

03 JULY 2007

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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 July 2007

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

PUBLIC FILING

PROSECUTOR'S FIFTH PROGRESS REPORT

The Office of the Prosecutor:
Ms. Carla Del Ponte

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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PROSECUTOR'S FIFTH 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") the Prosecutor hereby files her fifth progress report in this case.
2. The Organisation for Security and Co-operation in Europe's Fourth Report in this case¹ notes two issues of interest.
3. First, the Report reiterates OSCE's concerns regarding the vague justification of pre-trial custody previously mentioned in the *Janković* and *Ljubičić* cases as well as in the previous reports in the *Mejakić et al* case. OSCE finds problematic that the Court introduced a new fact to support the existence of threat to public and property security.²
4. Second, OSCE expresses concern regarding the fact that the Trial Panel has not informed injured parties about their right to file compensation claims, even when injured parties expressly asked for more information regarding this matter.

¹ OSCE's Fourth Report in the *Željko Mejakić et al*. Case Transferred to the State Court pursuant to Rule 11 *bis*, June 2007 ("Report").

² Report, p. 2. The Court found that "the fact that a large number of witnesses in this case opted to testify under pseudonym, or with some protective measures, [is] yet another indicator of the fear for their safety [...]."

5. The Prosecutor understands and gives due regard to the issues identified in the Report and considers them to be of value for the local actors. However, at present those issues do not appear to affect the right to a fair trial of these four Accused.

6. The OSCE summarises the proceedings in the *Mejakić et al.* case to date as follows:³

- During the reporting period, 18 main trial hearings have been held. In total, 17 prosecution witnesses have been heard. Five witnesses testified protected from the public through the assignment of pseudonyms and the use of a variety of means precluding their visual identification by the public. The hearings were mainly held in public. The public was excluded only when the use of protective measures was discussed and for part of the testimony of three of these protected witnesses, to avoid revealing their identity.
- On 4 May 2007, the Trial Panel issued in writing a Decision dated 18 April to refuse the Defence motion requesting the Court to be supplied with the translations of transcripts of earlier testimonies of witnesses given before the ICTY. The Panel found that the Prosecutor complied with his obligation of disclosure by supplying the Defence with technically acceptable audio-visual recordings in B/C/S. It further found that the Prosecutor's Office would need to have any witnesses' testimonies that it decides to tender into evidence translated in one of the local languages, unless the Defence accepts an English version. On the other hand, the Defence can use and submit into evidence documents in English language.
- The Defendants remain in custody on the grounds of risk of flight and threat to public security, as initially ordered by the Preliminary Hearing Judge.
- On 1 June 2007, Defence Counsel representing Željko Mejakić and Dušan Fuštar filed an Application with the European Court of Human Rights (ECHR). The Applicants claim a violation of Article 5(3) ECHR, because of the unreasonable length of the Defendants' pre-trial custody, and of Article 6(1) ECHR, because of the failure of the State Court and the Constitutional Court of BiH to give reasons for their decisions when rejecting the Defendants' arguments against the length of detention. The Applicants asked the European Court to find the State of BiH liable for mentioned breaches and oblige it to pay adequate compensation, as well as to take interim measures and order

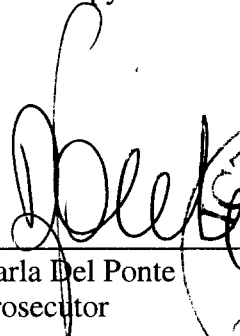
³ Report, p. 1.


Bosnia and Herzegovina to release the Defendants or to place them under less stringent measures such as house arrest.

- The next main trial hearing is scheduled for 27 June.

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

Word count: 652


Carla Del Ponte
Prosecutor



Dated this third day of July 2007
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 A
TO
PROSECUTOR'S FIFTH PROGRESS REPORT



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

Fourth Report in the Case of

Željko Mežakić et al.

Transferred to the State Court pursuant to Rule 11bis

June 2007

SUMMARY OF DEVELOPMENTS

The case against Željko Mejačić, Momčilo Gruban, Dušan Fuštar and Duško Knežević (*Mejačić et al.* case, "Accused" or "Defendants") is the third one referred from the ICTY to the State Court of BiH, pursuant to Rule 11bis of the ICTY Rules of Procedure and Evidence. This constitutes the fourth report submitted by the OSCE Mission to Bosnia and Herzegovina ("OSCE BiH" or "Mission") to the ICTY Prosecutor's Office in the *Mejačić et al.* case, covering the period between 21 March 2007 and 25 June 2007.

During this reporting period, OSCE BiH has noted two issues of interest. The first reiterates the problematic use of the potential threat to public and property security as ground for pre-trial custody, which has been already extensively analysed in previous OSCE BiH reports.¹ The present Report finds it problematic that the Court refers to the protective measures applied to certain witnesses as an example for application of this ground. The second concern relates to the fact that the trial panel has not been instructing or giving information to injured parties regarding their right to compensation, even when injured parties expressly asked so.

The proceedings within the reporting period may be summarised as follows:

- During this reporting period, 18 main trial hearings² have been held. In total, 17 prosecution witnesses have been heard. Five witnesses testified with protections including the assignment of pseudonyms and the use of a variety of means to prevent their being visually identified. The hearings were mainly held in public with exclusions only occurring when the use of protective measures was discussed and for parts of three protected witnesses' testimony (to avoid revealing their identity).
- On 4 May 2007, the Trial Panel issued in writing a Decision dated 18 April to refuse the Defence motion requesting the Court to be supplied with the translations of transcripts of earlier testimonies of witnesses given before the ICTY. The Panel found that the Prosecutor complied with his obligation of disclosure by supplying them with technically acceptable audio-visual recordings in B/C/S. It further concluded that the Prosecutor's Office would need to have any witnesses' testimonies that it decides to tender into evidence translated in one of the local languages, unless the Defence accepts an English version. On the other hand, the Defence can use and submit into evidence documents in English language.³
- The Defendants remain in custody on the grounds of risk of flight and threat to public security, as initially ordered by the Preliminary Hearing Judge.
- The Mission would like to note that on 1 June 2007, Defence Counsel representing Željko Mejačić and Dušan Fuštar filed an Application to the European Court of Human Rights (ECtHR). The Applicants claim a violation of Article 5(3) ECHR, because of the unreasonable length of the Defendants' pre-trial custody, and of Article 6(1) ECHR, because of the failure of the State Court and the Constitutional Court of BiH to reason their decisions when rejecting the Defendants' arguments against the length of detention. The Applicants asked the European Court to find the State of BiH liable for mentioned breaches and oblige it to pay adequate compensation, as well as to take interim measures and order Bosnia and Herzegovina to release the Defendants or to place them under less stringent measures such as house arrest.
- The next main trial hearing is scheduled for 27 June.

¹ See for instance, OSCE BiH, First Report in the *Paško Ljubičić* Case Transferred to the State Court pursuant to Rule 11bis, December 2006.

² On 12, 13, 18, 19, 25 and 26 April; 3, 7, 8, 17, 22, 24 and 29 May; 4, 5, 11, 12 and 14 June 2007.

³ It may be of note that a similar issue was raised in the case of *Paško Ljubičić*, and in that case the Court decided to appoint an additional defence counsel of the Accused's choice, who speaks English and was able to prepare for the trial in a minimum period of time. For further reference see OSCE-BiH, Third Report in *Paško Ljubičić* Case Transferred to the State Court pursuant to Rule 11bis, June 2007

PART I

A. ISSUES CONCERNING CUSTODY

OSCE BiH reiterates its concerns and conclusions already expressed in previous reports on Rule 11bis cases⁴ regarding the justification and application of the threat to public or property security as grounds for pre-trial custody. The Decision mentioned below provides yet another example of the Court using this ground in a manner that does not comply with the standards envisaged in international human rights jurisprudence.

In the present case, pre-trial custody was ordered against the Defendants upon their arrival to BiH, but the ground of threat to public security was added only after the acceptance and confirmation of the BiH indictment. This ground has been used ever since to continue detention.

In its recent Decision of 8 May 2007 on custody, the Trial Panel introduced a new fact to support the existence of threat to public and property security; namely, it found that “the fact that a large number of witnesses in this case opted to testify under pseudonym, or with some protective measures, [is] yet another indicator of the fear for their safety [...]”. The Trial Panel continued that:

“Finally, one should bear in mind that the protected object in the instant criminal offence is of greater social importance, and the offence is punishable according to both the applicable criminal laws of Bosnia and Herzegovina, and international law. This is corroborated by the fact that pursuant to Article 19 of the Criminal Code of Bosnia and Herzegovina, statute of limitations does not apply to the prosecution and execution of sentence for this type of criminal offences...”⁵

First, in general, it would appear that the fear for the security of witnesses relates more to the detention ground of Article 132(1)(b) BiH CPC foreseeing the risk of influencing the witnesses, and less to the threat against public and property security that a defendant’s release may pose, as in Article 132(1)(d) BiH CPC. It is unclear how the Trial Panel did not find the former ground as applicable, but relied on the latter. In this context, it should be noted that all the protected measures granted to witnesses in this case were aimed at protecting their identities from the public and not from the Accused, who knew the witnesses’ identities.

Second, although domestic law links the notion of threat to public and property security to the gravity of the criminal offence, international standards insist that a threat to public order should be based on facts capable of demonstrating that there is an actual threat and that it persists after the passage of time.⁶ At no point have the decisions on custody in this case demonstrated such an actual threat existing in case the Defendants are released.

Furthermore, although the Defence has submitted proposals for the application of alternatives to custody, such as house arrest, the first-instance decisions have not at all addressed such proposals, while the Appellate Panel has merely stated that alternatives were not sufficient, without further arguments justifying this position.⁷

⁴ See 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.

⁵ See Decision of 8 May 2007. Upon appeal by the Defence, the Appellate Panel agreed with the Trial Panel on 25 May.

⁶ *Letellier v. France*, ECtHR Judgement, 26 June 1991, para. 51.

⁷ It may be reiterated that one Defendant in this case was provisionally released by the ICTY in the past. Further, even at the ICTY where release is the exception, provisional release has been granted to defendants. For instance, recently several defendants in the *Milutinović et al.* and *Prlić et al.* cases were provisionally released pending proceedings.

Against this background, OSCE BiH reiterates the relevant recommendations included in its prior reports,⁸ particularly in relation to the removal of Article 132(1)(d) BiH CPC from the criminal procedure code, as the Human Rights Committee has also recommended in the case of Bosnia and Herzegovina. Furthermore, it is recommended that judges, prosecutors, and defence counsel give proper consideration to the application of prohibiting measures as alternatives to custody. If courts or prosecutors refuse to grant these measures, their opinion should be duly justified.

B. ISSUES REGARDING THE OBLIGATION OF THE COURT TO INFORM INJURED PARTIES ABOUT THEIR RIGHT TO COMPENSATION

The Mission has observed that the Trial Panel has not been informing duly the injured parties about their right to compensation, although criminal procedure specifically obliges the court to do so. In one instance when an injured party specifically inquired about their right to compensation, the Court replied in a vague and incomprehensible manner.

Law and General Practice

The Criminal Procedure Code of BiH obliges courts to deliberate during the criminal proceedings on claims under property law that have arisen because of the commission of the related criminal offence. This is foreseen as the rule, *unless* deciding on the property claim *will considerably prolong the criminal proceedings*.⁹

A claim under property law may pertain to the compensation of material or immaterial damage, recovery of items, etc.¹⁰ In fact, judges are obliged to inform injured parties in a criminal case about their right to file a compensation claim until the end of the main trial proceedings.¹¹ When injured parties are examined as witnesses, the law foresees that they be asked about their desires with respect to satisfaction of a property claim in the criminal proceedings.¹² This obligation also independently falls upon prosecutors questioning injured parties as witnesses. Moreover, prosecutors have a duty to gather evidence and investigate as necessary facts indicating whether the possible claim under property law is relevant to the criminal offence in question.¹³

At the State Court, compensation is usually not awarded through criminal verdicts. Rather injured parties are directed to file compensation claims in civil proceedings. This may be understandable, given the complex nature of compensation claims relating to suffering, or other immaterial damage, that occurred in the context of war crimes. However, in criminal cases including war crimes proceedings, there may be other forms of material damage that can be concretely and promptly assessed. The Mission has generally observed throughout the country that even in simpler criminal proceedings involving material damage, such as theft of movable property, judges direct property claims to civil proceedings, contributing to a massive backlog of civil cases -- last estimated at 1.8 million.

Facts in the *Mejakić* Case

In the instant case of *Mejakić et al.*, the Trial Panel has omitted to inform the injured parties appearing as witnesses about their right to file a compensation claim. Furthermore, at the hearing of 8 May 2007, after the witness/injured party completed her testimony, the Presiding Judge informed her about the right to be reimbursed transportation and other costs related to her testimony. When the witness asked

⁸ See OSCE-BiH, Second Report in the *Paško Ljubičić* Case - Transferred to the State Court pursuant to Rule 11bis, March 2007; OSCE-BiH, Third Report in the *Željko Mejakić et al.* Case - Transferred to the State Court pursuant to Rule 11bis, March 2007.

⁹ See Article 193(1) BiH CPC.

¹⁰ See Article 193(2) BiH CPC and the main Commentary to the CPC of BiH, Council of Europe, 2005, pp. 545 ff, at 549. The concept of "damage" is further defined in the Law on Obligations.

¹¹ See Articles 258(4) BiH CPC, 86(10), 195(4) BiH CPC.

¹² Article 86 (10) BiH CPC.

¹³ Article 197(1) BiH CPC.

about her right to compensation in general, the Presiding Judge responded: “That, when you get it, you will, naturally, be entitled to everything.”

The Mission is not aware of whether prosecutors involved in this case have, at any time, informed injured parties about their right to have civil compensation claims settled through criminal proceedings.

Assessment

The fact that the Court has not informed the injured parties during the hearings about their right to file compensation claims runs contrary to provisions of the BiH CPC expressly obliging the court to do so. This obligation has also been breached in the case of the Court providing the aforementioned vague and incomprehensible response to the one injured party who specifically inquired more information on the matter.

Conclusion - Recommendations

Criminal courts and prosecutors have a duty to properly inform injured parties of their right to have civil claims adjudicated in criminal proceedings. Should a court decide not to settle civil claims in this manner, it should inform the injured parties of its decision and direct them to claim compensation in independent civil proceedings. The law urges the authorities to provide such information when the injured party is present to give testimony. Authorities should use this opportunity, to the extent that it is not common for injured parties in war crimes cases to follow in person the proceedings at the State Court.

Finally, courts have a general duty to process civil compensation claims of injured parties during the criminal proceedings, if doing so would not considerably prolong the trial. This is all the more important since many injured parties lack the knowledge on how to proceed with an independent civil action and lack the financial resources to hire professional assistance to do so.

In BiH, although there was a project of one counsel providing free assistance to certain injured parties at cases before the State Court, this OHCHR project was terminated on 1 June 2007. To the knowledge to the Mission, OHCHR in BiH will cease its operations at the end of June 2007.

Previous reports of OSCE BiH have made a number of recommendations relating to victims' rights.¹⁴ The Mission further recommends that:

- Trial panels and prosecutors examining injured parties always comply with their obligation to instruct them about their right to file civil claims through the criminal proceedings, in a manner that they can understand, at the earliest possible opportunity, and particularly after their giving testimony in court. If the court decides not to adjudicate civil claims through the criminal trial, it should inform the injured parties and refer them to independent civil proceedings.
- Criminal courts should endeavour, to the extent possible, to adjudicate compensation claims within the context of criminal proceedings. Further, they should justify any decision not to.
- Judicial and Prosecutorial Training Centres should consider further developing judges' and prosecutors' skills to assess compensation claims within the context of criminal proceedings.

¹⁴ See Recommendations 4.5 and 5.6 of OSCE Report “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles”, March 2005. Also see OSCE Report “Plea Agreements in Bosnia and Herzegovina: Practices Before the Courts and their Compliance with International Human Rights Standards”, January 2006, page 26.

PART II

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Answer of the Prosecutor's Office to the Appeals of the Defence Counsel of Željko Mejačić, Dušan Fuštar and Momčilo Gruban against the Decision extending custody of 9 March 2007, dated 29 March 2007
- (ii) Main trial hearing, held on 12 April 2007
- (iii) Decision to dismiss of Goran Rodić as the additional Defence Counsel of Dušan Fuštar, dated 13 April 2007
- (iv) Decision appointing John R. Ostojić as additional ex officio Defense Counsel for the Accused Dušan Fuštar, dated 13 April 2007
- (v) Main trial hearing, held on 13 April 2007
- (vi) Appellate Panel Decision refusing as unfounded the Appeals of the Defence Counsels of the Accused Željko Mejačić, Dušan Fuštar and Momčilo Gruban against the Trial Panel Decision extending custody, dated 16 April 2007
- (vii) Main trial hearing, held on 18 April 2007
- (viii) Procedural decision on the Motion of the Defence to be supplied with translated transcripts of earlier testimonies before the ICTY, dated 18 April 2007
- (ix) Main trial hearing, held on 19 April 2007
- (x) Main trial hearing, held on 25 April 2007
- (xi) Main trial hearing, held on 26 April 2007
- (xii) Main trial hearing, held on 3 May 2007
- (xiii) Main trial hearing, held on 7 May 2007
- (xiv) Main trial hearing, held on 8 May 2007
- (xv) Decision of the Trial Panel extending custody, dated 8 May 2007
- (xvi) Appeal of Defence Counsel of Željko Mejačić and Dušan Fuštar against the Decision extending custody of 8 May 2007, dated 9 May 2007
- (xvii) Appeal of Defence Counsel of Momčilo Gruban against the Decision extending custody of 8 May 2007, dated 12 May 2007
- (xviii) Appeal of Defence Counsel of Duško Knežević against the Decision extending custody of 8 May 2007, dated 12 May 2007
- (xix) Answer of the Prosecutor's Office to the Appeal of Defence Counsel of Momčilo Gruban against the Decision extending custody of 8 May 2007, dated 15 May 2007
- (xx) Main trial hearing, held on 17 May 2007
- (xxi) Main trial hearing, held on 22 May 2007
- (xxii) Main trial hearing, held on 24 May 2007
- (xxiii) Appellate Panel Decision refusing the Defence Counsels Appeals against the Trial Panel Decision extending custody of 8 May 2007 as unfounded, dated 25 May 2007
- (xxiv) Main trial hearing, held on 29 May 2007
- (xxv) Application to the European Court of Human Rights for violations of Articles 5(3) and 6(1) of the ECHR, submitted by the Defence Counsel of Željko Mejačić and Dušan Fuštar, dated 1 June 2007
- (xxvi) Main trial hearing, held on 4 June 2007
- (xxvii) Main trial hearing, held on 5 June 2007
- (xxviii) Main trial hearing, held on 11 June 2007
- (xxix) Main trial hearing, held on 12 June 2007
- (xxx) Main trial hearing, held on 14 June 2007