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<b>COMMENTS</b>			
Counsel for Zoran Zigic: Mr. Slobodan Stojanovic			
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Mechanism for International Criminal Tribunals

Case No: MICT-14-81-ES.1

Date: 3 October 2014

Original: English

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**BEFORE THE PRESIDENT**

**Before: Judge Theodor Meron**

**Registrar: Mr. John Hocking**

**THE PROSECUTOR**

**v.**

**ZORAN ŽIGIĆ**

***PUBLIC***

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**PROSECUTION'S RESPONSE TO ZORAN ŽIGIĆ'S REQUEST  
FOR NON-COMPLIANCE WITH THE REPUBLIC OF  
AUSTRIA'S EXTRADITION DECISION**

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**The Office of the Prosecutor:**

Mr. Hassan B. Jallow, Prosecutor  
Mr. Mathias Marcussen, Senior Legal Officer

**Counsel for Zoran Žigić:**

Mr. Slobodan Stojanović

1. Zoran Žigić's request that the President refuse consent to the Republic of Austria ("Austria") to extradite Žigić to Bosnia and Herzegovina ("BiH") upon being released from serving his ICTY sentence should be dismissed.<sup>1</sup>
2. Žigić was transferred to the ICTY from BiH, where he was in detention for offences unrelated to the crimes for which he was eventually tried before the ICTY.<sup>2</sup> Austria's judicial authorities have approved Žigić's extradition to BiH to serve the remainder of his BiH sentence.<sup>3</sup> Austria's domestic legislation requires the Mechanism's consent or waiver of consent to extradite persons convicted by the ICTY whose sentences are being enforced by Austria.<sup>4</sup> The Mechanism should not withhold consent because convictions by the ICTY do not shield convicted persons from being prosecuted or serving sentence in national jurisdictions for offences unrelated to the crimes for which they stood trial before the ICTY.
3. The fact that Austria's law makes extradition contingent upon the Mechanism's consent does not confer upon the Mechanism the competence to review national extradition decisions to take effect after a convicted person has been released from serving his or her ICTY sentence, beyond ensuring respect for the agreement with the enforcing state and the *non-bis-in-idem* principle.<sup>5</sup> The majority of Žigić's objections to his extradition are therefore a matter for national courts rather than for the Mechanism.<sup>6</sup>

<sup>1</sup> *Prosecutor v. Zoran Žigić*, Case No. MICT-14-81-ES.1, Request of the Convicted Zoran Žigić for Non-compliance with Republic of Austria's Extradition Decision ("Request"). The Request was dated 10 September 2014, but appears to have been filed confidentially and *ex parte* the Prosecution on 23 September 2014 and made public on 24 September 2014, when the Prosecution received it.

<sup>2</sup> *See, by analogy, Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11bis with confidential Annex A and Annex B, 5 April 2007, para.117 (footnotes omitted): "In a situation where a citizen of a state has been transferred by the state to the Tribunal, and the case of that citizen is then referred back to that same state for trial under Rule 11bis, laws relating to the exercise of criminal jurisdiction would appear to offer no obstacle to the state also being able to prosecute the citizen for other crimes, even though they may be outside the jurisdiction of the Tribunal."

<sup>3</sup> Annex I. Decision by the Court of Appeal of Graz, 22 September 2010 (original language) ("Extradition Decision"), p.1 (dismissing Žigić's appeal against the decision of the District Criminal Court of Graz of 11 June 2010 and stating that there is no appeal from the Extradition Decision).

<sup>4</sup> Federal Law on Cooperation with the International Tribunals (in force as of 1 June 1996) ("Austria's Law on Co-operation"), Article 21 (Special Feature of the Execution of a Sentence) and Article 25 (Conclusion of the Execution of a Sentence). Found under <http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation> *See also* Extradition Decision, p.7 (referring to these provisions of Austria's Law on Co-operation).

The Prosecution is not aware of Austria having contacted the Mechanism for consent. *See also* Extradition Decision, p.7 (stating that extradition is subject to ICTY consent which at the time of the decision had not been received and noting that extradition is suspended for as long as Žigić is serving his ICTY sentence).

<sup>5</sup> The Mechanism's competence on supervision of sentence enforcement is found in the Statute (Articles 25 and 26), the Transitional Arrangements (Article 6), the Rules of Procedure and Evidence (Rules 127, 128, 149-151), the Practice Direction on the Procedure for Designation of the State in which a Convicted Person is to Serve his or her Sentence of Imprisonment (MICT/2 Rev.1) and the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (MICT/3).

4. The Extradition Decision does not violate the principle of *non-bis-in-idem*.<sup>7</sup> In fact, the ICTY has already determined that the principle of *non-bis-in-idem* is not compromised by Žigić's BiH sentence as that sentence stems from different offences than those for which he was tried before the ICTY.<sup>8</sup>
5. The Extradition Decision also does not breach the Enforcement Agreement with Austria.<sup>9</sup> The "rule of speciality" found in the Enforcement Agreement—but absent from any other agreement with enforcing states<sup>10</sup>—does not prohibit extradition. As opposed to extradition treaties which explicitly prohibit (re-)extradition,<sup>11</sup> the Enforcement Agreement does not mention extradition and only prevents Austria as the enforcing state from "prosecut[ing] or proceed[ing] against" the convicted person for conduct predating his or her transfer to

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It is also regulated by agreement with enforcing states, in this case, the Agreement between the United Nations and the Federal Government of Austria on the Enforcement of Sentences of the International Criminal Tribunal for the Former Yugoslavia, 23 July 1999 ("Enforcement Agreement"). Agreements concluded by the ICTY remain in force for the Mechanism (S/RES/1996 (2010), para.4).

Article 5(2) of the Enforcement Agreement refers to Article 10 of the ICTY Statute (*Non-bis-in-idem*) which corresponds *mutatis mutandis* to Article 7 of the Statute of the Mechanism (*Non-bis-in-idem*). See also Rule 16.

<sup>6</sup> *Contra* Request, para.29 (arguing that the Extradition Decision "was rendered contrary to the facts and law"). See also paras.15-18, 20-24, 28.

<sup>7</sup> *Contra* Request, para.13.

<sup>8</sup> *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), fn.1187. See also paras.746, 749-750. See further *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para.713. The Court of Appeal of Graz came to the same conclusion: see Extradition Decision, p.3 (finding no violation of *non-bis-in-idem*). Although Žigić argues that the *Kvočka* Trial Judgement misstated the length of his detention in BiH (Request, fn.6), this does not undermine the conclusion that there is no violation of the *non-bis-in-idem* principle.

<sup>9</sup> *Contra* Request, para.26.

<sup>10</sup> Twenty different agreements between the United Nations and States for the purposes of enforcing ICTY sentences can be found under <http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation>. Article 5 of the Agreement between the United Nations and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentence of the International Criminal Tribunal for the former Yugoslavia, 11 March 2004 is entitled "*Non-bis-in-idem* (rule of speciality)", but is limited to stating the principle of *non-bis-in-idem*.

<sup>11</sup> See Model Treaty on Extradition, Un Doc. A/RES/45/116 (1990), Article 14 (Rule of Speciality) ("A person extradited under the present Treaty shall not be *proceeded against*, sentenced, detained, *re-extradited to a third State*, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than: (a) An offence for which extradition was granted; (b) Any other offence in respect of which the requested State consents. Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty." (emphasis added)). See also European Convention on Extradition, entered into force 18 April 1960, 359 U.N.T.S. 273, Article 14 (Rule of speciality) ("A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases: (a) when the Party which surrenders him consents [...]; (b) when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it [...]") and Article 15 (Re-extradition to a third state) ("Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender [...]").

Austria to serve sentence, save in certain instances.<sup>12</sup> There is thus no basis for Žigić's claim that extradition is covered by the terms "prosecute[] or proceed[] against" in the Enforcement Agreement.<sup>13</sup>

6. For these reasons, Žigić's Request should be dismissed.

Word Count: 1494



Mathias Marcussen  
Senior Legal Officer

Dated this 3<sup>rd</sup> day of October, 2014  
At The Hague, The Netherlands.

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<sup>12</sup> *I.e.*: where the convicted person stays on in the territory of the enforcing state for more than 45 days after release despite being able to leave, or where the convicted person returns voluntarily or is lawfully brought back by another state: Enforcement Agreement, Article 5(1).

<sup>13</sup> *Contra* Request, para.26.



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