

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

IT-96-23/2-PT  
D5879- D5861  
07 June 2006

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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: 7 June 2006

THE PROSECUTOR

v.

RADOVAN STANKOVIĆ

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PROSECUTOR'S THIRD PROGRESS REPORT

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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 THIRD PROGRESS REPORT**

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 22 May 2006,<sup>1</sup> the Prosecution hereby files its third progress report in this case.
  
2. The Second OSCE Report in this case<sup>2</sup> focuses on the exclusion of the public from the entire trial,<sup>3</sup> which was identified by the OSCE monitors as the issue of concern relating to the applicable human rights standards during the reporting period.<sup>4</sup> On 23 February 2006, prior to the commencement of the trial, the Trial Panel granted the BiH Prosecutor's motion to exclude the public from the main trial, and issued a decision to this effect on 4 April 2006. The Trial Panel reached its decision to exclude the public "in order to protect the personal and intimate life of the injured parties, morals, and the interests of witnesses."<sup>5</sup>
  
3. The OSCE report details the submissions of the BiH Prosecutor and Defence Counsel, and the basis of the Trial Panel's decision, and OSCE's remarks and concerns with respect to the aforesaid. The OSCE examines these matters "in light of the accused's rights to a public trial, to adequate facilities to present his case, and to effective defence counsel as guaranteed in Article 6 of the European Convention on Human Rights (hereinafter ECHR)."<sup>6</sup>

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<sup>1</sup> *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Order on Prosecutor's Request for an Extension of Time to File Third Progress Report, 22 May 2006.

<sup>2</sup> Second OSCE Report, Case of Defendant Radovan Stanković, Transferred to the State Court pursuant to Rule 11 *bis*, May 2006 ("Second OSCE Report").

<sup>3</sup> The trial commenced on Tuesday, 6 June 2006.

<sup>4</sup> *Op cit.*, Executive Summary, para. 3.

<sup>5</sup> *Ibid.*, page ("p."). 6, second full para.

<sup>6</sup> *Ibid.*, Executive Summary, para. 4.

4. The OSCE's primary concerns are that:
- (a) The BiH Prosecutor did not present objective criteria on a case-by-case basis to justify its motion for holding the entire trial *in camera*, but instead relied on the vulnerability of the witnesses as a whole and the need to protect their identities by holding a closed trial;<sup>7</sup>
  - (b) The Defence Counsel did not diligently present professional arguments to support his client's desire for an open trial;<sup>8</sup> and,
  - (c) The Trial Panel did not examine the necessity of ordering this measure on a case-by-case basis, nor give the Defence an effective opportunity to reply.<sup>9</sup>

5. The OSCE recommends that:
- (a) The BiH Prosecutor should properly substantiate its motions for the protection of witnesses by closed sessions, using objective criteria and a case-by-case approach;
  - (b) Defence Counsel should properly represent their client's right to a public trial by putting forward professional arguments; and,
  - (c) The Court should properly examine the individual interests of each witness when granting protective measures such as closed trials/hearings, and comply with the principle of necessity/proportionality in the application of such measures, and provide a reasoned decision. In addition, when the Court considers *ex officio* factors indicating a need to exclude the public, they should provide the opportunity to the parties to present arguments.<sup>10</sup>

6. While the Prosecution agrees with the OSCE's recommendations and its assessment that "the right to a public trial is a fundamental safeguard of criminal procedure enshrined in both domestic law and international human rights standards,"<sup>11</sup> it does note that "[a]lthough the publicity of a criminal trial is the rule, the right to a public trial is not an absolute one. Both domestic and international standards provide for specific exceptions, based on which the public and the media may be excluded

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<sup>7</sup> *Ibid.*, pp. 6-7. In addition, the BiH Prosecutor advanced the argument that the witnesses would refer to other perpetrators of rape, currently under investigation, awaiting arrest.

<sup>8</sup> *Ibid.*, pp. 7-8.

<sup>9</sup> *Ibid.*, pp. 8-9.

<sup>10</sup> *Ibid.*, pp. 10-11.

<sup>11</sup> *Ibid.*, p. 3, para. 5 (footnotes omitted).

from all or part of the main trial.”<sup>12</sup> The Second OSCE Report sets out ICTY jurisprudence as to how the balance is struck, i.e., on case-by-case basis for each witness, using objective criteria.<sup>13</sup> Moreover, in this case, it must be pointed out that although the trial is closed to the public generally, it is being monitored by the OSCE, thus ameliorating one of the concerns that arise when a trial is closed, in that the trial is subject to the scrutiny of outsiders.

7. The Prosecution also agrees with the OSCE recommendation that the Prosecutor should not propose, and the Court should not implement, a stricter measure when a less strict one can achieve the same purpose.<sup>14</sup> If the BiH Prosecutor or the Trial Panel has reservations that the witnesses may identify other protected witnesses, similar procedures to that adopted by the ICTY Trial Chamber in the *Prosecutor v. Kunarac* case could be implemented in the instant case.<sup>15</sup> Further, if the BiH Prosecutor or the Trial Panel has reservations that the Accused will identify the protected witnesses in open court, the Court can implement measures so that this would not occur.<sup>16</sup> With respect to any of the witnesses who may testify about suspects at large, this part of the witnesses’ testimony could be given in private or closed session.

8. The Prosecution notes that the Trial Panel has declared that it will be reviewing its decision on the exclusion of the public during the course of the proceedings.<sup>17</sup> While there are concerns raised by the Trial Panel’s decisions as set forth in the OSCE’s report, it is important to take into account the fact that the trial has been continuously monitored by the OSCE and the Trial Panel’s decision must be seen in this light.

9. With regard to OSCE’s concerns with respect to Defence Counsel, the Prosecution notes that two new counsels have been appointed to act for the Accused in this case.<sup>18</sup>

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<sup>12</sup> *Ibid.*, p. 3, para. 6.

<sup>13</sup> *Ibid.*, p. 4, first full para.

<sup>14</sup> *Ibid.*, p. 10, para. 5.

<sup>15</sup> For example, by the use of a “pseudonym sheet” listing names and locations, and parts of the testimony could be given in private or closed session.

<sup>16</sup> For example, the accused could be placed in a soundproof booth with his microphone being controlled by the Presiding Judge.


<sup>17</sup> Second OSCE Report. p. 6, second full para., p. 11, first full para.

<sup>18</sup> *Ibid.*, Executive Summary, para. 3.

10. The OSCE “intends to share this report with “local actors, discuss its findings, and follow-up in the implementation of its proposals.”<sup>19</sup> The Prosecution has discussed, and will further discuss, the issues raised in the report with OSCE and the BiH Prosecutor.

11. Attached to this report and marked as Annex A is a copy of Part I of the Second OSCE Report. Part II of the report consists of summaries of the principal hearings, submissions by the parties, and decisions of the Court. The Prosecution will provide Part II of the report if the Referral Bench deems it necessary.

Word count: 1141.

  
AP \_\_\_\_\_  
Carla Del Ponte  
Prosecutor

Dated this seventh day of June 2006  
At The Hague  
The Netherlands

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<sup>19</sup> *Ibid.*, p. 2, last para.

IT-96-23/2-PT  
D 5874- D 5861

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ANNEX A



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

**Second OSCE Report  
Case of Defendant Radovan Stanković  
Transferred to the State Court pursuant to Rule 11*bis***

**May 2006**

**TABLE OF CONTENTS**

Executive Summary ..... 1

Part I: Issues of Concern ..... 3

    Introduction..... 3

    I) The Law..... 3

    II) The Facts..... 5

    III) Remarks and Concerns ..... 6

    IV) Conclusion/Recommendations ..... 10

Part II: Summaries of Main Hearings – Submissions- Decisions ..... 12



## EXECUTIVE SUMMARY

This constitutes the second OSCE Report in the case of Radovan Stanković (hereinafter also “Defendant” or “Accused”), which was the first case transferred by the ICTY to the BiH State Court pursuant to Rule 11 *bis* of its Rules of Procedure and Evidence.

This Report focuses on the exclusion of the public from the entire trial in question, which was identified by OSCE monitors as the main human rights issue of concern during the reporting period. The findings, conclusions, and recommendations on this matter are presented in Part I, while Part II consists of summaries of the principal hearings, decisions, and submissions.

The main trial of Radovan Stanković was scheduled to start on 23 February 2006. Prior to its commencement, the Accused was removed from the courtroom for misconduct. Upon the motion of the Prosecutor, the Trial Panel decided to exclude the public from the main trial, and issued a written decision to this effect on 4 April 2006. On 17 March, the State Court’s Plenum decided to reject as unfounded the Defendant’s motion for the disqualification of the first-instance panel. Furthermore, pursuant to the requests made both by the Accused and his Defence Counsel, the Court decided on 7 April 2006 to dismiss Mr. Milenko Radović from his duty as *ex officio* Counsel of the Accused, and to appoint two new Defence Counsel. The Court rejected the Defendant’s request to represent himself. Finally, on 17 May, the Court refused the Accused’s request to have his case transferred to the District Court in Trebinje as untimely. This decision was upheld on appeal. The main trial is currently scheduled to start on 6 June 2006.

Part I of this Report addresses the matter of excluding the public from the entire main trial as was discussed by the Parties, and as was justified in the written decision of the Court. More specifically, OSCE remarks that the Prosecution did not present objective criteria on a case-by-case basis to justify its motion for holding the entire trial in camera. On the other hand, Defence Counsel did not diligently present professional arguments to support his client’s will for an open trial. Further, the Court’s written decision to exclude the public does not examine the necessity of ordering this measure on a case-by-case basis, while it also considers an argument to which the Panel did not give the Defendant an effective opportunity to reply. These matters are mainly examined in light of the accused’s rights to a public trial, to adequate facilities to present his case, and to effective defence counsel as guaranteed in Article 6 of the European Convention on Human Rights (hereinafter ECHR).

These findings are accompanied by recommendations to the prosecution, defence counsel, and courts. The OSCE intends to share this Report with local actors, discuss its findings, and follow-up in the implementation of its proposals.



## PART I: ISSUES OF CONCERN

### INTRODUCTION

Within the reporting period, the OSCE noted certain problematic issues arising from the decision to exclude the public from all main trial proceedings in the case of Radovan Stanković and the related discussions prior to this decision. These matters are mainly examined through the prism of the accused's rights to a public trial, to adequate facilities to present his case, and to effective defence counsel as guaranteed in Article 6 ECHR.

Firstly, the arguments of the BiH Prosecutor's Office<sup>1</sup> to support its proposal for holding the entire trial closed to the public were presented in a rather abstract manner, without providing objective criteria to evaluate the necessity for this additional protective measure for each of the witnesses.

Secondly, Defence Counsel did not diligently support with professional arguments before the Court the will of his client to hold the main trial in the presence of the public; in this matter, standards on the professional duties of defence counsel may not have been fully respected.

Thirdly, the Trial Panel's written decision on excluding the public for the entire trial did not examine the interests of victims and witnesses on a case-by-case basis. Moreover, in that decision, the Court considered *ex officio* the argument that there was a fear that the Defendant would reveal protected information, without previously providing the Defendant with an effective opportunity to be heard on this matter.

### D) THE LAW

The right to a public trial is a fundamental safeguard of criminal procedure enshrined in both domestic law<sup>2</sup> and international human rights standards.<sup>3</sup> In the words of the European Court of Human Rights (ECtHR): "*This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial.*"<sup>4</sup> Therefore, the publicity of the trial is intended for the benefit of the accused, but is also in the interest of the public in general,<sup>5</sup> as well as of the justice authorities, in which confidence can be maintained.<sup>6</sup>

Although the publicity of a criminal trial is the rule, the right to a public trial is not an absolute one. Both domestic law and international standards provide for specific exceptions, based on which the public and the media may be excluded from all or part of the main trial. Namely, Article 235 BiH CPC foresees the exclusion of the public also *when it is necessary* to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness. Article 6(1) ECHR foresees the same when it is, among others, for the protection of the private life of the parties, or to the

<sup>1</sup> Hereinafter, when the Report refers to "Prosecutor," "Prosecution," or "Prosecutor's Office" the terms should be understood to correspond to the BiH Prosecutor's Office, unless otherwise indicated.

<sup>2</sup> Article 234(1) BiH CPC.

<sup>3</sup> Article 6(1) ECHR, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>4</sup> See *Werner v. Austria*, ECtHR (24 November 1997), para. 45.

<sup>5</sup> Also see Human Rights Committee General Comment 13 on Article 14 ICCPR (21<sup>st</sup> session, 1984), para. 6, where it is stated that: "The publicity of hearings is an important safeguard in the interest of the individual and of society at large."

<sup>6</sup> Of interest may be the dictum of Chief Justice Warren in *Estes v. Texas* before the U.S. Supreme Court: "There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously..."; quoted in the ICTY *Prosecutor v. Zejnir Delalic et als.*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", 28 April 1997, para 34.

*extent strictly necessary* in the opinion of the court *in special circumstances* where publicity would prejudice the interests of justice.

The wording of Article 6(1) ECHR implies a complex balancing exercise between the rights of the accused, one of which is that to a public trial, and the interests reflected in the enumerated restrictions, in this case the interests and rights of victims and witnesses involved in the proceedings.<sup>7</sup> Similarly, the ICTY decisions on protective measures apply such a balancing test.<sup>8</sup> The ICTY has explicitly stated that the determination of how the balance is struck should be made on a case-by-case or individual basis for each witness, thus implying that “blanket” measures to protect witnesses are not permitted.<sup>9</sup> Further, the ICTY has required that the Prosecutor demonstrate “objective criteria,” upon which the Tribunal can base its decision on protective measures, including closed sessions.<sup>10</sup> Finally, to the knowledge of the OSCE, the ICTY has never declared an entire trial closed to the public.<sup>11</sup>

Apart from the exclusion of the public from main trial hearings, which is provided for only in the BiH CPC, other specific measures for the protection of witnesses are foreseen in the special BiH Law on Protection of Witnesses Under Threat and Vulnerable Witnesses (hereinafter “Law on Witness Protection”).<sup>12</sup> The latter law expressly provides for a test of “necessity”, namely that the Court may order such measures as it deems necessary, but when deciding which of them to apply the Court shall not order the application of a more severe measure if the same effect can be achieved by application of a less severe measure.<sup>13</sup> Furthermore, the wording of Article 235 BiH CPC can be interpreted as implying a necessity test on case-by-case basis. Although the exclusion of the public is not foreseen in the Law on Witness Protection but in the BiH CPC, it is similarly subjected to a test of necessity as foreseen in Article 235 BiH CPC and consistently with European Court case law.

Further, Article 235 BiH CPC specifically provides that the Court may decide to exclude the public upon the motion of the parties and defence attorney or *ex officio*, but *always* after hearing the parties and the defence attorney. The duty to hear the parties and counsel when the exclusion of the public is contemplated, even *ex officio*, reflects the human rights principles of providing adequate time and

<sup>7</sup> A proportionality test was used in the context of the right to a public hearing, among other cases, in *Campbell and Fell v. the United Kingdom*, ECtHR (28 June 1984), para. 87, and in *Diennet v. France*, ECtHR (26 September 1995), para. 34. In interpreting similar restrictions to rights guaranteed in Articles 8-11 ECHR, the ECtHR has required that the restriction be a proportionate response to a pressing social need, or otherwise necessary in a democratic society. In the view of experts, “[a]lthough the text of Article 6(1) ECHR does not contain this precise formula, there are echoes of it and, in any event, such a balancing approach seems generally appropriate”; see D.J. Harris, M. O’Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 219. Regarding the “counterbalancing” approach between the rights of the defendant and the rights of victims-witnesses, see *Doorson v. The Netherlands*, ECtHR (26 March 1996), para. 70.

<sup>8</sup> For instance, see the Decision in *Prosecutor v. Zejnir Delalic et al.*, *supra* footnote 6, para 35; and *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 6. Also see the article by Pascale Chifflet, “The Role and Status of the Victim”, in Gideon Boas and William A. Schabas (editors), *International Criminal Law Developments in the Case Law on the ICTY*, Volume 6 of the Humanitarian Law Series (Martinus Nijhoff Publishers, 2003), pp. 75 ff.

<sup>9</sup> See *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, Case No. IT-94-I-T, 31 July 1996. On page 4 of this Decision, the Tribunal stated: “How the balance is struck will depend on the facts on each case.” Similarly, in *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-I-T, 10 August 1995, para 50, it is stated: “In determining where the balance lies between the right of the accused to a fair and public trial and the protection of victims and witnesses, consideration has been given to the special concerns of victims of sexual assault. These concerns have been factored into the balance on an individual basis for each witness for whom protection is sought.”

<sup>10</sup> *Prosecutor v. Zejnir Delalic et al.*, *supra* footnote 6, para. 47.

<sup>11</sup> Corroborating this piece of information, also see the Justice Report by Balkan Investigative Reporting Network (BIRN), Issue No.01, 9 March 2006, also available at <[www.birn.ba](http://www.birn.ba)>.

<sup>12</sup> See Chapter II of the Law on Witness Protection, BiH Official Gazette 3/03 with amendments as published in BiH Official Gazette 61/04. Witness protection measures can also be found throughout the BiH CPC, such as measures to avoid the repetition of testimony, the duty of the court to protect witnesses from harassment, confusion, threats and to control the manner and order of witness examination, etc.

<sup>13</sup> See Article 4 of the Law on Witness Protection.

facilities to present one's case and of equality of arms, as foreseen in Article 6 ECHR. In case the public is to be excluded, Article 237(1) BiH CPC requires that the court issue a decision, *which must be explained* and publicly announced. The Commentary to the BiH CPC states that such a decision is in the form of a ruling, which does not have to be in a written form, but is entered in the minutes.<sup>14</sup> Obviously, nothing would preclude the court from issuing a written decision to this effect, as was done in the *Stanković* case. The decision to exclude the public may be contested only in the appeal against the verdict.<sup>15</sup>

## II) THE FACTS

The State Court has accepted a number of requests for granting protective measures for all witnesses proposed by the Prosecution in the 28 November 2005 Indictment against the Accused. These measures mostly involve the allocation of pseudonyms, and voice and image distortion while testifying. They also pertain to witnesses protected by the ICTY, whose measures remain in force as per the State Court's decision.<sup>16</sup>

On 23 February 2006, prior to the commencement of the main trial, the Accused was removed from the courtroom for misconduct, and was thereafter represented before the Court by his Counsel.

Subsequently, the Trial Panel heard the oral arguments of the Prosecutor to exclude the public from the entire main trial pursuant to Article 235 BiH CPC.<sup>17</sup> The two main reasons quoted were the protection of the personal and intimate lives of victims and the protection of the interests of witnesses, although more reasons were eventually presented. The Prosecutor explained that the witnesses are mostly injured parties who have been subjected to rape, so their testimony before the public and the media would constitute an infringement on their personal life and health, and inflict severe suffering, since they have been severely traumatized and are mentally unstable. It was added that maybe even their families do not have knowledge of the acts against them. Furthermore, it was mentioned that the witnesses in this trial are mainly witnesses also protected by the ICTY, and that their testimony will additionally endanger their families.

The Prosecutor also indicated that witnesses will refer to other perpetrators of rape in the Foča municipality. Apart from the ones who have been charged before the Court, the Prosecutor's Office has completed investigations in three other cases and is waiting for these suspects to be arrested. It was argued that the mere fact that the witnesses will identify these persons in their testimony would prompt them to flee the country. Moreover, the Prosecutor stated that the majority of these victims/witnesses have returned or intended to return to the area where these crimes were committed, and that they will be testifying in up to five other cases. Later, the Prosecutor added as a reason for the exclusion of the public the conduct of the Accused on that day, which would be known to public through the media.

Defence Counsel stated that he did not want to state his view regarding this motion, since his client was not present, and claimed that this proposal should have been submitted prior to the main trial, so as to allow time to consult and receive the position of the Accused. Upon the reminder of the Presiding

<sup>14</sup> See Hajrija Sijercic-Colic, Malik Hadziomerovic, Marinko Jurcevic, Damjan Kaurinovic, Miodrag Simovic: *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe/European Commission, Sarajevo, 2005), Article 237, pp. 637-638.

<sup>15</sup> Article 237(2) BiH CPC.

<sup>16</sup> On 11 November 2005, the Prosecutor's Office submitted a Motion to the Preliminary Hearing Judge to extend the force of protective measures ordered by the ICTY for nine witnesses pursuant to Article 12(1) of the Law on Witness Protection. On 28 November 2005, the Prosecutor submitted two Motions requesting that protective measures be ordered for five witnesses pursuant to Articles 12 and 13 of the Law on Witness Protection. On the same date, the State Court granted all three Motions of the Prosecutor. It decided to declare confidential all personal information regarding the witnesses concerned; ordered that the actual names of the witnesses be revealed to the Defence at least 30 days before they give evidence; and ordered that the witnesses be enabled to give evidence during the proceedings from behind a screen or through electronic equipment for distorting their voice and/or image.

<sup>17</sup> This request was originally included in the 28 November Indictment of the Prosecutor's Office of BiH in this case.

Judge that this motion was included in the indictment, Defence Counsel diverted the discussion to whether the conditions for holding the main trial were met. Eventually, a recess was granted so that he could consult with his client on the matter of publicity of the trial. Upon reconvening, Counsel succinctly informed the Court that his client opposed the motion of the Prosecutor and requested that his trial be open until its conclusion.

After deliberating, the Presiding Judge briefly stated that the Court accepted the motion of the Prosecutor for the reasons the latter put forward, namely “the protection of personal and intimate life of the injured parties and the protection of the integrity of witnesses.” The Presiding Judge mentioned that this decision was based on Articles 235 and 236 of the BiH CPC and on Article 6 ECHR. He further clarified that this decision can only be challenged in an appeal against the verdict, and proceeded with the exclusion of the public and the identification of persons who had a reason to attend the closed proceedings.

On 4 April 2006, the Trial Panel issued a written decision explaining the reasons for which it ruled to exclude the public from the entire main trial. More specifically, the Court reached this decision in order to protect the personal and intimate life of the injured parties, morals, and the interests of witnesses. It declared that it would allow certain professionals and close relatives of the accused to attend the trial. It concluded that it would be revising its decision in the course of the trial and would allow the attendance of the public once the reasons for excluding it cease to exist.

In particular, the Court stated that the exclusion of the public was necessary both because of the protection of the personal life of victims and witnesses, and because there is a fear that the Accused would reveal the names of the protected witnesses, taking into consideration his previous behaviour. In support of these concerns, the Court mentioned that the proposed witnesses will testify on rapes and other humiliating acts, and that “[t]estifying in public on such delicate and sensitive issues, even with certain measures of protection, always stands as a risk for the private and personal life of witnesses-victims.” Furthermore, the Decision states that “[i]t is impossible for the Court to always predict and to control completely all the elements of the events that are not known to the public otherwise,” whereas if these elements were revealed, they could lead to the identification of the victims, their being hurt again, and their social reputation and family life endangered. The Court estimated that the “measures for protecting the witnesses are not a sufficient guarantee of protection of their personal and human dignity, but, in this particular case, it seems to be logical and adequate to protect both their testimonies and the complete event for the purpose of protecting the identities of victims and witnesses” [unofficial translations]. The Court also stated that the damage arising from revealing the identities of witnesses-victims would be absolutely unrecoverable and that the only way to counter that is to preclude its emergence by preventive actions.

### III) REMARKS AND CONCERNS

Admittedly, in the given trial of Radovan Stanković the importance of striking a proper balance between the right to a public trial and the protection of other interests is magnified. The satisfaction of public interest in this trial is of crucial significance, both due to the subject-matter of the case, but also since this is the first trial transferred from The Hague to be adjudicated before the newly established State Court. On the other hand, the protection of the victims and witnesses involved continues to be of enormous importance, especially to the extent that the witnesses proposed by the Prosecution are basically victims of sexual assault. This section addresses shortcomings that were noted in the justification of the arguments presented by the Prosecution, the Defence, and the Court in relation to the exclusion of the public for the entire trial.

#### *a) Remarks regarding the Prosecutor’s Motion for the exclusion of the public*

The following points indicate matters that the Prosecution should have more adequately addressed in its motion for an entirely closed trial:

- The reasons presented to support its motion in fact appear to pertain mostly, if not exclusively, to prosecution witnesses. The Prosecution did not clarify whether it had any ground for requesting that

the presentation of material evidence or the testimony of defence witnesses be shielded from public knowledge.

- The interests of (prosecution) witnesses and victims were not identified separately, but rather as a whole. The Prosecutor did not specify at the session whether all witnesses insisted on the exclusion of the public throughout their testimony. For instance, the 28 November 2005 Decision of the State Court ordering protective measures for three witnesses mentions the Prosecution's statement that the third witness would testify in BiH under the conditions that her identity is protected and the public excluded from the main trial. This would imply that other witnesses may not have conditioned their testimony on being heard in closed session, at least until the time of the said Decision.

- The first argument of the Prosecutor was the vulnerability of the witnesses and the need to protect their identities, by holding a closed trial. Regarding this particular argument, the Prosecutor did not persuasively indicate why the witness protective measures already ordered were insufficient to achieve the desired purpose of protecting their identity in each case, but instead additional resort to the exclusion of the public was necessary. It should be noted that the State Court has the technical capacity to implement a number of protective measures including anonymity and voice and image distortion.

- By not referring to the need for closed sessions on a case-by-case basis, the Prosecutor did not clarify whether all witnesses were expected to reveal names of other suspects currently at large.<sup>18</sup> It also did not present to the Court any reasons why alternative ways of referring to the names of such suspects would not be possible, such as through the use of aliases during testimony, or excluding the public for that part of the testimony relating to such suspects (or other protected witnesses).

- Lastly, the last reason provided by the Prosecution was that the conduct of the Accused would become known to the public through the media. The phrasing of this reason did not specify which interest foreseen by law the Prosecutor intended to protect.

*b) Defence Counsel did not sufficiently protect the right of the defendant to a public trial*

The OSCE is concerned that Defence Counsel of Radovan Stanković did not appear to diligently protect his client's right to a public trial, thus possibly not fully respecting in this matter the duty arising from the Law on the Attorney's Profession of the Republika Srpska<sup>19</sup> and the international standards as reflected, *inter alia*, in the United Nations Basic Principles on the Role of Lawyers.

Article 3 of the Law on the Attorney's Profession of the Republika Srpska foresees that attorneys shall provide conscientiously and professionally legal assistance in protection of the human rights and civil freedoms. Similarly, Principles 13 to 15 of the Basic Principles on the Role of Lawyers requires that, in protecting the rights of their clients and in promoting the cause of justice, lawyers shall seek to uphold human rights and act diligently, as well as always loyally respect the interests of their clients.

After the Defendant was removed from the courtroom and the Prosecutor presented his motion to hold the entire trial closed to the public, the Court asked the Defence Counsel to present his arguments on the Prosecution's motion. Defence Counsel firstly stated that he did not wish to present his view on this motion in the absence of his client, and claimed that the proposal should have been submitted previously so as to allow time for preparation and consultation. Eventually, after having consulted with the Defendant during the recess, Defence Counsel merely conveyed the position of his client as opposing the motion and requesting the trial to be public.

<sup>18</sup> The OSCE does not have information whether any of the names of the three suspects at large have in fact been mentioned in any of the related indictments.

<sup>19</sup> See the Law on the Attorney's Profession of the Republika Srpska, Official Gazette of the Republika Srpska 37/02, 23 May 2002, and the Basic Principles on the Role of Lawyers, adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana – Cuba, 27 August to 7 September 1990.

In view of the above, the OSCE is concerned that Defence Counsel in the *Stanković* case apparently had not properly prepared to counter the motion of the Prosecutor for a closed trial, which was indeed included in the 28 November 2005 Indictment. Furthermore, Defence Counsel eventually did no more than merely convey the stance of his client. There was no evidence of any effort on his part to present professional arguments countering the prosecution's motion, which raises doubts as to whether Counsel performed his duty to uphold his client's human rights and interests diligently and loyally.

c) *Remarks regarding the Court's decision on exclusion of the public*

The following issues arise from the Court's written Decision to exclude the public from the main trial:<sup>20</sup>

- First, the Court appeared to treat all witnesses as having the same characteristics and interests. However, it is unclear whether it determined the need for a closed trial after having examined their interests separately, or whether it merely assumed that all injured parties and witnesses would need such additional protection. It may be noted that the Panel did not clarify whether material evidence and defence witness testimony had such sensitive content that it was imperative to be presented in closed sessions. Additionally, it did not demonstrate having examined whether any witness was willing to testify in open session or whether each testimony was so particular as to reveal protected identities. Although witnesses and victims of sexual assaults generally receive more special protection in comparison to other witness groups, nevertheless the law does not alleviate the duty of the court to restrict as little as necessary the rights of the accused, when it foresees such limitations.

Certain decisions of the ICTY are worthy of note as they order protective measures for relevant witnesses in a more individualised manner.<sup>21</sup> For instance, the Decision of the ICTY Trial Chamber in the case *Prosecutor v. Dragoljub Kunarac* orders protective measures for certain witnesses.<sup>22</sup> In that Decision, the Tribunal ordered that the testimonies of four witnesses are to be heard in closed session.<sup>23</sup> However, the Tribunal ordered that edited recordings and transcripts of these sessions shall be released to the public and the media after being reviewed by the Prosecution and the Victims and Witnesses Unit. The Tribunal deemed that certain other witnesses would testify using image and voice altering devices to prevent their identity from being made public; one of these would testify from the courtroom, but with the use of screening so as to be shielded from the public and the accused.

It is understandable that a trial panel would eventually resort to the additional measure of closed sessions, regardless of previously imposed measures, if it found additional reasons that merited this or evaluated the same circumstances differently. However, one would expect these additional reasons or change in circumstances to be adequately explained. This has not been the case in the *Stanković* proceedings before the State Court. Consequently, as far as the argument regarding the sensitivity of witness testimony is concerned, it can be argued that the Court could have more carefully and adequately considered the right to a public trial by assessing that sensitivity on a case-by-case basis and to the extent strictly necessary.

- The second principal argument that the Trial Panel invoked for the exclusion of the public, namely the fear that the Accused would reveal the names of protected persons, could indeed apply

<sup>20</sup> The oral decision of the Court to exclude the public from the entire trial was not properly reasoned, to the extent that the Panel merely stated that it accepted the motion of the Prosecution in order to protect the personal life of witnesses and victims. However, the Trial Panel later issued a written decision explaining in more detail its considerations.

<sup>21</sup> It may also be of interest to refer to a decision of the US Supreme Court, *Weller v. Georgia*, 467 U.S. at 48, 104 S.Ct. at 2216, 81 L.Ed.2d (1984) at 39: where the Court found: "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

<sup>22</sup> See the ICTY Trial Chamber's Order on Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial in *Prosecutor v. Dragoljub Kunarac*, 5 October 1998 (IT-96-28-PT).

<sup>23</sup> In fact, one of these witnesses later indicated that she did not request any longer to be heard in a closed session, but she found it enough to have her voice and image distorted during testimony; See the transcript of the main trial session in the ICTY case *Prosecutor v. Kunarac* of 25 April 2000, page 2181.



throughout the main trial. However, this argument was not raised by the Prosecutor in his motion, nor did the Court give any indication during the hearing that it would be considering this factor *ex officio*. In spite of this, the Court based its decision also on this argument, without providing the Defendant with the opportunity to present his arguments in advance.

Article 235 BiH CPC provides that the parties be heard before the court takes a decision on excluding the public regardless of whether this is initiated by the parties or *ex officio*. For the hearing to be effective, the court would need to inform properly the parties regarding the issues at stake, even when considered *ex officio*, and seek their position on the matter. At the human rights plane, such right to reply to *ex officio* considerations could be covered by the right of the accused to be given adequate facilities to prepare one's case. This right has been mostly considered by the ECtHR in the context of preparing one's defence against charges and prosecution evidence, as well as in the context of preparing one's case against pre-trial detention. It guarantees that a defendant should be afforded the possibility of exercising his/her rights in a practical and effective manner, and in good time.<sup>24</sup> Since the Court contemplated *ex officio* a further argument to restrict the right to a public trial, the Defendant should have been given a timely and effective opportunity to present and clarify his position on the existence of the fear that he would reveal names of protected persons.

Additionally, the failure of the Court to give the Defendant the opportunity to reply to an argument it considered *ex officio* may be viewed from the perspective of the principle of equality of arms under Article 6(1) ECHR. This principle enshrines the opportunity for the parties to a criminal trial to have knowledge of and comment on all evidence adduced or observations filed, even by a judge, with a view to influencing the court's decision.<sup>25</sup> Although there is no case-law on the matter, there is expert opinion upholding that there should be a right to reply when the court considers an argument *ex officio*.<sup>26</sup>

Providing an effective opportunity to reply to this argument considered *ex officio* is particularly important since the decision to exclude the public is not subject to appeal, save as part of an appeal against the verdict. Moreover, the Court specifically stated that it would be reviewing its decision in the course of the main trial, and would invite the public to attend should the reasons for excluding it cease to exist. For the fear of the Accused revealing protected identities to cease, one would assume that the Court would subsequently seek to obtain assurances that the Defendant would comply and adequately warn him of the consequences of such actions. It is unclear why the Court did not pursue, prior to making its decision, to hear the Accused as regards this argument and possibly obtain relevant assurances from him at this initial stage of the proceedings.

- Lastly, the Court's written Decision makes reference to the exclusion of the public on the basis of protecting "morals."<sup>27</sup> The Panel made reference in general terms to the behaviour of the Accused who was removed from the courtroom for unpredictable manners and misconduct, but it did not clarify whether this point was mentioned in connection to the threat of revealing witnesses' identities or served to substantiate the need to protect morals. In any case, the necessity to exclude the public in order to protect morals cannot be considered as adequately explained in the written Decision.

<sup>24</sup> See Nuala Mole and Catharina Harby, *The Right to a Fair Trial: A guide to the implementation of Article 6 of the European Convention on Human Rights* (2001, Council of Europe Human Rights Handbooks No. 3), pp. 7-8.

<sup>25</sup> See *J.J. v. The Netherlands*, ECtHR (27 March 1998), para. 43.

<sup>26</sup> See Frederic Sudre, *Droit Europeen et International des Droits de l' Homme* (Presses Universitaires de France, April 2005, 7<sup>th</sup> edition), p. 353, and particularly footnote number 1 on that page.

<sup>27</sup> Moreover, although the Court had orally indicated that it was accepting the motion of the Prosecution, its written Decision did not make reference to the danger of witnesses disclosing the names of suspects at large, which the Prosecution had indicated in its oral motion. Thus it is unclear if the Court also based its written decision on this point.

#### IV) CONCLUSION/RECOMMENDATIONS

Both domestic and international instruments foresee the right to a public trial as a fundamental guarantee for the accused. Beyond the interest of the defendant, however, the publicity of trials benefits the justice system and the public at large. Particularly in war crime trials, the public has a particular interest in following the proceedings and gaining knowledge, either in person or through the media, about the facts established through the legal process. Open and transparent trials, with due regard to the protection of witnesses, are essential for the perception of the public that the proceedings are fair, so that confidence in the efforts of the judiciary is enhanced. If war crime trials are to contribute to the reconciliation process, justice must not only be done, but must also be seen to be done.<sup>28</sup> Of course, the publicity of trials should be properly balanced against other interests prescribed by law.

The decision of the Trial Panel in the *Stanković* case lacked proper consideration of balance between the rule of holding the trial open and transparent on the one hand, and the necessity of protecting witnesses or other evidence on an individual basis on the other. Instead, the Prosecution treated all evidence to be presented at the trial *en masse*, failed to present arguments as to whether all evidence merited the exclusion of the public, and did not explain why the protective measures already imposed were insufficient to achieve the protective purpose. In a similar manner, the Trial Panel upheld what was asserted, but not adequately substantiated, by the Prosecution and did not effectively allow the Accused and Counsel to comment on the fear that the Defendant would release protected identities to the public. What is more, Defence Counsel did not properly represent the interests of his client, but, in this matter, simply acted as a *porte-parole* of the defendant.

It is noteworthy that the *Stanković* trial was not the only one in which the public was excluded. The main trial of Nedo Samardžić was also declared entirely *in camera* on the basis of an oral reasoning, although it was eventually opened to the public at the final stages of the proceedings. In that case, the defence did not object to the motion of the prosecutor. Both the *Stanković* and *Samardžić* cases involve allegations of rape in similar circumstances.

Finally, there is no information whether the State Court intends to make available to the public redacted transcripts or summaries of the main trial hearings in these cases, as appears to be the ICTY practice in connection to closed sessions.

In view of the above, the OSCE recommends that:

- The prosecution should properly substantiate its motions for the protection of witnesses by closed sessions, using objective criteria and a case-by-case approach. In view of the existing alternative protective measures, the prosecution's motions should comply with the principle of necessity, by not proposing a stricter measure when a less strict one can achieve the same purpose.

- Defence counsel should properly represent their clients' right to a public trial by putting forward professional arguments.

Should defence counsel propose the protection of defence witnesses, they should take into consideration the relevant recommendations for the Prosecutor's Office.

- Courts should properly examine the individual interests of each witness when granting protective measures such as closed trials/hearings, and comply with the principle of

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<sup>28</sup> The importance of holding open, transparent trials has also been noted by the President, Chief Prosecutor, and Registrar of the ICTY in a letter dated 16 March 2006, where these officials conclude by encouraging the regional courts to use all technical and other resources to make the proceedings accessible to the public. This letter was obtained by the OSCE at the regional conference titled "Transparency of War Crimes Trials: Radio and Television Recording of War Crimes Trials", organized by the OSCE Mission to Serbia and Montenegro and Youth Initiative for Human Rights in Belgrade on 20 March 2006.

necessity/proportionality in the application of such measures. In this context, courts should give due consideration to the defendants' right to a public trial. Should the public be excluded from all or part of the main trial, the court should properly justify/explain its decision (whether written or in the record of the trial) using objective criteria on a case-by-case basis. Should this not be the case, if the decision to exclude the public is appealed with the verdict, appellate courts should revoke such improperly justified decisions.

Since the Trial Panel in the *Stanković* case has declared that it will be reviewing its decision on the exclusion of the public in the course of the proceedings, balancing of rights on a case-by-case basis to assess the continued necessity of excluding the public should be considered by the Court during the trial.

Additionally, when courts consider *ex officio* factors indicating a need to exclude the public, they should always provide the opportunity to the parties and counsel to present their arguments.

Finally, courts may wish to examine the possibility of making available to the public transcripts or summaries of witness testimony from closed sessions, redacted as appropriate to prevent the disclosure of any protected information.