the apartment block called "Lepa Brena" in Foča and kept her in detention in that apartment until 1 November 1992 and during this entire time of her detention he continued forcibly engaging in sexual intercourse with her, also compelling her to forced labor which included washing his clothes, cooking, cleaning the apartments where she was detained, and then, on 1 November 1992, he transported her illegally across the state border between Bosnia and Herzegovina and Monte Negro and on 2 or 3 November 1992 took her to the bus station in Nikšić and released her.

4. During the same time period, on an unknown day and date, at the detention center, during the daytime, the accused forcefully took the underage FWS-87, sister of DB., to a room upstairs in the house and forcibly raped her, while on another occasion, in the evening hours, after she was forced to drink alcohol, he took her to the living room in the house, where he had previously sent her sister DB., and ignoring the fact that FWS-87 was crying and begging him to stop, he forcibly engaged in sexual intercourse with her in the presence of her sister, he forcibly raped and abused her on several other occasions hitting her and causing visible injuries, such as bruises and swellings, to her face.

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5. In the month of May, on an unknown day, in the afternoon hours, he went to the detention center located at the Miljevina Motel, municipality of Foča, where civilians from the area of Foča municipality were detained, and armed with a rifle and intoxicated he went to one of the rooms where SK. was detained, he forcibly undressed her and forcibly engaged in sexual intercourse with her despite her protests.

6. Between June and December 1992, armed with a rifle and a knife, he went to the hospital in Foča, where MB. was admitted as a patient, and forcibly took her out of the hospital and to an apartment in Foča, where he forcibly raped her and then took her back to the hospital comforting her and saying that he was going to become very good friends with her.

Consequently, as part of a widespread and systematic attack targeting civilian population in the municipality of Foča, being aware of such an attack and partaking in it, he perpetrated, abetted and aided enslavement, torture, rape and other forms of sexual abuse of the detainees DB. and FWS-87 and raped SK. and MB.

Whereby he committed the following offences,

Count 1, Crimes Against Humanity under Article 172 (1) (c), (f) and (g) of the CC of BiH;

Count 2, Crimes Against Humanity under Article 172 (1) (c) and (f) of the CC of BiH;

Count 3, Crimes Against Humanity under Article 172 (1) (e), (f) and (g) of the CC of BiH;

Count 4, Crimes Against Humanity under Article 172 (1) (f) and (g) of the CC of BIH;

Counts 5 and 6, Crimes Against Humanity under Article 172 (1) (g) of the CC of BiH;

Therefore,

I hereby move the Court

I) To schedule and conduct the main trial and summon the following persons:

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- Prosecutor of the Prosecutor's Office of BiH
- Suspect Radovan Stanković, currently in the Detention Unit of the Court of BiH, and his Defense Counsel Milenko Radović – Voja, attorney-at-law from Foča,

II) To present the following evidence:

a) Hear the following persons as witnesses:

1. FWS-90
2. FWS-96
3. FWS-31/31a
4. FWS-48
5. FWS-50/50a
6. FWS-51
7. FWS-74
8. FWS-88
9. FWS-95
10. FWS-33
11. FWS-65
12. AS.
13. FWS-132
14. FWS-75

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15.FWS-190

16.DB.

17.FWS-87

18.FWS-175

19.FWS-191

20.BM.

21.SK.

22.CB.

23.HR.

24.SP.

Detailed addresses of the witnesses mentioned above including all personal information and the respective original witness examination records are contained in a separate sealed envelope marked as 1-a since those are witnesses under protective measures ordered by the decisions of the ICTY and the Court of BiH, whereas envelope marked as 1 contains redacted statements of the witnesses mentioned above so that once when the Indictment is accepted and confirmed they could be disclosed to the Defence.

Inspect the following evidence:

25.Record of a questioning of the suspect Radovan Stanković, No. KT-RZ-45/05 of 28 November 2005 conducted on the premises of the Prosecutor's Office of BiH;

26. ICTY Indictment against Radovan Stanković;

27.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;

SLUŽBENI PRIJEVOD ZA ENGLESKI
DANIELA SMILJIĆ

28. 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;

29. Certified transcripts of testimonies in the ICTY case IT-96-23-T and IT-96-23/1-T against Dragoljub Kunarac et al. and other witnesses DB., FWS-87 and FWS-75 (contained in a sealed envelope marked as 2-a due to transcripts not being redacted);

30. Crime scene sketch No. 14-13/1-7-257/05 dated 18 October 2005 produced during forensic examination of the house owned by Nusret Karaman;

31. Photo documentation No. 14-13/1-7-257/05 dated 18 October 2005 compiled during forensic examination of the house owned by Nusret Karaman;

32. Photo documentation compiled by the ICTY Investigator R. Schouten dated July 1996 (panoramic view of Foča, Partizan Sports Hall, Miljevina Motel, Karaman's house);

33. Konjic War Prisoners Exchange Commission records No. 01/1-114/92 dated 15 December 1992;

34. ID card issued by the International Committee of the Red Cross under number 311419 to the witness FWS-190 (enclosed with the statement in a sealed envelope);

35. Certificate of the Ilidža Municipality War Prisoners Exchange Commission number 1110/93 dated 9 November 1993 issued to the witness FWS-190 (enclosed with the statement in a sealed envelope);

36. Certificate of the State Missing Persons Commission No. 05/5-15-R-98 dated 23 March 1998 issued to the witness FWS-190 (enclosed with the statement in a sealed envelope);

37. List of occupied apartments in Miljevina dated 7 September 1992;

38. Request to station the Garrison in Foča dated 17 March 199[illegible] and

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forwarded to JNA[3] General Staff by Foča Serb Municipal Assembly;

39. Report on the escape of detainee Radovan Stanković from Foča Correctional Facility, Ref. number 56/93 dated 6 May 1993;

40. Order issued by the President of Republika Srpska, Radovan Karadžić, Ref. number 01-653/95 dated 7 April 1995 including a list of men liable for military service who are to be reassigned from the Army of RS to Ministry of Internal Affairs;

41. BiH Supreme Court Decision, Ref. number illegible, dated 9 July 1996;

42. File: Pero Elez's "Brothel" – Miljevina;

43. Information Paper on Ethnic Cleansing by Trnovo Public Security Station, Ref. number 17-11-197/92 dated 21 October 1992;

44. Order on deblocking Goražde, Ref. number 01/113-1 dated 7 July 1992, issued by the Commander of Foča Tactical Group;

45. Displaced Persons records dated 3 November 1992 regarding witness DB (enclosed with the statement in a sealed envelope);

46. International Committee of the Red Cross records on missing persons regarding the underage AB;

47. Report on Exchange by the Republic of BiH State War Prisoners Exchange Commission, Ref. number 02-153-692/93 dated 25 March 1993 (enclosed with the statement in a sealed envelope);

48. Approval for Exchange issued by the BiH State War Prisoners Exchange Commission, Ref. number 02-153-691/93 dated 24 March 1993 (enclosed with the statement in a sealed envelope);

49. Miljevina 3rd Light Infantry Brigade List of soldiers who were wounded between 6 October 1992 and 30 September 1993, Ref. number 472/93 dated 6 October 1993;

[3] Local abbreviation for Yugoslav National Army. This abbreviation shall be used throughout the text of the translation – translator's note.

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50. List of the 3rd Battalion Command, number unknown, dated 27 October 1995;

51. Findings and opinion of the committee of doctors in charge of the examination of persons falling under the Law on the Rights of Disabled War Veterans and Families of Killed Soldiers , Ref. number 34/95 dated 28 March 1995;

52. Certificate issued by Foča Military Post 7141, Ref. number 05-1/640 dated 29 September 1993;

53. Certificate issued by Foča Military Post 7141, Ref. number 04/1-6-165 dated 22 June 1994;

54. Document issued by East Sarajevo Public Security Center – Foča Public Security Station, Ref. number 13-1-8/02-2-248-19-479/05 dated 22 November 2005;

55. Criminal Record Certificate for the accused Radovan Stanković, Ref. number 13-1-8/02-2-248-19-479/05 dated 2 November 2005;

56. Court of BiH Order number X-KRO-05/70 dated 17 November 2005;

57. Official Record written by the authorized employees of BiH Court Police dated 21 November 2005;

58. Official Record written by the authorized employee of the Court of BiH Detention Unit, Ref. number SL-59/05;

59. CDs containing audio recordings of the testimonies of the following witnesses: AS., DB., FWS-33, FWS-65, FWS-75, FWS-191, FWS-87, FWS-132, FWS-175 and FWS-190;

Results of Investigation

Following the investigation conducted by the ICTY Office of the Prosecutor and the confirmation of the Third Amended Indictment against the accused Radovan Stanković by ICTY, it has been established that there is grounded suspicion that the accused Radovan Stanković is individually responsible for the perpetration of a criminal offence of Crimes Against

Humanity under Article 172 (1) (c), (e), (f) and (g) of the CC of BiH in conjunction with Article 180 (1) of the CC of BiH. Evidence supporting the charges is primarily comprised of the statements of the above mentioned protected witnesses, eyewitnesses to the incidents, who are direct victims. In the course of adapting the Indictment and examining new witnesses, evidence has been obtained showing that Radovan Stanković has committed rapes of another two Bosniak women in Foča area. This is supported by the statements given to this Prosecutor's Office by the injured parties. These statements are enclosed herein. The remaining portion of the reasoning provided in the ICTY Indictment represents the reasoning of this adapted Indictment.

Material supporting the allegations of the Indictment:

1. Record on the statement of protected witness FWS-90

2. Record on the statement of protected witness FWS-96;

3. Record on the statement of protected witness FWS-31/31a

4. Record on the statement of protected witness FWS-48;

5. Record on the statement of protected witness FWS-50/50a;

6. Record on the statement of protected witness FWS-51;

7. Record on the statement of protected witness FWS-74;

8. Record on the statement of protected witness FWS-88;

9. Record on the statement of protected witness FWS-95;

10. Record on the statement of protected witness FWS-33;

11. Record on the statement of protected witness FWS-65;

12. Record on the statement of protected witness AS.;

13. Record on the statement of protected witness FWS-132;

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14. Record on the statement of protected witness FWS-75;

15. Record on the statement of protected witness FWS-190;

16. Record on the statement of protected witness DB.;

17. Record on the statement of protected witness FWS-87;

18. Record on the statement of protected witness FWS-175;

19. Record on the statement of protected witness FWS-191;

20. Record on the statement of protected witness BM.;

21. Record on the statement of protected witness SK.;

22. Record on the statement of protected witness CB.;

23. Record on the statement of protected witness HR.;

24. Record on the statement of protected witness SP.;

25. Record of a questioning of the suspect Radovan Stanković No. KT-RZ-45/05 of 28 November 2005 conducted on the premises of the Prosecutor's Office of BiH;

26. ICTY Indictment against Radovan Stanković;

27. 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;

28. 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;

29. Certified transcripts of testimonies in the ICTY case IT-96-23-T and IT-96-23/1-T against Dragoljub Kunarac et al. and other witnesses [illegible]

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FWS-87 and FWS-75 (contained in a sealed envelope marked as 2-a due to transcripts not being redacted);

30. Crime scene sketch No. 14-13/1-7-257/05 dated 18 October 2005 produced during forensic examination of the house owned by Nusret Karaman;

31. Photo documentation No. 14-13/1-7-257/05 dated 18 October 2005 compiled during forensic examination of the house owned by Nusret Karaman;

32. Photo documentation compiled by the ICTY Investigator R. Schouten dated July 1996 (panoramic view of Foča, Partizan Sports Hall, Miljevina Motel, Karaman's house);

33. Konjic War Prisoners Exchange Commission records No. 01/1-114/92 dated 15 December 1992;

34. ID card issued by the International Committee of the Red Cross under number 311419 to the witness FWS-190 (enclosed with the statement in a sealed envelope);

35. Certificate of the Ilidža Municipality War Prisoners Exchange Commission number 1110/93 dated 9 November 1993 issued to the witness FWS-190 (enclosed with the statement in a sealed envelope);

36. Certificate of the State Missing Persons Commission No. 05/5-15-R-98 dated 23 March 1998 issued to the witness FWS-190 (enclosed with the statement in a sealed envelope);

37. List of occupied apartments in Miljevina dated 7 September 1992;

38. Request to station the Garrison in Foča dated 17 March 1992 and forwarded to JNA General Staff by Foča Serb Municipal Assembly;

39. Report on the escape of detainee Radovan Stanković from Foča Correctional Facility, Ref. number 56/93 dated 6 May 1993;

40. Order issued by the President of Republika Srpska, Radovan Karadžić, Ref. number 01-653/95 dated 7 April 1995 including a list of men liable

for military service who are to be reassigned from the Army of RS to Ministry of Internal Affairs;

41. BiH Supreme Court Decision, Ref. number illegible, dated 9 July 1996;

42. File: Pero Elez's "Brothel" – Miljevina;

43. Information Paper on Ethnic Cleansing by Trnovo Public Security Station, Ref. number 17-11-197/92 dated 21 October 1992;

44. Order on deblocking Goražde, Ref. number 01/113-1 dated 7 July 1992, issued by the Commander of Foča Tactical Group;

45. Displaced Persons records dated 3 November 1992 regarding witness DB (enclosed with the statement in a sealed envelope);

46. International Committee of the Red Cross records on missing persons regarding the underage AB;

47. Report on Exchange by the Republic of BiH State War Prisoners Exchange Commission, Ref. number 02-153-692/93 dated 25 March 1993 (enclosed with the statement in a sealed envelope);

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52. Certificate issued by Foča Military Post 7141, Ref. number 05-1/640

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dated 29 September 1993;

53. Certificate issued by Foča Military Post 7141, Ref. number 04/1-6-165 dated 22 June 1994;

54. Document issued by East Sarajevo Public Security Center – Foča Public Security Station, Ref. number 13-1-8/02-2-248-19-479/05 dated 22 November 2005;

55. Court of BiH Order number X-KRO-05/70 dated 17 November 2005;

56. Official Record written by the authorized employees of BiH Court Police dated 21 November 2005;

57. Official Record written by the authorized employee of the Court of BiH Detention Unit, Ref. number SL-59/05;

58. Criminal Record Certificate for the accused Radovan Stanković, Ref. number 13-1-8/02-2-248-19-479/05 dated 2 November 2005;

59. CDs containing audio recordings of the testimonies of the following witnesses: AS., DB., FWS-33, FWS-65, FWS-75, FWS-191, FWS-87, FWS-132, FWS-175 and FWS-190;

Proposal to accept as proven facts established by legally binding decisions by the ICTY

Pursuant to Article 4 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, the Prosecution moves the Court to, after hearing the parties, accept as proven those facts that are established by the legally binding Judgment of the ICTY Trial Chamber IT-96-23-T and IT-96-23/1-T of 22 February 2001 in the case of the Prosecutor versus Dragoljub Kunarac et al. and the Judgment of the Appellate Chamber in the same case.

Proposal for pretrial detention following the adapted and confirmed Indictment

Based on the results of the investigation conducted by the ICTY and the Prosecutor's Office of BiH and based on the confirmation of the Third Amended Indictment against the accused Radovan Stanković by ICTY, there is grounded suspicion that the accused Radovan Stanković has committed the criminal offence he is charged with. By Decision of the Preliminary Hearing Judge of the Court of BiH, Ref. number X-KRO-05/70, dated 29 September 2005, it was decided that the detention ordered against the accused Radovan Stanković by Order of the ICTY Trial Chamber II in the case of the Prosecutor versus Janković et al. (IT-96-23/2) shall remain effective pending the Court of BiH decision on the acceptance of the adapted Indictment filed by the Prosecutor's Office of BiH. At the same time, the Court granted the Prosecutor's Office of BiH 40 days to adapt the ICTY Indictment to the BiH Criminal Procedure Code. Following the Prosecutor's Office of BiH request, this deadline was extended for another 15 days by a Decision of the Preliminary Hearing Judge of the Court of BiH, Ref. number X-KRO-05/70, dated 9 November 2005, effective as of 14 November 2005. At the same time, it was decided that the detention ordered against the accused Radovan Stanković by Order of the ICTY Trial Chamber II in the case of the Prosecutor versus Janković et al. (IT-96-23/2) shall remain effective pending the Court of BiH decision on the acceptance of the adapted Indictment filed by the Prosecutor's Office of BiH. Based on the Decision reference to which is made above, Prosecutor's Office of BiH is under an obligation to state their position with regards to the detention upon the expiration of the above mentioned deadline.

Pursuant to Articles 227 (3) and 137 (1) of the CPC of BiH, the Prosecutor's Office of BiH proposes that, following the adaptation and confirmation of the Indictment, the accused Radovan Stanković's detention be extended pursuant to Article 132 (1) (a), (b) and (d) of the CPC of BiH.

As regards the legal grounds for detention prescribed under Article 132 (1) (a) of the CPC of BiH, we would like to note that the accused Radovan Stanković did not surrender voluntarily but instead was apprehended by SFOR members on 9 July 2002, after being surrounded by the armed SFOR members for several hours. This was confirmed by the accused during his first appearance before the Preliminary Hearing Judge of the Court of BiH on 29 September 2005. The Prosecution would also like to note that in his submission of 23 February 2005, the accused stated that he did not believe that the Court of BiH would try his case in an independent, objective and unbiased manner. This opinion was reiterated several times by the accused during the Hearing on Referral of the Case Under Rule 11 bis. On the other hand, following the

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summons of the Prosecutor's Office of BiH and the Court of BiH Order No. X-KRO-05/70 dated 17 November 2005, the accused, who is currently detained at the Court of BiH Detention Unit, refused to leave the cell saying that he had nothing to do with the Prosecutor's Office of BiH and that the authorized officials could only carry him out of the cell handcuffed, which points to the fact that there is no prospect of the accused responding to the Court of BiH summonses voluntarily. The foregoing allegations lead to the conclusion that there are circumstances and valid reasons to fear that the accused, if released, might flee and be unavailable for the Court of BiH during the criminal proceedings. 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 regards to that, the Prosecutor's Office of BiH would like to note that the Indictment is mainly based on the statements of witnesses, women who are direct victims of the rapes perpetrated by the accused and his co-perpetrators, whose identity the accused is well familiar with, so the accused, if released, could easily influence the witnesses mentioned above and contact the other co-perpetrators, some of which are still at large, and in that way hinder further criminal proceedings.

In addition to that, the Prosecutor's Office of BiH would like to note that the accused Radovan Stanković'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 the criminal offence of Crimes Against Humanity under Article 172 of the CC of BiH which carries a minimum penalty of ten years or long term imprisonment. The gravity of the offence, as well as its consequences, especially because this is the case of systematic enslavement and rape of women, even young girls, most of whom come from the Foča region, also including pronounced constant infliction of psychological and physical suffering which resulted in severe trauma and in some cases even tragic outcome, destroying the youth of the above referenced persons and inflicting severe suffering upon the families of victims, close and distant relatives, as well as the previous conduct of the accused during the criminal proceedings give valid reason to suppose the risk that the accused, if released, would reveal the identity of the victims – protected witnesses not only to his co-perpetrators but also to the general public. 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.

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Based on the foregoing, the Prosecutor's Office of BiH moves the Preliminary Hearing Judge of the Court of BiH to accept counts 1 through 4 of this adapted Indictment of the ICTY Office of the Prosecutor pursuant to Article 2 (1) of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected from the ICTY in the Proceedings Before the Court of BiH and confirm counts 5 and 6 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.

Pursuant to Article 235 of the CPC of BiH, we hereby move the Court of BiH Trial Panel to exclude the public from the entire main trial for the purpose of protecting personal intimate lives of the injured parties, as well as the witnesses, some of whom were very young girls at the time of the commission of the offence, while most of them were underage.

DEPUTY CHIEF PROSECUTOR of the
PROSECUTOR'S OFFICE OF BIH

Vaso Marinković

I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian language.

Sarajevo, 2 December 2005
Daniela Smiljić
Certified Court Interpreter for English Language