

IT-96-23/2-PT
05938-05932
01 August 2006

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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: 1 August 2006

THE PROSECUTOR

v.

GOJKO JANKOVIĆ

PROSECUTOR'S THIRD PROGRESS REPORT

The Office of the Prosecutor

Ms. Carla Del Ponte

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

THE PROSECUTOR

v.

GOJKO JANKOVIĆ

PROSECUTOR'S THIRD PROGRESS REPORT

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

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.¹

3. The Prosecutor filed an Initial Progress Report on 18 January 2006 and Second Progress Report on 3 May 2006.²

4. The Prosecutor received the OSCE's second report on 28 July 2006.³

5. The Report has not identified any issue of concern which would infringe upon the Defendant's right to a fair trial,⁴ but rather, particularises certain procedural issues which, according to the OSCE, "may need to be addressed in order to achieve higher

¹ *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005, at p. 34.

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

³ OSCE Second Report, Case of Defendant Gojko Janković, Transferred to the State Court pursuant to Rule 11*bis*, July 2006 (hereafter "Report").

⁴ Report, p.1, para. 2.

effectiveness in the justice system and a more uniform approach to the interpretation of certain legal provisions.⁵ The Prosecutor notes that the OSCE “intends to share this Report with actors in the justice system.”⁶

6. Attached to this report and marked as Annex A is a copy of Part I of the 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: 370.



Carla Del Ponte
Prosecutor

Dated this first day of August 2006
At The Hague
The Netherlands

⁵ Report, p. 1, para. 4.
⁶ Report, p. 4, last para.

ANNEX A

D-26-23/2-15

5924



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

Second Report

Case of Defendant Gojko Janković

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

July 2006

SECOND REPORT ON THE DEVELOPMENTS IN THE GOJKO JANKOVIĆ CASE

The case of Gojko Janković (hereinafter also "Defendant" or "Accused") is the second case transferred from the ICTY to the BiH State Court, pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence. This constitutes the second OSCE Report delivered to the ICTY Prosecutor regarding the developments in these criminal proceedings from April 2006 until present.

Through its monitoring activities during the reporting period, the OSCE Mission to Bosnia and Herzegovina ("OSCE" or "Mission") has not identified any issue of concern that could be assessed, at this stage, as infringing upon the Defendant's right to a fair trial. Therefore, this report consists of a short summary of the developments in these proceedings, a reference to certain procedural issues of note, and an annex with summaries of relevant hearings and submissions in this case.

The proceedings within the reporting period may be summarised as follows:

- The main trial in the case of Gojko Janković commenced on 21 April; the hearing mostly served as a status conference. Until present, the Court has held seven sessions in total,¹ all open to the public, during which 12 witnesses proposed by the Prosecution have been heard. Ten of these witnesses have testified protected from the public through the assignment of pseudonyms and the use of a screen, protecting them from being visually identified by the public.
- On 10 March, the Accused proposed that he be granted *ex officio* representation by a new defence counsel. This Counsel began exercising his duties, and was officially appointed to represent the Defendant on 15 May. Counsel requested on 10 and 21 April the appointment of one additional court appointed counsel, but his request was rejected by the Court on the basis that he would be provided adequate time to prepare.
- On 25 April, the Prosecution moved the Court to accept as proven 22 facts established in legally-binding decisions of the ICTY. Earlier, at the opening session of 21 April, the Prosecutor had indicated that he would submit such a motion. On that occasion, the Defence orally opposed the proposal. The Court has not yet issued a decision on this motion.
- On 27 June, the Prosecution filed a second indictment against the Defendant for crimes against humanity under Article 172(1)(e), (f), and (g) BiH CC, as read with Article 180 BiH CC. The indictment was confirmed on 4 July 2006. The following day, the Prosecutor sought joining the proceedings deriving from the second indictment with the ongoing main trial. On 18 July, the Accused entered a plea of not guilty to the second indictment, and the Preliminary Hearing Judge ruled to join the two proceedings against the Defendant.
- The Defendant remains in pre-trial custody.
- The next main trial sessions are scheduled for 3 and 4 August 2006.

Although not deemed as amounting to breaches of fair trial standards, the Mission has noted a few issues that may need to be addressed in order to achieve higher effectiveness in the justice system and a more uniform approach to the interpretation of certain legal provisions.

For instance, the Prosecutor in the *Janković* case expressed his concern that the oral translation of witness testimony is not always accurate on substantial points. This led him to request that the audio record of the main trial hearings be transcribed and officially translated as necessary. This request has been granted by the Court, and transcripts are being produced on a regular basis. However, there appear to be restrictions to the prompt availability of translated written trial records imposed by the limited availability of resources.

Moreover, it seems that the Law on Protection of Witnesses is not always applied uniformly, including in transferred cases. For instance, in the case of Mr. Janković, the Preliminary Proceedings Judge

¹ Main trial sessions have been held on 21 April; 16 May; 6, 7, 22, and 23 June; and 18 July.

D-96-20/2-PT

5722

ordered protective measures for certain witnesses according to Article 12 of the Law on Protection of Witnesses ("LPW" or "Law"); he rejected that part of the Prosecution's request to order the application of Article 13 (paragraphs 1 and 2) LPW for the reason that the exceptional circumstances and the fear for safety required by this provision did not exist at that moment, since the witnesses had not been yet examined and cross-examined at the main trial. Further, the Preliminary Proceedings Judge deemed that the measures of Article 13 LPW were under the competence of the trial panel. This has led the Prosecution in *Janković* to request additional protection for these witnesses pursuant to Article 13(1) of the said Law, after their oral testimony. However, pursuant to the prosecution's request, the preliminary hearing judge in the case of Radovan Stanković, and other cases, did order protective measures for witnesses, not only on the basis of Article 12, but also on the basis of Article 13 (both paragraph 1 and 2) LPW.

This lack of uniform application of protective measures may be largely owed to fact that certain provisions of the LPW lack clarity or do not sufficiently regulate all matters at issue. OSCE is aware that State Court judges and the Prosecutor's Office of BiH are looking into resolving problematic issues deriving, among others, from the unclear provisions of the Law on Witness Protection. The Mission is also conducting further research into the problems with the quality of the relevant laws on witness protection, as well as with their interpretation and application at the State Court, the cantonal, and district courts.

An additional procedural issue, on which there does not appear to be an established practice, is the question as to whether the parties can provide witnesses that they have summoned with records of their prior statements or depositions, so as to refresh their memory prior to their oral testimony before the court. This is considered advisable practice in a number of justice systems, although domestic procedure neither foresees it, nor excludes it. In the *Janković* case, the Prosecution asked the Court on at least two occasions whether this practice would be acceptable. The Defence opposed the proposal and subsequently stated that it did not exclude the possibility that witnesses already have their previous statements available. In general, it may be noted that many witnesses in war crimes trials may have given their statements on numerous occasions, and some seek to have access to their prior testimony. At the session of 6 June, the Presiding Judge expressed her personal opinion that it would not be good to present a witness with prior statements before their oral testimony, although the Court would allow during the examination of the witness that he/she be reminded of what they have stated earlier, if they cannot recall. It is unclear if this opinion is widely shared within the domestic justice system, while the clarification of the matter would eliminate the danger of different panels applying double standards.

Another matter for which there appears to be no standard practice is the time-limit within which a court should issue a decision on a motion to accept as proven certain facts established in ICTY legally-binding decisions. In the *Janković* case, the Prosecution moved the Court to accept certain facts as proven at the early stages of the proceedings. In its opening statement, the Defence opposed this motion in its entirety. Despite the fact that the Prosecution has been repeatedly seeking the decision of the Court throughout the proceedings, the Trial Panel has not ruled on this matter to date. It may be noted that the trial panel in a different case before the State Court ruled on a similar motion of the prosecution only in the verdict. In general, the Mission would need to assess the matter further with a view to the effectiveness of proceedings and fair trial standards.

The Mission intends to share this Report with actors in the justice system and stands ready to provide its support to the authorities as necessary to further improve the administration of justice.