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UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

Case No. MICT-14-79

Before: Judge Theodor Meron, President

Registrar: Mr John Hocking

Filing Date: 6 November 2015

PROSECUTOR

v.

NASER ORIĆ

PUBLIC with PUBLIC ANNEXES

SECOND MOTION REGARDING A BREACH OF *NON BIS IN IDEM*

Office of the Prosecutor
Mr. Hassan B. Jallow
Mr Mathias Marcussen

Counsel for Naser Orić
Ms Vasvija Vidović
Mr John Jones

I. INTRODUCTION

1. This motion is filed before the Mechanism for International Criminal Tribunals ("MICT" or "Mechanism") on behalf of Naser Orić ("the applicant"). It requests that, acting under rule 16 of the Rules of Procedure and Evidence ("RPE"):
   (i) the President designate a Trial Chamber; and
   (ii) the Trial Chamber issue an order requesting the Court of Bosnia and Herzegovina ("BiH Court") to permanently discontinue proceedings against the applicant.

II. PROCEDURAL HISTORY

2. On 28 March 2003 the International Criminal Tribunal for the Former Yugoslavia ("ICTY" or "Tribunal") confirmed an indictment ("ICTY Indictment")[1] against the applicant for alleged war crimes committed in Bosnia and Herzegovina ("BiH").

3. On 8 June 2005 Trial Chamber II dismissed parts of the indictment under rule 98*bis* of the Tribunal's RPE.[2] On 30 June 2006 Trial Chamber II issued its Judgement, acquitting the applicant of most charges, but convicting him of certain acts of murder and cruel treatment.[3] On 3 July 2008 the Appeals Chamber overturned the convictions and acquitted the applicant of all charges.[4]

4. In November 2008 the applicant was summoned for questioning before prosecutors in Republika Srpska. On 11 December 2008 the applicant filed a motion requesting an order that Republika Srpska permanently discontinue proceedings against the applicant, on the basis of *non bis in idem*.[5] On 7 April 2009 Trial Chamber II rejected that motion, holding that criminal proceedings had not been instituted.[6]

5. Also in April 2009 the applicant's case was transferred from Republika Srpska to the BiH Court, at the applicant's request.

[1] For this motion, the relevant version is the Second Amended Indictment (1 October 2004), on the basis of which trial proceeded. The subsequent (third) amendment reflected the removal of charges following the rule 98*bis* decision.
[2] *Prosecutor v Orić*, Case No.IT-03-68-T, Transcript, 8 June 2005.
[3] *Prosecutor v Orić*, Case No.IT-03-68-T, Judgement, 30 June 2006.
[4] *Prosecutor v Orić*, Case No.IT-03-68-A, Judgement, 3 July 2008.
[5] *Prosecutor v Orić*, Case No.IT-03-68-A, Motion Regarding a Breach of Non-Bis-In-Idem, 11 December 2008.
[6] *Prosecutor v Orić*, Case No.IT-03-68-A, Decision on Oric's Motion Regarding a Breach of *Non-Bis-In-Idem*, 7 April 2009.

6. In June 2015 the applicant was arrested in Switzerland on the basis of a Serbian arrest warrant. BiH then requested extradition and ultimately the applicant was extradited to BiH.

7. On 9 September 2015 the BiH Court confirmed an indictment ("BiH Indictment") against the applicant.[7] The applicant filed objections to that indictment but these were rejected on 5 October 2015. The objections did not include *non bis in idem*, which is a matter for the MICT to determine.

III. APPLICABLE LAW

8. Article 7(1) of the Statute of the MICT[8] states that:

> *No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism.*

9. Rule 16 of the RPE of the MICT[9] provides that:

> *When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the ICTY, the ICTR, or the Mechanism, a Trial Chamber designated by the President shall, following mutatis mutandis the procedure provided in Rule 12, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.*

10. Minimal ICTY or MICT jurisprudence exists on these provisions, and what there is has mostly focused on what it means for a person to have "already been tried."[10]

IV. ANALYSIS

11. The preconditions for the issue of a rule 16 order are:

    (i) Reliable information shows that criminal proceedings have been instituted before a court of any state; and

    (ii) Those proceedings are "for a crime for which that person has already been tried" before the Tribunal or the Mechanism.

    Where these two requirements are met the Trial Chamber retains no discretion but "shall" issue an order requesting that the domestic proceedings be permanently discontinued.

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[7] Indictment No.T200KTRZ000501507 (Annex 1).
[8] See also ICTY Statute, art.10(1).
[9] See also ICTY RPE, rule 13.
[10] *Prosecutor v Tadić*, Case No.IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995;*Prosecutor v Karadžić*, Case No.IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, 16 November 2009.

(i) Criminal proceedings have been instituted

12. Annex 1 to this motion is the BiH Indictment.[11] It is respectfully submitted that this constitutes "reliable information" demonstrating the institution of criminal proceedings in BiH.

(ii) The proceedings concern events for which the applicant "has already been tried" by the ICTY

13. This second element of Rule 16 requires a comparison between the matters already dealt with by the ICTY and those currently before the BiH Court.

The ICTY proceedings

14. On 15 December 2002 and 3 March 2004 Republika Srpska made submissions concerning the applicant to the ICTY Prosecutor under the "Rules of the Road" process. The purpose of these submissions was to request authorisation from the ICTY to proceed with a domestic prosecution.

15. The submissions included charges against the applicant under articles 141, 142 and 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY") (genocide, war crimes against the civilian population and war crimes against prisoners of war). Those charges concerned killings allegedly carried out in Srebrenica Municipality from mid-1992 through 1993. Accompanying those charging documents was evidentiary material, including documents concerning a wider range of military operations in Eastern Bosnia in 1992 and 1993.

16. In 2003 the ICTY Indictment was issued. It charged the applicant with war crimes alleged to have occurred in Eastern Bosnia in 1992 and 1993. The particulars in the ICTY Indictment did not mention all incidents covered by the Rules of the Road submission. The particulars fell into two categories:

    (i) Alleged instances of killings and cruel treatment between 24 September 1992 and 29 March 1993 in Srebrenica Municipality.

    (ii) Alleged instances of wanton destruction and plunder between 10 June 1992 and 8 January 1993 in Srebrenica and Bratunac Municipalities.

[11] The material in support of the indictment runs to 877 pages including translations and has therefore not been filed with this motion. It can be provided if required.

The BiH proceedings

17. The BiH Indictment charges the applicant under article 144 of the Criminal Code of the SFRY (war crimes against prisoners of war). The counts concern alleged killings in Srebrenica and Bratunac Municipalities:

    (i) Alleged killing of Slobodan Ilić on 12 July 1992 in Zalazje, Srebrenica Municipality;

    (ii) Alleged killing of Milutin Milošević in the second half of May 1992 in Lolići, Bratunac Municipality;

    (iii) Alleged killing of Mitar Savić in December 1992 in Kunjerac, Bratunac Municipality.

Comparison of the ICTY proceedings with the BiH proceedings

18. The proceedings against the applicant in BiH relate to the same military activities which formed the basis of the ICTY case. It encompassed operations undertaken by Muslim armed units in Eastern Bosnia between May 1992 and February 1993,[12] focusing on events in Srebrenica and Bratunac Municipalities. The case before the BiH Court concerns the same series of military activities and events in Srebrenica and Bratunac Municipalities from mid to late 1992.

19. The allegations in the BiH Indictment all concern matters which were before the ICTY Prosecutor prior to the issuance of the ICTY Indictment. The Rules of the Road submissions included allegations concerning the disappearance of persons from Zalazje on 12 July 1992, including Slobodan Ilić.[13] They also included information about deaths in Kunjerac and Sandići (near Lolići) including those of Milutin Milošević and Mitar Savić.[14] Additional documents relating to these matters were also collected by the ICTY Prosecutor from other sources.[15]

20. It is irrelevant that the BiH Indictment uses a different legal characterisation from that adopted in the ICTY Indictment. *Non bis in idem* is engaged not only where two cases use the same legal characterisation, but wherever the same underlying acts are involved. This

[12] ICTY Indictment, para.27.
[13] Annex 2 (documents marked RR145431 and RR322078).
[14] Annex 2 (documents marked RR321893 and RR321894).
[15] Annex 3.

is clear from the term "acts" used in article 7(1) of the MICT Statute, as well as the discussion in *Tadic*.[16]

21. Neither is the application of *non bis in idem* excluded by the fact that the specific acts alleged in the BiH Indictment were not among those specifically particularised in the ICTY Indictment. The ICTY and MICT are yet to consider this question,[17] however decisions from other jurisdictions strongly support the view that *non bis in idem* applies not only where two cases involve identical particulars, but also where the acts alleged form part of the same alleged course of conduct. In Canada courts look at "factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events... and whether the accused's actions were related to each other by a common objective."[18] The European Court of Justice considers that acts charged are the same for the purpose of *non bis in idem* if "the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter."[19]

22. The Supreme Court of Republika Srpska treats the overall course of conduct as one act for this purpose, so that a subsequent prosecution for any part of it would violate *non bis in idem*:

> *"if one person commits several actions of the same type, or of different types, described in Article 142,* Paragraph *1 of the CC SFRY, they will not be considered as several criminal acts of war crimes against the civilian population, but rather as just one criminal act of this kind. This is based on the fact that the legal description of this criminal act states that the matter in question is one criminal act, regardless of the number of committed individual actions."*[20]

23. Moreover, *non bis in idem* also applies where a subsequent prosecution involves an abuse of process.[21] In England "double jeopardy" has been held to mean that where prosecutors consider a course of conduct and charge only in respect of a limited part of it, a later

[16] *Prosecutor v Tadić*, Case No.IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995, para.13.
[17] In *Žigić* the MICT did not need to determine this issue. The acts for which Mr Žigić had been convicted in BiH were not linked to the conduct which formed the basis of his ICTY trial. Mr Žigić appears to have argued only that those acts could have been given the same legal characterization (persecution) as was applied to separate conduct in his ICTY trial: *Prosecutor v Žigić*, Case No.MICT-14-81-ES.1, Request of the Convicted Zoran Žigić for Non-Compliance with Republic of Austria's Extradition Decision, 10 September 2014; *Prosecutor v Žigić*, Case No.MICT-14-81-ES.1, Decision on Zoran Žigić's Request to Withhold Consent for the Execution of the Republic of Austria's Extradition Decision, 12 December 2014.
[18] *R v Prince* [1986] 2 SCR 480, para.20.
[19] *Van Esbroek*, Case C-436/04, 9 March 2006, para.38.
[20] Case No.110K00918212Kž, 22 November 2012 (Annex 4), p6.
[21] *R v Carroll* [2002] HCA 55 (Australia); *Fofana v Thubin* [2006] EWHC 744 (Admin)(England).

criminal proceeding covering other parts of the same course of conduct can amount to an abuse of process.[22]

24. This is consistent with the rationale for the principle of *non bis in idem*. It derives from a recognition that prosecutions may be used oppressively, and that it is inherently unfair to an accused if the outcome of a criminal proceeding is not final. The United States Supreme Court explained it in this way:

> *The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*[23]

25. These principles have specific application in international war crimes prosecutions, for two reasons.

26. First, the finality which *non bis in idem* is designed to ensure is particularly difficult to achieve in international war crimes cases. ICTY cases usually begin as large, complex investigations which are ultimately reduced in size, even by removing arguable allegations, in order to achieve manageable proportions. Indeed this is the very purpose of rule 73*bis*(D) of the ICTY RPE[24] which enables a Chamber to limit the counts charged in an indictment "in the interest of a fair and expeditious trial." It would be ironic if that procedure, rather than creating fairness for an accused, meant that specific incidents dropped from an indictment could later provide the basis for a fresh trial.[25] Even where rule 73*bis*(D) is not used, the size of war crimes investigations means that prosecutors will inevitably pare down cases to what they consider are the strongest charges relating to a course of conduct. If other allegations, having been dropped at that stage, were later able to ground a fresh prosecution, this would fundamentally undermine the *non bis in idem* principle and mean that defendants before the ICTY could never be assured of finality.

27. Secondly, the ICTY enjoys a particular relationship with domestic courts from the region. This is demonstrated by the Rules of the Road agreement which, until it ended in 2004, gave the ICTY responsibility for preventing oppressive or unjustified domestic prosecutions. The consequences of this special relationship for the *non bis in idem*

[22] *Fofana v Thubin* [2006] EWHC 744 (Admin), paras27-29.
[23] *Green v United States*, (1957) 355 US 184, pp187-188.
[24] See also MICT RPE, rule 81(D).
[25] This argument was raised in *Karadžić*, however the Chamber considered it premature to address this issue before the end of trial: *Prosecutor v Karadžić*, Case No.IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, 16 November 2009.

principle were seen in the English case of *Serbia v Ganic*.[26] There a Serbian extradition request was held to be an abuse of process and refused. Mr Ganic, the subject of the extradition request, had earlier been the subject of a Rules of the Road referral. ICTY prosecutors had determined that there was no case against him. The English court noted that:

> *there is a distinction between the role of individual prosecutors and the role of the prosecutor within the ICTY. The ICTY [was] set up with international agreement to deal with war crimes alleged to have been committed in the former Yugoslavia and has within its responsibilities the investigation and prosecution of those cases. The investigation was carried out on behalf of the ICTY and acting upon a report from their investigators and prosecutors it was the ICTY that concluded that there was no case against Dr Ganic. Until The Rules of the Road Agreement ended in May 2004 no other prosecutor would have authority to bring proceedings.*[27]

28. The same applies to the applicant's case. Rules of the Road submissions were made in respect of him. They included charges and evidence relating to the allegations now made against the applicant in BiH. Parts of those submissions were incorporated into particulars in the ICTY Indictment, while other particulars were not included. Just as it was an abuse of process in *Ganic* for charges rejected by the ICTY Prosecutor to later be brought in Serbia, those allegations against the applicant which were ultimately not particularised in the ICTY Indictment should not later be permitted to form the basis of a case against him.

29. For these reasons, the proceedings being brought against the applicant in the BiH Court violate the principle of *ne bis in idem*.

V. REQUEST FOR URGENT DISPOSAL

30. It is respectfully requested that the present motion be dealt with urgently.

31. As a result of the BiH proceedings the applicant is subject to measures prohibiting him from leaving the Federation of Bosnia and Herzegovina and mandating that he report weekly to police. These measures interfere with the applicant's work and personal life. In combination with the ongoing threat of criminal sanction, they also add a measure of indignity and insecurity to the applicant's life from which his acquittal should have protected him. The criminal proceedings and associated restrictive measures should therefore be ended as soon as possible.

[26] *Serbia v Ganic* (unreported) 27 July 2010 (Annex 5).
[27] *Ibid.* para.32.

32. In case assurances on the matter are required, the present motion has been filed at the earliest opportunity following the BiH Court's 5 October decision rejecting the applicant's objections to the BiH Indictment. Some time has been required for translating the indictment and other materials.

VI. CONCLUSION

33. The requirements for an order under rule 16 of the MICT RPE are made out. Reliable information shows that criminal proceedings have been instituted before the BiH Court, and those proceedings concern acts which have already been dealt with by the ICTY.

34. It is requested that the President designate a Trial Chamber pursuant to rule 16 of the MICT RPE, and that the Trial Chamber issue an order under the same rule requiring the BiH Court to permanently discontinue its proceedings against the applicant.

Word count: 2893

Respectfully submitted,

Vasvija Vidović, Lead Counsel

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