



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 April 2008

THE PROSECUTOR

v.

ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

PUBLIC FILING

PROSECUTOR'S EIGHTH PROGRESS REPORT

The Office of the Prosecutor:
Mr. Serge Brammertz

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PUBLIC

PROSECUTOR'S EIGHTH 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 eighth progress report in this case.
2. The Decision on Referral requires that following the initial report, six weeks after transfer of material, the OTP must file a report every three months on the course of the proceedings before the State Court of Bosnia and Herzegovina.²
3. The OTP filed its seventh progress report on 3 January 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 seventh report on 28 March 2007.⁴ The Report outlines the main findings of trial monitoring activities to date in the *Mejakić et al* case, from the perspective of international human rights standards.

¹ *Prosecutor v. Željko Mejakić 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 Mejakić et al*, Case No. IT-02-65-PT, Prosecutor's Seventh Progress Report, 3 January 2008.

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

5. The OSCE summarises the proceedings in the *Mejakić et al.* case to date as follows:⁵

- During the reporting period 17 main trial hearings were held. The public was excluded only during the discussion about the identity of protected witnesses or measures of witness protection. Fourteen defense witnesses and one expert witness were heard. Of those witnesses, 12 witnesses testified in public while 2 witnesses testified under a pseudonym and subject to a restriction on publishing information which might reveal their identity;
- The Trial Panel appointed new ex officio additional counsels to Dušan Fuštar (Zlatko Knežević) and Momčilo Gruban (Goran Rodić). Jovo Djukanović, who was a previous counsel to Dušan Fuštar was appointed as a judge of the Prijedor Basic Court while Veljko Kondić, previous counsel to Momčilo Gruban was dismissed due to ongoing criminal proceedings against him for crimes against humanity committed in the Ključ Municipality in 1992;
- The Accused remain in custody as the Trial Panel concluded that custody is still justified on the basis of the risk of flight and threat to public security;
- The next main trial hearing is scheduled for 10 April 2008.

6. OSCE has identified one issue of concern which raises a need for further clarification from the trial panels concerning the rights and obligations of accused who testify in their own defence.⁶ The Accused Željko Mejakić decided to testify in his own defense and was not compelled to take an oath to tell the truth but was warned by the Trial Panel that he must tell the truth without withholding relevant information and that giving false statement is a criminal offence.⁷

7. Article 261 of the Criminal Procedure Code of BiH (“CPC”) enumerates evidence which should be presented in the proceedings. Testimony of an accused has not been considered in this provision. The OSCE reports that that the Plenary Session of the judges of the State Court determined that when a Defence submits a motion to examine an accused in his own trial, the accused should be heard in the capacity of a witness.⁸ However, according to the OSCE, the BiH Constitutional Court held that warning that the accused must tell the truth and can be prosecuted for giving false

⁵ Report pp. 1,2.

⁶ Report, p.1

⁷ *Ibid.*

⁸ *Ibid.*

statements or asking the accused to take an oath “would, in essence, be in contradiction to the right of the accused against self-incrimination”.⁹ This position is shared by the commentaries to the CPC.¹⁰

8. The OSCE notes that relevant judicial actors should formulate a concrete practice on how defendants should testify and that it should be consistent with holding of the BiH Constitutional Court. Although the Prosecutor shares this view, he also agrees with the findings of the BiH Constitutional Court in the decision cited above wherein it held that “...suggesting and carrying out this type of evidence, regardless how the first instance court named it, in itself is not in collision with any of the elements of a right to a fair trial as prescribed in Article 6 of the European Convention”.¹¹ Therefore, the Prosecutor considers that this issue at this moment does not appear to affect the rights of the accused to a fair trial.

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

Word count: 800



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

⁹ Report p. 2.

¹⁰ *Ibid.*

¹¹ Decision of the Constitutional Court of BiH, case *BiH Federation v. Pendek et al.*, Case No. AP-2632/05, 20 September 2005, para 25 (unofficial translation)

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ANNEX A
TO
PROSECUTOR'S EIGHTH PROGRESS REPORT



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

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

Transferred to the State Court pursuant to Rule 11bis

March 2008

SUMMARY OF DEVELOPMENTS

The case against Željko Mejačić, Momčilo Gruban, Dušan Fuštar and Duško Knežević (*Mejačić et al.* case, the “Accused” or “Defendants”) is the third case referred from the ICTY to the State Court of BiH, pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence. This constitutes the seventh 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 24 December 2007 and 19 March 2008.

During this reporting period, an issue of note was observed, which is addressed as part of the summary below. It raises the need for further clarification for the trial panels concerning the rights and obligations of defendants testifying as witnesses in their own defence. This derives from the fact that the Defendant Mejačić was asked to testify on the basis of certain procedural formalities that do not appear consistent with those that the Constitutional Court of BiH has foreseen as appropriate.

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

- During this reporting period, 17 main trial hearings¹ were held, mainly in the presence of the public. The public was excluded only during the discussion about the identity of protected witnesses or measures of witness protection. In total, 14 defence witnesses and one expert witness were heard. Of these, 12 witnesses testified without any protective measures, while two testified under a pseudonym and subject to a restriction on the publishing of their photographs or other information that might reveal their identity.
- In addition to the witnesses that testified during this reporting period, the Accused Željko Mejačić testified in his own defence in public session on 28, 29, and 30 January, and 4 and 5 February 2008. The Defendant was not compelled to take an oath to tell the truth, but was warned by the Trial Panel that he must tell the truth without withholding relevant information and that giving false statements is a criminal offence.

The Criminal Procedure Code of BiH (BiH CPC) of 2003 does not explicitly provide for the possibility of having accused persons testify in their own defence, and therefore does not state how defendants should be treated when they do so.² The law does provide guidance on how witnesses must testify, though. It states that witnesses must testify under oath that they will tell the truth without withholding relevant information and must be warned that giving false statements (*davanje lažnog iskaza*) is a criminal offence.³ Witnesses may refuse to answer questions to which a truthful reply would result in danger of prosecution.⁴ In Conclusion of the Plenary Session of the Court of BiH held on 26 April 2005, the judges of the State Court determined that when the Defence submits a motion to examine an accused in his/her favour during a main trial, the accused should be heard in the capacity of a witness.⁵ This appears to be the approach taken in part by the Trial Panel in this case, when warning the Accused Željko Mejačić that he must tell the truth without withholding relevant information and that giving false statements is a criminal offence.

¹ On 10, 11, 28, 29 and 30 January; 4, 5, 6, 18, 19, 20, 21, 22, 26 and 27 February; 5 and 19 March 2008.

² See Article 260(3) BiH CPC.

³ Article 86(2) BiH CPC: Before examination, the witness shall be called upon to tell the truth and not withhold anything and then he shall be cautioned that giving false statements is a criminal offence. According to the letter of Article 235 BiH CPC, giving false statements is a criminal offence applicable only to witnesses, experts, translators or interpreters. In short, an accused cannot be prosecuted for such an offence. In contrast, the giving of false information about a criminal offence is a separate offence proscribed under Article 234 BiH CPC and generally applicable to all persons. According to the Commentaries on the BiH CPC, p. 57, an accused may still be prosecuted for this offence.

⁴ Article 84(1) BiH CPC.

⁵ Conclusion of the Plenary Session of the Court of BiH held on 26 April 2005, published in the State Court Bulletin of September 2005.

Nevertheless, the Constitutional Court in the case of *Senad Pendek and Suvad Đuderija* on 20 September 2006 opines that warning the accused that s/he must tell the truth and can be prosecuted for giving false statements (davanje lažnog iskaza) or asking the accused to take an oath “would, in essence, be in contradiction to the right of the accused against self-incrimination.”⁶ This position is shared by the Commentaries on the CPC BiH.⁷

Against this backdrop, the Mission urges relevant judicial actors at all levels to formulate a concrete practice on how defendants should testify in their own defence that is consistent with the direction provided by the Constitutional Court of BiH.

- On 7 and 28 January 2008, the Trial Panel, in accordance with the Defendants’ choice, appointed new *ex officio* additional Defence Counsel, Mr. Zlatko Knežević and Mr. Goran Rodić, to the Accused Dušan Fuštar and Momčilo Gruban respectively. Mr. Jovo Đukanović, previous Defence Counsel to Dušan Fuštar, was dismissed at his own request since he was appointed judge at the Basic Court in Prijedor, while Mr. Vinko Kondić, the previous Defence Counsel to Momčilo Gruban, was dismissed due to ongoing criminal proceedings against him for crimes against humanity allegedly committed in 1992 in the area of Ključ Municipality.
- The Defendants remain in custody. While conducting regular two-month reviews of custody, the Trial Panel concluded each time that custody is still justified on the basis of the risk of flight and threat to public security.⁸ Following defence appeals, the Appellate Panel issued a decision on 8 February 2008, confirming the first-instance decision on custody. As the translation of this decision, which invokes a new line of reasoning, has only recently been obtained, the Mission makes a reservation to comment on it at a later stage.
- The next main trial hearing is scheduled for 10 April 2008.

⁶ Decision of the Constitutional Court of BiH in the case no. AP 2632/05, upon the appeal of Senad Pendek and Suvad Djuderija, dated 20 September 2006, para. 25 [unofficial translation]. In this case, the Court held that no violation of the appellants’ rights had been committed because, although they were called “witnesses”, they were not treated in that manner by the trial panel, namely they were not compelled to take an oath to tell the truth and were not warned that not doing so would subject them to criminal prosecution. The appellants were cross-examined by the prosecutor, but the Court noted that they did not object to this.

⁷ See the Commentaries on the BiH CPC, p. 672-673.

⁸ The concerns and recommendations made in previous reports are reiterated as regards the Trial Panel’s decisions to use the threat to public security as grounds for detention to the extent that they do not appear to invoke any specific facts pointing to the likelihood that public order *continues* to be *actually* threatened by the release of the Defendants. See for instance, OSCE-BiH, First Report - 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 Mejakić et al.* case, March 2007; Fourth OSCE Report in case of Defendant *Paško Ljubičić*, September 2007; Sixth OSCE Report in case of Defendant *Paško Ljubičić*, March 2008

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Prosecutor's Office Response to the proposal of Defence evidence for the accused Dušan Fuštar of 3 December 2007, dated 13 December 2007.
- (ii) Trial Panel Decision extending custody, dated 26 December 2007.
- (iii) Appeal of the Accused Željko Mejakić against the Decision extending custody of 26 December 2007, dated 27 December 2007.
- (iv) Appeal of Defence Counsel of Momčilo Gruban against the Decision extending custody of 26 December 2007, dated 28 December 2007.
- (v) Appeal of Defence Counsel of Duško Knežević against the Decision extending custody of 26 December 2007, dated 31 December 2007.
- (vi) Response of the Prosecutor's Office to the Appeal of the Accused Željko Mejakić against the Decision extending custody of 26 December 2007, dated 31 December 2007.
- (vii) Appeal of Defence Counsel of Željko Mejakić and Dušan Fuštar against the Decision extending custody of 26 December 2007, dated 3 January 2008.
- (viii) Trial Panel Decision on dismissal of Mr. Jovo Đukanović and appointment of Mr. Zlatko Knežević as the additional Defence Counsel of the Accused Dušan Fuštar, dated 7 January 2008.
- (ix) Main trial hearing, held on 10 January 2008.
- (x) Main trial hearing, held on 11 January 2008.
- (xi) Response of the Prosecutor's Office to the Appeal of the Defence Counsel of Željko Mejakić and Dušan Fuštar against the Decision extending custody of 26 December 2007, dated 17 January 2008.
- (xii) Main trial hearing, held on 28 January 2008.
- (xiii) Proposal of the Defence Counsel of Željko Mejakić for admission of evidence obtained from the ICTY under the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH (LoT), dated 28 January 2008.
- (xiv) Trial Panel Decision on dismissal of Mr. Vinko Kondić and appointment of Mr. Goran Rodić as the additional Defence Counsel of the Accused Momčilo Gruban, dated 28 January 2008.
- (xv) Main trial hearing, held on 29 January 2008.
- (xvi) Main trial hearing, held on 30 January 2008.
- (xvii) Proposal of the Defence Counsel of Željko Mejakić for exemption from direct presentation of evidence, dated 4 February 2008.
- (xviii) Main trial hearing, held on 4 February 2008.
- (xix) Main trial hearing, held on 5 February 2008.
- (xx) Main trial hearing, held on 6 February 2008.
- (xxi) Appellate Panel's Decision refusing the Appeals of the Defence Counsel of Željko Mejakić, Momčilo Gruban, Dušan Fuštar and Duško Knežević against the Trial Panel Decision extending custody of 26 December 2007 as unfounded, dated 8 February 2008.
- (xxii) Main trial hearing, held on 18 February 2008.
- (xxiii) Main trial hearing, held on 19 February 2008.
- (xxiv) Main trial hearing, held on 20 February 2008.
- (xxv) Submission/proposal of evidence of the Defence of Željko Mejakić, dated 21 February 2008.
- (xxvi) Main trial hearing, held on 21 February 2008.
- (xxvii) Submission/proposal of evidence of the Defence of Željko Mejakić, dated 22 February 2008.
- (xxviii) Main trial hearing, held on 22 February 2008.
- (xxix) Main trial hearing, held on 26 February 2008.
- (xxx) Main trial hearing, held on 27 February 2008.
- (xxxi) Main trial hearing, held on 5 March 2008.
- (xxxii) Main trial hearing, held on 19 March 2008.