THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-97-25/1-PT

IN THE REFERRAL BENCH

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

Registrar: Mr Hans Holthuis

Date Filed: 17 January 2007

THE PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

PROSECUTOR'S SECOND 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 SECOND PROGRESS REPORT

1. In accordance with the "Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II"[1] of 8 July 2005, the Prosecutor hereby files her second 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 of Bosnia and Herzegovina in the prosecution of the Accused six weeks after transfer of the evidentiary material and, thereafter, every three months, including information on the course of the proceedings of the State Court of Bosnia and Herzegovina after commencement of trial, such reports to comprise or to include the reports of the international organisation monitoring or reporting on the proceedings pursuant to this Decision provided to the Prosecutor.[2]

3. The Prosecutor filed an Initial Progress Report on 17 October 2006.[3]

4. Following the agreement between the Chairman in Office of the Organisation for Security and Co-operation in Europe Mission's to Bosnia and Herzegovina (the "OSCE") and the Prosecutor, the Prosecutor received OSCE's first report on 11

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1 *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-PT, ("*Rašević and Todović* case"), Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005 ("Decision on Referral").

2 Decision on Referral, p. 46.

3 See *Rašević and Todović* case, Prosecutor's Initial Progress Report, 17 October 2006.

January 2007.[4] The Report outlines the main findings of trial monitoring activities to date in the *Rašević and Todović* case, from the perspective of international human rights standards.[5]

5. The OSCE summarises the proceedings in the *Rašević and Todović* case to date as follows:

- The Accused were transferred to BiH authorities on 3 October 2006. Since then they have been represented by *ex officio* Defence Counsel. On the said date, a hearing on pre-trial custody took place before the Preliminary Hearing Judge. Upon the motion of the Prosecutor, the Judge ordered custody for one month on grounds of risk of flight and threat to public and property security.

- By Decision dated 3 November 2006, the "out-of-hearing" Panel granted the request of the Prosecutor to extend custody of both Accused for two additional months, in order to allow sufficient time to adapt the indictment, on the basis of risk of flight and threat to public and property security. Counsel for Rašević appealed this decision. On 23 November 2006, the Appellate Panel issued a decision confirming the two-month extension.

- On 22 December 2006, the Prosecution filed the adapted indictment with a motion for extension of custody. Counsel for both Accused submitted a response to the motion. The Preliminary Hearing Judge accepted the adapted indictment on 29 November 2006 and extended pre-trial custody of the Accused until completion of the main trial.

- The plea hearing was scheduled for 15 January 2007.[6]

6. The OSCE has identified three main issues related to the rights of the Accused and discussed them in the Report:

(a) Decision of the State Court to have a Preliminary Hearing Judge deciding on the request for custody during the pre-adaptation stage;

(b) The fact that telephone conversations between a detainee and his defence counsel in the Detention Unit of the Bosnia and Herzegovina ("BiH") State Court can be listened to by public officials which could impinge on the right of an accused to communicate with his lawyer in full confidentiality; and,

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4 OSCE First Report in the *Mitar Rašević and Savo Todović* Case Transferred to the State Court Pursuant to Rule 11*bis*, January 2007 (hereinafter "Report").

5 Report, Executive Summary. p. 1.

6 *Ibid.*

(c) Justification of pre-trial detention on the grounds of public and property security.

7. With regard to the first issue, the OSCE indicates the manner in which a transferred case is dealt with before an indictment is adapted (a Preliminary Proceedings Judge dealt with the *Mejakić et al* case and a Preliminary Hearing Judge dealt with *Ljubičić* and *Rašević and Todović* cases). The different approaches impact on the status of an accused upon his transfer to BiH, on the procedural regime of his pre-trial custody and on the procedural nature of the period during which the ICTY indictment is adapted. However, the OSCE concludes with respect to the Accused Rašević and Todović that "there is no reason to consider that the approach defined by the Appelate (sic) Panel run contrary to the rights of the Defendants. Actually, it could have been some positive effects with regard to the protection of their right to trial within a reasonable time or to release pending trial under Article 5(3) ECHR."[7]

8. With regard to the second issue, namely the possibility that prison authorities can listen to phone conversations between detainees and their counsel, the OSCE recommends that "the State Court of Bosnia and Herzegovina and the Detention Unit cooperate to ensure that the right of detainees to communicate with their counsel out of hearing of third persons is protected."[8] The Prosecutor fully supports this recommendation.

9. With regard to the third issue, the OSCE recommends that the legislative authorities delete Article 132(1)(d) of the Criminal Procedure Code of Bosnia and Herzegovina, namely the ground for detention on the basis of threat to public or property security. The Prosecutor notes that this issue was previously raised by the OSCE in the *Janković* and *Ljubičić* cases and considers that it does not appear to affect Rašević's and Todović's right to a fair trial.

10. In addition, the OSCE identified an issue of interest which concerns the public information policy of the BiH State Court. The matter relates to the fact that names of all victims (including disappeared or killed) and witnesses are being redacted from public documents, such as indictments, apparently for the general purpose of

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7 Report, page 3.
8 Report, page 5.

protecting their privacy.[9] As flagged by the OCSE, this matter concerns the public information policy and does not affect the right to a fair trial.

11. The Prosecutor intends to discuss the issues raised in the report with OSCE and the State Prosecutor's Office of Bosnia and Herzegovina ("State Prosecutor").

12. Rašević and Todović did not appear before the BiH State Court at the plea hearing held on 15 January 2007. The Court concluded that they deliberately failed to appear at the hearing and recorded a plea of not guilty in accordance with the law.[10] Both Accused are currently on a hunger strike, together with all other detainees from the Detention Unit of the State Court, including those Accused transferred from the ICTY to BiH according to decisions of the Referral Bench pursuant to Rule 11*bis* of the Rules of Procedure and Evidence.[11]

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

Word count: 1,145

Carla Del Ponte
Prosecutor

Dated this seventeen day of January 2007
At The Hague
The Netherlands

9 Report, page 6.
10 BiH State Court press release, ref. no X-KR-06/275 07-01/215, 15 January 2007.
11 *See* BiH State Court press release dated 10 January 2007.

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THE PROSECUTOR

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Annex A
to the
PROSECUTOR'S SECOND PROGRESS REPORT

OSCE

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

First Report in the

Mitar Rašević and Savo Todović Case

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

January 2007

EXECUTIVE SUMMARY

The case of Mitar Rašević and Savo Todović (hereinafter also "Defendants") is the fifth case transferred from the ICTY to the Court of BiH pursuant to Rule 11*bis* of the ICTY Rules of Procedure and Evidence (RoPE). This constitutes the first report in these criminal proceedings that the OSCE Mission to Bosnia and Herzegovina ("OSCE-BIH" or "Mission") delivers to the ICTY Prosecutor, covering the period from the transfer of the Defendants to the Court of BiH on 3 October 2006 until the end of December 2006.

During this reporting period, the OSCE-BIH has identified three main issues related to the rights of the Defendants, namely: a) the decision to appoint a preliminary hearing judge as competent for this case upon its transfer; b) the right of the accused to communicate with his attorney in full confidentiality; c) the justification of the application of the threat to public and property security as ground for detention. With regard to these matters, which are examined in Part I of the Report, the OSCE reiterates the findings already expressed in the First OSCE Report in the case of Paško Ljubičić[1] (hereinafter "First Ljubičić Report"). The report also includes, at the end of Part I, a note on the public information policy of the State Court, with particular regard to the crossing out of witnesses and victims names from public documents.

Proceedings in the *Todović* and *Rašević* case until present may be summarised as follows:

• The Defendants were transferred to BiH authorities on 3 October 2006. Since then, they have been represented by *ex officio* Defence Counsels. On the said date, a hearing on pre-trial custody took place before the Preliminary Hearing Judge. Upon the motion of the Prosecutor, the Judge ordered custody for one month on grounds of risk of flight and threat to public and property security.

• By Decision dated 3 November 2006, the "out-of-hearing" Panel granted the request of the Prosecutor to extend custody of both Defendants for two additional months, in order to allow sufficient time to adapt the indictment, on the basis of risk of flight and threat to public and property security. The Counsel of Defendant Rašević appealed the Decision on extension of pre-trial custody. On 23 November 2006, the Appellate Panel issued a Decision confirming the two-month extension.

• On 22 December 2006, the Prosecution filed the adapted indictment with a motion for extension of custody. Counsels of both Defendants submitted a response to the motion. The Preliminary Hearing Judge accepted the adapted indictment on 29 December 2006 and extended pre-trial custody against the Defendants until completion of the main trial.

• The plea hearing is scheduled for 15 January 2007.

[1] See OSCE-BIH, *First Report - Case of Defendant Paško Ljubičić - Transferred to the State Court pursuant to Rule 11*bis, December 2006.

PART I

A) Remarks related to the decision of the State Court to have a Preliminary Hearing Judge deciding on the request for custody during the pre-adaptation stage.

The request for custody upon the Defendant's transfer was adjudicated by the Preliminary Hearing Judge (hereinafter "PHJ"). Since this procedural approach was adopted also in the *Ljubičić* case, it denotes consistency in the interpretation of the pre-trial custody regime in 11 *bis* cases and a higher level of certainty with regard to the *status* of defendants in these proceedings.

The Facts

Upon their arrival to BiH on 3 October 2006, the Defendants were brought before the PHJ, who, upon the motion of the Prosecutor, ordered pre-trial custody for one month on the grounds of the risk of flight and threat to public and property security. In his decision, the Judge noted that an indictment confirmed by the ICTY already existed, referred to the CPC provisions applicable in the post-indictment phase and referred to the Defendants as the "Accused."[2]

On 1 November 2006, the Prosecutor in the *Todović* and *Rašević* case requested an extension of pre-trial custody for two additional months in order to complete the process of adaptation of the ICTY indictment. He explained that the adaptation required additional time as it entailed reviewing the evidence provided by the ICTY, verifying the availability of witnesses and their willingness to testify. By its written Decision of 3 November, the "out-of-hearing" Panel granted the request on the grounds of risk of flight and threat to public and property security, but based it on the provisions which regulate the extension of custody during the investigative phase. Consequently, in that Decision, the Defendants were referred to as "the Suspects", since "there is no legally valid indictment against them before the Court of BiH".

This contrast of views between the PHJ and the "out-of-hearing" Panel was eventually resolved by the Appellate Panel in its decision dated 23 November 2006 rejecting the appeal filed by Defendant Rašević against the decision of 1 November.[3] The Panel reiterated the reasoning given in the *Ljubičić* case, namely that the adaptation process does not imply a return to the investigation stage by the BiH Prosecutor, since it has to be considered as a formal harmonization of the indictment in accordance with the BiH CPC; this is because the indictment has already been confirmed by the ICTY, while, under the Law on Transfer, only the inclusion of additional charges or accused by the BiH Prosecutor would require a confirmation by the State Court. As a result, the Appellate Panel attributed the *status* of Accused to the Defendants and stated that the time spent in custody since their arrival in BiH qualifies as custody after the confirmation of the indictment, which, under the applicable provisions of the BiH CPC may last up to a maximum of three years.[4] This was also deemed to be in favour of the accused, since pending an investigation the Defendants could be held in detention for up to 9 months. The decision also appears to indicate that the term of a maximum of 90 days prescribed under Article 229(4) BiH CPC for the beginning of the main trial, starts running, in the present case, from the day the Defendant came under the jurisdiction of the Court of BiH. Accordingly, the main trial should have begun before 3 January 2007. This deadline, however, has not been met.

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[2] Pursuant to the BiH Criminal Procedure Code (hereinafter "CPC"), the PHJ is competent to decide on requests for custody only after the indictment is confirmed, at which stage the suspect acquires the *status* of accused.

[3] The Defence Counsel, in his appeal dated 9 November 2006, disagreed with the view of the "out-of-hearing" Panel, arguing that procedural status of Mr. Rašević was "accused" and not "suspect" since the confirmed indictment against him exists according to the provisions of the Law on the 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 (hereinafter "Law on Transfer"). He added that this was particularly important for the proper count of the duration of pre-trial custody.

[4] Under Article 137(2)*d* BiH CPC, (as amended by Decision of the High Representative dated 16 June 2006, and adopted by the Parliamentary Assembly of BiH on 7 September 2006) custody pronounced after the confirmation of an indictment and before the first instance verdict may not last longer than three years in case of a criminal offense for which a punishment of long-term imprisonment is prescribed.

Upon the motion of the Prosecution submitted within the indictment, the PHJ extended on 29 December 2006 pre-trial custody against the Defendants until the completion of the main trial, but for no longer than three years and subject to review of the justification of custody every two months.

Assessment

OSCE-BIH recalls that the Law on Transfer does not clarify whether the period between the transfer of 11*bis* defendants and the acceptance of the ICTY indictment as adapted falls within the phase of investigations or the post-indictment phase, as regulated in the BiH CPC. The Mission considers that the Decision of the Appellate Panel dated 23 November clarifies the initial uncertainty concerning the *status* of the Defendants and the provisions of the BiH CPC applicable to their pre-trial custody. It may be argued that this uncertainty was partly caused by the decision of the BiH Court to depart from the approach it adopted in the *Mejakić et al.* case. In that case, the initial hearing on custody was held before the Preliminary Proceedings Judge, the Defendants acquired the *status* of suspects, and their custody was regulated under the regime applicable to the investigative phase until the adapted indictment was accepted by the PHJ.

Unlike this approach, the Appellate Panel in the *Todović* and *Rašević* case held that the provisions of the BiH CPC regulating the investigative phase were inapplicable during the pre-adaptation period. Nevertheless, it must be noted that this stance seems to disregard the fact that, both in this case and the other 11*bis* cases, the BiH Prosecutor has admitted carrying out actions which could reasonably be defined as investigative acts (such as contacting witnesses to check their availability and willingness to testify and reviewing evidence from the ICTY).

Having said that, OSCE-BIH holds that, until present, there is no reason to consider that the approach defined by the Appellate Panel ran contrary to the rights of the Defendants. Actually, it could have some positive effects with regard to the protection of their right to trial within a reasonable time or to release pending trial under Article 5(3) ECHR.[5]

B) Concerns related to the right of the Defendant to communicate with his attorney in full confidentiality.

OSCE-BIH is concerned that, in the Detention Centre of the BiH Court, phone conversations between the detainees and their defence counsel are taking place within hearing range of public officials. This is contrary to the right of the accused to communicate with his lawyer in full confidentiality and may potentially result in a breach of the right to have adequate time and facilities for the preparation of defence under Article 6 § 3(c) of the ECHR. This concern, which in the present case was raised by Mr. Todović, reinforces those previously expressed by the Defendants in the *Mejakić et al.* and *Ljubičić* cases. It also confirms the Mission's belief that this problem affects all detainees held in the Detention Centre who intend to communicate with their attorneys by phone.[6] In war crimes cases and particularly in the 11*bis* ones, this means of communication is a very important one since most of the acting defence counsels have their offices out of Sarajevo, where the Detention Centre is located, or even out of BiH.

i. Applicable domestic law and international human rights standards

Under Article 114(5) BiH CPC, "a detainee shall be entitled to free and unrestrained communications with his defence attorney". Article 48(2) BiH CPC specifies that conversations between the suspect or

[5] This is because the Appellate Panel explained that, under this approach, the maximum term for custody before the first instance verdict starts running from the date of the transfer of the Defendant to the BiH Court and not, as in the previous 11*bis* case, from the date of the acceptance of the adapted indictment. As already mentioned, this term may last now for a maximum of three years. ~~It is~~ worth noting that at the time when, in the previous 11*bis* cases, the Court of BiH held that the maximum term for custody before the first instance verdict started running from the date of the acceptance of the adapted indictment, the term in question was of one year only.

[6] On this issue, see OSCE-BIH, First Report - Case of Defendant Paško Ljubičić - Transferred to the State Court pursuant to Rule 11*bis*, December 2006.

accused held in custody and his attorney may be observed but may not be heard. The Book on House Rules of the Detention Unit expressly addresses the issue of phone conversations. Consistently with the BiH CPC, it foresees that, while phone calls by detainees should take place under the surveillance of authorized officials, the latter cannot listen to the conversations.[7]

These provisions are fully consistent with international human rights standards. Article 14(3)(b) of the ICCPR protects the right of the accused "to communicate with counsel of his own choosing". Even if the ECHR does not contain a similar reference, the Court of Strasbourg has held that "an accused's right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3(c) of the Convention".[8] The ECtHR noted, in this regard, that "if a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective".[9]

It must be added that the position of the ECtHR on this matter is reflected in the UN Standard Minimum Rules for the Treatment of Prisoners, under which "interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official".[10]

ii. Assessment of the relevant facts in the Rašević *et al.* case

In a written submission addressed to the Court of BiH dated 28 October 2006, the Defendant Todović stated that "possibility of telephone contact with counsel from the detention unit is restricted by control performed by official persons (police officers) by listening to the contents of the conversations".

Officers from the Human Rights Department of the Mission visited the Detention Unit of the State Court on 20 November 2006. On that occasion OSCE-BIH met with the Director of the Detention Unit, Mr. Hajdarević, and with Mr. Zubac, Director of the new State Prison, presently under construction, and discussed the matter at issue here. In the course of the visit, OSCE-BIH understood that the problem is caused by the fact that the phone available to detainees is located on the wall of the hallway, very near to the office of the guard; this location makes virtually impossible to avert that conversations are overheard by officials while they survey the detainees during the phone call.

OSCE-BIH also learned that in order to solve this problem, the phone was partially shielded by a cover placed over it. The Director of the Detention Unit and of the new State Prison stated that, in case this proves not to be sufficient to protect the confidentiality of the detainees' communications, another solution will be found. OSCE-BiH will continue to monitor this issue.

OSCE-BIH deems that the described situation is not in compliance with the domestic law and international human rights standards referred above and is affecting the right of the defendants to have adequate facilities for the preparation of defence under Article6 § 3(c) of the ECHR. The shield cannot be considered a satisfactory solution as it does not isolate the phone from the hallway. The Mission holds that the confidentiality of those conversations can be adequately preserved only by setting a

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[7] Rules of the House of the Detention Unit, Article 63, para. 8 and 9.
[8] ECtHR, *Öcalan v. Turkey*, Judgment, 12 March 2003, para. 146.
[9] *Ibidem.*
[10] Rule 93, *Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. See also Principle 8, *Basic Principles on the Role of Lawyer*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials".

phone in a place where the detainees would be within sight but not within the hearing of officials or other detainees.

Therefore the Mission recommends that the BiH Court and the Detention Unit cooperate to ensure that the right of the detainees to communicate with their counsel out of hearing of third persons is protected.

C) Concerns related to the application of custody on grounds of threat to public or property security.

OSCE-BIH is concerned that the custody in the *Rašević and Todović* case on the basis of threat to public or property security was not properly justified according to the standards established by the relevant case-law of the European Court of Human Rights ("ECtHR"). In this regard, the OSCE-BIH reiterates the principal arguments already expressed in its First Report on the case of Paško Ljubičić,[11] where it addressed the ambiguity of the public or property security concept envisaged in the BiH CPC and of its application by the courts throughout BiH. The recommendations formulated in that Report are therefore reiterated herein.

In this regard, OSCE-BIH notes that the Appeals Chamber of the ICTY evaluated these concerns as "very legitimate" and urged the competent BiH authorities and the State Court to consider seriously the recommendations addressed to them by the Mission.[12] It is equally important to add that the Human Rights Committee, in its final observations on the report submitted by BiH on implementation of the ICCPR, recommended that the State party "should consider removing from the Code of Criminal Procedure of Bosnia and Herzegovina the vague concept of public security or security of property as a ground for ordering pre-trial detention".[13]

i. The Relevant Law and International Human Rights Standards

In this regard, see OSCE-BIH, *First Report - Case of Defendant Gojko Janković - Transferred to the State Court pursuant to Rule 11bis*, April 2006, at p. 9 or OSCE-BIH, *First Report - Case of Defendant Paško Ljubičić - Transferred to the State Court pursuant to Rule 11*bis, December 2006, at p. 6.

ii. The relevant facts in the Rašević and Todović case

Pre-trial detention of both Defendants was initially ordered, by **Decision** of the PHJ **dated 3 October 2006**, for one month on the grounds of risk of flight and threat to public and property security. In motivating his ruling on the point of the latter ground, the PHJ referred to the arguments presented by the Prosecutor, namely: the widespread scale of the alleged crimes, the large number of victims, the severe consequences suffered by them and the negative influence on the return process of displaced persons. In addition, the PHJ argued that "[t]he absence of safety and fear of return, particularly a great number of persons who were victims of the mentioned crimes committed in the KPDom Foča [*sic*] – a synonym of suffering of non-Serbs in this region, would significantly reduce the confidence of the public in the judicial system".

The "out-of-trial" Panel, upon request of the Prosecutor, extended pre-trial custody for two additional months. In its **Decision dated 3 November 2006**, the Panel held that, apart from the manner of commission of the crimes and the consequences on the victims, the presence of the Defendants in the Municipality of Foča "would cause insecurity with the non-Serb citizens" and "would certainly have a negative effect on their willingness to return".

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[11] *See supra footnote 1.*

[12] See ICTY Appeals Chamber, *Prosecutor v. Rašević and Todović*, Decision on Savo Todović's appeals against decisions on referral under rule 11*bis*, 4 September 2006, para. 118, 119.

[13] Human Rights Committee, Concluding observations of the Human Rights Committee - Bosnia and Herzegovina, 10 November 2006, CCPR/C/BIH/CO/1.

Finally, pre-trial custody on this ground was confirmed on appeal by the **Appellate Panel**, which, in its **Decision of 23 November 2006**, agreed that, due to the manner of commission of the crimes and their consequences, the release of the defendants "would probably cause anxiety and fear and threaten the safety of public and property".

iii. Assessment of the application of Article 132(1)(d) BiH CPC in the Rašević and Todović case

OSCE-BIH believes that the aforementioned decisions do not point to any fact "capable of showing that the defendant's release would actually disturb public order"[14]. Indeed, they only make reference to the manner of commission and consequences of the alleged criminal offences and to the fear, anxiety and insecurity which the release of the Defendant may cause among the people who are living in the areas where the crimes alleged in the ICTY indictment were committed. In this regard, it must be noted that the use, in the context of the decisions, of terms such as "fear", "anxiety" and "insecurity" is more indicative of a personal feeling that citizens may have if the Defendant is released than of a threat to public or property security. Moreover, this argument is put forward in very hypothetical terms, as it was merely assumed that such a situation of fear and anxiety "would probably" happen in case of release.

The aforementioned Decision of 3 October additionally refers to the fact that the release of the Defendant could raise doubts in the public as to the efficiency of the judicial system and, thus, could have negative effects on the return of displaced persons. While recognizing the valid policy argument inferred in the referenced point, OSCE-BIH underlines that the need to preserve the trust of the citizens in the justice system cannot be used as a legal ground for ordering custody.

Considering that the Appellate Panel, in its Decision of 23 November 2006, did not propose further arguments, it can be concluded that the reasons given by the BiH Court to support the existence of this ground for custody are phrased in such terms that the ECtHR has characterized as insufficient.

Against this background, OSCE-BIH reiterates the relevant recommendations included in the First Report on the case of Paško Ljubičić, namely:

- The legislative authorities should delete from the criminal procedure code Article 132(1)(d) BIH CPC, namely the ground for detention on the basis of threat to public or property security. If this ground is retained, the law-maker should carefully review its wording and establish precise criteria upon which its application may be conditioned, taking into consideration international human rights standards. The Mission recommends that the burden of proof to establish facts that indicate a potential disruption of public order/security always rests with the Prosecution.

- To the extent that Article 132(1)(d) BiH CPC remains applicable, the OSCE-BIH also recommends that the courts cease applying it almost automatically when the objective criterion is met. Rather this ground should be used exceptionally when credible facts point to an actual and persistent threat to public order, in accordance with human rights standards. Judges should particularly refrain from using this ground as a substitute or in overlap with other special grounds for custody.

As a **final note**, OSCE-BiH identified an issue of interest, which concerns the public information policy of the State Court. The matter relates to the fact that the names of all victims (even disappeared or killed) and witnesses are being redacted from public documents, such as indictments, apparently for the general purpose of protecting their privacy. This includes protected persons, as well as those whose identity is not protected by any measure. The Mission recognizes that it may be difficult for a member of the public to read such documents with ease in order to be kept informed of the developments in war crimes cases, and notes that the ICTY has not followed this practice.

[14] *Letellier v. France*, Judgment of 26 June 1991, para. 51 ; *also I.A. v. France*, Judgment of 23 September 1998, para 104 [references omitted].

Consequently, although a member of the public can read the names (or pseudonyms) of witnesses and victims in ICTY indictments, even in the Rule 11*bis* cases, such names are blackened out in the State Court indictments. Due to its implications on the transparency of the proceedings and the outreach efforts of the Court of BiH, OSCE-BiH will follow up on this issue and address it after completing further research and hearing the views of the relevant officials.

PART II

LIST OF RELEVANT HEARINGS - SUBMISSIONS – DECISIONS

(i) Official note of the Court of BiH on assignment of judge, dated 2 October 2006.

(ii) Prosecution Motion for ordering pre-trial custody, dated 3 October 2006.

(iii) Decision to appoint *ex officio* Defence Counsel for the Defendant Mitar Rašević, dated 3 October 2006.

(iv) Decision to appoint *ex officio* Defence Counsel for the Defendant Savo Todović, dated 3 October 2006.

(v) Hearing on pre-trial custody, held on 3 October 2006.

(vi) Decision of the Preliminary Hearing Judge ordering pre-trial custody, dated 3 October 2006.

(vii) Appeal of the Defendant Todović against the Decision to appoint *ex officio* Defence Counsel, dated 6 October 2006.

(viii) Defence Counsel's Request for dismissal and appointment of another defence counsel for the Defendant Todović, dated 10 October 2006.

(ix) Prosecution Response to the Appeal of the Defendant Todović against the Decision to appoint *ex officio* Defence Counsel, dated 12 October 2006.

(x) "Out-of-hearing" Panel's letter regarding the Appeal of the Defendant Todović against the Decision to appoint *ex officio* Defence Counsel, dated 13 October 2006

(xi) Submission of the Defendant Todović addressed to the Court of BiH informing that he does not object to the extension of pre-trial custody, dated 24 October 2006

(xii) Submission of the Defendant Todović addressed to the Court of BiH asking the Court to leave him sufficient time to choose an appropriate defence counsel for himself since he was not able to do so earlier, dated 28 October 2006

(xiii) Prosecution Motion for extension of custody, dated 1 November 2006

(xiv) PHJ's Response to Submission of the Defendant Todović of 28 October 2006, addressed to the Defendant and his Defence Counsel, explaining that the Defence Counsel appointed by the Court shall not be dismissed until he appoints or chooses another one, dated 1 November 2006.

(xv) Todović's Defence Counsel's Response to the Prosecution Motion for extension of custody, dated 1 November 2006.

(xvi) Defendant Todović's Submission informing the Court that he does not object to extension of custody, dated 1 November 2006.

(xvii) Decision of "out-of-hearing" Panel granting extension of pre-trial custody, dated 3 November 2006.

(xviii) Appeal of Rašević's Defence Counsel against the Decision granting extension of pre-trial custody, dated 9 November 2006.

(xix) Prosecution Response to the Appeal of Rašević's Defence Counsel against the Decision granting extension of pre-trial custody, dated 13 November 2006.

(xx) Appellate Panel's Decision rejecting the Appeal of the Rašević's Defence Counsel against the Decision granting extension of pre-trial custody as ungrounded, dated 23 November 2006.

(xxi) Prosecution Motion to grant protective measures for witnesses, dated 5 December 2006.

(xxii) PHJ's Decisions partially granting protective measures for witnesses requested by the Prosecution, dated respectively 7 and 19 December 2006.

(xxiii) PHJ's Letter to Todović's Defence Counsel informing him that his Defendant has not submitted any new request for his dismissal whereby he remains Todović's Defence Counsel until the Court decides otherwise, dated 22 December 2006.

(xxiv) Request of Todović's Defence Counsel for granting permanent permission for visiting his Defendant in the Detention Unit of the Court of BiH, dated 22 December 2006.

(xxv) Indictment and Motion of the Prosecution for extension of custody, dated 22 December 2006.

(xxvi) Responses of the Defence Counsel to the Prosecution motion for extension of pre-trial custody, dated respectively 26 and 27 December 2006.

(xxvii) PHJ's Decision on extension of pre-trial custody, dated 29 December 2006.