

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 2006

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

PROSECUTOR'S SECOND PROGRESS REPORT

The Office of the Prosecutor:
Ms. Carla Del Ponte

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PROSECUTOR'S SECOND PROGRESS REPORT

1. Pursuant to the Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis* of 20 July 2005 ("Referral Decision") and the Referral Bench's Order of 25 September 2006,¹ the Prosecution hereby files its fourth progress report in this case.

2. The Organisation for Security and Co-operation in Europe's First Report in this case² focuses on two issues, namely (1) the application of protective measures ordered by the ICTY after the transfer of a case, and (2) the delay in the transfer of the defence case-files for two of the accused. The OSCE deem that the resolution of these issues would greatly improve the effectiveness of the transfer proceedings in the future. In addition, the OSCE raise a "side issue" in relation to the application of Articles 12 and 13 of the Law on Protection of Witnesses.³

3. The OSCE noted with satisfaction that the problems underlined in the first reports in the *Stanković* and *Janković* cases which concerned the manner in which the State Court ordered and reviewed pre-trial custody did not arise in the *Mejakić et al.*

¹ *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Order on Prosecution Request for an Extension of Time to File Progress Report, 25 September 2006.

² OSCE's First Report in the *Željko Mejakić et al.* Case Transferred to the State Court pursuant to Rule 11 *bis*, September 2006 ("Report").

³ Bosnia and Herzegovina ("BiH") Law on Protection of Witnesses Under Threat and Vulnerable Witnesses ("BiH Law on Protection of Witnesses"). The same issues were raised by the OSCE in its Third Report in the *Stanković* case (IT-96-23/2-PT) filed in that case on 20 September 2006 as an Annex to the Office of the Prosecutor's ("OTP") Fourth Progress Report, so this issue will not be further addressed in this report.

case.⁴ However, the OSCE is concerned with the fact that the Preliminary Hearing Judge has denied the OSCE access to the case-file since 11 July 2006, and that it has been unable to monitor the case effectively since that date.⁵ The OSCE Head of Mission in BiH has requested that President of the BiH State Court clarify the basis and extent of the OSCE's mandate to the judges of War Crimes Chamber, and hopes to have the matter resolved in the very near future.⁶ The OTP is discussing this matter with the OSCE Head of Mission in BiH in the coming days.

4. The OSCE summarises the proceedings in the *Mejakić et al.* case to date as follows:

- The four Defendants were transferred to the BiH authorities on 9 May 2006. Unlike the previously transferred cases, this one was assigned to a Preliminary Proceedings Judge, competent to act during the investigative procedure. On 9 and 10 May, a hearing on pre-trial custody took place, after which the Judge ordered one-month pre-trial custody based on the risk of flight and the risk to public security; she also urged the Prosecution to submit the adapted/amended indictment within this period. The Decision on custody was upheld on appeal, but only on the ground of the risk of flight. On 8 June 2006, the Appellate Panel held a hearing to discuss the Prosecution's motion to extend custody for two additional months in order to allow sufficient time to adapt the indictment. The motion was partially granted, as custody was extended for one month. Appeals against this Decision were rejected.
- On 8 May and 30 June 2006, respectively, the Prosecution filed two motions requesting the Preliminary Proceedings Judge to order witness protection measures. The first motion was rejected [without prejudice] on 11 May 2006, while the second was granted after being discussed in a hearing on 7 July.
- On 7 July 2006, the Prosecutor submitted the adapted indictment, which presents five counts of crimes against humanity under Article 172 BiH CPC, and includes additional charges of torture, imprisonment and sexual violence as crimes against humanity. The Preliminary Hearing Judge accepted the indictment and confirmed the additional charges on 14 July

⁴ Report, p. 2.

⁵ The "OSCE is not aware, or is insufficiently informed [due to non-access to the case-file] whether the issues of concern - identified in this Report at earlier stages of proceedings - remain the same, have been resolved, or, more worryingly, have been aggravated." Report, p. 3.

⁶ Report, pp. 2-3.

2006. At the plea-hearing held on 28 July 2006 the Defendants entered a plea of not guilty to all counts.⁷

5. Since 28 July 2006, the OTP is aware of the following decisions issued by the Preliminary Hearing Judge:

- (a) Decision to appoint an additional ex officio Defence Counsel for Accused Gruban.⁸
- (a) Decision on review of justification of custody – establishing that the grounds justifying further keeping the accused in custody continue to exist.⁹
- (b) Decision on Defence preliminary motions relating to the indictment – refused as unfounded.¹⁰

A. The application of protective measures ordered by the ICTY after the transfer of a case

6. The OSCE discusses the issue of ICTY ordered protective measures and their enforcement in BiH¹¹ and raises the question of who is competent to decide on procedural issues relating to the protection of witnesses after the transfer of a case, the ICTY or the BiH State Court.¹² The OSCE recommends that “the Referral Bench clarify promptly whether, or to which extent, it retains jurisdiction after the transfer of a case on the application of witness protection measures that were ordered by the ICTY.”¹³

7. The OTP is aware that the Referral Bench considered, in another Rule 11*bis* case, that it has a role in securing the continuation of protective measures of victims and witnesses post-referral. The Referral Decision in this case ordered that “the protective measures granted to victims and witness [. . .] are to remain in force.”¹⁴ Any variation to existing protective measures requires the OTP to file an application for variation of protective measures with the Referral Bench. However, the OTP

⁷ Report, p. 2.

⁸ Decision X-KR/06/200 dated 28 August 2006 and Decision X-KR/06/200 dated 31 August 2006.

⁹ Decision X-KR/06/200 dated 13 September 2006.

¹⁰ Decision X-KR/06/200 dated 15 September 2006.

¹¹ Report, pp. 5-7.

¹² Report, p. 4.

¹³ Report, p. 7.

¹⁴ Referral Decision, p. 47.

considers that where a witness requests measures in addition to those already granted by the ICTY, the BiH State Court is the competent court to decide on this additional request.

8. The OSCE state in the Report that the majority of the witnesses protected by the ICTY in the *Mejakić et al.* case informed the State Court's Prosecutor's Office ("POBiH") that they no longer required protection,¹⁵ citing to the BiH State Court Procedural Decision issued on 7 July 2006, which related to the POBiH's motion seeking pre-trial protective measures. The OTP has been advised by the POBiH that a very small number of protected witnesses do not require protective measures to testify before the BiH State Court. These witnesses were contacted by the OTP to confirm this fact, prior to the OTP filing an application for variation of protective measures with the Referral Bench. As a result, the POBiH will be filing another motion for protective measures in the near future. At this time, no application for variation of protective measures will be filed with the Referral Bench. The OTP can provide the Referral Bench with additional information if required.

9. The OTP is aware that the Referral Bench has ordered the authorities of BiH to ensure that the protective measures decisions issued by the ICTY Trial Chamber in this case¹⁶ are applied. The BiH Law on Protection of Witnesses requires amendment in this regard.

B. The delay in the transfer of the defence case-files for two accused

10. The OSCE is concerned about the delays in the transfer of Defence case-files of the accused Gruban and Knežević (from ICTY assigned counsel to newly appointed BiH counsel), and considers that the prompt transfer of these files is an important factor in ensuring that the Defence has adequate time and facilities to prepare, in accordance with Article 6(3)(b) of the European Convention on Human Rights.¹⁷ The Report states that, on the basis of available information, the delay in the transfer of defence files does not appear to have been caused by any flaw in the transfer procedure as foreseen in the relevant Memorandum of Understanding

¹⁵ Report, p. 4.

¹⁶ Relating to material provided by the Prosecution to the Defence which cannot be disclosed to the public or any third party.

¹⁷ Report, p. 7.

(“MOU”) between the BiH Criminal Defence Section (“OKO”) and the ICTY Office of Legal Aid and Detention (“OLAD”), but rather related to logistical problems.¹⁸

11. The OTP is aware that subsequent to the signing of the MOU, the Referral Bench established the procedure to be followed in relation to the transfer of Rule 11*bis* case-files (“transfer procedure”). With respect to the accused Knežević, the case-file has been transferred to the newly appointed Defence Counsel.¹⁹ With respect to the accused Gruban, the OTP is aware that the transfer procedure has not been completed by defence counsel.

12. The OTP agrees with the OSCE’s conclusion that the delay in the transfer of Defence case files is preventable in future cases by better co-ordination between the OKO and OLAD, and former and newly appointed defence counsels.²⁰

13. Finally, the OSCE recommends that an ICTY “Liaison Judge” be appointed to work out the Preliminary Hearings Judge of the BiH State Court to smooth out any logistical matters relating to the transfer procedure.²¹ For the reasons outlined above, the OTP does not regard this as necessary.

14. The “OSCE intends to share the Report with the domestic authorities, discuss its findings, and further advocate for the implementation of its recommendations to improve the justice system.”²² The OTP intends discussing the matters raised in the report with the OSCE, the POBiH and other judicial actors, including OKO and OLAD.

15. The OTP understands and gives due regard to the issues identified in the OSCE report which are of value for the ICTY and local actors, however, the OTP considers that these issues do not appear, at this time, to affect the four Accused’s right to a fair trial.

¹⁸ Report, p. 8.

¹⁹ Report, p. 7.

²⁰ Report, p. 8.


²¹ Report, p. 7.

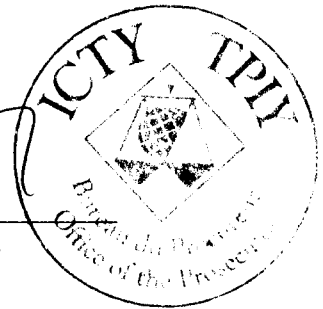
²² Report, p. 3.

16. Attached to this report and marked as Annex A is a copy of Part I of the Report. Part II of the Report consists of summaries of the principal hearings, submissions by the parties, and decisions of the Court. The OTP will provide Part II of the Report if the Referral Bench deems it necessary.

17. Pursuant to Article 229(4) of the BiH Criminal Procedure Code, the trial should commence by 28 October 2006.

Word count: 1,778.


Carla Del Ponte
Prosecutor



Dated this third day of October 2006
At The Hague
The Netherlands

INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-02-65-PT

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
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DUŠKO KNEŽEVIĆ

ANNEX
TO
PROSECUTOR'S SECOND PROGRESS REPORT



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

**First Report in the
Željko Mejačić et al. Case
Transferred to the State Court pursuant to Rule 11bis**

September 2006

EXECUTIVE SUMMARY

The case against Željko Mejačić, Momčilo Gruban, Dušan Fuštar and Duško Knežević (*Mejačić* case, “Suspects” or “Defendants”) is the third one referred 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 submitted by the OSCE to the ICTY Prosecutor’s Office in this case, spanning the period between the first appearance of the Defendants before the court in connection to their pre-trial detention until the plea-hearing.

During the reporting period, the OSCE identified two issues, whose resolution would greatly improve the effectiveness of the transfer procedure in the future. The first concerns the need for clarification on how the protective measures which were originally ordered by the ICTY are to be implemented in BiH and how the two jurisdictions (those of the ICTY and of the State Court, respectively) interact on the matter of witness protection. The second issue relates to the unjustifiably long delay in the transfer of the Defence files from ICTY Counsel to the newly appointed ones by the State Court. At the end of its analysis of these issues, the Mission makes a side note which refers to certain of its findings and recommendations that were included in the Third OSCE Report in the case of Radovan Stanković, which was submitted confidentially on 15 September 2006.

The Organisation notes with satisfaction that the problems underlined in the First OSCE Reports in the *Stanković* and *Janković* cases that concerned the manner in which the State Court ordered and reviewed pre-trial custody did not arise in the *Mejačić* case. In the present case, custody was requested, ordered and reviewed on the basis of the BiH CPC, also in line with OSCE recommendations in the previous reports.

OSCE has been able to draft this Report, thanks to the full co-operation that it enjoyed from the Preliminary Proceedings Judge in this case, and the other officials at the State court. However, the OSCE has been denied access to the case-file by the Preliminary Hearing Judge. As a result, the Mission has been unable to review relevant information and documentation that is vital to its assessment of whether the proceedings in the *Mejačić* case comply with human rights and rule of law standards after the Preliminary Hearing Judge denied access to the case file.

The proceedings until present may be summarized as follows:

- The four Defendants were transferred to the BiH authorities on 9 May 2006. Unlike the previously transferred cases, this one was assigned to a Preliminary Proceedings Judge, competent to act during the investigative procedure. On 9 and 10 May, a hearing on pre-trial custody took place, after which the Judge ordered one-month pre-trial custody based on the risk of flight and the risk to public security; she also urged the Prosecution to submit the adapted/amended indictment within this period. The Decision on custody was upheld on appeal, but only on the ground of the risk of flight. On 8 June 2006, the Appellate Panel held a hearing to discuss the Prosecution’s motion to extend custody for two additional months in order to allow sufficient time to adapt the indictment. The motion was partially granted, as custody was extended for one month. Appeals against this Decision were rejected.
- On 8 May and 30 June 2006, respectively, the Prosecution filed two motions requesting the Preliminary Proceedings Judge to order witness protection measures. The first motion was rejected on 11 May 2006, while the second was granted after being discussed in a hearing on 7 July.
- On 7 July 2006, the Prosecutor submitted the adapted indictment, which presents five counts of crimes against humanity under Article 172 BiH CPC, and includes additional charges of torture, imprisonment and sexual violence as crimes against humanity. The Preliminary Hearing Judge accepted the indictment and confirmed the additional charges on 14 July 2006. At the plea-hearing held on 28 July 2006 the Defendants entered a plea of not guilty to all counts.

The Mission would like to note with concern the following: The international Preliminary Hearing Judge in the *Mejačić* case has questioned the mandate of the OSCE Mission to BiH under Annex Six of the Dayton Peace Agreement to access the case-file in criminal cases. It appears that the Judge in question considers the whole case-file to be confidential, not only in this case, but in general. He

expressed the position that the Mission can adequately fulfil its human rights monitoring mandate under Dayton by following only sessions open to the public and by being allowed to attend closed sessions.

As a consequence of having been denied access to the case-file from the time this Preliminary Hearing Judge took over in these proceedings, the Mission has not been able to monitor the case effectively during this time. For instance, OSCE is not aware, or is insufficiently informed through no fault of its own, whether the issues of concern – identified in this Report at earlier stages of the proceedings - remain the same, have been resolved, or, more worryingly, have been aggravated.

It should be stressed that this constitutes the first time that the Mission's access to the court case files has been hindered or questioned in the ten years during which it has monitored trials. OSCE considers access to material in case files to be an integral part of its monitoring activities, necessary to fulfil its mandated task properly. The OSCE does not seek to have access to confidential and other information within the private domain, such as names of protected witnesses, for these are not relevant to its work. However, in case such information comes into its possession, the Mission adheres by the principle of confidentiality and has proper procedures in place to safeguard it.

In order to resolve the problem, the Head of the OSCE Mission to BiH has requested from the President of the State Court to address the matter and to clarify the basis and extent of OSCE's mandate to the judges of the War Crimes Chamber. Additionally, among the numerous statements supporting the monitoring of war crime cases also before the Court of BiH at Madame Carla Del Ponte's address to the OSCE Permanent Council on 7 September 2006, the Ambassador of the US Mission to the OSCE referred to this very impediment and urged the President of the State Court and the High Representative to look into this issue as soon as possible. It is hoped that the matter will be resolved promptly.

OSCE intends to share this report with the domestic authorities, discuss its findings, and further advocate for the implementation of its recommendations to improve the justice system.

PART I

INTRODUCTION

In this Report, the Mission examines two issues of note: The first concerns the application of protection measures ordered by the ICTY after the transfer of a case is effected. Although this matter is mostly related to transferred cases, it adds a piece to the puzzle of witness protection issues that need improvement. The second issue refers to delays in the transfer of the defence case-files for two of the attorneys *ex officio* engaged to represent Defendants Gruban and Knežević.

At the end of Part I of this Report, OSCE includes a side note relating to Article 12 of the BiH Law on Protection of Witnesses Under Threat and Vulnerable Witnesses (hereinafter “Law on Protection of Witnesses” or “LPW”) being used to prevent the disclosure of a witness’ personal details exclusively from the public before a witness testifies. This side note reiterates and supplements certain of the Mission’s findings and recommendations that formed the Third OSCE Report in the *Stanković* case, which was submitted confidentially to the ICTY Chief Prosecutor on 15 September 2006.

A) PROBLEMS ARISING FROM THE LACK OF HARMONISATION BETWEEN ICTY AND STATE COURT WITNESS PROTECTION ORDERS

A distinct issue that arose in the *Mejakić* case brought to light yet another area in which the procedure surrounding the transfer of a case-file would benefit from further clarification. Namely, the majority of the witnesses protected by the ICTY in the *Mejakić* case informed the State Court Prosecutor’s Office that they no longer required protection. This has highlighted the question of whether the ICTY Referral Bench intends for the State Court to be fully responsible and competent to decide on procedural issues relates to the protection of witnesses after the transfer of a case is effected, or whether the Referral Bench retains jurisdiction over its witness protection orders, and if so, to what degree. In either case, there appears to be a need for the Referral Bench to spell out more clearly how it envisages witness protection procedures to function after referral. Clarifying any grey areas in the interrelation between the ICTY and the State Court protection procedures will better ensure that the interests of the accused, of the witnesses, and of the public are safeguarded, as well as better serve the rule of law, by avoiding any dangers arising from dissimilar practices when protecting ICTY witnesses in domestic trials. More generally, there seems to be merit in seriously and urgently considering proposals for better harmonisation of procedural issues in transferred cases between the ICTY and the State Court.

i) The relevant facts in the *Mejakić et al.* case

The BiH Prosecutor’s Office in the *Mejakić* case filed two motions for protective measures to the Preliminary Proceedings Judge:

The first, dated 8 May 2006, requested that the State Court issue an order under domestic law effectuating the protective measures that were ordered by the ICTY in connection to witnesses that are to testify in the said case, as well as order additional protective measures. These measures are related to witnesses protected in the *Mejakić* case, but also witnesses assigned protective measures in other related ICTY proceedings.¹ The Prosecution argued that the witnesses in question are vulnerable and under threat, and it asked the Preliminary Proceedings Judge to grant the measures foreseen under Articles 12 and 13 LPW. The motion considered as additional legal bases the ICTY Referral Bench Decision of 20 July 2005 and Article 29(2) of the ICTY Statute. The Referral Bench Decision ordered that the protective measures granted to victims and witness as set forth in a confidential Annex are to remain in force, and directed requests for protective measures pending before the ICTY to be re-submitted to the State Court for determination.² Article 29(2) of the ICTY Statute obliges States to comply without undue delay with any request for assistance or an order issued by a Trial Chamber.

¹ The protective measures in those cases include closed sessions and image distortion.

² *Prosecutor v. Mejakić et al.*, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11bis, 20 July 2005.

The Preliminary Proceedings Judge refused this motion on 11 May 2006, because the Prosecution did not establish that the witnesses in question either were under threat or that the disclosure of their personal details would seriously endanger them. Therefore, the requirements set under Article 12 LPW were not met. However, with regard to the standing nature of the protective measures ordered by the ICTY in *Mejakić et al.*, the Preliminary Proceedings Judge underlined that these orders still bind the parties after the referral of the case to the BiH authorities. Moreover, the Judge explained that the same orders do not envisage any obligation for the State Court and, therefore cannot constitute a legitimate basis for the implementation of protective measures under domestic law.

On 30 June 2006, the Prosecutor filed confidentially a second motion, seeking pre-trial protective measures under Article 12 LPW for 55 witnesses, which was discussed during a public hearing on 7 July 2006 before the Preliminary Proceedings Judge. On the same day, the Judge issued a written Decision provisionally ordering that all 55 witnesses be assigned pseudonyms and that their personal and identifying details not be disclosed to the public according to Article 12 LPW. Furthermore, the Decision stated that the requirements for applying Article 12 LWP had not been met for 30 of these witnesses who, according to the Prosecutor, had been contacted and had refused to give their consent to the proposed protective measures. Since Article 5a LWP sets this consent as a condition for the implementation of the protective measures on the domestic plane, the application of measures under Article 12 LPW for those witnesses was found to be inappropriate.

Nevertheless, with the consent of the Defence, the Judge decided to grant provisionally the requested measures also for these 30 witnesses, noting that the implementation of these measures was a compromise between the requirements of domestic law and the ICTY orders, since these witnesses are protected by measures that were set out in the ICTY Order on the Prosecutor's Motion for Protective Measures dated 13 June 2002 ICTY Order in the *Mejakić et al* case. The Judge found that the Referral Bench has retained jurisdiction over its protective order and exercised it with its Order dated 30 June 2006, where it also ordered the authorities of BiH to ensure that the protective measures in the June 2002 ICTY Order are applied. The Judge expressed the Court's expectation that the parties "co-operate in expeditiously petitioning or requesting the petition of the ICTY Referral Chamber to consider lifting the continuing order as to these 30 witnesses so that this court may conform this order to the requirements of the law of BiH and the witnesses' right to refuse protective measures may be respected."³

Lastly, it may be noted that the 20 July 2005 Referral Bench's Decision to refer the case makes a general declaration that the referral of this case shall not have the effect of revoking the previous Orders and Decisions of the Tribunal in this case, whereas it will be for the State Court or the competent national authorities of Bosnia and Herzegovina to determine whether different provisions should be made for the purposes of the trial in this case in BiH. However, the same Decision specifically orders later in its disposition that the protective measures granted to victims and witnesses are to remain in force and that requests for protective measures pending before the Tribunal be re-submitted to the State Court.

N.B. It should be stressed that from the point in time that OSCE was denied access to the case-file by the Preliminary Hearing Judge (on 11 July 2006), the Mission is no longer aware of any submissions or decisions relating to witness protection measures that have been subsequently made.

³ Decision on the motion for protective measures by the State Court Preliminary Proceedings Judge in the *Mejakić et al* case, dated 7 July 2006.

ii) Assessment of the application of protective measures

When considering the aforementioned decisions, general principles of law, and practicality, one may reach different conclusions as to how much discretion the Referral Bench has intended to give to the State Court in connection with ICTY-ordered protection measures, in case there is a need to revoke, modify, or augment them.⁴ This is a matter that requires prompt clarification by the Referral Bench, as well as better co-ordination between the Bench and the State Court justice system. The need for co-ordination derives from the differing requirements for application of protective measures as set out in the ICTY provisions and in the national legislation. One should also consider that the circumstances between the time the protective measures were ordered at the ICTY and the time the case arrives to be tried before the State Court may very well change. It should be noted that the OSCE has based its assessment on the documents that were available in the case-file, before such access was denied by the Preliminary Hearing Judge.

On the one hand, a plain and strict reading of the Referral Bench's orders suggests that the Bench leaves no leeway to the State Court to revoke the protection of ICTY witnesses or protect them in a different manner than that of the ICTY. According to this interpretation, the Referral Bench would retain jurisdiction for any different enforcement of these measures, even after the transfer of cases. Although the Referral Bench did not declare explicitly its continuing jurisdiction over this matter, that is what the Preliminary Proceedings Judge in *Mejakić* opined as regards the *revocation* of ICTY-ordered measures. In fact, there may be some merit in believing that the Referral Bench is cautious about a domestic jurisdiction revoking the ICTY protective measures. Possible reasons for such caution could be the fear that the withdrawal of the witnesses' consent is not informed, or that the authorities are unwilling to provide the same level of protection as at the ICTY.

However, it is unclear what should be done in cases in which there is a request or need for augmentation or modification of the ICTY measures. The ICTY orders do not differentiate between revocation on the one hand and other modifications on the other, or between the use of pseudonyms on one hand and other trial-related measures on the other. So it could be said that based on the same principle as for the revocation of measures, any requests for modification or augmentation of protective measures should also be addressed to the Referral Bench, regardless of whether it involves pseudonyms or any other measures.

On the contrary, though, the trials of other Rule 11*bis* cases suggest that there is no involvement of the Referral Bench if the measures are not revoked, but rather augmented, and if they do not involve the disclosure of personal data to the public. For instance, to the Mission's knowledge, there has been no request to the Referral Bench to allow the State Court to augment the protective measures in the transferred case of Radovan Stanković where all witnesses are heard in closed sessions, even witnesses that the ICTY had deemed adequately protected through less strict measures. By the same token, there is no information indicating that the Referral Bench has deemed this augmentation by the State Court Trial Panel as a breach of its order. It is not certain whether the ICTY-ordered measures are then to be perceived as the minimum protection the Tribunal thinks appropriate for its witnesses, and therefore the State Court has discretion in ordering stricter measures or different measures of similar level of protection as the ICTY ones.

If the Referral Bench intended to retain jurisdiction over some or all actions requiring the modification of protective measures, it is unclear why it did not state so explicitly in its orders, why it did not seek to establish a clear procedure by which the interested parties or domestic court seeking to modify the protective measures can address the Bench, or why it did not clarify how the two parallel jurisdictions (that of the Referral Bench and that of the State Court enforcing the ICTY measures) should interact. Having parallel jurisdictions over protective measures would entail additional administration for both the ICTY and the domestic actors. Furthermore it can give rise to delays in the transferred cases and serious complications regarding the respect for the rule of law and the respect of the adjudicating

⁴ It should be noted that the ICTY Rules of Procedure and Evidence, which foresee the variation of protective measures before the ICTY, are not binding upon the State Court and have not been invoked in any manner in the referral decisions.

court's discretion. For instance, if the Defence motions for the revocation of domestically effectuated ICTY measures and the State Court accepts the motion, the Defence would still need to motion for the same request before the ICTY. Evidence of such problems is the *Mejakić* case, where the State Court felt compelled to provisionally protect witnesses who no longer want to be protected, despite the fact that witnesses' consent is an explicit requirement of the domestic law and an implicit one in relevant ICTY practice. Resolving the situation could then depend on how promptly the parties make a motion to the Referral Bench, and whether the ICTY itself withdraws its measures.

Conclusion/Recommendations

In summary, there is a need for better clarification of which court has jurisdiction, and to which extent, over protective measures ordered by the ICTY. If both the ICTY and the State Court have competence to decide on the application of these measures, the interrelation of these two jurisdiction should be better defined.

Therefore, the OSCE recommends that the Referral Bench clarify promptly whether, or to which extent, it retains jurisdiction after the transfer of a case on the application of witness protection measures that were ordered by the ICTY. One would assume that the Referral Bench would consult with the State Court in this process. In case the ICTY indeed retains any such competence over protective measures, the Tribunal and the State Court are urged to harmonize their respective regimes on the application of witness protection measures.

As part of resolving this problematic issue, the Mission notes a proposal that the Preliminary Proceedings Judge in the *Mejakić* case addressed to the President of the State Court, and shared with the OSCE on 14 June 2006 in the understanding that it could be disseminated further. The Judge suggested that it would be extremely helpful if the ICTY could appoint a liaison judge after the Referral Bench's Decision to transfer a case to BiH. This liaison judge could work with the preliminary proceedings judge of the State Court to smooth out any logistical matters relating to the transfer procedure. Such matters could also include the harmonisation of outstanding protective orders, the facilitation of uninterrupted legal representation of the suspects, the timely delivery of the prosecution file, etc. OSCE urges the ICTY Referral Bench and the State Court President to discuss ways in which the two jurisdictions can achieve better co-ordination as regards transferred cases, based on the aforementioned proposal or any other alternatives to it.

B) DELAYS IN THE TRANSFER OF DEFENCE FILES FROM THE ICTY TO THE BIH COUNSEL

OSCE is concerned about the delays affecting the process of transferring defence files from the Defence Counsel who represented Defendants Gruban and Knežević before the ICTY to those who were selected to represent them *ex officio* before the State Court. The prompt transfer of these files is an important factor in ensuring that the Defence has adequate time and facilities to prepare, in accordance with Article 6(3)(b) ECHR.

At the hearing of 7 July 2006, the two BiH Counsel stated that they had not received yet the Defence files from the previous ICTY lawyers. Asked by the Preliminary Proceedings Judge why, one of the BiH lawyers replied that he had not signed the statement of confidentiality required by the ICTY for the transfer of confidential documents included in the defence files, since he had not received any instructions in that regard. OSCE was informed by OKO (Criminal Defence Section) that, after one of the BiH lawyers signed the confidentiality statement, the transfer of the defence files to him was completed by the end of August. However, until mid-August, the other BiH lawyer had not received the files, as he had not signed the mentioned statement. As OSCE has not had access to the case file since the filing of the indictment, it has sought to inquire through OKO whether the second lawyer has finally obtained the defence file; OKO has responded that they are not involved in the communication between the ICTY and the BiH lawyer on this occasion. OSCE will seek other means to obtain the relevant information.

On the basis of the available information, the delay in the transfer of defence files does not appear to have been caused by any flaw in the transfer procedure as foreseen in the relevant Memorandum of

Understanding between OKO and OLAD. Rather, the delay in question seems to be related to a synergy of logistical problems, although they may not entirely explain the very long period of time that it has taken for the BiH lawyers to sign the confidentiality statements. One matter to be considered in this regard is the fact that these BiH lawyers assumed their duties only after the transfer of the Defendants, hence only then could the process of transferring the case-files to them start. Additionally, there are indications that there may have been a lack of communication between the ICTY and the BiH lawyers, and periods of inactivity due to summer vacations.

In conclusion, the OSCE does not have adequate information on the reasons for the delay in transferring the defence files on these two occasions. However, the obvious reasons appear to be preventable in future cases. First, there seems to be room for better co-ordination between OKO and OLAD in order to ensure the timely appointment of new counsel for transferred defendants, if necessary, as well as adequately informing them of the process of transfer of defence files. Second, counsel should comply with their duties to provide effective representation of defendant's interests; if there is any reason to suspect that counsel is not exercising their duties diligently in the procedure of case-file transfer, these matters may be for the counsels' disciplinary bodies to examine, and for the court to be informed of. On the last point, OSCE reiterates that there is merit in discussing the proposal of the Preliminary Proceedings Judge for a liaison judge who, among other issues in the transfer process, could also play an important role in the effective transfer of the parties' case files.

C) SIDE NOTE ON THE PROTECTIVE MEASURE OF NON-DISCLOSURE OF THE PERSONAL DETAILS OF A WITNESS TO THE PUBLIC

As a side note to the issues discussed herein, OSCE would like to remark that the Preliminary Proceedings Judge in the *Mejakić* case used Article 12 LPW as legal basis to prevent the disclosure of witnesses' personal details to the public, although only the current whereabouts of these witnesses are to be kept confidential from the suspects. In its Third OSCE Report in the case of Radovan Stanković, which was recently submitted confidentially to the ICTY Office of the Prosecutor, the Mission raised the question whether Article 12 LPW can indeed be used to protect the personal details of a witness not from the Accused, but exclusively from the public.

Supplementing the issues that are raised in Third OSCE Stanković Report, the Mission is of the view that the Law on Witness Protection does not appear to intend Article 12 LPW to be the equivalent of Article 13(1) LPW for the period before the witness testifies. A clear indication for that is the fact that Article 12 LPW only focuses on the late disclosure of the witnesses' personal data to the accused, hence its use should be limited only to that purpose. Protection of such data from the public appears to be merely derivative from and dependant on the need to protect them from the accused. First, Article 12 LPW is titled "Limitation of the right of an accused and his defence attorney to inspect files and documentation," which makes its purpose self-evident. But apart from its title, the provisions of this Article do not treat the opposing parties equally, unlike Article 13 LPW: Article 12 LPW only foresees the prosecution motioning for its measure, while Article 13 can be ordered *ex officio* or on the motion of either party. Moreover, the measure of Article 12 LPW *may* be revoked upon the motion of the defence but *shall* be revoked upon the Prosecutor's motion; for the revocation of measures in Article 13 LPW, the court has the same discretion irrespective of which party motions for it. In conclusion, there are strong arguments urging against the use of Article 12 LPW in cases where the prosecution seeks the protection of witnesses' names and other personal details only or mainly from the public before the witnesses testify.

There appear to be no valid reasons against ordering such protection under Article 13(1) LPW if its conditions are met before the witness testifies, to the extent that the court can assess in advance that the danger claimed by the party would persist after the testimony is given. One should not forget that if such danger no longer exists after the testimony, the measure can always be revoked.

OSCE reiterates the following recommendations that were included in the confidential Third OSCE Report in the *Stanković* case: The need for the Ministry of Justice to establish promptly a working group to review thoroughly and amend the Law on Witness Protection, in order to improve its clarity, effectiveness, and human rights compliance; until the amendment of the Law on Witness Protection is

effected, it would be useful if the Ministry of Justice would formulate and issue detailed guidelines on how Articles 12 and 13 LWP should be interpreted by the State Court, so as to achieve a more uniform application of these provisions. In this regard, OSCE welcomes the information by the Preliminary Proceedings Judge in the *Mejakić* case, that there are ongoing efforts among certain judges of the State Court to issue rules of procedure as prescribed by Article 25 LPW, which should ensure more appropriate use of the means to protect witnesses.