

IT-02-65-PT
D 4965 - D4955
03 January 2007

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-02-65-PT

IN THE REFERRAL BENCH

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

Registrar: Mr. Hans Holthuis

Date Filed: 3 January 2007

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

PROSECUTOR'S THIRD PROGRESS REPORT

The Office of the Prosecutor:
Ms. Carla Del Ponte

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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PROSECUTOR'S THIRD PROGRESS REPORT

1. Pursuant to the Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* of 20 July 2005 ("Referral Decision") the Prosecution hereby files its third progress report in this case.

2. The Organisation for Security and Co-operation in Europe's Second Report in this case¹ mentions one issue which relates to the rights of the Accused, namely that pre-trial custody on the basis of threat to public or property security was not properly justified according to the standards established by the relevant case-law of the European Court of Human Rights (ECHR).²

3. The OSCE recommends that the legislative authorities delete Article 132 (1) (d) of the Criminal Procedure Code of Bosnia and Herzegovina, namely the ground for detention on the basis of threat to public or property security. Alternatively, if this Article remains applicable, the OSCE recommends that this ground for detention should be used exceptionally, when credible facts point to an actual and persistent threat to public order. The Prosecutor notes that the OSCE expressed the same concern in its reports in the *Gojko Janković* and *Paško Ljubičić* cases³, and considers that it does not appear to affect right of the four Accused's to a fair trial.

¹ OSCE's Second Report in the *Željko Mežaković et al.* Case Transferred to the State Court pursuant to Rule 11 *bis*, December 2006 ("Report").

² Report, page 1.

³ OSCE's First Report in the *Gojko Janković* Case Transferred to the State Court pursuant to Rule 11 *bis*, April 2006 OS and OSCE First Report in the *Paško Ljubičić* Case Transferred to the State Court pursuant to Rule 11 *bis*, December 2006

4. The OSCE noted that concerns expressed in the previous report on this case regarding the access of the OSCE monitors to the case file appear to have been resolved.⁴ After the exchange of letters between the OSCE's Head of Mission and the President of the BiH State Court ("State Court"), no obstacle was posed to the OSCE's monitoring activities in this or other cases at the State Court.⁵

5. The OSCE summarises the proceedings in the *Mejakić et al.* case to date as follows:

- By his decision dated 15 September 2006, the Preliminary Hearing Judge refused as unfounded the preliminary motions filed by the Defendants which challenged the jurisdiction of the court, the application of the principle of legality and formal defects of the indictment. The Judge held that the arguments raised by the Defendants were premature and falling beyond the procedural scope of preliminary motions.
- On 19 October 2006 a status conference where a motion of the Prosecution for taking judicial notice of adjudicated facts was supposed to be discussed. Since the Defense has not received the motion, the status conference was postponed, as well as subsequent status conferences due to the absence of the prosecutor in charge of the case for health reasons. On 29 November the status conference was held but the issue of adjudicated facts was not discussed. The prohibition of use of DVD and CD players in the Detention Unit was discussed. The Accused Gruban complained that this measure prevents him from adequately preparing his case. The Presiding Judge stated that the Trial Panel will do what is possible in its capacity to solve the problem.
- The main trial started on 12 December with opening statement by the Prosecution. The Defense counsels stated that they will give their opening statements at the beginning of the Defense case. The Presiding Judge stated that if the parties do not reach an agreement on the matter of adjudicated facts by the end of January the Trial Panel will take the decision. The presentation of evidence in this case will start on 16 January 2007.⁶

⁴ The Prosecution was in contact with both the OSCE and the State Court regarding this issue and it is the Prosecution's understanding is that it has been resolved.

⁵ Report, page 2

⁶ *Ibid*

6. Attached to this report and marked as Annex A is the Report.

Word count: 662.



Dated this third day of January 2007
At The Hague
The Netherlands

5-02-65-PT

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INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-02-65-PT

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

ANNEX
TO
PROSECUTOR'S THIRD PROGRESS REPORT

5-02-65-17

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

Second Report in the
Željko Mejačić et al. Case
Transferred to the State Court pursuant to Rule 11bis

December 2006

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Second Report in the *Željko Mejakić et al.* Case

Pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence (RoPE), the case against Željko Mejakić, Momčilo Gruban, Dušan Fuštar and Duško Knežević (*Mejakić case*, "Suspects" or "Defendants") is the third one referred from the ICTY to the BiH State Court. This constitutes the second report submitted by the OSCE-BiH to the ICTY Prosecutor's Office in this case, spanning the period between the filing of the indictment and the opening of the main trial.

During this reporting period, the Mission has identified one main issue of concern related to the rights of the Defendants, namely that pre-trial custody on the basis of threat to public or property security was not properly justified according to the standards established by the relevant case-law of the European Court of Human Rights ("ECtHR"). In this regard, the OSCE-BiH reiterates the arguments already expressed in its two first reports on the cases of Gojko Janković and Paško Ljubičić.¹

In the present case it should be noted that custody on this specific ground was ordered only after the acceptance/confirmation of the indictment by the Preliminary Hearing Judge (PHJ). The latter, in his Decision dated 14 July 2006 extended the custody until the end of the main trial, for a maximum duration of three years, according to Article 137 BiH CPC. Differently from decisions on custody taken during the pre-adaptation period which had been based exclusively on the risk of flight, the one of 14 July also includes the ground envisaged under Article 132(1)(d) BiH CPC.² In that regard, the PHJ found that "the prosecutor in his request sufficiently argues that public unrest and public outcry can occur if the accused in this particular case would be set free." The Prosecutor, in his request for pre-trial detention dated 7 July 2006, had alleged that "there is a risk that should any of the accused be granted release from detention, this would generate anxiety and fear within the community at large and inflame inter-ethnic fears, tensions and division, the outcome of which may be unpredictable". However, neither the Decision of the PHJ (which was confirmed by the "out-of-hearing" Panel in its Decision of 27 July) nor the request of the Prosecutor present any fact "capable of showing that the accused's release would actually disturb public order,"³ as envisaged under the case-law of the ECtHR.⁴ As a matter of fact, they only make reference to the manner of commission and consequences of the alleged criminal offences and to the fear, anxiety and insecurity which the release of the Defendants may cause among the people who are living in the areas where the charged crimes were committed.

In addition to that, OSCE-BiH underlines that the Human Rights Committee, in its final observations on the report submitted by BiH on implementation of the ICCPR, recommended that the State party "should consider removing from the Code of Criminal Procedure of Bosnia and Herzegovina the vague concept of public security or security of property as a ground for ordering pre-trial detention."⁵

Against this background, OSCE-BiH reiterates the relevant recommendations included in the two first reports on the cases of Gojko Janković and Paško Ljubičić, namely:

- The legislative authorities should consider removing from the criminal procedure code Article 132(1)(d) BiH CPC, i.e. the ground for detention on the basis of threat to public or property security. If this ground is retained, the law-maker should carefully review its wording and

¹ See OSCE-BiH, *First Report - Case of Defendant Gojko Janković - Transferred to the State Court pursuant to Rule 11bis*, April 2006; OSCE-BiH, *First Report in the Paško Ljubičić Case - Transferred to the State Court pursuant to Rule 11bis*, December 2006.

² Under this provision, custody may be ordered "if the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense requires that custody be ordered for the reason of *public or property security* [emphasis added]. If the criminal offense concerned is the criminal offense of the terrorism, it shall be considered that there is assumption, which could be disputed, that the safety of public and property is threatened."

³ *Letellier v. France*, Judgment of 26 June 1991, para. 51; also *J.A. v. France*, Judgment of 23 September 1998, para 104 [references omitted].

⁴ In this regard, please refer to the analysis provided in the reports cited at n. 1.

⁵ Human Rights Committee, Concluding observations of the Human Rights Committee - Bosnia and Herzegovina, 10 November 2006, CCPR/C/BiH/CO/1.

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establish precise criteria upon which its application may be conditioned, taking into consideration international human rights standards. In any case, the Mission recommends that the burden of proof to establish facts that indicate a potential disruption of public order/security always rests with the Prosecution.

- To the extent that Article 132(1)(d) BiH CPC remains applicable, the OSCE-BiH also recommends that the courts cease applying it almost automatically when the objective criterion alone is met, that is when it concerns a crime punishable by ten years or more. Rather, this ground should be used exceptionally when credible facts point to an actual and persistent threat to public order, in accordance with human rights standards. Judges should particularly refrain from using this ground as a substitute or in overlap with other special grounds for custody.

The rest of the proceedings during the reporting period may be summarised as follows:

- By his Decision dated 15 September 2006, the PHJ refused as unfounded the preliminary motions filed by the Defendants which challenged the jurisdiction of the court, the application of the principle of legality and formal defects of the indictment. The Judge held that the arguments raised by the Defendants were premature and falling beyond the procedural scope of preliminary motions.
- On 19 October 2006 a status conference was scheduled by the Trial Panel for the main purpose of discussing the Prosecution's motion dated 11 October for taking judicial notice of adjudicated facts and trying to find an agreement between the parties on this matter. Since the Defence Counsel had not received the Motion before the hearing, the status conference was adjourned. Subsequent status conferences scheduled on 6 and 14 November were postponed due to the absence of the Prosecutor for health reasons. A status conference was held on 29 November, although no mention was made to the issue of adjudicated facts. During the status conferences, the prohibition on the use of DVD or CD players inside the Detention Unit was also discussed. Defendant Gruban complained that this measure prevents him from adequately preparing his case, since DVD/CD is the only support available to him to learn about previous statements given before the ICTY by persons who are going to testify in these proceedings. The Presiding Judge stated that the Panel will do what is possible in its capacity to solve this problem.
- On 12 December 2006 the main trial started with the reading of the indictment and the opening statements of the Prosecutor. Defence Counsel affirmed that they will give their opening statements at the beginning of the Defence case. As to the issue of adjudicated facts, the Presiding Judge stated that, if the parties reach no agreement on this matter by the end of January, the Panel will take a decision in the absence of such agreement. The Presiding Judge underlined that, for the sake of efficiency, decisions on this kind of matters need to be taken at the beginning of the trial. The session was adjourned to 16 January 2006.

As a final note, OSCE-BiH remarks that the concerns expressed in the previous report on this case regarding the access of Mission monitors to the case-file appear to have been resolved. The Mission regained access as soon as the file was passed to the Trial Panel. Furthermore, upon the initiative of the President of the State Court, the matter was discussed in the Plenary of judges. The Court President replied to the Head of the OSCE Mission to Bosnia and Herzegovina proposing certain arrangements for access, which were already the practice of trial monitoring staff. The Mission acknowledges that, since then, no obstacle was posed to its monitoring activities in this or other cases at the State Court.

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ANNEX

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Decision of the Preliminary Hearing Judge extending custody until the end of the main trial, dated 14 July 2006
- (ii) Appeals of Defence Counsels against the Decision on extension of custody, dated respectively 18, 20 and 21 July 2006
- (iii) Response of the Prosecutor to Defence Appeals against the Decision extending the custody, dated 26 July 2006
- (iv) Appellate Panel Decision refusing the Appeals of Defence Counsels as unfounded, dated 26 July 2006
- (v) Decision appointing additional *ex officio* Defence Counsel for Defendant Dušan Fuštar, dated 27 July 2006
- (vi) Preliminary Motions against the Indictment filed by Defence Counsel of Momčilo Gruban, dated 27 July 2006
- (vii) Decision of "out-of-hearing" Panel refusing as unfounded the Appeals of Defence Counsels against the Decision extending the custody, dated 27 July 2006
- (viii) Plea Hearing, held on 28 July 2006
- (ix) Preliminary Motions against the Indictment filed by Defence Counsel of Duško Knežević, dated 2 August 2006
- (x) Prosecution Response to the Preliminary Motions, dated 11 August 2006
- (xi) Joint Preliminary Motions of the Defence against Form of the Indictment, 24 August 2006
- (xii) Appeal of Defence Counsels to the BiH Constitutional Court against the Decision to extend the custody, dated 25 August 2006
- (xiii) Decision appointing additional *ex officio* Defence Counsel for the Accused Momčilo Gruban, dated 28 August 2006
- (xiv) Prosecution Response to the Joint Preliminary Motions, dated 7 September 2006
- (xv) Decision of "out-of-hearing" Panel to extend custody, dated 13 September 2006
- (xvi) Decision of the Preliminary Hearing Judge refusing the Preliminary Motions as unfounded, dated 15 September 2006
- (xvii) Appeals of Defence Counsels against the Decision to extend custody, dated respectively 18, 19 and 21 September 2006
- (xviii) Responses of the Prosecutor to the Appeals filed against the Decision extending custody, dated respectively 25 and 27 September 2006
- (xix) Appellate Panel Decision refusing the Appeals of the Defence Counsels as unfounded, dated 10 October 2006
- (xx) Prosecution Motion for Judicial Notice of established facts, dated 11 October 2006
- (xxi) Status Conference, held on 19 October 2006
- (xxii) Decision appointing additional *ex officio* Defence Counsel for the Accused Duško Knežević, dated 20 October 2006
- (xxiii) Status Conference, held on 6 November 2006
- (xxiv) Decision of "out-of-hearing" Panel to extend custody, dated 13 November 2006
- (xxv) Defence Joint Objection to the Prosecution Motion for Judicial Notice of established facts, dated 14 November 2006
- (xxvi) Letter of the Accused Momčilo Gruban requesting permission for the use of DVD player, dated 14 November 2006
- (xxvii) Status Conference, held on 14 November 2006
- (xxviii) Appeals of Defence Counsels against the Decision to extend custody, dated respectively 17 and 20 November 2006
- (xxix) Prosecution Response to Defence Appeals against the Decision extending custody, dated 22 November 2006
- (xxx) Status Conference, held on 29 November 2006
- (xxx1) Letter of the Accused Momčilo Gruban requesting permission for the use of DVD player for the second time, dated 12 December 2006
- (xxxii) Opening of main trial, held on 20 December 2006