

IT-00-41-PT
D4209 - D4200
19 DECEMBER 2007

4209
AT

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: 19 December 2007

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

PUBLIC FILING

PROSECUTOR'S SIXTH PROGRESS REPORT

The Office of the Prosecutor

Ms. Carla Del Ponte

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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PUBLIC

PROSECUTOR'S SIXTH 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 sixth progress report in this case.
2. The decision on Referral requires that following the initial report, six weeks after transfer of material, the Prosecutor must file a report every three months on the course of the proceedings before the State Court of Bosnia and Herzegovina.²
3. The Prosecutor filed her fifth progress report on 19 September 2007.³
4. Following the agreement between the Chairman in Office of the Organisation for Security and Co-operation in Europe's Mission to Bosnia and Herzegovina (the "OSCE") and the Prosecutor, the Prosecutor received OSCE's fifth report on 12 December 2007.⁴ The report outlines the main findings of trial monitoring activities to date in the *Ljubičić* case, from the perspective of international human rights standards.
5. OSCE 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.⁵

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 Fifth Progress Report, 19 September 2007.

⁴ OSCE Fifth Report in the *Paško Ljubičić* Case Transferred to the State Court Pursuant to Rule 11 *bis*, December 2007 (hereinafter "Report").

⁵ Report, p. 2.


6. The OSCE summarises the proceedings in the Ljubičić case as follows:⁶
- During the period between September and December 2007, the Court held 14 sessions in total, 19 Prosecution witnesses testified (nine without protective measures and two in a closed session). Other hearings were held mainly in public, and the remaining witnesses testified with some form of protection.
 - On 5 October, the Court decided that custody was still justified on the same grounds as before. Defence Counsel appealed the decisions on 12 October 2007, but on 7 November 2007 the Appellate Panel refused the appeal as unfounded.
 - On 9 October 2007, the Defence submitted a motion moving the Court to make a preliminary decision on the meaning of "a joint enterprise having the common criminal purpose" as the form of liability, with which the Accused is charged. The Court has not yet issued a decision on this motion.
 - On 22 October, the Defence filed a written motion requesting the trial panel to substitute custody ordered against the Accused with alternative measures, also offering bail if these measures weren't sufficient. After hearing the party's arguments on 12 November 2007, the Panel decided that the Defendant remain in custody on the same grounds as previously ordered.
 - The next main hearing is scheduled for 14 December 2007, continuing the presentation of the Prosecution case.
 - OSCE BiH notes that the Court has not yet issued a decision on the Prosecutor's motion for the Court to accept as proven facts established in the ICTY judgements.
7. The Prosecutor takes note of OSCE's continuous concern regarding justification for the Defendant's pre-trial custody, which the Court partly based on "threat to public and property security" (Article 132(1)(d) BiH Criminal Procedure Code).⁷ However, the Prosecutor considers that at present this issue does not appear to affect Ljubičić's right to a fair trial.


⁶ Report, pp. 2, 3, 4.

⁷ Report, pp. 2-3.

8. Attached to this report and marked as annex A is a copy of the OSCE report.

Word Count: 582


P.P. Carla Del Ponte
Prosecutor



Dated this nineteenth day of December 2007
At The Hague
The Netherlands

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-00-41-PT

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

ANNEX A
TO
PROSECUTOR'S SIXTH PROGRESS REPORT



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

**Fifth Report in the
Paško Ljubičić Case**

Transferred to the State Court pursuant to Rule 11bis

December 2007

SUMMARY OF DEVELOPMENTS

The case of Paško Ljubičić (hereinafter also “Defendant”) is the fourth case transferred from the ICTY to the BiH State Court pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the fifth report in this case that the OSCE Mission to Bosnia and Herzegovina (“OSCE BIH” or “Mission”) delivers to the ICTY Prosecutor, covering the period from the beginning of September 2007 to the main trial hearing held on 5 December 2007.

From its monitoring activities during the reporting period, the Mission has not identified any additional issues of concern that could be assessed as a violation of the Defendant’s right to a fair trial at this stage. However, in this summary of developments, the Mission reiterates points of concern that have been addressed in previous reports on the basis of updated information. Thereafter, this Report includes an Annex with the list of relevant hearings, decisions, and submissions in this case.

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

- During the reporting period, the Court held 14 sessions in total,¹ during which 19 witnesses proposed by the Prosecution were heard. Nine witnesses testified without any protective measures and two witnesses were examined in a closed session. Other hearings were held mainly in public, and the remaining witnesses testified with some form of protection: either through the assignment of pseudonyms, or by moving the public to a different room, or a combination thereof.²
- On 5 October 2007, the Court decided that custody was still justified on the same grounds as before, namely the risk of flight and the threat to public security. Defence Counsel appealed the decisions on 12 October 2007. On 7 November 2007, the Appellate Panel refused the appeal as unfounded.

The OSCE BIH reiterates its concerns regarding (a) the justification of the Defendant’s pre-trial custody on the basis of the threat to public and property security, and (b) the narrow interpretation that the Court adopts in relation to the applicability of provisions on alternatives to custody.³ At this point, it is important to underline again that the OSCE BiH does not question the merits of whether an accused should be detained or not in the given circumstances, but concentrates its analyses on whether the justification provided in

¹ Main trial sessions have been held on 10, 11, 21, 24, 25, and 26 September; 8, 19 and 23 October; 8, 12, 22 and 28 November; and 5 December 2007.

² Closed sessions took place only during the discussion on the use of protective measures prior to witness testimony and for limited parts of protected witnesses’ testimonies. As regards the other protective measures that were provided: one witness testified without protection of personal data, although the public was moved to another room, where from it was only able to hear the witness. Three witnesses testified with a pseudonym to protect them from the public, while other four witnesses testified after the use of pseudonyms and the removal of the public to another room, preventing visual identification.

³ See, for instance, 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; OSCE-BIH, First Report in the Mitar Rašević and Savo Todović Case - Transferred to the State Court pursuant to Rule 11bis, January 2007; Second OSCE Report in case of Defendant Paško Ljubičić, Transferred to the State Court pursuant to Rule 11bis, March 2007; Second OSCE Report in the Željko Mejakić et al. case, Transferred to the State Court pursuant to Rule 11bis, March 2007; Fourth OSCE Report in case of Defendant Paško Ljubičić, Transferred to the State Court pursuant to Rule 11bis, September 2007.

prosecutors' motions and courts' decisions meets the requirements that human rights standards dictate when depriving one's right to liberty.

To summarize the concerns addressed in previous reports, the motions and decisions finding the existence of a threat to public and property security in the *Ljubičić* case do not appear to comply with the requirements prescribed in international human rights standards. Namely, they do not appear to mention facts that point to an *actual* threat to public order if the accused were released and do not include indications that such actual threat continues to exist so many years after the commission of the criminal offences the Accused is charged of or so long after he was initially detained. It is of note that the criminal offences date back to 1993, while the Accused is in pre-trial detention since 2001.

Furthermore, the Court reviewing pre-trial custody seems to maintain its previous strict and formalistic interpretation on the applicability of non-custodial measures, although it has not rendered an explicit comment on this matter as it has in the past. Namely, it previously stated that alternatives to custody can only be applied when the risk of flight is invoked alone. However, such a stance does not appear to find support in international standards nor, any longer, in domestic criminal procedure.

It is noteworthy that, just recently, the Constitutional Court of BiH issued its written decision rejecting the appeal of Defendant Ljubičić as inadmissible. However, this is currently available only in local language. As soon as the Mission obtains the English translation of the decision, it should be able to review the Court's reasoning and assess the decision's impact on the Defendant's right to liberty, possibly in the next report in this case.

- On 9 October 2007, the Defence submitted a motion moving the Court to make a preliminary decision on the meaning of "a joint enterprise having the common criminal purpose" as the form of liability, with which the Accused is charged.

By this motion, the Defence requested the Court to order the Prosecution to clarify the term "as part of a joint enterprise having the common criminal purpose" and especially to explain whether it considers it synonymous with "joint criminal enterprise", as is recognized in the ICTY jurisprudence. In case the concept were considered synonymous to "joint criminal enterprise", the Defence moved the Court to decide that this notion cannot be applied and discussed in the concrete proceedings. The Defence stressed the importance of clarifying this, given that this vagueness prevents it from developing the most appropriate defence strategy. In his response dated 19 October, the Prosecutor explained that the two phrases are "simply another way of saying the same thing."⁴ He also argued that a charge alleging this form of liability is sufficient for the defence to prepare the appropriate strategy. The Court has not yet issued a decision on this motion.⁵

- On 22 October 2007, the Defence filed a written motion requesting the trial panel to substitute custody ordered against the Accused with the alternative measures, namely house arrest, travel ban, daily reporting to police officials, prohibition from meeting with certain persons, and handing over his ID card to the Registry. Moreover, if these prohibiting measures were not

⁴ See Procedural Note, Response to Defence Submission, filed by the Prosecutor's Office of BiH on 19 October 2007, p. 4.

⁵ The Mission notes that Joint Criminal Enterprise as a form of liability is not explicitly prescribed by the Criminal Code of BiH. Furthermore, there is not yet domestic jurisprudence that recognizes it and determines the scope of its application.

sufficient, the Defence stated that the Accused was ready to offer bail. This motion was discussed at the hearing held on 12 November 2007.⁶ After hearing the parties' arguments, the Panel decided that the Defendant remain in custody on the same grounds as previously ordered.

- The next main trial hearing is scheduled for 14 December 2007, when the Prosecution should continue with the presentation of its case.
- Lastly, the OSCE BIH would like to note that the Court has not yet issued a decision on the Prosecutor's motion for the Court to accept as proven facts established in the ICTY judgments. On this matter, the Mission reiterates its recommendations expressed in previous reports, namely that judicial economy and the equality of arms are best respected when such decisions are made as early as possible in the proceedings. Additionally, in this regard, the Mission wishes to correct a piece of information that was included in the previous report in this case: In footnote eight, two cases were reported as examples where the Court ruled on similar motions only in the written verdict. In fact, the Trial Panel presiding in the *Dragoje Paunović* case had issued an oral decision on this motion earlier in the proceedings, although its extensive written decision was included only in the verdict. The Mission would like to thank the staff of the State Court who brought this to its attention.

⁶ Notwithstanding the fact that the Mission has clearly communicated to the parties and Court, on several occasions, the mandate and the purpose of its monitoring and reporting, there appears to have been a misunderstanding regarding the concerns and recommendations made in previous reports in this case. More specifically, during the hearing of 12 November 2007, the Defence pointed out the Mission's concerns as regards the refusal of the Court to examine alternatives to custody, while in its written motion it appeared to suggest that the OSCE recommended that the Court substitute custody with alternatives. In his oral response, the international Prosecutor expressed the position that the OSCE should not be involved in and should not advocate that the Court does one thing or another. It is worth reiterating that the Mission's comments and recommendations in relation to motions of the parties and decisions of the court do not address the merits, for instance of whether a person should be detained or not. Rather, the Mission findings pertain mostly to procedural aspects that are deemed problematic from the perspective of human rights.

PART II**LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS**

- (i) Defence Motion relating to delivery of prosecution evidence, dated 10 September 2007
- (ii) Main trial hearing, held on 10 September 2007
- (iii) Main trial hearing, held on 11 September 2007
- (iv) Prosecution response to Defence Motion relation to delivery of evidence, dated 19 September 2007
- (v) Main trial hearing, held on 21 September 2007
- (vi) Main trial hearing, held on 24 September 2007
- (vii) Main trial hearing, held on 25 September 2007
- (viii) Main trial hearing, held on 26 September 2007
- (ix) Defence Submission in response to the Response of the Prosecutor relating to delivery of evidence, dated 1 October 2007
- (x) Decision of the "Out-of-Hearing" Panel on review of custody, dated 5 October 2007
- (xi) Main trial hearing, held on 8 October 2007
- (xii) Defence Submission moving the Panel to make a preliminary decision on "a joint enterprise having the common criminal purpose" as the form of liability charged against the Accused, dated 9 October 2007
- (xiii) Defence Counsel's Appeal against the Decision on review of custody, dated 12 October 2007
- (xiv) Prosecution Response to Defence Appeal, dated 18 October 2007
- (xv) Main trial hearing, held on 19 October 2007
- (xvi) Prosecution Response to Defence Submission requisition the Panel's preliminary decision, dated 19 October 2007
- (xvii) Defence Brief relating to application of prohibiting measures, dated 22 October 2007
- (xviii) Main trial hearing, held on 23 October 2007
- (xix) Defence Submission relating to Prosecution Response of 19 October, dated 5 November 2007
- (xx) Decision of the Appellate Panel refusing the Defence Appeal as unfounded, dated 7 November 2007
- (xxi) Main trial hearing, held on 8 November 2007
- (xxii) Main trial hearing, held on 12 November 2007
- (xxiii) Main trial hearing, held on 22 November 2007
- (xxiv) Main trial hearing, held on 28 November 2007
- (xxv) Main trial hearing, held on 5 December 2007