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STATUS	Public	D/A	81
CASE/AFFAIRE NO.	MICT-14-81-ES.1 Zoran Zigic (Enforcement)	DATE	12/12/2014
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Decision on Zoran Zigic's request to withhold consent for the execution of the Republic of Austria's extradition decision, submitted by President on 12 December 2014			
COMMENTS			
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Mechanism for International Criminal Tribunals

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

Date: 12 December 2014

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Theodor Meron, President

Registrar: Mr. John Hocking

Decision of: 12 December 2014

PROSECUTOR

v.

ZORAN ŽIGIĆ

PUBLIC

**DECISION ON ZORAN ŽIGIĆ'S REQUEST TO WITHHOLD
CONSENT FOR THE EXECUTION OF THE REPUBLIC OF
AUSTRIA'S EXTRADITION DECISION**

The Office of the Prosecutor:

Mr. Hassan B. Jallow
Mr. Mathias Marcussen

Counsel for Zoran Žigić:

Mr. Slobodan Stojanović

1. I, Theodor Meron, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism” respectively), am seized of a request by Zoran Žigić to withhold consent for the execution of a decision of the Republic of Austria authorizing his extradition to the authorities of Bosnia and Herzegovina.¹ The Prosecution responded on 3 October 2014.² I am also seized of a request by Žigić to dismiss the Response.³ The Prosecution responded to the Motion to Dismiss on 22 October 2014,⁴ and Žigić replied on 27 October 2014.⁵

I. BACKGROUND

2. On 19 March 1997, the Military Tribunal of Banja Luka convicted Žigić of a “serious offence against general safety of people and property” committed on 16 November 1992, for which he received a four-year imprisonment sentence, and of a murder committed on 11 June 1993, for which he received a 12-year sentence.⁶ Pursuant to laws governing concurrent sentences, Žigić was given a combined single sentence of 15 years of imprisonment.⁷

3. On 15 April 1998, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) issued an order to transfer Žigić to its jurisdiction.⁸ On 16 April 1998, Žigić was transferred from Banja Luka, the Republika Srpska, Bosnia and Herzegovina, where he had been detained since 15 June 1993, to the United Nations Detention Unit of the ICTY in The Hague, The Netherlands.⁹ On 9 November 1998, the ICTY indicted Žigić, Miroslav Kvočka, Milojica Kos, and Mlado Radić.¹⁰ Žigić was charged with four counts of crimes against humanity and four counts of violations of the laws or customs of war for his participation in the murder, torture, and persecution of non-Serb detainees.¹¹

¹ Request of the Convicted Zoran Žigić for Non-Compliance with the Republic of Austria’s Extradition Decision, 23 September 2014 (initially *ex parte* but later made public as per Žigić’s request on 24 September 2014) (“Request”).

² Prosecution’s Response to Zoran Žigić’s Request for Non-Compliance with the Republic of Austria’s Extradition Decision, 3 October 2014 (“Response”).

³ Motion of the Convicted Zoran Žigić [*sic*] for Dismissing of Prosecution’s Response to Zoran Žigić’s Request for Non-Compliance with Republic Austria Extradition Decision, 14 October 2014 (“Motion to Dismiss”).

⁴ Prosecution’s Response to Zoran Žigić’s Motion to Dismiss Prosecution’s Response to Earlier Request, 22 October 2014.

⁵ Zoran Žigić’s Reply to Prosecution’s Response to Zoran Žigić’s Motion to Dismiss Prosecution’s Response to Earlier Request, 27 October 2014.

⁶ Request, para. 11.

⁷ Request, para. 11.

⁸ *Prosecutor v. Zoran Žigić*, Case No. IT-95-4-I, Order under Rule 59 *bis* for Transmission of an Arrest Warrant, 15 April 1998 (“Order of Transfer”).

⁹ Request, paras. 1, 12.

¹⁰ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30-I, Amended Indictment, 26 October 2000 (“Amended Indictment”). The initial indictment against Žigić was confirmed on 21 July 1995 under case number IT-95-4-I.

¹¹ Amended Indictment, pp. 5-11.

4. On 2 December 1998, the Supreme Military Tribunal upheld the judgement of the Military Tribunal of Banja Luka.¹² On 19 August 1999, the Military Tribunal of Banja Luka rendered a decision on amnesty relieving Žigić from serving one year and 20 days of his 15-year sentence.¹³

5. On 2 November 2001, Trial Chamber I of the ICTY found Žigić guilty of committing crimes against humanity and violations of the laws or customs of war as a participant in the joint criminal enterprise of the Omarska camp, and for committing crimes against humanity and violations of the laws or customs of war in the Omarska, Keraterm, and Trnopolje camps.¹⁴ The Trial Chamber sentenced him to 25 years of imprisonment with credit for time served while in detention from 16 April 1998 pursuant to Rule 101(C) of the ICTY Rules of Procedure and Evidence.¹⁵

6. On 28 February 2005, the ICTY Appeals Chamber upheld his sentence.¹⁶ On 8 June 2006, Žigić was transferred to the Correctional Institute Graz-Karlau in Austria to serve the remainder of his 25-year sentence.¹⁷

7. On 22 September 2010, Austria confirmed, subject to the consent of the ICTY, the extradition of Žigić to Bosnia and Herzegovina upon the completion of his ICTY sentence in order to serve the sentence imposed on him by the Military Tribunal of Banja Luka (“Extradition Decision”).¹⁸

II. SUBMISSIONS

8. Žigić submits that the Mechanism should withhold its consent to the Extradition Decision.¹⁹ In particular, he contends that the offences of which he was convicted in Bosnia and Herzegovina, while not related to his subsequent indictment by the ICTY,²⁰ could be encompassed by the *Kvočka* Trial and Appeal Judgments because they are related to the same territory, period of time, and conduct.²¹ In addition, Žigić argues that his surrender by Bosnia and Herzegovina to the custody of the ICTY did not interrupt the service of the sentence pronounced by the Military Tribunal of Banja

¹² Request, para. 10.

¹³ Request, para. 14.

¹⁴ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (“*Kvočka* Trial Judgement”), paras. 683-691, 764.

¹⁵ *Kvočka* Trial Judgement, para. 764.

¹⁶ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka* Appeal Judgement”), para. 716.

¹⁷ Request, para. 5. *See also Nota Verbale* from the Austrian Embassy to the ICTY, 30 July 2014. *See also* ICTY Press Release, 9 June 2006, available from <<http://www.icty.org/sid/8736>>.

¹⁸ Request, para. 7; Request, Annex I.

¹⁹ *See* Request, paras. 29-30.

²⁰ Request, para. 2.

²¹ Request, para. 13.

Luka and that therefore any such sentences would have been served by now, leaving no grounds for extradition.²² Žigić also asserts that, even assuming that the ICTY Order of Transfer did in fact interrupt his service of the sentence, the attempt to enforce that sentence more than 10 years after the issuance of the judgement of the Supreme Tribunal is untimely because the 10-year statute of limitations applicable in the Republika Srpska on the enforcement of his sentence has run.²³ In addition, Žigić argues that such an assumption would necessarily mean that the ICTY Order of Transfer also “interrupted the criminal procedure that was underway”, rendering the proceedings that continued after his transfer to the ICTY and the judgement of the Supreme Tribunal issued therefrom invalid.²⁴

9. Moreover, Žigić contends that, given that he was under the jurisdiction of the ICTY during the extradition proceedings, the exclusion of the ICTY from those proceedings constitutes an “irreparable shortcoming”.²⁵ Žigić further submits that the Extradition Decision is unlawful and premature, as any determination on his extradition until he becomes eligible for release.²⁶ Žigić argues that the Extradition Decision violates Article 5 of the Agreement between the United Nations and the Federal Government of Austria on the Enforcement of Sentences of the ICTY, which, according to him, prohibits such an extradition procedure.²⁷ Lastly, Žigić argues that because the applicable laws of the Republika Srpska do not provide the same guarantees as the laws of Bosnia and Herzegovina regarding the joinder of sentences in cases of multiple verdicts passed by one or more courts of law, he is placed in a position of inequality relative to other citizens.²⁸ For all of the foregoing reasons, Žigić requests that the ICTY withhold consent to Austria to enforce the Extradition Decision.²⁹

III. DISCUSSION

10. As a preliminary matter, I note that the Prosecution did not participate in anyway in the underlying proceedings in Bosnia and Herzegovina and Austria which are challenged by Žigić in his Request. While the Prosecution is consulted during early release proceedings to take into

²² Request, para. 17.

²³ Request, paras. 15-16.

²⁴ Request, para. 18. In such a case, Žigić argues that the statute of limitations for the prosecution of offences committed in 1992 and 1993 has also run, likewise leaving no grounds for extradition.

²⁵ Request, para. 19.

²⁶ Request, para. 20.

²⁷ Request, para. 26 *referring to* 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”), Article 5. Žigić argues that the word “proceeded” in this context encompasses the extradition procedure.

²⁸ Request, para. 28.

²⁹ Request, para. 30.

account “any substantial cooperation of the prisoner with the Prosecutor”,³⁰ I see no compelling reason or special circumstances in this case that would give the Prosecution standing to make submissions in relation to the extradition of a convicted person who has or will have completed his ICTY or ICTR sentence.³¹ Accordingly, I dismiss the Prosecution’s Response.

11. Turning to the merits of the Request, I consider that Žigić’s arguments in connection with the statute of limitations on the enforcement of his sentence in Bosnia and Herzegovina and his alleged position of inequality challenge the lawfulness of Austria’s determination on Žigić’s extradition and are therefore beyond the Mechanism’s jurisdiction. In decisions respectively dated 14 June 2010 and 22 September 2010, the Regional Court of Graz for Criminal Matters and the Graz Higher Regional Court both rejected Žigić’s request to deny his extradition to Bosnia and Herzegovina.³² The latter decision specified that no further legal recourse existed on the matter.³³ The Mechanism is not an appellate court vested with jurisdiction to review extradition decisions rendered by domestic courts that are unrelated to proceedings before the ICTY or Mechanism.

12. However, I find that the agreement of the Mechanism is nevertheless required as the Mechanism has the power to supervise the enforcement of sentences pronounced by the ICTY, including the implementation of the relevant sentence enforcement agreements.³⁴ Although extradition is ordinarily a matter concerning only states, in the case at hand, Žigić’s presence in Austria is a consequence of the sentence imposed on him by the ICTY, and the Mechanism continues to exercise supervision over Austria’s enforcement of the sentence.³⁵ Moreover, as the Graz Higher Regional Court held, Austrian law – namely Articles 21(1) and 25 of the Federal Law on Cooperation with International Courts – expressly provides that the extradition of any ICTY convicted person serving his or her sentence in Austria is subject to the approval of the ICTY.³⁶

13. Indeed, Article 21 of the Federal Law on Cooperation with International Courts is the domestic implementing legislation of Article 5 of the agreement between the ICTY and Austria on

³⁰ See Rule 151 of the Mechanism’s Rules of Procedure and Evidence (“Rules”). See also Paragraph 4(c) of the Practice Direction on the Procedure for the Determination for Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism (“Practice Direction”).

³¹ In this regard, I recall Article 14 of the Statute of the Mechanism (“Statute”), which describes the role of the Prosecutor as being responsible “for the investigation and prosecution of persons covered by Article 1 of this Statute”.

³² Request, para. 7; Annex I. In finding the extradition of Žigić to Bosnia and Herzegovina permissible, the Austrian court analysed whether there was any identity of criminal offences between the procedure before the ICTY and before the courts of Bosnia and Herzegovina and concluded that that the acts for which Žigić was sentenced by the Military Tribunal of Banja Luka were not the same acts for which he was sentenced by the ICTY.

³³ Request, Annex I.

³⁴ See Article 25(2) of the Statute.

³⁵ See Article 25 of the Statute. See also Enforcement Agreement, *supra* fn. 27, preamble (“NOTING the willingness of the requested State to enforce sentences imposed by the International Tribunal; IN ORDER to give effect to the judgements and sentences of the International Tribunal”), Article 3.

³⁶ See Request, Annex I, *citing* Bundesgesetzes über die Zusammenarbeit mit den internationalen Gerichten BGBl Nr. 263/1996 §§ 21 Abs 1, 25 Abs 2.

the enforcement of sentences,³⁷ in that both provisions are codifications of the customary international legal principle of speciality.³⁸ Thus, both the Enforcement Agreement and Austria's domestic law limit Austria's right to proceed against individuals, who are serving their sentence imposed by the ICTY, for acts committed prior to their transfer to Austria.³⁹ In this respect, I am of the view that Austria's extradition proceedings against Žigić constituted "proceed[ings] against" him for an "act or conduct committed prior to his or her transfer" to Austria.⁴⁰ Therefore, Austria was required under the Enforcement Agreement and its domestic laws to consult the Mechanism.⁴¹ Insofar as the Mechanism is concerned, nothing precludes the convicted person from being extradited upon completion of the ICTY sentence unless his extradition would violate the *non bis in idem* principle guaranteed by Article 7 of the Statute.

14. I consider that Žigić's cursory submissions fail to show that his extradition is bared by the *non bis in idem* principle. I also observe that, in the case at hand, the ICTY was consulted⁴² and communicated that the Enforcement Agreement would not preclude Žigić's extradition to Bosnia and Herzegovina once he has served his ICTY sentence.⁴³ In this regard, the Extradition Decision is not premature, as argued by Žigić, and it can be enforced upon the completion of his sentence or upon his early release or pardon.⁴⁴ I am of the view that, at the time of Žigić's release, he will have completed his ICTY sentence within the meaning of Article 9 of the Enforcement Agreement and can be then extradited to the requesting State.

³⁷ Article 21 of the Federal Law on Cooperation with International Courts provides in relevant part: "(1) Without the consent of the International Tribunal, a person accepted for execution of a prison sentence imposed by the International Tribunal may not be prosecuted or punished in Austria for an offence committed prior to his acceptance, nor may he be restricted in his personal liberty or extradited to a third country, if the sentence passed by the International Tribunal does not pertain to the said offence." *Bundesgesetzes*, § 21(1). Article 5 of the Enforcement Agreement provides in relevant part: "A convicted person transferred to the requested State pursuant to the terms of this Agreement shall not be prosecuted or proceeded against in the requested State for any act or conduct committed prior to his or her transfer to the requested State". Enforcement Agreement, Article 5.

³⁸ See M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, at 538 (5th ed. 2007).

³⁹ Compare *Bundesgesetzes*, *supra* fn. 36, § 21, and Enforcement Agreement, *supra* fn. 27, Article 5.

⁴⁰ This interpretation is in line with the UN Agreement between the United Nations and Tanzania, Article 41, which reads: "The host state shall not exercise its jurisdiction or proceed with a request for extradition from another State with regard to persons surrendered to the Mechanism, persons granted provisional release or persons who appear before the Mechanism voluntarily or pursuant to a summons for any acts, omissions or convictions prior to their surrender or transfer to or appearance before the Mechanism except as may be provided for in the Rules of Procedure and Evidence".

⁴¹ Although Article 5 of the Enforcement Agreement does not expressly provide for the Mechanism's consent, such consent is part and parcel of the rule of speciality. In its classical formulation, the rule of speciality requires that the state requesting extradition limit its proceedings against the extradited individual to the offences for which the requested state agreed to extradite him, unless the requested state agrees otherwise. See *Bassiouni*, *supra* fn. 38, at 537-38. In other words, the rule confers upon the requested state a right of refusal with respect to proceedings against offences beyond those agreed to at the time of extradition. See *Bassiouni*, *supra* fn. 38, at 541.

⁴² Letter from the Austrian Federal Ministry of Justice to the ICTY, 7 February 2011 (internal document).

⁴³ Letter from the ICTY Registry to the Embassy of the Republic of Austria, 20 July 2011 (internal document).

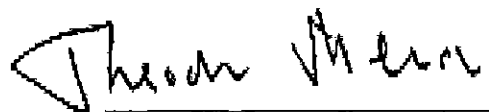
⁴⁴ Enforcement Agreement, Articles 8-9. See also Extradition Decision p. 7.

IV. DISPOSITION

15. For the foregoing reasons, I hereby **GRANT** the Motion to Dismiss the Prosecution's Response and **DENY** the Request.

Done in English and French, the English version being authoritative.

Done this 12th of December 2014,
At The Hague,
The Netherlands

A handwritten signature in black ink, appearing to read 'Theodor Meron', written over a horizontal line.

Judge Theodor Meron
President

[Seal of the Mechanism]



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