

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55-A

THE APPEALS CHAMBER

Before:      Judge Theodor Meron  
                Judge William Hussein Sekule  
                Judge Vagn Prusse Joensen  
                Judge Jose Ricardo de Prada Solaesa  
                Judge Graciela Susana Gatti Santana

Registrar:    Mr. Olufemi Elias

Date:           15 April 2017

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION TO COMPEL INSPECTION OF PSEUDONYMS OF  
WITNESSES SUBJECT TO *EX PARTE* RULE 86 PROCEEDINGS

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The Office of the Prosecutor:

Laurel Baig  
Barbara Goy  
Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson  
Kate Gibson

## **Introduction**

1. President Radovan Karadzic respectfully moves, pursuant to Rule 71(B), for an order compelling the Prosecution to allow him to inspect information in its possession that is material to the preparation of his defence. That information is the pseudonyms of those protected witnesses who are the subject of applications under Rule 86 filed by national authorities or parties to national proceedings.

2. National authorities and parties to national proceedings have been using Rule 86, and ICTY Rule 75, to obtain information or access to protected witnesses who testified during President Karadzic's trial or whose evidence was admitted pursuant to ICTY Rule 92 *bis*. The purpose of obtaining this information is to use these same witnesses in national investigations and prosecutions being conducted in the former Yugoslavia involving the same or related events as those that were the subject of President Karadzic's case. Such applications have uniformly been made *ex parte*.

3. Therefore, a protected witness who is the subject of such an application is likely to be contacted by the national authorities and parties to national proceedings and may thereafter provide a statement and/or testimony in such proceedings. However, because the applications, submissions, and decisions are all *ex parte*, President Karadzic does not know which of the 446 prosecution witnesses are the subject of such applications.

4. It is material to the preparation of President Karadzic's appeal to obtain those subsequent statements and testimony, and review them to determine if the witness has provided information inconsistent with his/her testimony or other evidence in President Karadzic's case, or has provided additional exculpatory information not provided earlier.

## **Procedural History**

5. President Karadzic has been trying for more than a year to obtain this information, one way or another.

6. On 8 December 2015, President Karadzic requested that the Trial Chamber order the Registrar to disclose to him a list of witnesses who have given evidence in the *Karadzic* case, whether orally or in writing pursuant to Rules 92 *bis* and *quater*, as to whom an application for variation of witness protection measures has been filed to enable

disclosure of confidential material in connection with investigations or cases conducted by national authorities.<sup>1</sup>

7. The Prosecution opposed the motion as overly broad. It argued that:

[i]f there are particular witnesses, or national judicial proceedings, that are of interest to the Accused, he is free to direct requests for assistance to national authorities in order to obtain access to evidence that he may then review for information that he considers may be valuable. Likewise, if the Prosecution comes into possession of transcripts or other statements of witnesses from this trial who have subsequently given evidence elsewhere, such information is disclosed to the Accused under standard procedures.<sup>2</sup>

8. The Trial Chamber agreed with the Prosecution and denied the motion.<sup>3</sup>

9. On 22 February 2016, President Karadzic requested that the Office of the Prosecutor endeavor to obtain from national authorities subsequent statements or testimony made by witnesses who were the subject of Rule 75 applications. When the Prosecution refused, he requested that the Appeals Chamber order the Prosecution to do so.<sup>4</sup> The Appeals Chamber declined.<sup>5</sup>

10. However, the Appeals Chamber did order that public redacted versions of the Trial Chamber's Rule 75 decisions be issued.<sup>6</sup> Those versions contained the pseudonyms of the witnesses who were the subject of the Rule 75 applications. President Karadzic was then able to contact the national authorities and obtained two transcripts of testimony given by a protected Prosecution witness in his case in subsequent proceedings in the Court of Bosnia and Herzegovina. A review of those transcripts revealed that there were no material inconsistencies or new information in the witness's subsequent testimony.<sup>7</sup>

11. President Karadzic subsequently learned that the practice of *ex parte* motions from national authorities and parties to national proceedings had continued in his case

<sup>1</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Motion for Disclosure of Information on Variation of Protective Measures* (8 December 2015)

<sup>2</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Prosecution Response to Motion for Disclosure of Information on Variation of Protective Measures* (18 December 2015)

<sup>3</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disclosure of Information on Variation of Protective Measures* (18 February 2016)

<sup>4</sup> *Motion for Order to Prosecution to Obtain and Disclose Subsequent Statements* (30 March 2016)

<sup>5</sup> *Decision on a Motion to Order the Prosecution to Obtain and Disclose Subsequent Statements* (10 May 2016)

<sup>6</sup> *Decision on a Motion for Redacted Versions of Decisions Issued under Rule 75(H) of the ICTY Rules* (18 July 2016)

<sup>7</sup> *Motion for Inter Partes Proceedings* (30 January 2017) at para. 6

before the Mechanism under Rule 86. He was able to obtain public redacted versions of decisions under Rule 86(F) on applications made by national authorities for access to protected Prosecution witness information from his trial.<sup>8</sup>

12. However, those decisions, unlike the decisions issued by the Trial Chamber under Rule 75, did not make reference to the pseudonym of the witness who was the subject of the Rule 86 (F) application.<sup>9</sup> As a result, President Karadzic does not have the information he needs from the Rule 86 applications to request the subsequent statements from the national authorities.

13. On 15 March 2017, President Karadzic's counsel requested, pursuant to Rule 71(B), that the Prosecution allow him to inspect "information as to the pseudonyms of those prosecution witnesses who were the subject of cases MICT-13-55-R86F.1 thru .5 and R86H.1 thru .5"<sup>10</sup> On 30 March 2017, the Prosecution refused.<sup>11</sup>

### **Argument**

14. Rule 71(B) provides:

The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

15. This rule continues to apply on appeal.<sup>12</sup>

16. Knowing the pseudonyms of prosecution witnesses who are the subject of requests from national authorities or parties to national proceedings is material to the preparation of President Karadzic's appeal because it will enable him to determine the existence of statements or testimony given by prosecution witnesses that can be requested from the national authorities. Should any such information materially contradict their earlier testimony, or other prosecution evidence, it can be the subject of further

<sup>8</sup> *Decision on a Motion for Redacted Versions of Rule 86(F) Filings* (24 January 2017)

<sup>9</sup> The Appeals Chamber subsequently denied President Karadzic the right to participate in those Rule 86 proceedings which were pending, which would have provided him another avenue to learn which witnesses were the subject of those proceedings. *Decision on a Motion for Inter Partes Proceedings in Rule 86 Matters* (9 March 2017).

<sup>10</sup> See Annex A.

<sup>11</sup> See Annex B.

<sup>12</sup> *Prosecutor v Uwinkindi*, No. MICT-12-25-AR14.1, *Decision on Motions for Disclosure* (25 May 2016) at p.2, fn 13

investigation by the defence potentially leading to a motion to admit additional evidence on appeal. As Grounds 28-46 encompass challenges on appeal to findings on all of President Karadzic's convictions, the new information would likely be relevant to one or more of those grounds of appeal.

17. The potential impact of such evidence should not be underestimated. In *R v Stone*, where a prosecution witness subsequently retracted part of their testimony, even when other corroborating evidence was present, the conviction was quashed and re-trial ordered.<sup>13</sup>

18. The Prosecution claimed, as its reason not to provide the pseudonyms, that "any such information from those proceedings is confidential and *ex parte*."<sup>14</sup> However, Rule 86(F)(ii) specifically provides that nothing in Rule 86 shall prevent the Prosecutor from discharging any disclosure obligation under the Rules. Since Rule 71(B) provides an obligation to provide inspection of information "material to the preparation of the defence", the Prosecution was in error when using the *ex parte* nature of the Rule 86 proceedings as a reason not to comply with its obligation under Rule 71(B).

19. Therefore, the Appeals Chamber should compel the Prosecution to allow President Karadzic to inspect the pseudonyms of those protected witnesses who are the subject of applications under Rule 86 filed by national authorities or parties to national proceedings in his case. Such an order will allow President Karadzic to make requests for any subsequent statements and testimony of those witnesses to national authorities—an avenue that is currently blocked due to his lack of knowledge of those pseudonyms.

20. Such an order will also provide "a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses and the confidentiality of sensitive information."<sup>15</sup>

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<sup>13</sup> *R v Stone*, [2001] EWCA Crim 297, paras. 9-14. See also *Prosecutor v Ntakirutimana*, No. MICT-12-17, *Decision on Motion to Appoint an Amicus Curiae to Investigate False Testimony* (2 March 2016).

<sup>14</sup> Annex B.

<sup>15</sup> *Decision on a Motion for Public Redacted Versions of Rule 86 Jurisprudence* (6 April 2017) at p. 2

Word count: 1572

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson".

PETER ROBINSON

Counsel for Radovan Karadzic

## **ANNEX A**

**PETER ROBINSON**  
*Defence Counsel*  
*Residual Mechanism for*  
*International Criminal Tribunals*  
 Churchillplein 1  
 2517JW The Hague  
 Netherlands  
**E-mail: [peter@peterrobinson.com](mailto:peter@peterrobinson.com)**

15 March 2017

Ms. Katrina Gustafson  
 Office of the Prosecutor  
 Residual Mechanism for  
 International Criminal Tribunals

Re: *Prosecutor v Radovan Karadzic*

Dear Ms. Gustafson,

Thank you for the disclosure you provided yesterday in Batch 5.

I have a further request for disclosure pursuant to Rule 71(B).

I am requesting that the Prosecution allow me to inspect information as to the pseudonyms of those prosecution witnesses who were the subject of cases MICT-13-55-R86F.1 thru .5 and R86H.1 thru .5.

I can see from the decisions in those cases that have been made public by the Appeals Chamber so far that the pseudonym of the witness is not included in the body of the decision.

Rule 71(B) provides in pertinent part that the Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence...

The Appeals Chamber has held that this Rule applies to cases on appeal.<sup>16</sup>

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<sup>16</sup> *Prosecutor v Uwinkindi*, No. MICT-12-25-AR14.1, *Decision on Motions for Disclosure* (25 May 2016) at p 2

Ms. Katrina Gustafson  
--page two--

Knowing the pseudonyms of prosecution witnesses who are the subject of requests from national authorities or parties to national proceedings is material to the preparation of our appeal because it will enable us to determine the existence of statements or testimony given by prosecution witnesses that we can request from the national authorities. Should any such information materially contradict their earlier testimony, or other prosecution evidence, it can be the subject of further investigation by the defence potentially leading to a motion to admit additional evidence on appeal. As Grounds 28-46 encompass challenges on appeal to findings on all of President Karadzic's convictions, the new information would likely be relevant to one or more of those grounds of appeal.

I note that Rule 86(F)(ii) specifically provides that nothing in Rule 86 shall prevent the Prosecutor from discharging any disclosure obligation under the Rules. Therefore, I should be allowed to inspect the information of the pseudonyms of the witnesses who have been the subject of the Rule 86 proceedings because that information is material to the preparation of our appeal pursuant to Rule 71(B).

Thank you very much for your consideration of this request.

Respectfully submitted,



PIETER ROBINSON  
Counsel for Radovan Karadzic

## **ANNEX B**

UNITED NATIONS  
 Mechanism for  
 International Criminal Tribunals  
 NATIONS UNIES  
 Mécanisme pour les  
 Tribunaux Pénaux Internationaux  
**MICT . MTPI**  
 OFFICE OF THE PROSECUTOR / BUREAU DU PROCUREUR

Reference: MICT-OTP-HA/2017/P/KG/056

Case No. MICT-13-55-A

30 March 2017

**Subject: Your letter dated 15 March 2017 requesting Prosecution witness pseudonyms**

Dear Mr. Robinson,

In the above referenced letter you request, pursuant to MICT Rule 71(B), to be provided with the pseudonyms of Prosecution witnesses who were the subject of the following proceedings: MICT-13-55-R86F.1 through MICT-13-55-R86F.5 and MICT-13-55-R86H.1 through MICT-13-55-R86H.5.

As you are aware, any such information from those proceedings is confidential and *ex parte* the Karadzic Defence, pursuant to court order.<sup>17</sup> The Prosecution is therefore not in a position to provide you with this protected information to the extent the Prosecution is itself privy to it.

Yours sincerely,

/s/

Katrina Gustafson  
 Senior Appeals Counsel

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<sup>17</sup> See, e.g. Prosecutor v. Radovan Karadzic, Case No.MICT-55-A, Decision on a Motion for *Inter Partes* Proceedings in Rule 86 Matters, 9 March 2017.