

Am

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 October 2007

THE PROSECUTOR

v.
MITAR RAŠEVIĆ
SAVO TODOVIĆ

PUBLIC

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. 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 fifth 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 her Fourth Progress Report on 17 July 2007.³
4. Following the agreement between the Chairman in the Office of the Organisation for Security and Co-operation in Europe's Mission to Bosnia and Herzegovina (the "OSCE") and the Prosecutor, the Prosecutor received OSCE's fourth report on 11 October 2007.⁴ The Report outlines the main findings of trial

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 Fourth Progress Report, 17 July 2007.

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

monitoring activities to date in the *Rašević and Todović* case, from the perspective of international human rights standards.

5. OSCE has not identified any issues of concern that could be assessed, at this stage, as infringing upon the Defendants' right to a fair trial.

6. The OSCE summarises the proceedings in the *Rašević and Todović* case as follows:

- During the reporting period, the Court held six main trial hearings in total, all of which were held in public. A total of eleven witnesses proposed by the Prosecution were examined, out of which only one witness testified without any protective measures.
- The Defendants remain in custody on the same grounds - risk of flight and threat to public security.
- Both Prosecution and Defence have submitted their Motions on judicial notice of certain facts adjudicated by ICTY judgements. At the hearing of 2 October 2007, the Trial Panel issued an oral decision partly accepting the Motions on the established facts, but the written decision is pending at the time of writing this report.
- The next main trial hearings scheduled for this month are on 9, 16, 23, and 30 October.⁵

7. During the reporting period OSCE has identified an issue that has previously been raised in OSCE's reports in the *Mejakić et al.* Case.⁶ OSCE notes that the Court fails to inform injured parties appearing as witnesses of their right to compensation. OSCE deems that judges should instruct witnesses in an "easy-to-understand" manner on the right to file a claim for compensation within the criminal proceedings and also explain the possibility of taking up civil proceedings, in case their claims are not settled through the criminal proceedings.⁷

8. The Prosecutor notes that while this is a valid concern for the local actors, it does not affect the right to a fair trial of the two Accused.

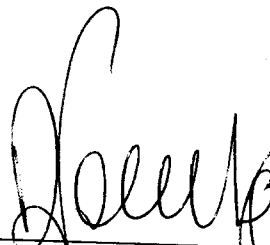
⁵ Report, p. 1.

⁶ OSCE's Fourth and Fifth Reports in the *Željko Mejakić et al.* Case Transferred to the State Court pursuant to Rule 11 *bis* (see Prosecutor's Fifth and Sixth Progress Report in the *Mejakić* Case, filed on 3 July 2007 and 1 October respectively).

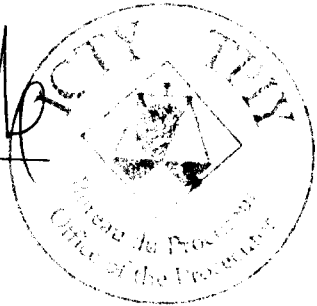
⁷ Report, p. 2.

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

Word count: 635



Carla Del Ponte
Prosecutor



Dated this seventeenth day of October 2007
At The Hague
The Netherlands

INTERNATIONAL CRIMINAL TRIBUNAL
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Case No. IT-97-25/1-PT

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ANNEX
TO
PROSECUTOR'S FIFTH PROGRESS REPORT



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

**Fourth OSCE Report in the
*Mitar Rašević and Savo Todović Case***

Transferred to the State Court pursuant to Rule 11bis

October 2007

EXECUTIVE SUMMARY

The case of Defendants *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 fourth report that the OSCE Mission to Bosnia and Herzegovina (“OSCE BiH” or “Mission”) delivers to the ICTY Prosecutor, covering the period from 28 June until 1 October 2007.

During this reporting period, the Mission has identified an issue that has been raised in previous OSCE reports; this is the failure of the Court to inform the injured parties-witnesses of their right to compensation. In accordance with applicable law, the Mission deems that judges should instruct witnesses in an easy-to-understand manner on the right to file a claim for compensation within the criminal proceedings and also explain the possibility of taking up civil proceedings, in case their claims are not settled through the criminal proceedings.

The proceedings in the *Rašević and Todović* case during this period may be summarised as follows:

- During the reporting period, the Court held six main trial hearings in total,¹ all of which were held in public. A total of eleven witnesses proposed by the Prosecution were examined, out of which only one witness testified without any protective measures.²
- The Defendants remain in custody on the same grounds - risk of flight and threat to public security.³
- Both Prosecution and Defence have submitted their Motions asking the Court to take judicial notice of certain facts from trial judgments rendered by the ICTY.⁴ At the hearing of 2 October, the Trial Panel issued an oral decision partly accepting the Motions on the established facts, but the written decision is pending at the time of writing this report. The Mission is waiting with anticipation the reasoning of this decision, but at this stage, it takes the opportunity to reiterate its recommendations formulated in the Second Report in the *Gojko Janković* Case and Fourth Report in the *Paško Ljubičić* Case. Namely, since the decision on taking judicial notice may be issued late in the proceedings, for the purposes of judicial economy and to ensure that parties are not placed at a disadvantage in the presentation of necessary evidence, the Mission urges the parties to submit any motions for judicial notice and the courts to decide on such motions at the earliest stages of the proceedings possible.
- The next main trial hearings scheduled for this month are on 9, 16, 23, and 30 October.

The Mission would like to take this opportunity to welcome certain initiatives planned for the coming months, which aim at enhancing the trial management skills of judges, as well as improve the capacity of judges and prosecutors at State and Entity levels to implement witness protection measures. OSCE BiH has made concrete recommendations in past reports that can contribute to promoting better control of proceedings and more efficient protection of witnesses, while respecting the rights of the accused and the public to information. The Mission will also endeavour to provide a more comprehensive input in advance of any such events, on the basis of its overall observations.

¹ On 20 July; 2 and 27 August; 14 and 18 September; and 2 October 2007.

² Ten other witnesses testified protected from the public through the assignment of pseudonym. Seven of those testified with a pseudonym and another form of protection; that is, six witnesses were additionally protected by precluding their visual identification by the public, which was able to hear but not to see the witness; while one was also granted the measure of voice distortion.

³ In this regard, the Mission reiterates its remarks and recommendations on the concerns related to pre-trial custody, which have been already addressed in numerous previous OSCE BiH reports.

⁴ See Motion of the Defence Counsel of Mitar Rašević to accept the facts established in the judgments of the ICTY, dated 30 July 2007; Motion of the Prosecutor's Office to accept the facts established in the judgments of the ICTY, dated 1 August 2007; Motion of the Defence Counsel of Savo Todović to accept the facts established in the judgments of the ICTY, dated 1 August 2007; Submission of the Accused Savo Todović related to the acceptance of facts established in the judgments of the ICTY, dated 3 September 2007.

A. Failure to Inform Injured Parties of their Right to Have Compensation Claims Adjudicated

The Mission notes that, during the proceedings, despite its legal obligation, the Trial Panel has not been asking during the proceedings any injured parties appearing as witnesses in this case⁵ whether they would like to exercise their right to have compensation claims satisfied through the criminal proceedings as required by law. The Mission is not aware whether relevant information is given or questions posed outside the criminal proceedings, but there is no indication that would imply so. Moreover, the Prosecution is not submitting any evidence in this regard.

OSCE BiH has previously reported on the obligations of judges to ask injured parties appearing as witnesses whether they wish to have their compensation claims satisfied through the relevant criminal proceedings, and to deliberate on any such compensation claims during the criminal proceedings, if this would not considerably prolong them⁶. Prosecutors also have a duty to investigate and collect evidence necessary to decide whether compensation claims are relevant to the criminal offences of a trial.⁷ In sum, the law sees a number of advantages in having compensation claims adjudicated in the context of criminal proceedings.

Assuming that it is the fear of unduly prolonging the criminal proceedings that may be prompting judges not to adjudicate compensation claims in the context of the criminal proceedings, the Mission deems that such process may be facilitated if courts consider using available guiding standards. For instance, the Supreme Court of the Federation of BiH has disseminated "Orientational Criteria" for determining just compensation for non-pecuniary damages.⁸ Under these guidelines, the court correlates certain specific criteria with monetary amounts of compensation.⁹

In light of the foregoing, the Mission reiterates its previous recommendations:

- It urges judges to comply with their legal obligation to ask injured parties appearing as witnesses whether they wish to exercise their right to have compensation claims settled through criminal proceedings, and that the judges endeavour to settle compensation claims through criminal proceedings to the extent possible. If judges in criminal cases decide to refer the settlement of such claims to civil proceedings, it is important to announce this decision.
- Court Presidents are also urged to ensure that the judges under their administration are aware of their obligation towards the adjudication of compensation claims in criminal proceedings, and to take all necessary steps to enable judges to carry out this duty.

⁵ All witnesses who testified during this reporting period appear to have been injured parties in the case.

⁶ See Articles 86(10), 193(1) and 198(1) BiH CPC.

⁷ BiH CPC Article 197(1).

⁸ "Orjentacioni kriteriji i iznosi za utvrđivanje visine pravične novčane naknade nematerijalne štete", adopted at the session of the Civil Law Department of the Supreme Court of the Federation BiH, 20 February 2006.

⁹ The criteria are: physical pain; fear; psychological/emotional suffering resulting from impairment; psychological/emotional suffering from visibility of disfigurement; psychological/emotional suffering caused by the death of a close family member; and psychological/emotional suffering resulting from the particularly difficult impairment of a close family member. These criteria must be applied by each court in light of the totality of circumstances in each case to establish a just monetary amount for compensation of non-pecuniary injuries. Several judicial bodies of BiH have addressed the issue of compensation for violations of ECHR Article 3 and Article 5 by state actors, see for example, *Mr. Bogdan Subotic*, Constitutional Court of BiH, No. AP-696/04, adopted at the session on 23 September 2005, sitting in Grand Chamber.

LIST OF RELEVANT HEARINGS - SUBMISSIONS - DECISIONS

- (i) Appeal of Defence Counsel of Savo Todović against the Decision extending custody of 25 June 2007, dated 28 June 2007.
- (ii) Response of the Prosecutor's Office to the Appeal of the Defence Counsel of Savo Todović against the Decision extending custody of 25 June 2007, dated 2 July 2007.
- (iii) Appellate Panel Decision refusing as unfounded the Appeal of the Defence Counsel of Savo Todović against the Trial Panel Decision extending custody, dated 11 July 2007
- (iv) Motion of the Defence Counsel of Mitar Rašević to accept the facts established in the judgments of the ICTY, dated 30 July 2007.
- (v) Motion of the Prosecutor's Office to accept the facts established in the judgments of the ICTY, dated 1 August 2007.
- (vi) Motion of the Defence Counsel of Savo Todović to accept the facts established in the judgments of the ICTY, dated 1 August 2007.
- (vii) Decision of the Trial Panel extending custody, dated 24 August 2007.
- (viii) Submission of the Defence Counsel of Savo Todović regarding Prosecution Motion to accept the facts established in the judgments of the ICTY of 1 August 2007, dated 24 August 2007.
- (ix) Submission of the Defence Counsel of Mitar Rašević regarding Prosecution Motion to accept the facts established in the judgments of the ICTY of 1 August 2007, dated 31 August 2007.
- (x) Appeal of Defence Counsel of Savo Todović against the Decision extending custody of 24 August 2007, dated 31 August 2007.
- (xi) Submission of the Accused Savo Todović related to the acceptance of facts established in the judgments of the ICTY, dated 3 September 2007.
- (xii) Response of the Prosecutor's Office to the Appeal of the Defence Counsel of Savo Todović against the Decision extending custody of 24 August 2007, dated 4 September 2007.
- (xiii) Submission of the Prosecutor's Office related to the acceptance of facts established in the judgments of the ICTY, dated 5 September 2007.