

IT-05-88/1-PT

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23 JULY 2009

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1-PT

IN THE REFERRAL BENCH

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

Registrar: Mr. John Hocking

Date Filed: 23 July 2009

THE PROSECUTOR

v.

MILORAD TRBIĆ

PUBLIC

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PROSECUTOR'S NINTH PROGRESS REPORT

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The Office of the Prosecutor  
Mr. Serge Brammertz

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

Case No. IT-05-88/1-PT

THE PROSECUTOR

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**PUBLIC**

**PROSECUTOR'S NINTH 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 ninth 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 organizations also monitoring the proceedings.<sup>1</sup>
  
3. The eighth progress report in the *Trbić* case was filed on 23 April 2009.<sup>2</sup>
  
4. Following the agreement between the Chairman in Office of the Organization 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 eighth report on 17 July 2009.<sup>3</sup> The Report

<sup>1</sup> *Prosecutors v. Milorad Trbić* ("Trbić case"), Case No. IT-05-88/1-PT, Referral Decision, p. 26.

<sup>2</sup> *Trbić* case, Prosecutor's Eighth Progress Report, 23 April 2009.

<sup>3</sup> OSCE's Eighth Report in the *Milorad Trbić* Case Transferred to the State Court pursuant to Rule 11 *bis*, July 2009 ("Report").

outlines the main findings of trial monitoring activities to date in the *Trbić* case, from the perspective of international human rights standards.

5. The OSCE summarises the proceedings in the *Trbić* case to date as follows:<sup>4</sup>
- The court held nine hearings/status conferences, and heard two expert witnesses, who testified without protective measures.
  - On 29 June 2009, the parties completed presentation of the evidence. The Prosecution submitted 1121 pieces of material evidence while the Defence submitted seven. The Court admitted *ex officio* four sets of material evidence, including the evidence used in the questioning of Vinko Pandurević before the ICTY.
  - On 22 May 2009, the Prosecution announced that compensation claims regarding 888 victims were filed with the Court. The Court decided that irrespective of the verdict, it would not discuss compensation claims because of the fact that there were so many claims which would delay the proceedings.<sup>5</sup>
  - The closing arguments of the parties have been scheduled for 24 and 26 August 2009 respectively.
  - The Defendant remains in custody because of the risk of flight and threat to public security pursuant to a decision of 6 March 2009.
6. In addition, the OSCE provides a note on the witness protection measures as decided by the court on 23 February 2009, which the OTP already discussed in the Eighth Progress Report.<sup>6</sup> A witness testified on 23 February 2009 under a pseudonym. Nevertheless, the Court allowed the public to attend this testimony, but ordered the attendees including media representatives, to keep both the identity of the witness and the content of his testimony secret. The OSCE requested a clarification of this decision and the Court explained that the witness “gave evidence under pseudonym

<sup>4</sup> Report, Summary of Developments, p. 1

<sup>5</sup> See *Trbić case*, Prosecutor’s Eighth Progress Report, 23 April 2009, p.3, note on filing compensation claims by the injured parties in the *Trbić case*.

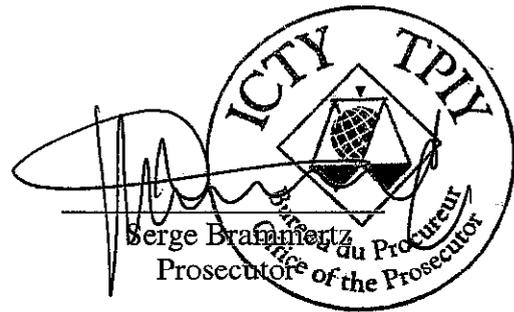
<sup>6</sup> Report, p. 2.

See also *Trbić case*, Prosecutor’s Eighth Progress Report, 23 April 2009, p.3

in open session, but requested that his testimony not be reported by the media and the Court granted this request". It also appears that the audio recording of this hearing is not accessible to the public. The OSCE explains that although this measure could be considered as a positive one, because the Court endeavours to keep hearings open to a limited public, at the same time it creates confusion about the purpose of the orders and the nature of those hearings. The OSCE suggest that the protective measures should be applied according to the provisions of law and that courts should properly justify their application.<sup>7</sup>

7. Attached to this report is a copy of the OSCE's Report.

Word Count: 672



Dated this twenty-third day of July 2009  
At The Hague  
The Netherlands

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<sup>7</sup> Report, p.2.

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ANNEX A

TO

PROSECUTOR'S NINTH PROGRESS REPORT



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

**Eighth Report in the  
*Milorad Trbić* Case**

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

**July 2009**

### SUMMARY OF DEVELOPMENTS

The case of Milorad Trbić (hereinafter also Defendant) 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 eighth report in this case that the OSCE Mission to Bosnia and Herzegovina (Mission) submits to the ICTY Prosecutor, covering the period from 3 April 2009 to 3 July 2009.

During this reporting period:

- The Court held nine hearings/status conferences and heard two expert witnesses for the Prosecution. Neither of these testified with protective measures.<sup>1</sup>
- On 29 June 2009, both parties completed the presentation of their evidence. In total, the Prosecution submitted 1121 pieces of material evidence. The Defence submitted seven. The Court admitted *ex officio* four sets of material evidence, including the evidence used in the questioning of Vinko Pandurević before the ICTY.
- On 22 May 2009, the Prosecution announced that there were compensation claims regarding 888 victims filed with the Court in the criminal proceedings, and claims involving 11 more victims that it recently received but of which it had not yet informed the Court. The Court ruled that irrespective of the verdict it renders on the Defendant's guilt, it would not discuss the compensation claims filed by victims because there were so many, hence considering them would delay the proceedings. The Mission will revisit the issue after the verdict is rendered.
- The closing arguments for the Prosecution and the Defence are scheduled for 24 and 26 August 2009 respectively.
- The Defendant remains in custody because of risk of flight and threat to public security pursuant to the Court's decision of 6 May 2009.

This report includes a short note on the decision of the Court to protect the testimony of a witness, which may be rather unclear as to its purpose.

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<sup>1</sup> Hearings were held on 20 and 27 April, 4, 11, 18 and 22 May 2009, and 8, 22 and 29 June 2009. The two expert witnesses for the Prosecution testified on 22 June.

**NOTE ON WITNESS PROTECTION MEASURES OF 23 FEBRUARY 2009**

As noted in the Seventh OSCE Report in the Case of Milorad Trbić, on 23 February 2009 the State Court of BiH allowed the public to attend the testimony of a protected witness. In what appears to be an inconsistent decision, however, the Court ordered the attendees, which included a media representative, to keep both the identity of the witness and the content of his testimony secret. Subsequently, the OSCE sought clarification on this decision. On 20 April 2009, during a hearing in this Case, the Court publicly noted the OSCE's aforementioned request for clarification. In response, the Court explained that the witness "gave evidence under pseudonym in open session, but requested that his testimony not be reported by the media. The Court granted his request." Furthermore, it appears that the audio tape record of this hearing is not accessible to the public.

It may be noted that this is not the only time in which the Court has allowed the public to attend the testimony of a protected witness, but has ordered, in advance, that the public keep what it hears secret. For instance, on 3 February 2009 in the Case of Radomir Vuković, the Court issued a similar order in advance of the hearing that was held in the presence of all members of the public.<sup>2</sup>

Although it could be considered as positive that the Court endeavours to keep hearings somehow open to the public, the aforementioned orders seem to create confusion both as to the purpose of the orders and as to the nature of those hearings. This is because the public is allowed *in advance and with the Court's knowledge*<sup>3</sup> to become aware of information, which in fact the court deems necessary not to be disclosed to the public. Additionally, it seems that the court essentially asks the media to forego the professional capacity in which they attend the hearing, which comprises of the professional duty to report on the information that comes to their possession. In essence, neither the confidentiality of the information is respected, knowingly, since at least some members of the public become privy to it, nor does the wider public benefit since they cannot access the information through media reports or subsequently hear the audio tapes or the accounts of others who were present. And legally speaking, as ICTY jurisprudence suggests by analogy, evidence cannot be construed as confidential after it is purposefully made public.<sup>4</sup>

Accordingly, in view of the crucial importance of protecting witnesses and their testimony when this is needed, it is suggested that courts take all appropriate measures to ensure that the public does not become aware of confidential information, to the extent that this information really necessitates to remain confidential. Should courts wish to introduce any protective measure that consists only of limitations in the wider dissemination of information to the public, i.e. through media reporting, it may be suggested that they elaborate and justify in more detail the legal and policy basis for such a measure.

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<sup>2</sup> See the Case of Radomir Vuković (X-KR-06/180-2). Pursuant to this order, a protected witness testified on 11 February 2009 and 11 and 13 March 2009 in open session, although the public was told not to disclose the contents of the testimony.

<sup>3</sup> Certain differences can be drawn between these orders, by which the court knows that confidential information will be revealed to the public, and orders which are given to members of the public in a public session when certain confidential information is revealed by accident (a practice which is followed at the ICTY, whereby the Tribunal is known to pause the hearing, warn the public that what they have heard is confidential and should not be discussed further, and orders appropriate redactions of the records and adjustment of the delayed broadcasting).

<sup>4</sup> See e.g., ICTY *Prosecutor v. Zejnil Delalić et als.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, 5 June 1997, paras 36-37 ("The Trial Chamber notes that the request made by the Prosecution seeks to prevent the public from gaining access to the said information in the future because it has not been widely disseminated. This argument, however, fails to grasp the essence of the matter. The core of the issue is, rather, that the information has been made public. While it is clear that the sentiments of the Witness have been offended by the public dissemination of the information, the Trial Chamber cannot ordinarily transform a public fact into a private one by virtue of an order. An order for the redaction of the information based on reasons of privacy would serve no purpose and its effectiveness would be of no avail. The testimony of the Witness was broadcast to the public on the same day she testified through the medium of the International Tribunal's television network. Moreover, members of the public were present in the public gallery of the courtroom during her testimony. Therefore, Rule 75 is not applicable for the resolution of this matter.")

**PART II****LIST OF RELEVANT HEARINGS - SUBMISSIONS – DECISIONS**

1. Prosecution Trial Brief 31 – Victims Family Property Claims Filings, dated 7 April 2009.
2. Status conference, held on 20 April 2009.
3. Status conference, held on 27 April 2009.
4. Court memorandum listing proposed *ex officio* evidence, dated 29 April 2009.
5. Prosecution Trial Brief 32 – Response to *ex officio* evidence memo, dated 30 April 2009.
6. Status conference, held on 4 May 2009.
7. Defence letter to the ICTY requesting information on the Defendant's time at The Hague from 24 October 2003 to 7 April 2005, dated 4 May 2009.
8. Defence proposal of material evidence, dated 4 May 2009.
9. Prosecution Trial Brief 33 – Response to Trial Panel inquiries on Prosecution evidence, dated 5 May 2009.
10. Court Decision on review of custody, dated 6 May 2009.
11. Prosecution Trial Brief 34 – On the admission into evidence of the testimony of Vinko Pandurević at the ICTY, dated 8 May 2009.
12. Status conference, held on 11 May 2009.
13. Prosecution response to Defence proposal of material evidence, dated 15 May 2009.
14. Status conference, held on 18 May 2009.
15. Status conference, held on 22 May 2009.
16. Prosecution Motion 18 – Seeking reconsideration of Court decision to not admit pieces of evidence, dated 29 May 2009.
17. Status conference, held on 8 June 2009.
18. Main trial hearing, held on 22 June 2009.
19. Prosecution list of evidence, dated 26 June 2009.
20. Main trial hearing, held on 29 June 2009.