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STATUS	Public	D/ A	1181
CASE/*AFFAIRE NO.*	MICT-14-79 NASER ORIC	DATE	18/02/2016

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Bench: Judge Meron, Judge Akay, Judge Rosa

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UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-14-79
Date: 17 February 2016
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Aydin Sefa Akay
Judge Ivo Nelson de Caires Batista Rosa

Registrar: **Mr. John Hocking**

Decision of: **17 February 2016**

PROSECUTOR

v.

NASER ORIĆ

PUBLIC

DECISION ON AN APPLICATION FOR LEAVE TO APPEAL THE SINGLE JUDGE'S DECISION OF 10 DECEMBER 2015

Counsel for Mr. Naser Orić:

Ms. Vasvija Vidović
Mr. John Jones QC

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the "Application for Leave to Appeal the Single Judge's Decision of 10 December 2015" with Annexes 1 through 4, filed confidentially and *ex parte* by Mr. Naser Orić on 16 December 2015 ("Application").[1]

I. BACKGROUND

2. On 30 June 2006, Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia ("ICTY") found Orić, the former commander of the Srebrenica Territorial Defence Staff, 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.[2] The ICTY Appeals Chamber reversed Orić's convictions on 3 July 2008.[3]

3. On 9 September 2015, a court in Bosnia and Herzegovina 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.[4] On 6 November 2015, Orić filed a motion before the Mechanism, requesting an order to stay the criminal proceedings instituted against him in Bosnia and Herzegovina as they violate the principle of *non bis in idem*.[5] Orić's motion was assigned to a Single Judge of the Mechanism ("Single Judge") on 12 November 2015.[6]

4. On 10 December 2015, the Single Judge dismissed Orić's request.[7] In the same decision, the Single Judge granted Orić's subsidiary request to strike the Prosecution's response to his motion on the basis that the Prosecution lacked standing.[8]

5. In his Application, Orić seeks leave to appeal the Impugned Decision, contending that: (i) it is subject to appeal; and (ii) the Single Judge erred in law and in fact in dismissing his motion.[9] The Prosecution has not appealed the Impugned Decision, nor has it applied to appear as *amicus curiae* in relation to any appeal that might be lodged by Orić against it.

[1] *See also* Order Assigning Judges to a Case before the Appeals Chamber, 5 January 2006 (confidential and *ex parte*).
[2] *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006, paras. 768, 782, 783.
[3] *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, p. 64.
[4] *See* Decision on Second Motion regarding a Breach of *Non bis in Idem*, 10 December 2015 ("Impugned Decision"), paras. 4, 8.
[5] *See* Impugned Decision, paras. 1, 6.
[6] Order Assigning a Single Judge to Consider a Motion, 12 November 2015.
[7] Impugned Decision, paras. 11, 12.
[8] Impugned Decision, paras. 5, 12.
[9] *See, e.g.*, Application, paras. 6-9, 14, 16.

II. PRELIMINARY MATTERS

6. The Appeals Chamber first examines whether it is properly seised of the Application as well as whether the confidential status of the Application is warranted. Orić contends that, while the Mechanism's Statute and Rules of Procedure and Evidence ("Rules") are silent on whether the Impugned Decision can be appealed, the general approach under the Rules is that, where certified, all decisions can be appealed unless the Rules expressly provide otherwise.[10] The Appeals Chamber observes that the Rules do not expressly provide for an appeal as of right from a decision of a trial chamber or a single judge applying the *non bis in idem* principle set out in Article 7 of the Statute and Rule 16 of the Rules.[11] Notwithstanding, Article 7(1) of the Statute prescribes that "[n]o 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" and Rule 16 of the Rules provides for a remedy in the event of a violation of this principle. The Appeals Chamber considers that, in order to give full effect to the statutory principle of *non bis in idem*, it is necessary to recognize that decisions by a trial chamber or a single judge that affect a party's right to the protections afforded in Article 7 of the Statute and Rule 16 of the Rules are subject to appellate review as of right.[12] The Appeals Chamber therefore finds that Orić is entitled to appeal the Impugned Decision.

7. The Appeals Chamber observes that the relief Orić seeks in the Application is to be granted "leave to appeal" the Impugned Decision.[13] In view of the foregoing finding on the right to appeal the Impugned Decision and considering that Orić has sufficiently developed the factual and legal support of his appeal,[14] the Appeals Chamber will adjudicate the Application on the merits.

8. As to the confidential status of the Application and its annexes, the Appeals Chamber observes that, in the course of the proceedings before the Single Judge, Orić's submissions and supporting annexes were filed publicly as was the Impugned Decision. Furthermore, Orić has not presented any argument justifying the confidential nature of his Application and annexes. Reiterating that all proceedings before the Mechanism shall be public unless exceptional reasons

[10] Application, paras. 6, 7. Mr. Orić did not support his argument by any reference to the Rules.
[11] *See also* Article 12(1) of the Statute and Rule 2(C) of the Rules.
[12] *Cf. Prosecutor v. Radovan Stanković*, 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, 21 May 2014 ("*Stanković* Decision"), para. 9, and references contained therein.
[13] *See* Application, paras. 1, 5, 30.
[14] *See* Application, paras. 10-29.

require keeping them confidential,[15] the Appeals Chamber finds no justification for maintaining the confidential status of the Application and relevant annexes.

III. STANDARD OF REVIEW

9. Orić contends that the Single Judge committed errors of law and fact when deciding that his prosecution in Bosnia and Herzegovina does not violate the *non bis in idem* principle.[16] The Appeals Chamber considers that, to succeed on appeal, Orić would have to demonstrate that the Single Judge committed a discernible error in his decision because this was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or because it was so unfair or unreasonable as to constitute an abuse of discretion.[17]

IV. DISCUSSION

10. In arguing that the Single Judge erred in dismissing his motion, Orić contends that the Single Judge solely relied on a discussion of the Appeals Chamber of the International Criminal Tribunal for Rwanda ("ICTR") in the *Ntakirutimana* case addressing the principle of *non bis in idem*, failing to consider his arguments and supporting case law concerning oppression and abuse of process caused by subsequent prosecutions.[18] Furthermore, Orić submits that the Single Judge erred in law and in fact in dismissing his abuse of process argument founded on the contention that all the allegations in his indictment in Bosnia and Herzegovina concern matters of which the ICTY Prosecutor was aware prior to the issuance of the final indictment in his ICTY case.[19] Finally, Orić provides supplementary submissions that were not made before the Single Judge, which, in his view, reflect witness tampering by Serbian authorities and further demonstrate that his prosecution in Bosnia and Herzegovina is the type of "oppressive repeated prosecution which the principle of *non bis in idem* is intended to prevent."[20]

11. The Appeals Chamber observes that, in the Impugned Decision, the Single Judge compared the acts on the basis of which Orić was charged and tried before the ICTY with the acts for which

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[15] Article 18 of the Statute of the Mechanism; Rules 92, 131 of the Rules. *See also Prosecutor v. Sreten Lukić*, Case No. MICT-14-67-R.1, Decision on Sreten Lukić's Application for Review, 8 July 2015, para. 8; *Aloys Ntabakuze v. The Prosecutor*, Case No. MICT-14-77-R, Decision on Ntabakuze's *Pro Se* Motion for Assignment of an Investigator and Counsel in Anticipation of his Request for Review, 19 January 2015, para. 1, n. 7; *Stanković* Decision, n. 1.

[16] *See, e.g.*, Application, paras. 9, 14, 16.

[17] *See, e.g., Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution Re-Opening, 22 May 2015, para. 6; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 14. *See also Stanković* Decision, para. 12; *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Muyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 19.

[18] Application, paras. 11-15, 17.

[19] Application, paras. 16-20.

be is charged in Bosnia and Herzegovina and concluded that these acts differ fundamentally with respect to the alleged victims and the nature, time, and location of the alleged criminal conduct.[21] Orić does not challenge this finding. Rather, he challenges the Single Judge's reference to the discussion of the principle of *non bis in idem* in the *Ntakirutimana* case. The Appeals Chamber finds that, in doing so, Orić fails to demonstrate that the Single Judge incorrectly interpreted the governing law. The ICTR Appeals Chamber's discussion in *Ntakirutimana* is consistent with the clear language of the Statute and relevant jurisprudence holding that a defendant shall not be tried before a national jurisdiction for the same acts on the basis of which he has already been tried before the relevant international jurisdiction.[22]

12. Likewise, the Appeals Chamber finds no merit in Orić's contention that the Single Judge failed to consider his arguments and case law he relied upon to demonstrate that his subsequent prosecution in Bosnia and Herzegovina amounts to an abuse of process. The Single Judge expressly considered jurisprudence upon which Orić relied to support his arguments, but found the submissions unpersuasive.[23] In particular, the Single Judge did not accept Orić's argument that, in these circumstances, the principle of *non bis in idem* should be expanded to apply to situations where the alleged acts form part of the "same alleged course of conduct" or the "same military activities" but in which the particulars differ.[24] The Appeals Chamber, having reviewed Orić's submissions and references to domestic and international case law he presented in the first instance,[25] finds that Orić does not demonstrate that the Single Judge committed a discernible error in rejecting his contentions on the basis that the particulars of the charges in the two sets of proceedings were fundamentally different.

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[20] Application, paras. 21-28.
[21] Impugned Decision, paras. 8, 9, 11.
[22] *See, e.g., Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-23-A, Decision, dated 31 May 2000, filed 4 July 2001 ("*Semanza* Decision"), para. 74 (noting that the "*non bis in idem* principle applies only where a person has effectively been 'tried'" and that the "term 'tried' implies that proceedings in the national Court constituted a trial *for acts covered by the indictment* brought against the Accused by the Tribunal") (first emphasis in original; second emphasis added). *See also Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004, para. 31 (observing that the plea agreement only concerned crimes committed "during the attack in Glogova" and noting that the accused "can still be indicted for all other possible crimes which he might have been involved, including, e.g. Srebrenica, before [the ICTY] or in other countries which have jurisdiction as well"); *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 ("*Tadić* Decision"), para. 9 ("Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice *for the same acts*.") (emphasis added). *Cf. The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal concerning the Scope of Evidence to be Adduced in the Retrial, 24 March 2009 ("*Muvunyi* Decision"), para. 16 (*referring to* Article 14(7) of the International Covenant on Civil and Political Rights) ("The *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted *from being tried for the same offence again*") (emphasis added).
[23] *See* Impugned Decision, nn. 28, 30.
[24] Impugned Decision, paras. 9, 10 and references contained therein.
[25] *See* Application, paras. 10, 14 and references contained therein.

13. Similarly unpersuasive is Orić's contention that the Single Judge erred in dismissing his abuse of process argument because the allegations in the case against him in Bosnia and Herzegovina concern matters of which the ICTY Prosecutor was aware. The Appeals Chamber considers that nothing in Article 7(1) of the Statute prohibits prosecutions in national jurisdictions in such circumstances. Rather, Article 7(1) of the Statute stipulates that a person cannot be tried in a national jurisdiction for acts for which he was already tried in the relevant international jurisdiction. It expressly refers to acts on the basis of which the person was tried, in the sense that a final judgment was rendered,[26] not circumstances in which certain acts may have been investigated but upon which the person concerned was not tried. Orić therefore fails to demonstrate an error in this respect in the Impugned Decision.

14. Finally, the Appeals Chamber finds that Orić's supplementary submissions cannot demonstrate a discernible error in the Impugned Decision. Orić did not raise these issues before the Single Judge, even though his Application and annexes reflect that he was aware of them before the Impugned Decision was issued.[27] In the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could have reasonably done so in the first instance.[28] Orić fails to demonstrate any circumstances that would justify consideration of the supplementary submissions for the first time on appeal.

V. DISPOSITION

15. For the foregoing reasons, the Appeals Chamber **DENIES** the Application in its entirety and **INSTRUCTS** the Registry to reclassify the Application and annexes as public.

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

Done this 17th day of February 2016,
At The Hague,
The Netherlands

Judge Theodor Meron
Presiding

[Seal of the Mechanism]

[26] *See Muvunyi* Decision, para. 16; *Semanza* Decision, para. 74. *See also 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, para. 13; *The Prosecutor v. Joseph Nzabirinda*, Case No. ICTR-2001-77-T, Sentencing Judgement, 23 February 2007, para. 46; *Tadić* Decision, paras. 9-11, 20, 22, 24, 30.

[27] *See* Application, Annexes 1-4. In this respect, the Appeals Chamber observes that several of the annexes relied upon were available to Orić prior to the filing of his motion before the Single Judge on 6 November 2015. *See, e.g., ibid.* Annexes 1 and 2 (containing publications and correspondence from June and September 2015).

[28] *See André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Prosecution's Notice of Appeal and Scheduling Order, 18 April 2007, para. 6. *See also Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 244.

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Original Language / *Langue de l'original* :	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*) :
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