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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 October 2008

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

PUBLIC FILING

PROSECUTOR'S TENTH PROGRESS REPORT

The Office of the Prosecutor:
Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL
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PUBLIC

PROSECUTOR'S TENTH PROGRESS REPORT

1. Pursuant to the Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* of 20 July 2005¹ ("Referral Decision") the Office of the Prosecutor ("OTP") hereby files its tenth progress report in this case.
2. The Decision on Referral requires that following the initial report, six weeks after the 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 ("BiH State Court").²
3. The OTP filed its ninth progress report on 3 July 2008.³
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 OTP received OSCE's ninth report on 26 September 2008.⁴

¹ *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2005.

² Referral Decision, p. 44.

³ *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-PT, Prosecutor's Ninth Progress Report, 3 July 2008 ("Ninth Report").

⁴ OSCE's Ninth Report in the *Željko Mejačić et al.* Case Transferred to the State Court pursuant to Rule 11 *bis*, September 2008 ("Report").

5. As previously reported, on 21 April 2008, the BiH State Court accepted a Plea Agreement between the Prosecutor's Office of BiH and Dušan Fuštar and sentenced him to nine years imprisonment. On 30 May 2008, the BiH State Court pronounced its oral verdict in relation to the remaining Accused Željko Mejakić, Momčilo Gruban and Duško Knežević. The BiH State Court found these Accused guilty on all counts of the indictment, sentencing them respectively to 21, 11 and 31 years imprisonment respectively.⁵

6. The OSCE summarized developments during the reporting period as follows:⁶

- On 18 June 2008, the first instance verdict against Dušan Fuštar became final.
- On 2 July 2008, the Court ordered Fuštar to begin serving his sentence on 25 July 2008 at the closed Penal-Correctional Facility in Foča.
- On 11 July 2008, Fuštar submitted a request to the Court to change the location for serving his sentence, naming in particular the semi-open penal-correctional facilities in Kula, Banja Luka, and Doboj. One reason provided was the greater proximity of the other detention facilities to the place of residence of his family. Fuštar also expressed belief that he deserves to be serving his sentence in a semi-open penal-correctional facility and not the closed-type facility of the Penal-Correctional Facility in Foča, because he pled guilty and expressed remorse. In addition, he has already spent more than two-thirds of his sentence in custody.
- The Court responded on 21 July 2008 informing Fuštar that he should submit his request to the Ministry of Justice, which has the competence to rule on the issue.
- On 25 July 2008, Fuštar began serving his sentence of imprisonment in the Penal-Correctional Facility in Foča.
- On 9 September 2008, the OSCE representatives met with the Defendants Željko Mejakić, Momčilo Gruban and Duško Knežević following a request by them and heard their grievances, which generally they intend to present in their appeals once the written first instance verdict is rendered.

7. As the Fuštar's plea agreement was one of the first concluded in war crimes cases throughout BiH and at the State level, the OSCE included in the Report a general note on issues raised by the plea agreement, including the compatibility of the practice of charge bargaining with the provisions on plea agreements articulated in the Criminal Procedure Code of BiH. The OSCE reports that these matters reflect upon

⁵ Ninth Report, p. 3

⁶ Report, pp. 1, 2

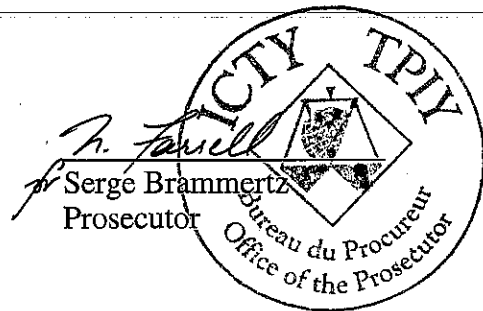
the need to ensure efficiency and effectiveness in dealing with the large numbers of outstanding war crimes cases in the country.⁷

8. The Prosecutor welcomes the analysis of the OSCE regarding the general issue of the use of plea agreements. This issue is of great importance for the local judicial actors. However, they do not infringe upon fair trial issues regarding the four accused in this case.

9. Attached to the Report and marked as Annex A is a copy of the Report.

Word count: 692

Dated this third day of October 2008
At The Hague
The Netherlands



⁷ Report, p. 1.

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ANNEX A
TO
PROSECUTOR'S TENTH PROGRESS REPORT



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

**Ninth Report in the
Željko Mejačić et al. Case**

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

September 2008

EXECUTIVE SUMMARY

The Case against *Željko Mejakić, Momčilo Gruban, Dušan Fuštar* and *Duško Knežević* is the third case referred from the ICTY to the State Court of BiH, pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence. On 17 April 2008, the Court separated the Case against *Dušan Fuštar*¹ from the Case against *Željko Mejakić, Momčilo Gruban, and Duško Knežević* (*Mejakić et al.* case). This constitutes the ninth report submitted by the OSCE Mission to Bosnia and Herzegovina (the "OSCE-BiH" or "Mission") to the ICTY Prosecutor's Office on these cases, covering the period between 15 June and 15 September 2008.

During the previous reporting period, the Court rendered verdicts in the Case against *Fuštar* and the Case against *Mejakić et al.* *Dušan Fuštar* was sentenced on 22 April 2008 to nine years imprisonment based on an Agreement to Enter Plea of Guilty to a Proposed Amended Indictment concluded with the Prosecutor on 27 March 2008. On May 2008, *Željko Mejakić, Momčilo Gruban, and Duško Knežević* (the "Defendants") were sentenced to imprisonment terms of 21 years long term, 11 years, and 31 years long term respectively.

With regard to the Case against *Mejakić et al.*, the Defendants remain in custody by the Decision of the Trial Panel on 30 May 2008 on the basis of the risk of flight and threat to public security. The Court has yet to render a written first instance verdict.

With regard to the Case against *Fuštar*, the Court rendered the written first instance verdict on 23 May 2008 based on the Agreement to Enter Plea of Guilty to a Proposed Amended Indictment. The first instance verdict became final on 18 June 2008. On 25 July 2008, *Fuštar* (the "Convicted Person") began serving his sentence at the Penal-Correctional Facility in Foča.

The plea agreement in the *Fuštar* case is one of the first concluded at the State level in war crime cases. In an attempt to further the development of best practices on the use of this mechanism, this Report includes a note on issues raised by the plea agreement, including on the compatibility of the practice of charge bargaining with the provisions on plea agreements articulated in the Criminal Procedure Code of BiH (the "CPC BiH"). Issues are also raised on how the trial panel should proceed in resolving cases based on a plea agreement. These matters reflect upon the need to ensure the fundamental efficiency and effectiveness of the process, not the least of which is the satisfaction of victims with the process and the context to which the outcome adheres to the principles of law at issue. Ultimately, the matter affects the certainty that a just outcome has been accomplished. Competing policy issues are at issue here and need to be discussed.

The main developments in the present case during this reporting period are:

- On 18 June 2008, the first instance verdict against the Convicted Person became final.
- On 2 July 2008, the Court ordered the Convicted Person to begin serving his sentence on 25 July 2008 at the closed Penal-Correctional Facility in Foča.
- On 11 July 2008, the Convicted Person submitted a request to the Court to change the location for serving his sentence, naming in particular the semi-open penal-correctional facilities in Kula, Banja Luka, and Doboj. One reason provided was the greater proximity of the other detention facilities to the place of residence of the Convict's family. The Convicted Person also expressed belief that he is deserving of imprisonment in a semi-open penal-correctional facility, and not the closed-type facility of the Penal-Correctional Facility in Foča, because he pled guilty and expressed remorse. In addition, he has spent more than two-thirds of his sentence in custody.
- The Court responded on the 21 July 2008 that the Convicted Person should submit his request to the Ministry of Justice, which has the competence to rule on the issue.

¹ Case against *Dušan Fuštar* (X-KR-06/200-1).

- On 25 July 2008, the Convicted Person began serving his sentence of imprisonment.
- On 9 September 2008, the Mission met with the Defendants Željko Mejakić, Momčilo Gruban, and Duško Knežević following their request and heard their grievances, which generally they intend to present in their appeals once the written first instance verdict has been rendered.

NOTE ON PLEA AGREEMENTS

The plea agreement in the *Fuštar* case and that concluded in the *Ljubičić* case (collectively, the “Plea Agreements”) are among the first plea agreements concluded in war crime cases throughout the country and at the State level. In previous months, a variety of meetings and roundtables on the use of plea agreements have been ongoing so that practitioners may familiarise themselves with this mechanism and discuss the manner and appropriateness of its use in war crime cases. In addition, it appears that both the Prosecutor’s Office of BiH and the Federation have separately embarked on the formulation of guidelines on plea agreements. The Federation Prosecutor’s Office has apparently consulted with its counterparts from Republika Srpska and Brcko District in preparing their guidelines. These actions have been necessitated not only by the relative lack of guidance on plea agreements in the relevant laws, but also the likely importance of such agreements in dealing with the larger numbers of outstanding war crime cases in the country.

As a result, continued and coordinated discussions will be warranted on the institute of plea agreements, concerning both the underlying policies and particular substance of such agreements. To contribute to this discussion, the following observations should be considered:

- Regarding the appropriate scope of bargaining, disagreement exists. While State level representatives believe that it is permissible to negotiate with accused persons on the admission of facts or charges,² numerous Entity practitioners and legal scholars believe that negotiations on facts and charges should not take place. The latter consider that the Principle of Legality of Prosecution underlying the BiH CPC forecloses the possibility of charge bargaining.³ This principle obliges prosecutors to initiate prosecution in each case where evidence exists that a criminal offense has been committed.⁴ Furthermore, they have pointed out that under the CPC BiH, an accused may negotiate with the Prosecutor on the conditions for admitting guilt “for the offence charged.”⁵

It is doubtless that many benefits may accrue from the use of plea agreements, including efficiency in proceedings and the cooperation of defendants, and those may be aided through the use of charge bargaining.

In spite of such advantages many questions are likely to be raised by victims concerning the use of plea agreements generally in war crime cases and the use of charge bargaining in particular. For example, victims may consider the use of plea agreements to result in lenient treatment of perpetrators. Furthermore, charge bargaining may lead to questions as to the accuracy of the resulting verdicts in terms of their use as a historical record. Moreover, some experts have also stated that when the same advantages can be obtained through negotiations on the sentence, negotiation on the charges may be unnecessary.⁶

² See Paragraphs 18 and 34 in the Plea Agreements. These Plea Agreements are based on amended indictments that charge the convicts with fewer and/or less serious allegations than those in the confirmed indictments. Namely, *Fuštar* was no longer alleged to have personally beaten or physically abused any detainees nor alleged to be accountable under the theory of command responsibility. *Ljubičić* was only charged with one count of War Crimes Against Civilians for a single incident, as opposed to the multiple counts of the original indictment alleging Crimes Against Humanity, War Crimes Against Civilians, and Violations of the Laws and Practices of Warfare. The cited paragraphs provide that the amended indictments upon which the Plea Agreements are based are only submitted for the purposes of the Plea Agreements and prosecution would continue on the original indictments if the Plea Agreements were rejected.

³ Article 17 CPC BiH.

⁴ The Commentary on the BiH CPC remarks that plea bargaining negotiations should be “primarily related to the type and length of criminal sanction.”

⁵ Article 231(1) CPC BiH. Article 231 was recently amended as part of set of wide-ranging amendments on the CPC BiH, but this construction remains the same. (BiH Official Gazette 3/03 with Corrections and Amendments of the CPC of BiH, as published in the “Official Gazette of BiH”, number 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05/ 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08).

⁶ See Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 Vand. L. Rev. 69 (2006), p.75-79.

In light of the policy concerns involved, it is recommended that the relevant officials engage in concerted dialogue on whether charge bargaining is an acceptable practice in Bosnia and Herzegovina. If consensus is reached, it is likely that the results of such discussions will necessitate either amendments to relevant laws or authoritative interpretations of the law to clarify the use of the institute in practice.

These referenced Plea Agreements also raise issues on how a Panel should proceed in resolving cases based on plea agreements and the desirable content of such agreements. These issues include the impartiality of the Panel vis-à-vis the plea agreement, the ability of a defendant to appeal the verdict, and the adjudication of compensation claims by victims. This last point also reflects the role of victims in the process of both negotiating the plea agreement and their ability to pursue compensation claims thereafter.

- First, the Commentary on Article 231 BiH CPC on plea agreements suggests that the impartiality of a Trial Panel presiding over a case is jeopardised once it examines a plea agreement and rejects it. In the Plea Agreements, both Fuštar and Ljubičić (collectively, the “Convicts”) have agreed to continue their cases with their presiding Trial Panels if those Panels reject their plea agreements.⁷ No guidance in local laws exists on the effectiveness of this agreement to waive any future occurrence of actual prejudice by the Trial Panel presiding over the case. Nor do provisions exist to provide minimum guarantees to defendants when making this agreement. Because of the central importance of the right to an impartial tribunal under the BiH CPC and the European Convention on Human Rights,⁸ it is recommended that this issue be given due consideration by the relevant authorities.
- Second, with regard to the ability of a defendant to appeal a verdict based on a plea agreement, the BiH CPC provides that a defendant may not appeal the sentence agreed upon in a plea agreement. Reaching beyond this limitation, the Convicts in the Plea Agreements have waived their right to appeal not only their sentences, but also the verdicts.⁹ The BiH CPC would seem to proscribe this action. It provides generally that an accused may not waive his right to appeal a verdict, when a prison sentence is imposed until after the delivery of the written verdict to the accused.¹⁰ There are no special provisions that allow for the possibility of such waiver in cases resolved through a plea agreement. It is important to note, the Court in the verdicts in the *Ljubičić* and *Fuštar* cases recognised the limitation of the Convicts to appeal their sentences, but made no mention of any limitation of their right to appeal their verdicts. However, neither Convict chose to file any appeals.

In so far as the administration of justice may benefit from assuring that accused persons do not appeal aspects of verdicts against them when those aspects conform to the plea agreements, the relevant authorities should consider whether exception from the general rule on waiver of appeals prior to the receipt of a verdict is appropriate in the case of plea agreements. In any case, this matter should be discussed.

- Regarding the role of victims in plea agreement cases, defendants who plead guilty under the BiH CPC may be subject to compensation claims for their admitted conduct.¹¹ The Prosecution has a duty to gather evidence and decide whether a possible claim under property law relates to the criminal offence in question and to inform injured parties about their claims. When plea agreements are being considered, the Prosecution should inform the injured parties about the potential settlement of a case so that those injured parties may be able to file their compensation claims prior to the completion of the trial.

⁷ See Paragraph 21 in the Plea Agreements.

⁸ See Article 29(c) BiH CPC and European Convention on Human Rights Article 6.

⁹ See Paragraph 24 of the Plea Agreement in the Case Against *Fuštar* and Paragraph 25 in the Plea Agreement in the Case Against *Ljubičić*.

¹⁰ Article 294 BiH CPC.

¹¹ Article 231(4) BiH CPC.

Additionally, the Court has the obligation to decide on such claims if doing so would not considerably prolong the proceedings.¹² This entails informing the injured parties about the results of the negotiation on guilt.¹³ Amendments to the CPC in August 2008 additionally mandated that, when deliberating on a plea agreement, the Court should ensure that the injured parties have had an opportunity to give statements in the presence of the Prosecutor regarding their claims for compensation.¹⁴

It must be noted that the Prosecution stated that it had spoken to the injured parties in both the *Fužtar* and *Ljubičić* cases and had considered their concerns when deciding upon the Plea Agreements.¹⁵ This is a welcome initiative.

¹² Articles 86(10), 193(1), 197(1), and 198(1) BiH CPC.

¹³ Article 231(9) BiH CPC on plea agreements; formerly Article 231(7) BiH CPC prior to the most recent amendments.

¹⁴ See Article 231(6)(e) BiH CPC.

¹⁵ See Paragraph 32 of the Plea Agreements.

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- i) Presiding Judge's Order to execute punishment of 9 years imprisonment for the Convicted Person Dušan Fuštar, dated 1 July 2008.
 - ii) Court's Referral Act for the Convicted Person to begin serving his sentence in the Penal-Correctional Facility in Foča, dated 2 July 2008.
 - iii) The Convicted Person's Request to change the penal-correctional facility in which he is ordered to serve his sentence, dated 11 July 2008.
 - iv) Court's Response to the request of 11 July 2008 to change the penal-correctional institution in which the Convicted Person is ordered to serve his sentence, dated 21 July 2008.
 - v) Letter – Information from the Penal-Correctional Institution in Foča on the commencement of the Convicted Person's imprisonment, dated 25 July 2008.
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