UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-14-79

Date: 10 December 2015

Original: English

BEFORE A SINGLE JUDGE

Before: **Judge Liu Daqun**

Registrar: **Mr. John Hocking**

Decision of: **10 December 2015**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

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

The Office of the Prosecutor:

Mr. Hassan B. Jallow
Mr. Mathias Marcussen

Counsel for Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones

1. I, Liu Daqun, Judge of the International Residual Mechanism for Criminal Tribunals ("Mechanism") and Single Judge in this case[1] am seised of the "Second Motion Regarding a Breach of *Non Bis in Idem*" with Annexes 1 through 5 filed on 6 November 2015 ("Motion") by Naser Orić ("Orić").[2] The Prosecution filed a response on 16 November 2015,[3] and, on 24 November 2015, Orić filed a "Request to Dismiss the Prosecution's Response or for Leave to Reply" ("Related Request"). On 4 December 2015, the Prosecution filed publicly, with a confidential and *ex parte* annex, a response to the Related Request.[4]

I. BACKGROUND

2. Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia ("ICTY") found Orić, the former commander of the Srebrenica Territorial Defence Staff,[5] guilty of failing to discharge his duty as a superior to prevent the commission of murder and cruel treatment, as violations of the laws or customs of war, and sentenced him to two years of imprisonment.[6] The ICTY Appeals Chamber subsequently reversed Orić's convictions.[7]

3. On 11 December 2008, Orić filed a motion before the ICTY requesting that the district Prosecutor Office in Bosnia and Herzegovina ("BiH") be ordered to permanently discontinue its proceedings against Orić as being in breach of the *non bis in idem* principle under Article 10 of the ICTY Statute and Rule 13 of the ICTY Rules of Procedure and Evidence.[8] On 7 April 2009, an ICTY trial chamber dismissed Orić's request, finding that there was no information showing that criminal proceedings had been instituted against him before a court in BiH for a crime for which he had already been tried by the ICTY.[9]

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[1] Order Assigning a Single Judge to Consider a Motion, 12 November 2015, p. 1, *referring to* Article 12(1) of the Statute of the Mechanism ("Statute") and Rules 2(C), 16, and 23(A) of the Rules of Procedure and Evidence of the Mechanism ("Rules").
[2] On 13 November 2015, Orić filed the supporting materal with respect to the indictment before the Court of Bosnia and Herzegovina ("BiH Court"). *See* Supplementary Material Relating to the Second Motion Regarding a Breach of *Non Bis In Idem*, 13 November 2015.
[3] Prosecution's Response to Naser Orić's Second Motion Regarding a Breach of *Non Bis in Idem*, 16 November 2015 ("Response").
[4] Prosecution's Response to Naser Orić's Request to Dismiss the Prosecutor's Response or for Leave to Reply, 4 December 2015 (public with confidential and *ex parte* annex) ("Response to the Related Request").
[5] *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006 ("Trial Judgement"), para. 768.
[6] Trial Judgement, paras. 782, 783. *See Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Second Amended Indictment, 1 October 2004 ("ICTY Indictment"), paras. 24-26.
[7] *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, p. 64.
[8] *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Orić's Motion Regarding a Breach of *Non-Bis-In-Idem*, 7 April 2009 ("First *Non Bis in Idem* Decision"), p. 1. Article 10(1) of the ICTY Statute provides that "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the [ICTY] Statute, for which he or she has already been tried by the [ICTY]".
[9] First *Non Bis in Idem* Decision, p. 5.

4. On 9 September 2015, the BiH court confirmed an indictment against Orić, charging him with war crimes for alleged killings committed in Srebrenica and Bratunac municipalities in May, July, and December 1992 ("BiH Indictment").[10] In his Motion, Orić submits that criminal proceedings were instituted against him following the confirmation of the BiH Indictment, and requests that, in accordance with Rule 16 of the Rules, the BiH court be ordered to permanently discontinue the proceedings as being in breach of the *non bis in idem* principle.[11]

II. DISCUSSION

5. As a preliminary matter, I note Orić's submission that the Prosecution has no standing to file a response to the Motion and his related request that the Response be dismissed or, in the alternative, that he be granted leave to file a reply.[12] In response, the Prosecution argues that its submissions should be considered as it is a party to the proceedings before the Mechanism and has an interest in the issue of the interpretation of the *non bis in idem* principle raised in the Motion.[13] I note that there are no ongoing proceedings against Orić before the ICTY or the Mechanism and that the Prosecution is not participating in any way in the BiH proceedings which are challenged by Orić in the Motion. In view of these considerations, and taking into account that the present decision on the Motion does not cause any prejudice to the Prosecution, I find no compelling reason in this case that would require consideration of the Prosecution's submissions in relation to an alleged violation of the principle of *non bis in idem* by the BiH court.[14] Accordingly, I dismiss the Response.

6. In the Motion, Orić requests an order to the BiH court to permanently discontinue criminal proceedings against him as they purportedly violate the principle of *non bis in idem*.[15] In particular, Orić submits that the BiH proceedings relate to the "same military activities" undertaken by the Muslim armed units in Eastern Bosnia between May 1992 and February 1993, which formed the basis of the case against him before the ICTY,[16] and concern acts which form part of the "same alleged course of conduct" as charged in the ICTY Indictment.[17] Orić further argues that the

[10] *See* Motion, Annex 1.
[11] Motion, paras. 12, 34.
[12] Related Request, paras. 1, 5-11, 20. *See* Related Request, paras. 12-19.
[13] Response to the Related Request, paras. 1-10.
[14] *Cf. 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, *referring, inter alia, to* Article 14 of the Statute. In addition, I note that in the First *Non Bis in Idem* Decision, the ICTY Trial Chamber made its determination in the absence of submissions by the ICTY Prosecution.
[15] Motion, paras. 1, 29, 33, 34. Orić further requests urgent disposal of the Motion since the measures imposed on him due to the BiH proceedings interfere with his work and personal life. *See* Motion, paras. 30, 31.
[16] Motion, para. 18, *referring to* paragraph 27 of the ICTY Indictment.
[17] Motion, paras. 21, 22, *referring to R. v. Prince*, [1986] 2 SCR 480 ("*Prince* Judgement"), para. 20; *Criminal Proceedings against Leopold Henri Van Esbroeck*, Case C-436/04, 9 March 2006 ("*Esbroeck* Judgement"), para. 38, Supreme Court of the *Republika Srpska*, Case No. 110K00918212Kž, 22 November 2012 ("*Dmičić* Judgement"), p. 6. *See also* Motion, para. 20.

principle of *non bis in idem* is also relevant where a subsequent prosecution would amount to an abuse of process.[18] In this regard, Orić submits that the allegations in the BiH Indictment concern matters that were before the ICTY Prosecutor, in the form of the "Rules of the Road" submissions,[19] prior to the issuance of the ICTY Indictment.[20] Orić argues that it would constitute an abuse of process and undermine the principle of finality since allegations from the Rules of the Road submissions, which were not particularised in the ICTY Indictment, form the basis of the case against him before the BiH court.[21]

7. I recall that under Article 7(1) of the Statute, no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the Statute, for which he has already been tried by the ICTY. Pursuant to Rule 16 of the Rules, where reliable information shows that criminal proceedings have been instituted against such a person before a national court, a trial chamber, or a single judge, shall issue a reasoned order requesting the court permanently to discontinue the proceedings.[22]

8. Before the ICTY, Orić was charged with murder, cruel treatment, wanton destruction of cities, towns or villages, not justified by military necessity, and plunder of public or private property, as violations of the laws or customs of war, which occurred between 10 June 1992 and 20 March 1993 on the territory of BiH.[23] Specifically in relation to the count of murder, Orić was charged with superior responsibility for the killing on 25 September 1992 in the Srebrenica Police Station of Dragutin Kukić, and for the killing on a date between 6 February and 20 March 1993 of Jakov Dokić, Dragan Ilić, Milislav Milovanović, Kostadin Popović, Branko Sekulić and Bogdan

[18] Motion, paras. 23, 24.
[19] The "Rules of the Road" was a procedural measure, which obliged the local prosecutors to make submissions to the ICTY Prosecutor for review before any arrests and/or indictments were issued by local authorities, so as to protect individuals against arbitrary arrests on suspicion of war crimes. *See* Office of the High Representative, Rome Agreement, 18 February 1996, Article 5 (Cooperation on War Crimes and Respect for Human Rights) which reads in relevant part: "Persons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action."
[20] Motion, para. 19. *See also* Motion, Annex 1.
[21] Motion, paras. 26-28, *referring, inter alia, to Government of the Republic of Serbia v. Ejup Ganić* ("Ganić case"). *See* Motion, paras. 14, 15.
[22] *See also* Article 12(1) of the Statute and Rule 2(C) of the Rules.
[23] ICTY Indictment, paras. 19-37. I note that, following the Trial Chamber's judgement of acquittal pursuant to Rule 98*bis* of the ICTY Rules of Procedure and Evidence, the following charges were deleted from the ICTY Indictment: (i) plunder of public or private property; (ii) murder of Bogdan Zivanović; (iii) cruel treatment of Miloje Obradović; and (iv) wanton destruction of cities, towns or villages, not justified by military necessity, regarding the villages of Radijevići and Božići in Bratunac municipality. *See Prosecutor v. Naser Orić*, Case No. IT-03-68-PT, Third Amended Indictment, 30 June 2005. For the purposes of this Decision, the relevant indictment is the ICTY Indictment which was confirmed prior to the judgement of acquittal since the *non bis in idem* principle is applicable to those charges for which Orić was tried and acquitted.

Zivanović, all detained in a building behind the Srebrenica Municipal Building.[24] In contrast, before the BiH Court, Orić is charged with war crimes against prisoners of war on the basis that: (i) he personally killed Slobodan Ilić on 12 July 1992 in Zalazje, Srebrenica municipality; and (ii) together with another individual killed Milutin Milošević and Mitar Savić in the second half of May and on an undetermined date in December 1992, respectively, in Bratunac municipality.[25]

9. I note that the *non bis in idem* principle enshrined in Article 7(1) of the Statute and Rule 16 of the Rules aims to protect a person who has been finally convicted or acquitted from being tried again for the same offence.[26] In the *Ntakirutimana* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") found no violation of the *non bis in idem* principle where the *actus reus* supporting the accused's two separate convictions for genocide occurred on a different date and location and, importantly, involved the killing of different victims.[27] I note that in the present case, the murder charges in the BiH Indictment fundamentally differ from the murder charges contained in the ICTY Indictment with respect to the alleged victims and the nature, time, and location of Orić's alleged criminal conduct. Bearing in mind the application of the *non bis in idem* principle by the ICTR Appeals Chamber in the *Ntakirutimana* case, I find unpersuasive Orić's submission that the principle should be expanded to apply also to situations where the acts alleged form part of the "same alleged course of conduct" or the "same military activities", even though the particulars differ.[28]

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[24] ICTY Indictment, paras. 25, 26.
[25] BiH Indictment, RP. 123, 122.
[26] *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009, para. 16, *referring to* the International Covenant on Civil and Political Rights, Article 14(7). *See* Article 9(1) of the ICTR Statute and Rule 13 of the ICTR Rules of Procedure and Evidence. *See also The Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of Non-Bis-In-Idem, 14 November 1995, paras. 9, 13.
[27] *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 19. *See also Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 and ICTR-96-17-T, Judgement and Sentence, 21 February 2003, paras. 794, 795, 832. In the case of *Sergey Zolotukhin v. Russia*, the European Court of Human Rights ("ECtHR") provided a harmonised interpretation of the notion of the "same offence" for the purposes of Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECtHR held that the principle of *non bis in idem* prohibits the prosecution or trial of a second offence "in so far as it arises from identical facts or facts which are substantially the same." *See Sergey Zolotukhin v. Russia* [GC], 14939/03, § 82, ECHR 2009.
[28] Motion, para. 21. In relation to Orić's reliance on the *Dmičić* Judgement where the Supreme Court of the *Republika Srpska* found a violation of the *non bis in idem* principle where an accused was convicted in separate trials for the killing of different victims in the course of the same armed conflict, I do not find this decision sufficiently persuasive in order to depart from the ICTR Appeals Chamber's jurisprudence in the *Ntakirutimana* case (*see supra* n. 27). As to Orić's reliance on *R v. Prince* and the *Esbroeck* cases, I find that neither decision supports his argument that the principle of *non bis in idem* applies to the "same alleged course of conduct" where different victims are concerned and where a significant variance in the date and location of the commission of the crime exists. In *R v. Prince*, the accused stabbed a pregnant woman in the abdomen causing the premature birth of her child and his death. The Supreme Court of Canada had to determine whether the accused, who was convicted of causing bodily harm in respect of the mother, could also be tried for manslaughter in respect of the deceased child. In finding that a trial in respect of the deceased child was allowed, the Supreme Court held, *inter alia*, that "in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims" (*Prince* Judgement, pp. 480, 482). In the *Esbroeck* case, the accused was convicted by a court in Belgium for illegally exporting narcotic drugs

10. As to Orić's argument that some allegations which were included in the Rules of the Road submissions to the ICTY Prosecutor were incorporated in the ICTY Indictment, while others were subsequently incorporated in the BiH Indictment,[29] I note that, on the basis of the record before me, it appears that the Rules of the Road submissions were communicated to the ICTY Prosecutor nearly a year after the initial indictment against Orić was confirmed before the ICTY, and did not directly result in any subsequent amendment to the ICTY Indictment.[30] Accordingly, Orić fails to substantiate his allegation of abuse of process and to demonstrate that the Prosecution relied selectively on the Rules of the Road submissions in bringing charges against Orić before the ICTY.

11. In view of the above considerations, I am not persuaded that the criminal proceedings instituted against Orić before the BiH Court are for acts constituting serious violations of international humanitarian law under the Statute, for which he has already been tried by the ICTY.

III. DISPOSITION

12. For the foregoing reasons, I hereby **GRANT**, in part, the Related Request, and **DISMISS** the Motion, the Response, and the Response to the Related Request in their entirety.

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and by a court in Norway for illegally importing the same drugs. The European Court of Justice held, *inter alia*, that "punishable acts consisting of exporting and importing the same narcotic drugs" which are prosecuted in different Contracting States to the Convention implementing the Schengen Agreement of 14 June 1985 "are, in principle, to be regarded as 'the same acts'" (*Esbroeck* Judgement, paras. 14, 15, 43(2)).

[29] Motion, para. 19.

[30] The initial indictment against Orić was confirmed on 28 March 2003 and was subsequently amended on 16 July 2003. *See* Trial Judgement, paras. 785, 789. The Rules of the Road submission attached to the Motion is dated 4 March 2004. *See* Motion, Annex, RP. 89. On 1 October 2004, the ICTY Prosecution filed the second amended indictment, which is the ICTY Indictment referred to in this Decision, by withdrawing the allegations relating to wanton destruction in one village, and altering the characterisation of the conflict in BiH from an "international armed conflict" to an "armed conflict" from the initial indictment. *See* Trial Judgement, para. 790. In relation to Orić's reliance on the *Ganić* case, I note the different context of that case. In the *Ganić* case, the ICTY Prosecutor had explicitly concluded that there was no case against Ganić after reviewing the Rules of the Road submissions (*See* Motion, Annex 5, para. 14) and given that the matters arose in the context of extradition proceedings, the judge reviewed whether the prosecution in Serbia was politically motivated (*see* Motion, Annex 5, paras. 18-25, 37-39) and considered the availability of fresh evidence from the prosecution in Serbia which was not before the ICTY Prosecution in the form of the Rules of the Road submissions. *See* Motion, Annex 5, paras. 33-35, 38.

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

Done this 10th of December 2015,
At The Hague,
The Netherlands.

Judge Liu Daqun
Single Judge

[Seal of the Mechanism]