

IT-00-41-PT  
D4220 - D4211  
19 MARCH 2008

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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 March 2008

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

*PUBLIC FILING*

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PROSECUTOR'S SEVENTH PROGRESS REPORT

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The Office of the Prosecutor

Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-00-41-PT

THE PROSECUTOR

v.

PAŠKO LJUBIČIĆ

**PUBLIC**

**PROSECUTOR'S SEVENTH PROGRESS REPORT**

1. In accordance with the "Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 *bis*"<sup>1</sup> of 12 April 2006 ("Decision on Referral") the Prosecutor hereby files his seventh 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.<sup>2</sup>
3. The Prosecutor's sixth progress report in the *Ljubičić* case was filed on 19 December 2007.<sup>3</sup>
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 sixth report on 18 March 2008.<sup>4</sup> The report outlines the main findings of trial monitoring activities to date in the *Ljubičić* case, from the perspective of international human rights standards.

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<sup>1</sup> *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.

<sup>2</sup> Decision on Referral, p. 21.

<sup>3</sup> See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Prosecutor's Sixth Progress Report, 19 December 2007.

<sup>4</sup> OSCE Sixth Report in the *Paško Ljubičić* Case Transferred to the State Court Pursuant to Rule 11 *bis*, March 2008 (hereinafter "Report").

5. From its monitoring activities during the reporting period the OSCE has not identified any new issues that would cause concern at this stage.<sup>5</sup>
6. The OSCE summarises the proceedings in the Ljubičić case as follows:<sup>6</sup>
  - a. During the period between December 2007 and March 2008, the Court held five sessions in total. During these hearings, one Prosecution witness was heard in closed session, while numerous pieces of material documentation were tendered into evidence. The Prosecution has not completed its case yet, because it has not been successful in scheduling the appearance of its remaining witnesses named in the indictment. In order to make the best use of time in the interim, the Panel decided to allow the Defence to start presenting its documentary evidence.
    - On 1 February 2008, the Trial Panel partially granted the Prosecutor's motion dated 30 May 2007 and took judicial notice of certain facts adjudicated by ICTY judgments.
    - The Court conducted regular reviews of custody on 5 December 2007 and 1 February 2008 and held that custody against the Defendant is still justified on the basis of the risk of flight, as well as for the safety of the public and property Article 132(1) items (a) and (d) BiH CPC. Furthermore, the Panel found that alternatives to custody were not sufficient. The Defence did not appeal these decisions.
    - The next main trial hearing is scheduled for 20 March 2008, when the Defence is expected to start its case by presenting documentary evidence.
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). OSCE confirms that there is no reason to doubt that detention has been adequately justified in relation to Article 132(1)(a) concerning the risk of flight, but notes that concerns remain about the argumentation used to justify custody under Article 132(1)(d).<sup>7</sup>
8. The Prosecutor further takes note of OSCE's general recommendation that for reasons of judicial economy and equality of arms decisions on adjudicated facts be preferably issued as early as possible in the proceedings.<sup>8</sup>

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<sup>5</sup> Report, p. 2.

<sup>6</sup> Report, pp. 2, 3, 4.

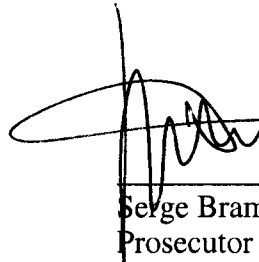
<sup>7</sup> Report, p. 3; OSCE notes the general positive development that certain Judges in particular at the State Court ceased to apply this ground in the absence of the presentation of concrete facts (Report, p. 4).


<sup>8</sup> Report, p. 2.

9. However, the Prosecutor considers that at present none of these issues appear to affect Ljubičić's right to a fair trial.

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

Word Count: 664

  
Serge Brammerts  
Prosecutor



Dated this nineteenth day of March 2008  
At The Hague  
The Netherlands

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-00-41-PT

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**PUBLIC**

**ANNEX A**  
TO  
PROSECUTOR'S SEVENTH PROGRESS REPORT



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

**Sixth Report in the**

***Paško Ljubičić Case***

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

**March 2008**

## 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 sixth 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 beginning of December 2008 and the main trial hearing held on 29 February 2008.

From its monitoring activities during the reporting period, the Mission has not identified any new issues that would cause concern at this stage. Therefore, this Report consists of a short summary of the developments in the present trial proceedings, but reiterates certain comments on previously observed concerns regarding adjudicated facts and justification of pre-trial custody. It also encloses an annex with a list of relevant hearings, decisions and submissions in this case.

Until present, the proceedings in the *Ljubičić* case may be summarized as follows:

- During the reporting period, the Trial Panel of the State Court (“Court” or “Panel”) held five sessions in total in this case.<sup>1</sup> During these hearings, one witness proposed by the Prosecution was both directly and cross-examined in closed session, while numerous pieces of material documentation were tendered into evidence. The Prosecution has not completed its case yet, because it has not been successful in scheduling the appearance of its remaining witnesses named in the indictment. In order to make the best use of time in the interim, the Panel decided to allow the Defence to start presenting its documentary evidence.
- On 1 February 2008, the Trial Panel partially granted the Prosecutor’s motion dated 30 May 2007 and took judicial notice of certain facts adjudicated by ICTY judgments.

Previous OSCE reports have raised issues in relation to the standards adopted by different panels on adjudicated facts, and particularly in relation to the delays in issuing a decision on the relevant motions.<sup>2</sup> It may be noted that, in the present case, eight months passed between the time the Prosecutor’s motion was filed and the time the Court issued its decision on it, during which period the Prosecution has almost completed the presentation of its evidence.

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.

- The Court conducted regular reviews of custody on 5 December 2007 and 1 February 2008 and held that custody against the Defendant is still justified on the basis of the risk of flight, as well as for the safety of the public and property [Article 132(1)(a) and (d) BiH CPC]. Furthermore, the Panel found that alternatives to custody were not sufficient,

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<sup>1</sup> Main trial sessions have been held on 14 December 2007; 9 January; and 1, 8 and 29 February 2008. The main trial hearings scheduled for 7 and 8 January 2007 were postponed.

<sup>2</sup> See OSCE BiH, Fifth Report in *Paško Ljubičić* Case, December 2007; OSCE BiH, Second Report in *Milorad Trbić* Case, January 2008.

notwithstanding the fact that the Accused has already been in detention for seven years. The Defence did not appeal these decisions.

There is no reason to doubt that detention has been adequately justified in relation to the Article 132 (1)(a) concerning the risk of flight. Despite this rationale for custody, however, concerns remain about the argumentation used to justify custody under Article 132 (1)(d). While the decision makes extensive arguments to raise the likelihood of a threat to public and property security, it does not adequately substantiate that such a threat would arise directly from the release of the accused, as per international human rights standards for pre-trial detention.<sup>3</sup> Rather, the decision concentrates more on the gravity of the crime and assumes in a generalised manner that the release of a person charged with such crimes as the Accused is charged with would always be disturbing to victims.

There can be little doubt that having persons accused of war crimes or other serious crimes at liberty, even when they are not engaged in provocative behaviour, is distressing to victims and their affected communities. However, according to fair trial standards, generalising such reactions are not enough to substantiate grounds for custody. There has never been an articulated exception to this concept on the basis of the situation in war-affected areas and persons suspected of war crimes, genocide, or crimes against humanity. Rather the articulated standards of the European Court of Human Rights hold that continued detention must be based on actual facts that exist at the time of the decision and which indicate that public order will be disrupted if the accused is released. And since the disruption of public order in this context is viewed as an exceptional circumstance by international and domestic standards, it is quite clear that that it does not refer to all negative feelings, but rather to very strong reactions of the public. If such concrete facts continue to exist, then the prosecution and the court should make specific reference to them.<sup>4</sup>

In its decisions, the State Court first clarified that the Accused is not directly or indirectly threatening the safety of witnesses. Rather, it found that the threat to the safety of these witnesses is based on the "general living circumstances of these people in the area of Central Bosnia,"<sup>5</sup> but did not specify how the release of the Accused would have an aggravating impact on these living circumstances. Then, the Court's decision reached the general conclusion that the release of the Accused at the main trial stage "could cause

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<sup>3</sup> See, for instance, OSCE BiH, First Report in the Case of Defendant Gojko Janković, April 2006; OSCE BiH, First Report in the Paško Ljubičić Case, December 2006; OSCE BiH, First Report in the Mitar Rašević and Savo Todović Case, January 2007; Second OSCE Report in case of Defendant Paško Ljubičić, March 2007; Second OSCE Report in the Željko Mejačić et al. case, March 2007; Fourth OSCE Report in case of Defendant Paško Ljubičić, September 2007.

<sup>4</sup> The European Court has specifically demanded that, in order to use the notion of disturbance to public order to continue detaining an accused the court has to show that this is based on facts capable of showing that the defendant's release would actually disturb public order. Especially for crimes that occurred a long time ago, it has to show that public order actually remains threatened beyond the initial period of time. And to substantiate this ground, specific facts are required; it is not enough to refer in an abstract manner to the nature of the crime concerned, the circumstances in which it was committed, and to the reactions of the injured parties. See *I.A. v. France*, European Court of Human Rights (ECtHR) judgement, 23 September 1998, para. 104, and *Letellier v. France*, ECtHR judgement, 26 June 1991, para. 51.

<sup>5</sup> More specifically, the decisions begin by making reference to the crimes concerned, in the sense that they carry a prison sentence of more than 10 years' imprisonment, they are not subject to statute of limitation, and that they were committed in a manner that had grave consequences.



disturbance of the public, especially of those people who are direct or indirect injured parties of the criminal offences in question.”

This type of generalised justification is not unique to this case, and practitioners agree that this ground for detention is widely abused in practice and can amount to almost mandatory detention for some crimes. Detention decisions that invoke the threat to public and property security as ground for custody do not individualise the circumstances. They also tend to lower the degree of what constitutes disruption of public order substantially and for how long this can last, as compared with what is accepted by human rights standards. In these respects, it is a positive development that that certain judges, particularly at the State Court, ceased to apply this ground in the absence of the presentation of concrete facts, as discussed above.

In response to the problem, it is recommended that detention decisions are properly justified. Furthermore, the legislative authorities, who at present have the opportunity to review detention provisions through the amendment procedure of the Criminal Procedure Code, should consider taking all appropriate legislative steps to ensure that the right to liberty is protected in compliance with human rights standards.

- The next main trial hearing is scheduled for 20 March 2008, when the Defence is expected to start its case by presenting documentary evidence.

## ANNEX

## LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Decision of the Trial Panel on review of custody, held on 5 December 2007
- (ii) Main trial hearing, held on 14 December 2007
- (iii) Main trial hearing, held on 9 January 2008
- (iv) Prosecution Motion to take testimony from a witness not named in the indictment during presentation of the evidence for the prosecution, dated 29 January 2008
- (v) Prosecution Motion to appoint legal counsel to a witness, dated 29 January 2008
- (vi) Prosecutor's Request for protective measures for a witness, dated 31 January 2008
- (vii) Main trial hearing, held on 1 February 2008
- (viii) Decision on established facts, 1 February 2008
- (ix) Decision of the Trial Panel on review of custody, dated 1 February 2008
- (x) Defence Response to Prosecutor's motion to take testimony from a witness not named in the indictment, dated 4 February 2008
- (xi) Defence Response to Prosecutor's Motion to appoint legal counsel to a witness, dated 4 February 2008
- (xii) Defence Response to Prosecutor's Request for protective measures for witness, dated 4 February 2008
- (xiii) Main trial hearing, held on 8 February 2008
- (xiv) Main trial hearing, held on 29 February 2008