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Mechanism for International Criminal Tribunals

Case No: MICT-14-79

Date: 4 December 2015

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Liu Daqun

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

NASER ORIĆ

PUBLIC WITH CONFIDENTIAL AND EX PARTE ANNEX

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

The Office of the Prosecutor:

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

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

A. Overview

1. Orić's motion to dismiss¹ the Prosecution's Response² to his request that the Court of Bosnia and Herzegovina discontinue criminal proceedings against him³ should be denied. The Prosecution's submissions should be considered as the Prosecution is a party to the proceedings with an interest in the issues involved, including the interpretation of *non bis in idem* and the consequences of that interpretation for decisions regarding the scope of current indictments.

B. The Prosecution is a party to the proceedings with an interest in the outcome

2. Absent an express right to make submissions under the Rules, standing before the ICTY and ICTR has been determined on a case-by-case basis, taking into account factors such as the interests of interveners in the proceedings,⁴ their status before the court,⁵ and any resulting prejudice.⁶ These considerations, which also apply before the MICT, demonstrate that the Prosecution is entitled to respond in the circumstances of this case.

¹ *Prosecutor v. Orić*, Case No.MICT-14-79, Request to Dismiss the Prosecution's Response or for Leave to Reply, 24 November 2015 ("Motion to Dismiss"), para.1(i), 5-11.

² *Prosecutor v. Orić*, Case No.MICT-14-79, Prosecution's Response to Naser Orić's Second Motion Regarding a Breach of *Non Bis in Idem*, 16 November 2015 ("Response").

³ *Prosecutor v. Orić*, Case No.MICT-14-79, Second Motion Regarding a Breach of *Non Bis in Idem*, 6 November 2015 ("Original Motion").

⁴ *Prosecutor v. Gotovina et al.*, Case No.IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, App.Ch., 29 June 2007 ("*Gotovina Appeal Decision*"), para.12 ("while the Practice Direction does not specifically provide for the possibility for a co-accused to file submissions in appeals proceedings initiated by another co-accused, it is clear from the procedural background of the case that Gotovina does have a specific interest in the matter") (emphasis added); *Prosecutor v. Karadžić*, Case No.IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, App.Ch., 13 November 2013, paras.9-11 (contrary to the express provisions of the Rules, Tolimir is entitled to appeal a decision to subpoena him because his right against self-incrimination is at issue); see also, *Prosecutor v. Stanković*, Case No.MICT-13-51, Decision on Stanković's Appeal Against the Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, App.Ch., 21 May 2014, para.8 (although only the Prosecution has standing to seek revocation of a referral under Rule 11bis, request on behalf of the accused is properly before the Chamber because it "relates to the fairness of the proceedings");

⁵ *Prosecutor v. Gotovina et al.*, Case No.IT-06-90-T, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, T.Ch., 12 March 2010, para.31 (request for restraining order against Croatia in relation to a criminal proceeding against Gotovina's legal team "could possibly affect the position of both parties, and [...] concerns an issue related to the fairness of the proceedings. The Chamber is satisfied that the Prosecution, as a party to these proceedings, has standing to respond."). Chambers have also refused standing to non-parties. See e.g., *Prosecutor v. Brdanin*, Case No.IT-99-36-T, Decision on Talić Motions, T.Ch., 6 December 2002, p.3 (Talić is not a party to the proceedings and therefore has no standing).

⁶ *Gotovina Appeal Decision*, para.12; see also, *Prosecutor v. Lukić*, Case No.MICT-14-67-ES.4, Decision on Sreten Lukić's Request for Determination by the President of Time Served, 29 May 2015, p.2 (assessing Prosecution standing based, *inter alia*, on the "possible prejudice requiring consideration of the Prosecution's submissions").

3. First, the Prosecution has an “interest in the matter”⁷ raised by the Original Motion.⁸ In *Galić*, the President noted that the Rules and Practice Direction did not specifically grant the Prosecution standing in an application for early release, yet still took the Prosecution’s submissions on the “particular issue presented” into account as relevant.⁹ That issue involved a question of law under the Statute.¹⁰ Similarly, the Prosecution has an interest in the question of law raised in the Original Motion, namely the interpretation of *non bis in idem* under the MICT Statute and Rules that Orić claims arises “for the first time” in the Original Motion.¹¹
4. In particular, Orić’s overly broad definition of *non bis in idem* has implications for the exercise of the Prosecution’s “broad discretion” regarding which crimes to charge in an indictment.¹² Several indictments before the MICT remain outstanding,¹³ and the Prosecution has continued to amend those indictments as necessary.¹⁴
5. Second, in general, “the Defence and the MICT Prosecutor are parties to the proceedings before the Mechanism.”¹⁵ Orić himself recognized the Prosecution’s status as a party in choosing to notify the Original Motion to the Prosecution.¹⁶ Had Orić believed that the Prosecution had no interest in responding, he could instead have filed his motion *ex parte*.¹⁷

⁷ *Gotovina* Appeal Decision, para.12; *see also*, fn.4, *supra*.

⁸ *Contra* Motion to Dismiss, para.10.

⁹ *Prosecutor v. 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.

¹⁰ *Prosecutor v. 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.5 (the Prosecution claimed to have standing on the grounds that the request involved a “question of law under the Statute”), 26 (taking the Prosecution’s arguments on the substantive legal issue into consideration), 30 (same). *See also*, *Prosecutor v. Lazarević*, Case No.MICT-14-67-ES.3, Public Redacted Version of the 7 September 2015 Decision of the President on the Early Release of Vladimir Lazarević, 3 December 2015, paras.16-17, fn.21 (noting Prosecution made submissions with regard to the question as to whether time spent on provisional release should be counted as time served); *Prosecutor v. Haradinaj et al.*, Case No.IT-04-84-T, Decision on Purported Motion for Certification to Appeal Trial Chamber Decision Concerning Subpoenaed Witness, T.Ch., 14 September 2007, para.6 (an Appeals Chamber decision in *Brdanin* granting standing is distinguishable because it concerned a “question of general public interest expected to impact upon cases before [the] Tribunal generally”).

¹¹ Motion to Dismiss, para.14.

¹² *Prosecutor v. Delalić et al.*, Case No.IT-96-21-A, Judgment, App.Ch., 20 February 2001, para.602.

¹³ Indictments remain outstanding before the MICT against three accused, Augustin Bizimana, Félicien Kabuga and Protais Mpiranya.

¹⁴ *See Prosecutor v. Protais Mpiranya*, Case No. MICT-12--2, Second Amended Indictment (Made Public pursuant to Single Judge’s Order of 4 June 2013 to Unseal and Publicly File the Second Amended Indictment), 3 August 2012.

¹⁵ *In re. Deogratias Sebureze and Maximilien Turinabo*, Case No.MICT-13-40-R90, MICT-13-41-R90, Decision on ICTR Prosecutor’s Motion for Reconsideration of 20 March 2013 Decision, 17 July 2013, para.7; MICT Rule 2 (defining “Party” as “The Prosecutor or the Defence”). *See* fn.5, *supra*; *In the Case Against Florence Hartmann*, Case No.IT-02-54-R77.5-A, Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009, para.15 (holding that an *amicus* prosecutor has standing to participate in appeal proceedings because his mandate “necessarily continues” beyond its express terms until the close of all related proceedings).

¹⁶ Original Motion, cover page.

¹⁷ *Prosecutor v. Dordević*, Case Nos.IT-05-87/1-PT & IT-02-54, Decision on Vlastimir Dordević’s Motion for Access to Transcripts, Exhibits and Documents in *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54, 6 February

6. Orić's Original Motion furthermore makes representations which only the Prosecution as a party to the proceedings was in a position to verify. As the Response demonstrates, the Original Motion misstates the timing of Rules of the Road submission, which the Prosecution received after it filed the pre-trial brief,¹⁸ not before it issued an indictment as Orić initially suggested.¹⁹ Orić does not contest this point in his reply.²⁰
7. Third, Orić "suffers no prejudice" from the Prosecution's Response because he has already availed himself of the opportunity to reply.²¹

C. Orić focuses unduly on the language of the Rules and on the Žigić decision

8. As the foregoing analysis demonstrates, parties before the MICT, ICTY and ICTR may be heard without explicit authorization under the Rules.²² The express terms of Rule 16 do not grant standing to either Orić or the Prosecution. The Rule 16 procedure is triggered when "the President receives reliable information" that crimes previously tried before the MICT, ICTY or ICTR are the subject of proceedings in a domestic court. The Rules otherwise fail to specify the manner in which the President should receive and evaluate such information. On his own argument, Orić lacked standing to file the Original Motion.
9. Orić's emphasis on the Žigić decision, which arose in the context of sentence enforcement, is also misplaced. The *Practice Direction on Early Release* expressly instructs the Prosecution to "submit a detailed report of any co-operation that the convicted person has provided to the Office of the Prosecutor" and its significance.²³ The President has at times – including in

2008, para.9 (*ex parte* submissions "are normally made to a Chamber on matters in which the opposing Party to the proceeding does not have a legal standing and therefore is not required to respond"). Although a party's filing classification does not determine standing, it may well reflect the filing party's view in that regard.

¹⁸ Response, para.10.

¹⁹ Original Motion, paras.14-16.

²⁰ Motion to Dismiss, para.19.

²¹ *Gotovina* Appeal Decision, para.12 ("the Appellant suffers no prejudice from such filing since he was granted the opportunity to reply to Gotovina's Response"); Motion to Dismiss, paras.12-19; *see also*, *Prosecutor v. Karadžić*, Case No.IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, App.Ch., 13 November 2013, para.11 ("neither the interests of Karadžić nor the Prosecution stand to be compromised by" granting standing to Tolimir).

²² *See e.g.*, *Prosecutor v. Stanković*, Case No.MICT-13-51, Decision on Stanković's Appeal Against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, App.Ch., 21 May 2014, para.8 (accused request for revocation of referral under Rule 11*bis* was properly before the Referral Bench notwithstanding express limitation of the right to file such a request to the Prosecution). *Contra* Motion to Dismiss, paras.6-8.

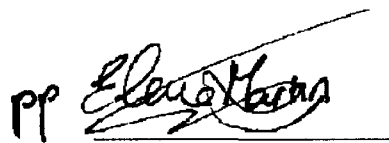
²³ Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism, MICT/3, 5 July 2012 ("Practice Direction on Early Release"), para.4(c).

Žigić – interpreted this language as a limitation on the Prosecution’s role in that context.²⁴ Even in that context, however, the President has accepted Prosecution submissions in issues of interest to the Prosecution such as questions of law,²⁵ or when it was otherwise in the interests of justice.²⁶ Orić’s Original Motion does not concern sentence enforcement and the language of the Practice Direction on Early Release does not apply.²⁷

D. Conclusion

10. The Prosecution has an interest in the Original Motion, which advances a broad legal standard never before adopted by the MICT, ICTY or ICTR impacting on the work of the Prosecution. The language of the Rules does not require that the Prosecution’s submissions be disregarded. Orić’s request to dismiss the Prosecution’s Response should be denied.
11. The Prosecution does not oppose Orić’s alternative request for leave to reply.²⁸

Word Count: 2042

pp 
 Mathias Marcussen
 Senior Legal Officer

Dated this 4th day of December, 2015
 At The Hague, The Netherlands.

²⁴ *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, para.10; *Prosecutor v. Lukić*, Case No.MICT-14-67-ES.4, Decision on Sreten Lukić’s Request for Determination by the President of Time Served, 29 May 2015, p.2, fn.5 (citing to Žigić for the proposition that, “in principle, the Prosecution has no standing to make submissions on sentence enforcement matters”); see also, *Prosecutor v. 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.

²⁵ *Prosecutor v. 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; *Prosecutor v. Lazarević*, Case No.MICT-14-67-ES.3, Public Redacted Version of the 7 September 2015 Decision of the President on the Early Release of Vladimir Lazarević, 3 December 2015, paras.16-17, fn.21.

²⁶ See confidential and *ex parte* annex containing reference to confidential decision in another case for which the Prosecution will seek a public redacted version.

²⁷ See para.8, *supra*.

²⁸ Motion to Dismiss, paras.1(ii), 12-19.



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