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**UNITED NATIONS MECHANISM FOR
INTERNATIONAL CRIMINAL TRIBUNALS**

Case No. MICT-14-79

Before: Judge Liu Daqun, Single Judge

Registrar: Mr John Hocking

Filing Date: 24 November 2015

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

**REQUEST TO DISMISS THE PROSECUTION'S RESPONSE
OR FOR LEAVE TO REPLY**

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 requests that the Single Judge either:
 - (i) dismiss the Prosecution's Response to Naser Orić's Second Motion Regarding a Breach of *Non Bis In Idem* ("the Prosecution Response" or "the Response");
or in the alternative
 - (ii) grant leave to Naser Orić ("the applicant") to reply to the Prosecution Response.

II. PROCEDURAL HISTORY

2. On 6 November 2015 the applicant filed his Second Motion Regarding a Breach of *Non Bis In Idem* ("the Motion").
3. On 12 November 2015 the President issued an Order Assigning a Single Judge to Consider a Motion, which assigned the Motion to Judge Liu Daqun.
4. On 16 November 2015 the Prosecution's Response was filed.

III. THE PROSECUTION'S LACK OF STANDING

5. The Prosecution had no standing to submit the Response. The Rules of Procedure and Evidence ("RPE") and the jurisprudence of the Mechanism for International Criminal Tribunals ("the Mechanism") provide no legal basis for a response from the Prosecutor to a motion filed under Rule 16.
6. Entitlements to submit motions, and to respond and reply to motions are set out in the RPE. They vary depending on the stage of proceedings and the RPE is structured accordingly. Rules 79 and 80 concern motions at pre-trial and in their language assume a right of response.¹ Rule 153 deals with responses filed during trial proceedings and appeal proceedings. None of these provisions by its words or context suggests that a general right of response exist outside those stages of proceedings.
7. Proceedings which may arise after the conclusion of a case at the ICTY, ICTR or the Mechanism are dealt with separately. Whether and to what extent the Prosecution may participate varies depending on the nature of those proceedings. In review proceedings, a

¹ See RPE, Rule 80(A), providing that a Chamber "...may rule on such motions based solely on the *briefs of the Parties...*" [emphasis added].

right to respond exists.² In contrast, where a convicted person requests pardon, commutation of sentence or early release, the Prosecutor has no entitlement to respond. He may only submit a report through the Registrar on the specific question of any cooperation provided by the convicted person to the Prosecution.³ Where seized of early release requests the President has dismissed responses filed by the Prosecution for lack of standing.⁴ In only one case, the President was willing to consider a Prosecution response because special circumstances existed, however he did so in express reliance on his power under the relevant Practice Direction to consider “any other information”.⁵

8. Rule 16 governs proceedings where information is provided to the President concerning a breach of *non bis in idem*. It gives no entitlement to the Prosecution to respond. Neither does any other rule or Practice Direction.
9. In *Žigić* an analogous situation arose before the President. *Žigić* faced extradition at the end of his sentence. Those extradition proceedings arose because of a domestic conviction and sentence which *Žigić* said should not be enforced because of *non bis in idem*. The Prosecution sought to respond to the motion filed by *Žigić*’s on those matters. The President noted that the Prosecution had not participated in any way in the domestic criminal proceedings.⁶ He also recalled Article 14 of the Mechanism’s Statute, which defines the Prosecutor’s role as being concerned with “the investigation and prosecution” of persons covered by Article 1 of the Statute.⁷ Accordingly the President dismissed the Prosecutor’s response, concluding that:

While the Prosecution is consulted during early release proceedings to take into account “any substantial cooperation of the prisoner with the Prosecutor”, I see no compelling reason or special circumstances in this case that would give the Prosecution standing to make submissions in

² RPE, Rule 146(C).

³ RPE, rules 149-151; 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), 5 July 2012, para. 4(c).

⁴ *Prosecutor v Drago Nikolić*, Case No. MICT-15-85-ES.4, Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or Other Relief of Drago Nikolić, 13 October 2015, para.9; *Prosecutor v Sreten Lukić*, Case No. MICT-14-67-ES.4, Decision on Sreten Lukić’s Request for Determination by the President of Time Served.

⁵ *Prosecutor v Stanislav Galić*, Case No. MICT-14-83-ES, Reasons for the President’s Decision to Deny the Early Release of Stanislav Galić and Decision on Prosecution Motion, 23 June 2015, para. 8; 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), 5 July 2012, para.9.

⁶ *Prosecutor v Zoran 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, para.10.

⁷ *Prosecutor v Zoran 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, footnote 31.

*relation to the extradition of a convicted person who has or will have completed his ICTY or ICTR sentence.*⁸

10. The same considerations arise here. Just as the Prosecutor's role under the Statute gives him no interest and hence no standing in respect of the extradition of a convicted person who has served his sentence, neither does the Prosecutor have an interest or standing in respect of the domestic prosecution of a person who has been acquitted by the ICTY. While the President left open the possibility that information supplied by the Prosecution could nonetheless be considered in exceptional circumstances,⁹ there is nothing in the present case that would constitute a "compelling reason or special circumstances". Even if compelling circumstances did exist such as required opposing submissions to be put before the Single Judge, the body having an interest and most appropriate to do so would be the Court of Bosnia and Herzegovina.
11. For these reasons the applicant submits that the Prosecution's Response should be dismissed.

IV. REQUEST FOR LEAVE TO REPLY

12. In the event that the Single Judge finds that the Prosecution did have standing to submit the Response, the applicant respectfully requests leave to reply to the Response on the following issues.
13. The applicant submits that the Prosecution's Response misstates the relevance or otherwise of particular caselaw.
14. In paragraph 3 of the Response the Prosecutor misrepresents the scope of the Republika Srpska decision relied on by the applicant, by suggesting that the decision "radically departs from the law of the Mechanism, the ICTY and ICTR" and that it "seems to imply that a single criminal act or 'course of conduct' could cover the entire five-year war period in Bosnia and Herzegovina." However that decision, which was included as Annex 4 to the Motion, dealt with offences so closely linked in time and space that they could clearly be considered as part of a course of conduct. Far from being spread out over "the entire five year war period", the incidents in question occurred on consecutive days.¹⁰

⁸ *Prosecutor v Zoran 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, para. 10.

⁹ *Ibid.*

¹⁰ Motion, Annex 4. The alleged events occurred on 14 and 15 July 1992.

Moreover, the applicant submits that the approach of the Republic Srpska can hardly be said to “radically depart from the law of the Mechanism, the ICTY and ICTR,” given that those bodies are yet to decide on the issues which were raised in that case. These issues arise for the first time in the context of the Motion.

15. In an attempt to suggest that relevant jurisprudence does exist from the Mechanism or the ICTY or ICTR, the Prosecution also misrepresents the caselaw of those institutions.
16. In paragraph 9 of the Response, the Prosecution relies on a decision in *Karadžić*. There the Chamber declined to apply *non bis in idem* because a complete trial in that case had not yet occurred.¹¹ That decision did not purport to determine the separate question of whether or not charges dropped at an early stage under Rule 73*bis* could later form the basis of a new and separate case *after* the end of a trial. That question arises now for the first time on the Motion.
17. The Prosecution Response claims that the question arising on the Motion is “virtually indistinguishable from the argument that the President rejected in *Žigić*.” However in *Žigić* almost no information was put before the President indicating that the crimes involved were part of the same course of conduct. *Žigić*’s motion merely asserted that crime charged domestically “could pose an integral part of the criminal offence of persecution” for which *Žigić* was convicted at the ICTY. No explanation was given as to how those acts were linked. The President in turn dismissed that claim with a single sentence: “I consider that *Žigić*’s cursory submissions fail to show that his extradition is bar[r]ed by the *non bis in idem* principle.”¹² There is nothing in that sentence to indicate that the President rejected the “course of conduct” approach which is advocated in the Motion. The President may rather, and with good reason, have considered that the facts asserted were not such as to put that issue before him.
18. In none of the caselaw relied on in the Prosecution Response has the ICTY, ICTR or MICT previously been required to grapple with the difficult questions of policy and principle which are raised by the facts set out in the Motion. These questions warrant a more careful analysis than the simplistic literal approach to Article 7 of the Mechanism’s Statute which the Prosecution Response advocates.

¹¹ *Prosecutor v Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on the Accused’s Motion for Finding of *Non-Bis-in-Idem*, 16 November 2009, paras 12-13.

¹² *Prosecutor v Zoran 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, para. 14.

19. Finally, the Prosecution states that the Republika Srpska Rules of the Road submission was not received by the ICTY until 4 March 2004. Even if that is the case, the applicant submits that it does not materially affect the submissions made. At that time it remained open to the Prosecution to seek amendment of its indictment in the applicant's case.¹³

V. CONCLUSION

20. For the reasons given, the applicant respectfully requests that the Single Judge dismiss the Prosecution's Response. In the alternative the applicant requests leave from the Single Judge to reply as set out above.

Word count: 1771

Respectfully submitted,



Vasvija Vidović, Lead Counsel



John Jones, Co-Counsel

¹³ Rule 50, ICTY RPE.