

**THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS**

CASE No. MICT-13-55-A

**IN THE APPEALS CHAMBER**

Before: Judge Theodor Meron, Presiding  
Judge William Hussein Sekule  
Judge Vagn Prüsse Joensen  
Judge José Ricardo de Prada Solaesa  
Judge Graciela Susana Gatti Santana

Registrar: Mr. Olufemi Elias

Date: 15 November 2017

**THE PROSECUTOR**

**-v-**

**RADOVAN KARADŽIĆ**

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**PUBLIC**

**ASSOCIATION OF DEFENCE COUNSEL PRACTISING BEFORE THE  
INTERNATIONAL COURTS AND TRIBUNALS (ADC-ICT)  
MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

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**ADC-ICT:**

**Mr. Branko Lukić, President**

**Defence Counsel for Mr. Karadžić:**

**Mr. Peter Robinson  
Ms. Kate Gibson**

**The Office of the Prosecutor:**

**Mr. Serge Brammertz  
Ms. Laurel Baig  
Ms. Barbara Goy  
Ms. Katrina Gustafson**

## I. INTRODUCTION

1. The Association of Defence Counsel practising before the International Courts and Tribunals (ADC-ICT) hereby applies, pursuant to Rule 83, to appear as *amicus curiae* in relation to the issue of remedies for disclosure violations, which forms part of Ground 6 of the Karadžić Defence Appeal Brief.<sup>1</sup> Specifically the ADC-ICT seeks leave to provide reasoning and support for Dr. Karadžić's argument that the Trial Chamber's lack of adequate remedies for disclosure violations directly impacted his right to a fair trial.

## II. LEGAL AND FACTUAL BASIS FOR PROPOSED SUBMISSIONS

2. Rule 83 of the Mechanism Rules of Procedure and Evidence provides that a “*Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.*” The ICTY/ICTR Appeals Chamber has held that the primary criterion for granting leave to file an *amicus* brief is whether the proposed submission would assist the Chamber in its consideration of the questions at issue.<sup>2</sup>
3. The ADC-ICT respectfully submits that it is well-qualified to offer submissions of assistance in relation to the questions at issue. The ADC-ICT is the body officially recognised by the Registrar of the Mechanism as representing all Defence Counsel practising before the Mechanism, pursuant to MICT Rule 42(A)(iii). This recognition is in addition to the fact that the ADC-ICT (formerly ADC-ICTY) has been the body officially recognised by the Registrar of the

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<sup>1</sup>*Prosecutor v. Karadžić*, MICT-13-55-A, *Radovan Karadžić's Appeal Brief (Revised Public Redacted Version)*, 23 December 2016, (“Karadžić Appeal Brief”) at paras.17-30.

<sup>2</sup> *Prosecutor v. Šainović et al.*, IT-05-87-A, *Decision on David J. Scheffer's Application to File an Amicus Curiae Brief* (7 September 2010) at p.3.

ICTY as representing all Defence Counsel practising before the ICTY since 2002.<sup>3</sup>

4. In its Preamble, the ADC-ICT Constitution states that it “is a partner, along with the organs of the respective International Courts or Tribunals at which they are the recognised Association of Counsel”.<sup>4</sup> A key objective of the ADC-ICT is to “offer advice to the President, the Chambers and the Registrar of the International Courts and Tribunals in relation to the rights of the accused to a fair trial and the Rules of Procedure and Evidence”.<sup>5</sup>
5. The ADC-ICTY has been previously granted the status of *amicus curiae* in proceedings before the *ad hoc* Tribunals, for example, in *Prosecutor v. Brđanin* (on substantive law questions regarding the doctrine of Joint Criminal Enterprise),<sup>6</sup> in *Prosecutor v. Prlić et al.* (on whether conduct of counsel constituted contempt of court in violation of the ICTY RPE or amounted to misconduct),<sup>7</sup> and in *Prosecutor v. Hadžihasanović & Kubura* (regarding the impact of the allocation of resources to the Accused on his right to fair trial).<sup>8</sup>
6. The ADC-ICT considers that part of its mission is to promote the rights of defendants and the fairness of proceedings in general. The ADC-ICT respectfully submits that it has a particular role in offering views on issues that have an institutional or systemic dimension transcending any individual case.

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<sup>3</sup> The ADC-ICTY was founded in September 2002 and recognised by the ICTY Registry the following month. The ADC-ICTY is recognised pursuant to ICTY Rule 44(A)(iii).

<sup>4</sup> Preamble, ADC-ICT Constitution.

<sup>5</sup> Article 2(3), ADC-ICT Constitution.

<sup>6</sup> *Prosecutor v. Brđanin*; IT-99-36-A, Amicus Brief of Association of Defence Counsel - ICTY, 5 July 2005.

<sup>7</sup> *Prosecutor v. Prlić et al.*, IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ADC-ICTY, 13 August 2009.

<sup>8</sup> *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-PT, Amicus Brief of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the former Yugoslavia in Support of Joint Defence Oral Motion for Reconsideration of Decision on Urgent Motion for *Ex Parte* Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 14 July 2003.

7. The issue raised in Ground 6 of the Karadžić Appeal Brief presents a direct threat to the ability of Defence Counsel and team members to adequately defend accused persons at the Mechanism. If disclosure violations by the Office of the Prosecutor are not subject to adequate remedy, this has a detrimental effect on the trial process, whereby no real incentive is given to comply with disclosure obligations as prescribed by the Rules of Procedure and Evidence which are considered ‘fundamental to a fair trial.’<sup>9</sup> Incentives are particularly important given that disclosure decisions are often within the sole knowledge of the disclosing party and violations frequently undetectable.
  
8. Disclosure violations have a direct impact on the rights of an Accused and disrupt the proper preparation of his or her defence. Dr. Karadžić asserts that the disclosure violations in his case have led to prejudice by virtue of undue delays,<sup>10</sup> the inability to prepare or formulate a defence strategy,<sup>11</sup> as well as preventing him from confronting prosecution witnesses with prior statements.<sup>12</sup> These are some of the ways in which disclosure violations have impacted Dr. Karadžić’s fair trial rights and hindered him in presenting his Defence case.
  
9. The Trial Chamber, while finding a violation of such a fundamental fair trial obligation on eighty-two occasions,<sup>13</sup> failed to provide an adequate remedy to the Defence. Violations without remedies will have a detrimental effect on the rigour with which disclosure is conducted, and the resources devoted to the task. This undermines trial fairness in ways known and unknown. The ADC-ICT believes that this issue is critical not only to the Appeal of Dr. Karadžić, but to the integrity of all future MICT proceedings.

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<sup>9</sup>*Prosecutor v. Lukić et al.*, IT-98-32/1-T, Decision on Milan Lukić’s Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para. 12.

<sup>10</sup> *Karadžić Appeal Brief* at para.86.

<sup>11</sup> *Karadžić Appeal Brief* at paras.93-99.

<sup>12</sup> *Karadžić Appeal Brief* at paras.100-111.

<sup>13</sup> *Karadžić Appeal Brief* at para.77.

### III. RELIEF SOUGHT

10. For the foregoing reasons, the ADC-ICT respectfully requests that the Appeals Chamber grant it leave to appear as *amicus curiae* and submit observations in the present case as detailed above.

Word count: 1,017

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'B. Lukic', is written over a faint rectangular stamp.

BRANKO LUKIĆ  
President  
ADC-ICT



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