

IT-05-88/1-PT 925
D925- D917 P.K.
23 JANUARY 2008

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1

IN THE REFERRAL BENCH

Before Judge Alphons Orié, Presiding
Judge O-Gon Kwon
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Date Filed: 23 January 2008

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

PROSECUTOR'S THIRD PROGRESS REPORT

The Office of the Prosecutor
Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1

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PROSECUTOR'S THIRD PROGRESS REPORT

1. Pursuant to the Referral Bench's Decision on Referral of Case Under Rule 11 *bis* with Confidential Annex ("Referral Decision") of 27 April 2007, the Prosecutor hereby files his third progress report in this case.

2. The Decision on Referral ordered:

...the Prosecutor to file an initial report to the Referral Bench on the progress made by the Prosecutor's Office of Bosnia and Herzegovina in this case six weeks after transfer of the evidentiary material. Thereafter, the Prosecution shall file a report every three months. These reports shall include information on the course of the proceedings before the competent national court after commencement of trial, and shall include any reports or other information received from any international organisations also monitoring the proceedings.¹

3. The second progress report in the *Trbić* case was filed on 23 October 2007.²

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 Office of the Prosecutor ("OTP"), the Prosecutor received OSCE's second report on 18 January 2008.³ The Report outlines the main findings of trial

¹ Referral Decision, p. 26.

² *Prosecutor v. Milorad Trbić* ("Trbić case"), Case No. IT-05-88/1, Prosecutor's Second Progress Report, 23 October 2007.

³ OSCE's Second Report in the *Milorad Trbić* Case Transferred to the State Court pursuant to Rule 11 *bis*, January 2008 ("Report").

monitoring activities to date in the *Trbić* case, from the perspective of international human rights standards.⁴

5. The OSCE has not identified any issues of concern that could be assessed, at this stage, as infringing upon the Defendant's rights guaranteed by international human rights standards.⁵

6. OSCE, however, reiterates two concerns mentioned in past reports, i.e. the "augmentation" of protective measures and the vague justification of custody on the ground of a threat to public security. As to the first concern, OTP reiterates its position from the Second Report in the *Mejakić et al.* case, 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.⁶ In addition, OTP continues to give due regard to the second issue and considers it to be of value for the local actors. However, still this issue does not appear to affect the right to a fair trial of this Accused.

7. The OSCE summarises the proceedings in the *Trbić* case to date as follows:⁷

- On 10 October 2007, the Court issued a Decision dismissing Miloš Perić and, in accordance with the Accused's choice, appointing Mr. Milan Trbojević as the new Defence Counsel in this case.
- A status conference was held on 30 October 2007. On 8 November 2007, the main trial started with the reading of the indictment and the presentation of the prosecutor's opening statement.
- During the reporting period from the end of September 2007 until 10 January 2008, nine main trial hearings were held mostly in public. The trial panel excluded the public from the sessions only during discussions on protected witnesses or protective measures, as well as for the duration of the testimony of one witness on 10 December 2007.
- Twelve prosecution witnesses were heard. Ten testified without any protective measures, whilst two received some form of protection. Of the two, one witness testified protected from the public by a pseudonym and image distortion. The other protected witness testified on 10 December 2007 through

⁴ Report, Executive Summary, p. 1.

⁵ Report, Executive Summary, pp. 1 and 2.

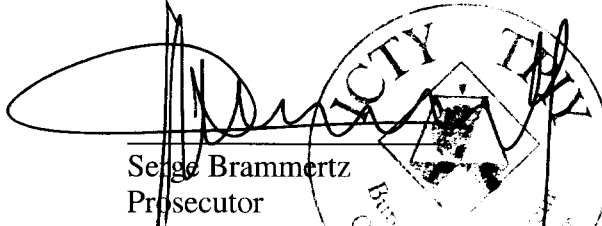
⁶ *Prosecutor v. Zeljko Mejakić et al.*, Case No. IT-02-65-PT, Prosecutor's Second Progress Report, 3 October 2006.


⁷ Report, Executive Summary, pp. 1 and 2.

the use of numerous protective measures. Namely, the witness was heard in closed session, under a pseudonym, through video link from abroad, and through the means of voice and image distortion. The exclusion of the public was ordered as an additional measure of protection at the said hearing, although the other measures that were granted already by the ICTY were also kept in force. The Trial Panel indicated that a more detailed reasoning on the issue will be provided later in a court decision.

- The Defendant remains in custody on the bases of the risk of flight and threat to public security.
 - On 13 December 2007, the Trial Panel partially granted the Prosecutor's Motion of 30 October 2007, requesting the Court to accept as established certain adjudicated facts. Out of a total of 375 facts adjudicated by the ICTY judgments that were proposed by the Prosecutor to be accepted as proven, the Panel took judicial notice of 85 facts. As for the remaining ones, the Court either rejected the request or postponed its decision for a later stage.
 - The OSCE notes that due to the fact that the Defense Counsel does not speak or read English the Trial Panel was willing to appoint an additional attorney or assistant who speaks English and who would be able to understand evidence presented in this language or contribute to the preparation of the case in any other manner, but the Defense Counsel refused the proposal.
8. Attached to this report is a copy of the OSCE's Report.

Word count: 866


Serge Brammertz
Prosecutor

The seal of the International Criminal Tribunal for the former Yugoslavia (ICTY). It is circular with the acronym 'ICTY' at the top. Inside the circle, there is a map of the Balkan region, specifically the area of the former Yugoslavia, with a central emblem. The words 'INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA' are written around the perimeter of the seal.

Dated this twenty third day of January 2008
At The Hague
The Netherlands

INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1

THE PROSECUTOR

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MILORAD TRBIĆ

PUBLIC

ANNEX

TO

PROSECUTOR'S THIRD PROGRESS REPORT



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

**Second Report in the
Milorad Trbić Case**

Transferred to the State Court pursuant to Rule 11bis

January 2008

EXECUTIVE SUMMARY

The case of Milorad Trbić (hereinafter also the “Defendant” or the “Accused”) is the sixth case transferred from the ICTY to the BiH State Court pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the second report in this case that the OSCE Mission to Bosnia and Herzegovina (the “OSCE BiH” or the “Mission”) delivers to the ICTY Prosecutor, covering the period between the end of September 2007 and 10 January 2008.

During the reporting period, the OSCE BiH has not noted any new issues that may be characterised at as problematic this stage from the perspective of human rights standards. However, certain matters mentioned in past reports continue to attract attention and are mentioned in the summary of the developments in these trial proceedings. Thereafter, the report contains an annexed list of the relevant hearings, submissions, and decisions in this case.

The proceedings in the *Trbić* case during this reporting period may be summarised as follows:

- On 10 October, following the appeal of Mr. Miloš Perić on his appointment as ex officio Defence Counsel of Milorad Trbić, the Court issued a Decision dismissing him and, in accordance with the Defendant’s choice, appointed Mr. Milan Trbojević as the new Defence Counsel in this case.
- A status conference in the present case was held on 30 October 2007. On 8 November, the main trial started with the reading of the indictment and presentation of the prosecutor’s opening statement. It should be noted that the Trial Panel appeared to be well prepared for this phase of the proceedings, as it conducted the status conference in an organised fashion, addressing all relevant issues, including witness protection measures and adjudicated facts.
- During this reporting period, nine (9) main trial hearings were held¹ mostly in public. The trial panel excluded the public from these sessions only during discussions on protected witnesses or protective measures, as well as for the duration of the testimony of one witness on 10 December 2007.
- In total, twelve (12) prosecution witnesses were heard. Ten testified without any protective measures, whilst two received some form of protection. Of the two, one witness testified protected from the public by a pseudonym and image distortion. The other protected witness testified on 10 December 2007 through the use of numerous protective measures. Namely, the witness was heard in closed session, under a pseudonym, through video link from abroad, and through the means of voice and image distortion. It may be noted that the exclusion of the public was ordered as an additional measure of protection at the said hearing, although the other measures that were granted already by the ICTY were also kept in force. The Trial Panel indicated that a more detailed reasoning on the issue will be provided later in a court decision. The Mission is looking forward to the Court’s views on the necessity to provide such cumulative protection to this witness, especially after the exclusion of the public, although such decision has not been issued yet at the time of writing this Report.

In relation to the protective measures ordered by the ICTY, an interesting issue with regard to the wording of Rule 75(H) of the ICTY RoPE should be reiterated at this stage. Considering that the domestic courts are bound to apply ICTY protective orders,² this Rule allows third parties from jurisdictions other than the ICTY to request the ICTY President to initiate the procedure for rescission, variation, or augmentation of protective measures for witnesses that come forward before domestic courts. It may be stressed that the Rule explicitly obliges the actors in the domestic jurisdiction to request permission from the ICTY also when they consider augmenting the protection. Although there may not be concrete definitions of the terms rescinding, varying, and augmenting or a universally accepted gradation of protective measures, adding the measure of excluding the public in the present case could safely be regarded as augmenting the protective

¹ Main trial hearings were held on 8, 27, and 28 November, as well as 3, 10, 11, 12, 17 and 19 December 2007.

² See Rule 75 (F)(1) RoPE and Referral Bench decisions in transferred cases.

measures ordered by The Hague Tribunal. Nevertheless, the Court or Parties did not appear to have requested or obtained the permission of the ICTY to augment the protection in this manner, hence strictly speaking, the State Court's order authorizing a closed session for the said witness could be considered as a breach of the provision of Rule 75 (H) RoPE.

Although the wording of the Rule in question is rather straightforward, it is unclear whether its drafters intended also to limit the domestic jurisdiction's discretion to augment protective measures on its own. In its Second Progress Report on the *Mejakić and Others* Case, the ICTY OTP expressed the opinion that the domestic jurisdiction did not need permission to augment protection. The ICTY, and particularly the Referral Bench which ordered that protective measures remain in force, have not expressed views on the issue. The Mission considers that an authoritative opinion on the matter would contribute to clarifying the obligations and discretion that actors in the domestic jurisdiction have in this important aspect of proceedings.

- The Defendant remains in custody on the bases of the risk of flight and threat to public security. Considering that the justification on the latter ground for detention does not invoke any specific facts pointing to an actual danger to public order that would ensue if the Accused were released, as human rights standards additionally require, but addresses only the gravity of the charged criminal offences and the alleged involvement of the Accused.³ To this extent, the concerns and recommendations made in numerous previous reports addressing the justification of this ground for custody must be reiterated.
- On 13 December, the Trial Panel partially granted the Prosecutor's Motion of 30 October 2007, requesting the Court to accept as established certain adjudicated facts. Out of a total of 375 facts adjudicated by the ICTY judgements that were proposed by the Prosecutor to be accepted as proven, the Panel took judicial notice of 85 facts. As for the remaining ones, the Court either rejected the request or postponed its decision for a later stage.

Considering previous recommendations that the Mission has made on the matter,⁴ the OSCE BiH welcomes the fact that the Prosecutor and the Trial Panel addressed the issue of adjudicated facts at an early stage of the proceedings.

It is notable that, in view of the fact that the Defence Counsel in this case does not speak English, on 8 November and 19 December, the Trial Panel informed him that they are willing to appoint an additional attorney or an assistant who speaks English and who would be able to understand evidence presented in this language or contribute to the preparation of the case in any other manner. The appointed Defence Counsel refused the proposal of the Court. The OSCE BiH will continue observing the situation in this regard.

³ According to the Panel, the subjective requirement for custody under Article 132 (1) item (d) BiH CPC pertains to the fact that "ordering custody is necessary in order to ensure the safety of citizens, because of the manner in which the criminal offence was committed, or because of the consequences of the criminal offence". Examining this requirement in the present case, the Panel found that the criminal offence the accused is charged with was committed in a particularly brutal manner, with multiple murders; that the accused was an Assistant Chief of Security of the Zvornik Brigade at the time of the criminal offence, whereby grounded suspicion derives that he took part in the systematically organized and brutal killings in several locations; that certain number of persons affected by those crimes returned to the area; that the commission of genocide in the area of Srebrenica was established in the judgment of the International Court of Justice. Furthermore, the panel found that another reason for custody under this item "could be the prevention of a renewed traumatizing of the victims of serious acts of violence", and the fact that the accused is charged with one of the most serious criminal offences in regard to which the prosecution and execution of punishment are not subject to the statute of limitations.

⁴ See OSCE BiH, Third Report in *Paško Ljubičić* Case Transferred to the State Court pursuant to Rule 11bis, June 2007; OSCE BiH, Forth Report in *Željko Mejakić et al.* Case Transferred to the State Court pursuant to Rule 11bis, June 2007.

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Appeal of the Defence Counsel Miloš Perić on the Decision on his appointment as *ex officio* Defence Counsel of Milorad Trbić of 24 September 2007, dated 28 September 2007.
- (ii) Application from the Prosecutor's Office of BiH to the ICTY pursuant to Rule 75(H), dated 2 October 2007.
- (iii) Decision of the "out-of-hearing" Panel extending custody, dated 9 October 2007.
- (iv) Decision of the "out-of-hearing" Panel upholding the Appeal of the Defence Counsel Miloš Perić on his appointment as *ex officio* Defence Counsel of Milorad Trbić of 28 September 2007 and appointing Milan Trbojević as new *ex officio* Defence Counsel of Milorad Trbić, dated 10 October 2007.
- (v) Prosecution Motion to Admit Prior Records of Examination of the Accused and Trial Testimony before ICTY Trial Chambers, dated 29 October 2007.
- (vi) Prosecution Motion to Accept Established Facts, dated 30 October 2007.
- (vii) Status conference held on 30 October 2007.
- (viii) Response of the Defence Counsel of Milorad Trbić to the Prosecution Motion to Admit Prior Records of Examination of the Accused and Trial Testimony before ICTY Trial Chambers of 29 October 2007, dated 7 November 2007.
- (ix) Main trial hearing held on 8 November 2007.
- (x) Response of the Defence Counsel of Milorad Trbić to the Prosecution Motion to Accept Established Facts of 30 October 2007, dated 26 November 2007.
- (xi) Main trial hearing held on 27 November 2007.
- (xii) Main trial hearing held on 28 November 2007.
- (xiii) Trial Panel's Decision establishing that protective measures granted to witnesses by the ICTY and by the Court of BiH remain in force the present case, dated 29 November 2007.
- (xiv) Main trial hearing held on 3 December 2007.
- (xv) Decision of the Trial Panel extending custody, dated 4 December 2007.
- (xvi) Main trial hearing held on 10 December 2007.
- (xvii) Main trial hearing held on 11 December 2007.
- (xviii) Main trial hearing held on 12 December 2007.
- (xix) Trial Panel's Decision on the Prosecution Motion to Accept Established Facts of 30 October 2007, dated 13 December 2007.
- (xx) Main trial hearing held on 17 December 2007.
- (xxi) Main trial hearing held on 19 December 2007.