THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-00-41-PT

IN THE REFERRAL BENCH

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

Registrar: Mr Hans Holthuis

Date Filed: 18 December 2006

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

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-00-41-PT

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

PROSECUTOR'S SECOND PROGRESS REPORT

1. In accordance with the "Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*" [1] of 12 April 2006 ("Decision on Referral") the Prosecutor hereby files her second 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.[2]

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

4. Following the agreement between the Chairman in Office of the Organisation for Security and Co-operation in Europe Mission's to Bosnia and Herzegovina (the "OSCE") and the Prosecutor, the Prosecutor received OSCE's first report on 11 December 2006.[4] The Report outlines the main findings of trial monitoring activities

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1 *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*, 12 April 2006.

2 Decision on Referral, p. 21.

3 See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Prosecutor's Initial Progress Report, 18 September 2006.

4 OSCE First Report in the *Paško Ljubičić* Case Transferred to the State Court Pursuant to Rule 11*bis*, December 2006 (hereinafter "Report").

to date in the *Ljubičić* case, from the perspective of international human rights standards.[5]

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

- Mr. Ljubičić was transferred to the BiH authorities on 22 September 2006. Since then he has been represented by an ex officio Defense Counsel selected by him. On the same day a hearing on pre-trial custody took place before thje Preliminary Hearing Judge. The Judge, upon motion of the Prosecutor, ordered custody for one month on the ground of a risk of flight. On 27 September, custody was confirmed on appeal by the "out-of-trial" panel.

- On 19 October 2006, a hearing took place before the "out-of-trial" Panel to discuss the Prosecution's motion to extend custody for two additional months in order to allow sufficient time to adapt the indictment. The Panel granted the request in order to allow sufficient time to adapt the indictment. The Panel granted the request on the bases of the risk of flight and of threat to public and property security.

- Defense Counsel appealed the Decision on extension of pre-trial custody and on 6 November a hearing took place before the Appellate Panel to discuss the appeal and the application of provisions on pre-trial custody in cases transferred pursuant to Rule 11*bis*. At this hearing, the Prosecutor stated that the adapted indictment will be filed before 15 December. The Appellate Panel confirmed the two-month extension of custody by its written decision dated 6 November. [6]

6. The OSCE has identified two main issues related to the rights of the accused and discussed them in the Report:

(a) Justification of pre-trial detention on the grounds of public and property security; and

(b) The fact that telephone conversations between a detainee and his defense counsel in the Detention Unit of the BiH State Court can be listen to by public officials which could impinge on the right of an accused to communicate with his lawyer in full confidentiality.[7]

7. The OSCE also indicates in an introductory note that issues exist as to the manner in which a transferred case is dealt with before an indictment is adapted (a

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5 Report, Executive Summary. p. 2.
6 *Idem.*
7 *Idem.*

Preliminary Proceedings Judge dealt with the *Mejakić* case and a Preliminary Hearing Judge dealt with *Ljubičić* and *Rašević and Todović* cases). The different approaches impact on the status of an accused upon his transfer to BiH, on the procedural regime of his pre-trial custody and on the procedural nature of the period during which the ICTY indictment is adapted. However, the OSCE concludes with respect to Ljubičić that "there is no reason at this stage to believe that the difference in the procedural approach negatively affected the rights of the Defendant."[8]

8. With regard to the first issue 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. The Prosecutor notes that this issue was previously raised by the OSCE in the *Janković* case and considers that it does not appear to affect *Ljubičić's* right to a fair trial.

9. With regard to the second issue namely the possibility that prison authorities can listen to phone conversations between the accused and his defense counsel, the OSCE recommends that the State Court of Bosnia and Herzegovina ("State Court") and the Detention Unit cooperate to ensure that the right of defendants to communicate with their attorneys in private is protected. The Prosecutor fully supports this recommendation.

10. The OSCE intends to share this report and to discuss its findings with the local government authorities and judiciary, and to further advocate the implementation of its recommendations to improve the judicial system. The Prosecutor intends to discuss the issues raised in the report with OSCE and the State Prosecutor's Office of Bosnia and Herzegovina ("State Prosecutor").

11. The Prosecutor has been informed by the State Prosecutor that the adapted indictment in the *Ljubičić* case was submitted to the State Court for confirmation on 15 December 2006.

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[8] *Idem.*

10. Attached to this report and marked as Annex A is a copy of the OSCE Report.

Word count: 959

Carla Del Ponte
Prosecutor

Dated this eighteen day of December 2006
At The Hague
The Netherlands

ANNEX A

OSCE

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

First Report in the *Paško Ljubičić* Case Transferred to the State Court pursuant to Rule 11*bis*

December 2006

EXECUTIVE SUMMARY

The case of Paško Ljubičić (hereinafter also "Defendant") is the fourth case transferred from the ICTY to the BiH State Court pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the first report in this case that the OSCE Mission to Bosnia and Herzegovina ("OSCE-BIH" or "Mission") delivers to the ICTY Prosecutor, covering the period between the transfer of the Defendant to the BiH State Court on 22 September 2006 until the end of November 2006.

During this reporting period, the OSCE-BIH has identified two main issues related to the rights of the accused, which deserve particular attention. These two matters are examined in Part I of the Report. The first issue concerns the justification of pre-trial detention on the ground of public and property security. In this regard, the OSCE-BIH reiterates the principal arguments already expressed in its First Report on the case of Gojko Janković.[1] The second issue refers to the fact that, at the Detention Centre where the Defendant is held, phone conversations between a detainee and his counsel are within the hearing of public officials. It appears that this situation may impinge on the right of an accused to communicate with his lawyer in full confidentiality. It is of note that all transferred defendants are held in this Detention Centre.

In addition to these two issues, this Report has an introductory note on the case. Therein, the Mission addresses the decision of the State Court to have a Preliminary Hearing Judge decide on the request for custody during the pre-adaptation stage. This course was also followed in the subsequently transferred case of Mitar Rašević and Savo Todović. It should be mentioned that pre-trial custody in the previous case of Mejakić et al. was decided instead by the Preliminary Proceedings Judge. The different approach taken in the present case impacts on the *status* of the Defendant upon his transfer to the BiH jurisdiction, on the procedural regime of his pre-trial custody, and on the procedural nature of the period during which the ICTY indictment is adapted to the requirements of the domestic law. Despite the fact that there has been uncertainty on these matters, which could have been avoided if the Law on Transfer were drafted more clearly and completely, there is no reason at this stage to believe that the difference in the procedural approach negatively affected the rights of the Defendant.

The proceedings until present in the *Ljubičić* case may be summarised as follows:

- The Defendant was transferred to BiH authorities on 22 September 2006. Since then he has been represented by an *ex officio* Defence Counsel selected by him. On the same day a hearing on pre-trial custody took place before the Preliminary Hearing Judge. The Judge, upon motion of the Prosecutor, ordered custody for one month on the ground of a risk of flight. On 27 September, custody was confirmed on appeal by the "out-of-trial" Panel.

- On 19 October 2006, a hearing took place before the "out-of-trial" Panel to discuss the Prosecution's motion to extend custody for two additional months in order to allow sufficient time to adapt the indictment. The Panel granted the request on the bases of the risk of flight and of threat to public and property security.

[1] See OSCE-BIH, *First Report - Case of Defendant Gojko Janković - Transferred to the State Court pursuant to Rule 11bis*, April 2006.

- Defence Counsel appealed the Decision on extension of pre-trial custody and on 6 November a hearing took place before the Appellate Panel to discuss the appeal and the application of provisions on pre-trial custody in cases transferred pursuant to Rule 11*bis* RoPE. At this hearing, the Prosecutor stated that the adapted indictment will be filed before 15 December. The Appellate Panel confirmed the two-month extension of custody by its written decision dated 6 November.

INTRODUCTORY NOTE

The request for custody upon the Defendant's transfer was adjudicated by the Preliminary Hearing Judge (hereinafter "PHJ"). This procedural approach departed from the one followed in the *Mejakić et al.* case, in which the defendants' custody was decided by the Preliminary Proceedings Judge. This difference generated uncertainty and confusion with regard to the Defendant's *status* before the State Court and the pre-trial custody regime under which his custody has been ordered, confirmed, and extended. The Mission notes that these matters were eventually clarified by the decision of the Appellate Panel of 6 November 2006, although any uncertainties could have been avoided if the Law on Transfer was sufficiently clear on these points.

The relevant facts and decisions may be summarised as follows: Upon his arrival to BiH on 22 September 2006, the Defendant was brought before the PHJ,[2] who, upon the motion of the Prosecutor, ordered one-month of pre-trial custody on the ground of the risk of flight. It must be noted that, under the BiH Criminal Procedure Code (hereinafter "CPC"), the preliminary hearing judge is competent to decide on requests for custody only after the indictment is confirmed, at which stage the suspect acquires the *status* of accused. In the written decision on custody, the Judge justified his competence by referring to the fact that the case had been transferred under the Rule 11*bis* RoPE and that there was an indictment confirmed by the ICTY. Consequently, in his reasoning, the PHJ made reference to the provisions of the CPC which regulate custody after the confirmation of the indictment[3] and referred to Mr. Ljubičić as "the Accused".

On 16 October 2006, the Prosecutor requested an extension of pre-trial custody for two additional months in order to complete the process of adaptation of the ICTY indictment. He explained that the adaptation required additional time as it entailed reviewing the evidence provided by the ICTY, verifying the availability of witnesses and their willingness to testify, and travelling to The Hague to receive sensitive information and documents. The "out-of-trial" Panel, by its written decision of 19 October, granted the request on the grounds of risk of flight and threat to public and property security, but based it on the provisions which regulate the extension of custody during the investigative phase;[4] the Panel came to this conclusion "bearing in mind the fact that the indictment has not been accepted by the Court." Taking this explanation into account, as well as the fact that the decision refers to the Defendant as "the Suspect," it can be concluded that the Panel, differently from the PHJ, did not consider the ICTY indictment to be the equivalent of a

[2] It is worth noting that some degree of confusion was visible already at this stage, since the Prosecutor's Motion for custody, dated 21 September 2006, was addressed to the Preliminary Proceedings Judge and, actually, at the hearing on custody, the Judge informed the parties that he was acting in the quality of Preliminary Proceedings Judge. It was only in the written decision issued after the hearing that the Judge took the role of Preliminary Hearing Judge.

[3] In particular, under Article 137(2)*d* BiH CPC, as amended by Decision of the High Representative dated 16 June 2006, custody pronounced after the confirmation of an indictment and before the first instance verdict may not last longer than three years in case of a criminal offense for which a punishment of long-term imprisonment is prescribed.

[4] Under Article 135 BiH CPC, as amended by Decision of the High Representative dated 16 June 2006, custody during the investigation phase can "exceptionally and in an extraordinarily complex case concerning a criminal offense for which a long-term imprisonment is prescribed" last up to a maximum of nine months.

confirmed indictment under the BiH CPC (at least for the purpose of defining the *status* of the Defendant and the legal provisions regulating his custody before trial).

This contrast of views between the PHJ and the "out-of-trial" Panel was eventually resolved by the Appellate Panel, in its decision dated 6 November 2006 rejecting the appeal filed by the Defendant's Counsel against the decision of 19 October.[5] The Panel explained that the adaptation process has to be considered as a formal harmonization of the indictment to meet the criteria prescribed by the BiH CPC, which does not imply a return to the investigation stage by the BiH Prosecutor; this is because the indictment has already been confirmed by the ICTY, while, under the Law on Transfer,[6] only the inclusion of additional charges or accused by the BiH Prosecutor would require a confirmation by the State Court. As a result, the Appellate Panel attributed the status of Accused to the Defendant and stated that the time spent in custody since his arrival in BiH qualifies as custody after the confirmation of the indictment, which, under the applicable provisions of the BiH CPC may last up to a maximum of three years.[7] The decision also clarifies that the term of a maximum of 90 days prescribed under Article 229(4) BiH CPC for the beginning of the main trial, starts running, in the present case, from the day the Defendant came under the jurisdiction of the BiH Court. Accordingly, the main trial should begin before 22 December 2006.

OSCE-BIH considers that the Decision of the Appellate Panel clarifies the initial uncertainty concerning the *status* of the Defendant and the provisions of the BiH CPC applicable to his pre-trial custody. It may be argued that this uncertainty was partly caused by the decision of the BiH Court to depart from the precedent set in the *Mejakić et al.* case, in which, the initial hearing on custody was held before the Preliminary Proceedings Judge, the Defendants acquired the *status* of suspects, and their custody was regulated under the regime applicable to the investigative phase until the adapted indictment was accepted by the PHJ. In the present case, instead, the Appellate Court embraced a very different approach and held the provisions of the BiH CPC regulating the investigative phase as inapplicable during the pre-adaptation period. Nevertheless, it must be noted that this stance seems to disregard the fact that, both in this case and the other 11*bis* cases, the BiH Prosecutor has admitted carrying out actions which could be reasonably be defined as investigative acts (such as contacting witnesses to check their availability and willingness to testify and reviewing evidence from the ICTY).[8]

Having said that, OSCE-BIH holds that, until present, there is no reason to consider that the approach defined by the Appellate Panel ran contrary to the rights of the Defendant. Actually, it

[5] The Defence Counsel, in her appeal dated 23 October 2006, claimed that the decision of the "out-of-trial" Panel to order the extension of custody on the basis of provisions applicable during investigations amounted to a violation of the CPC BiH. The Counsel argued that, since the Prosecutor had not announced any investigation against her client and the ICTY had confirmed the indictment against him, the Panel erroneously applied those provisions and referred to the Defendant as "suspect". She added that the views taken by the Panel would lead to the conclusion that the PHJ was incompetent to decide on the case at this stage of the proceedings.

[6] Law on the 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 (hereinafter "Law on Transfer").

[7] See note 3 above. The Panel also affirmed that the term of a maximum of 90 days prescribed by the BiH CPC for the beginning of the main trial, starts running from the day the Defendant came under the jurisdiction of the BiH Court (i.e., 22 September 2006).

[8] Moreover, even after the decision of the Appellate Panel in the present case, it remains unclear which Judge (i.e., the Preliminary Hearing Judge or the Preliminary Proceedings Judge) would be competent in the initial stage of the proceedings in case the BiH Prosecutor announces the opening of investigations with a view to add additional charges or accused to the ICTY indictment.

could have some positive effects with regard to the protection of his right to trial within a reasonable time or to release pending trial under Article 5(3) ECHR. This is because the Appellate Panel explained that, under this approach, the maximum term for custody before the first instance verdict starts running from the date of the transfer of the Defendant to the BiH Court and not, as in the previous 11*bis* case, from the date of the acceptance of the adapted indictment.[9]

OSCE-BIH notes that on 23 November 2006 the Appellate Panel issued a decision on appeal against extension of custody in the 11*bis* case of Rašević and Todović, in which it confirms the approach taken in the present case.

PART I

ISSUES OF CONCERN

A) Concerns related to the application of pre-trial custody on grounds of threat to public or property security

OSCE-BIH is concerned that pre-trial custody in the *Ljubičić* case 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"). Although the present assessment is limited to the facts that emerged in these proceedings, the Mission wishes to refer to the concerns expressed in its First Report on the case of Gojko Janković, where it addressed the ambiguity of the public or property security concept envisaged in the BiH CPC and of its application by the courts throughout BiH. The recommendations formulated in that Report are therefore reiterated herein.

In this regard, OSCE-BIH notes that the Appeals Chamber of the ICTY evaluated these concerns as "very legitimate" and urged the competent BiH authorities and the State Court to consider seriously the recommendations addressed to them by the Mission.[10] It is equally important to add 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".[11]

i. The Relevant Law and International Human Rights Standards

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

[9] As already mentioned (see note 3 above) this term, after an amendment by Decision of the High Representative dated 16 June 2006, may last for a maximum of three years. It is worth noting that at the time when, in the previous 11*bis* cases, the Court of BiH held that the maximum term for custody before the first instance verdict started running from the date of the acceptance of the adapted indictment, the term in question was of one year only.

[10] See ICTY Appeals Chamber, *Prosecutor v. Rašević and Todović*, Decision on Savo Todović's appeals against decisions on referral under rule 11*bis*, 4 September 2006, para. 118, 119.

[11] Human Rights Committee, *Concluding observations of the Human Rights Committee - Bosnia and Herzegovina*, 10 November 2006, CCPR/C/BIH/CO/1.

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

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

> "The Court accepts that, by reason of their **particular gravity and public reaction** to them, certain offences may give rise to **a social disturbance** capable of justifying pre-trial detention, **at least for a time**. In **exceptional circumstances** this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient **only provided that it is based on facts capable of showing that the accused's release would actually disturb public order**. In addition, detention will continue to be legitimate **only if public order actually remains threatened; its continuation cannot be used to anticipate a custodial sentence** [reference omitted].
>
> The above conditions have not been satisfied in the present case, since those of the decisions in issue which go some way towards substantiating this ground **do no more than refer in an abstract manner to the nature of the crime concerned, the circumstances in which it was committed and, occasionally, the reactions of the victim's family."** [12] [Emphasis added]

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

Additionally, the ECtHR has deemed in a variety of cases, even involving terrorism, that although it is reasonable to assume that there was a risk of prejudice to public order at the beginning, it may disappear after a certain time.[13]

ii. The relevant facts in the Ljubičić case

Pre-trial detention was initially ordered by the PHJ for one month exclusively on the ground of risk of flight. In his Decision of 22 September 2006, the Judge refused the proposal of the Prosecutor to base the measure also on fear of interfering with evidence and threat to public and property security. The latter ground, however, was held applicable by the "out-of-trial" Panel in its **Decision on appeals against custody dated 27 September 2006**.

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[12] See *I.A. v. France*, ibid, para 104. Also see *Letellier v. France*, ECtHR Judgment, 26 June 1991, para. 51.
[13] See *Tomasi v. France*, ECtHR Judgment, 27 August 1992, para. 91.

The Panel, in motivating its ruling on this point, refers to the arguments presented by the Prosecutor, namely: the widespread scale of the alleged crimes, the fact that their apparent goal was to create terror, anxiety and insecurity among the population, and that they resulted in the killing and disappearance of dozens, in severe injuries for many persons and in the permanent dislocation of a large number of people.

Against this background, the Panel, in addition to the risk of flight ground, ordered custody also under Article 132(1)(d) reasoning that:

> "one cannot exclude the existence of fear that the release of the person indicted by the ICTY for the commission of those offences could cause fear, anxiety and insecurity among the large number of persons who were in the immediate vicinity of the perpetration of the offences the Accused is charged with, and they all live in a small place with the possibility to meet the accused if he were to be released".

This stance was reaffirmed by the "out-of-trial" Panel which, upon request of the Prosecutor, extended pre-trial custody for two further months[14]. In its **Decision dated 19 October 2006**, the Panel, apart from referring to the nature and consequence of the alleged crimes on the population, substantiates the threat to public security also on the basis of "fear that if the suspect moved freely, the citizens could doubt the efficiency of the judicial system, and the fear could affect the testimonies of the witnesses, at the detriment of the successful finalization of the criminal proceedings".

Finally, pre-trial custody on this ground was confirmed on appeal by the **Appellate Panel**, which, in its **Decision of 6 November 2006**, agreed that, due to the manner of commission of the crimes and their consequences, the release of the accused "would probably cause anxiety and fear and threaten the safety of public and property".

iii. Assessment of the application of Article 132(1)(d) BiH CPC in the Ljubičić case

OSCE-BIH believes that the afore-mentioned **Decision of 27 September** does not point to any fact "capable of showing that the accused's release would actually disturb public order"[15]. Indeed, it only makes 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 Defendant may cause among the people who are living in the areas where the crimes alleged in the ICTY indictment were committed. In this regard, it must be noted that the use, in the context of the Decision, of terms such as "fear", "anxiety" and "insecurity" is more indicative of a personal feeling that citizens may have if the Defendant is released than of a threat to public or property security. Moreover, even this argument is put forward in very hypothetical terms, as the Panel merely assumes that such a situation of fear and anxiety could not be excluded in case of release.

The afore-mentioned **Decision of 19 October**, additionally refers to the fact that the release of the Defendant could raise doubts in the public at to the efficiency of the judicial system and, thus, could have detrimental effects on the testimonies of the witnesses. While recognizing the valid policy argument inferred in the referenced point, OSCE-BIH first underlines that the need to preserve the trust of the citizens in the justice system cannot be used as a legal ground for

[14] It must be noted that the "out-of-trial" Panel deciding on extension of custody is different in composition from the one deciding on appeal against the decision on custody by the Preliminary Proceedings Judge.
[15] *Letellier v. France*, Judgment of 26 June 1991, para. 51 ; *also I.A. v. France*, Judgment of 23 September 1998, para 104 [references omitted].

ordering custody. Secondly, it notes that issues concerning the impact of the release on the testimony of witnesses should be examined under the grounds for detention foreseen by Article 132(1)(b) BiH CPC (i.e.: fear of interference with evidence).

Considering that the Appellate Panel, in its Decision of 6 November 2006, did not propose further arguments, it can be concluded that the reasons given by the BiH Court to support the existence of this ground for custody are phrased in such terms that the ECtHR has characterized as insufficient.

Against this background, OSCE-BIH reiterates the relevant recommendations included in the First Report on the case of Gojko Janković, namely:

- The legislative authorities should delete from the criminal procedure code Article 132(1)(d) BIH CPC, namely the ground for detention on the basis of threat to public or property security. If this ground is retained, the law-maker should carefully review its wording and establish precise criteria upon which its application may be conditioned, taking into consideration international human rights standards. In any case, the Mission recommends that the 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 is met. 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.

B) Concerns related to the right of the Defendant to communicate with his attorney in full confidentiality

OSCE-BIH is concerned that, in the Detention Center of the BiH Court, phone conversations between the Defendant and his counsel are taking place within hearing range of public officials. This is contrary to the right of the accused to communicate with his lawyer in full confidentiality and may potentially result in a breach of the right to have adequate time and facilities for the preparation of defence under Article6 § 3(c) of the ECHR. The Mission underlines that this problem affects all detainees held in the Detention Center who intend to communicate with their attorneys by phone. Actually, the same concern was raised not only by Mr. Ljubičić, but also by the Defendants in the Mejakić *et al.* case during a hearing held before the Preliminary Proceedings Judge on 7 July 2006.

i. Applicable domestic law and international human rights standards

Under Article 114(5) BiH CPC, "a detainee shall be entitled to free and unrestrained communications with his defense attorney". Article 48(2) BiH CPC specifies that conversations between the suspect or accused held in custody and his attorney may be observed but may not be heard. The Book on House Rules of the Detention Unit expressly addresses the issue of phone conversations. Consistently with the BiH CPC, it foresees that, while phone calls by detainees

should take place under the surveillance of authorized officials, the latter cannot listen to the conversations.[16]

These provisions are fully consistent with international human rights standards. Article 14(3)(b) of the ICCPR protects the right of the accused "to communicate with counsel of his own choosing". Even if the ECHR does not contain a similar reference, the Court of Strasbourg has held that "an accused's right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3(c) of the Convention".[17] The ECtHR noted, in this regard, that "if a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective".[18]

It must be added that the position of the ECtHR on this matter is reflected in the UN Standard Minimum Rules for the Treatment of Prisoners, under which "interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official".[19]

ii. Assessment of the relevant facts in the Ljubičić case

In two written submissions to the BiH Court dated 12 October and 1 November 2006, the Defendant complained about the presence of officials standing close to him during phone calls with his attorney, since this creates the possibility that they hear the conversations. The Defendant asked the Court to solve the problem as soon as possible, otherwise he will have to stop communicating with his attorney by phone. The Preliminary Hearing Judge, in a letter addressed to the President of the BiH Court dated 30 October 2006, expressed the view that the Detention Unit should ensure that communications between the Defendant and his attorney are taking place in accordance with the relevant provisions of the BiH CPC and the Book on House Rules of the Detention Unit.

On 20 November 2006, officers from the Human Rights Department of the Mission visited the Detention Unit of the State Court to meet with the Director, Mr. Hajdarević, and with Mr. Momir Zubac, Director of the new State Prison, presently under construction. Among other things, the matter at issue here was discussed. In the course of the visit, OSCE-BIH understood that the problem is caused by the fact that the phone available to detainees is located on the wall of the hallway, very near to the office of the guard; this location makes virtually impossible to avert that

[16] Rules of the House of the Detention Unit, Article 63, para. (8) and (9).
[17] ECtHR, *Öcalan v. Turkey*, Judgment, 12 March 2003, para. 146.
[18] *Ibidem.*
[19] Rule 93, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. See also Principle 8, *Basic Principles on the Role of Lawyer*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials".

conversations are overheard by officials while they surveil the detainees during the phone call. OSCE-BIH also learned that in order to solve this problem, the phone was partially shielded by a cover placed over it. The Director of the Detention Unit and of the new State Prison stated that, in case this proves not to be sufficient to protect the confidentiality of the detainees' communications, another solution will be found.

OSCE-BIH deems that the described situation is not in compliance with the domestic law and international human rights standards referred above and is affecting the right of the Defendant to have adequate facilities for the preparation of defence under Article6 § 3(c) of the ECHR. The shield cannot be considered a satisfactory solution as it does not isolate the phone from the hallway. The Mission holds that the confidentiality of those conversations can be adequately preserved only by setting a phone in a place where the detainees would be within sight but not within the hearing of officials or other detainees. Therefore the Mission recommends that:

- The BiH Court and the Detention Unit cooperate to ensure that the right of the Defendant and of other detainees, to communicate with their attorneys out of hearing of third persons is protected.

PART II

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

(i) Prosecution Motion for ordering pre-trial custody, dated 21 September 2006

(ii) Decision of the Preliminary Hearing Judge to appoint *ex officio* defence counsel, dated 22 September 2006

(iii) Hearing on pre-trial custody, dated 22 September 2006

(iv) Decision of the Preliminary Hearing Judge ordering pre-trial custody, dated on 22 September 2006

(v) Appeal of Prosecution against decision on pre-trial custody, dated 25 September 2006

(vi) Defence Response to the Prosecution Appeal, dated 27 September 2006

(vii) Appeal of Defence Counsel against the Decision on pre-trial custody, dated 27 September 2006

(viii) Prosecution Response to the Defence Appeal, dated 27 September 2006

(ix) Decision of "out-of-hearing" Panel confirming Decision on pre-trial custody, dated 27 September 2006

(x) Prosecution Response on Defendant's Requests for contacts, dated 2 October 2006

(xi) Letter of Preliminary Hearing Judge requesting the Prosecutor to specify his submission concerning limitation and/or prohibition of contacts of the Defendant, dated 5 October 2006

(xii) Prosecution Reply to the Preliminary Hearing Judge letter, dated 6 October 2006

(xiii) Decision of Preliminary Hearing Judge to ban the Defendant from any form of communication with the outside world, dated 9 October 2006

(xiv) Defendant's letter related to communication with his Defence Counsel, dated 12 October 2006

(xv) Defence Appeal against the Decision banning the Defendant's communications with the outside world, dated 12 October 2006

(xvi) Prosecution Motion for extension of custody, dated 16 October 2006

(xvii) Prosecution Response to the Defence Appeal against the Decision banning the Defendant's communications, dated 18 October 2006

(xviii) Defence Response to the Prosecution Motion for extension of custody, dated 19 October 2006

(xix) Hearing on extension of pre-trial custody, dated 19 October 2006

(xx) Decision of "out-of-hearing" Panel granting extension of pre-trial custody, dated 19 October 2006

(xxi) Defence Appeal against the Decision extending custody, dated 23 October 2006

(xxii) Prosecution Response to Defence Appeal, dated 27 October 2006

(xxiii) Defence Counsel's letter requesting the Court to allow the expert to see the Defendant, dated 30 October 2006

(xxiv) Decision of "out-of-hearing" Panel to revoke the Decision banning the Defendant's communications with the outside world, dated 30 October 2006

(xxv) Defendant's letter related to communications with his Defence Counsel, dated 1 November 2006

(xxvi) Defendant's letter to Appellate Panel in relation to hearing on Defence Appeal against custody, dated 5 November 2006

(xxvii) Appellate Panel hearing on Appeal against extension of custody, dated 6 November 2006

(xxviii) Decision of the Appellate Panel rejecting Appeal against extension of custody, dated 6 November 2006

(xxix) Submission of Defence Counsel regarding communications with the Defendant, dated 17 November 2006