

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: 14 November 2017

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR DISCLOSURE OF EXCULPATORY MATERIAL
TO NATIONAL AUTHORITIES

Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson
Kate Gibson

Introduction

1. On 7 August 2017, the Appeals Chamber granted a Prosecution motion, pursuant to Rule 86(G), to disclose certain confidential material to national authorities to aid in the investigation and prosecution of events that were the subject of testimony in the *Karadzic* trial.¹ A public redacted version of that decision was issued on 20 October 2017.²

2. On 23 October 2017, counsel for President Radovan Karadzic requested that the Prosecution disclose to those same national authorities all exculpatory material in its possession concerning those events.³ On 14 November 2017, the Prosecution responded by e-mail that it declined to do so.⁴

3. Therefore, President Karadzic now moves for an order (1) directing the Registry to disclose to the relevant national authorities all confidential exculpatory material from the *Karadzic* case file relating to those events; and (2) directing the Prosecution to include exculpatory material in all future Rule 86(G) motions.

Argument

4. The Office of the Prosecutor acted laudably when it took it upon itself to seek to disclose confidential testimony and exhibits that could assist national authorities. This was consistent with the Mechanism's mandate to assist in national prosecutions now that the ICTY and ICTR have concluded their work.

5. However, the Mechanism has an equally important interest in ensuring that its assistance promotes fairness in those proceedings. Therefore, when disclosing material pursuant to Rule 86 to national authorities, the Mechanism should ensure that in addition to the inculpatory material disclosed to those authorities, all exculpatory material concerning the same events also be disclosed. This will enable national authorities to disclose the exculpatory material to the accused at the appropriate stage of the national proceedings in accordance with their own rules and ethical responsibilities.

¹ *Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed Word Limit* (7 August 2017) (“*Decision*”)

² *Prosecutor v Karadzic*, No. MICT-13-55-R86G.1, *Decision on a Motion for a Redacted Version of “Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed Word Limit”* (20 October 2017)

³ The letter is Annex A.

⁴ The response is Annex B.

6. The Appeals Chamber's decision delivered only half of the loaf to the national authorities. It directed the Registry to disclose the inculpatory evidence identified by the Prosecution from confidential testimony and exhibits under seal to the national authorities. By this motion, President Karadzic seeks to have the Appeals Chamber deliver the other half—by directing the Registry to disclose any exculpatory material contained in confidential testimony or exhibits under seal related to those same events to those same national authorities.

7. President Karadzic is not able to specify the exculpatory material due to the *ex parte* nature of Rule 86 proceedings at the Mechanism. However, the Appeals Chamber can direct the Prosecution to assist the Registry in identifying the exculpatory material. Given that President Karadzic called over 200 defence witnesses during the trial, offered thousands of defence exhibits, and disputed many of the crimes alleged in the indictment, there is a fair prospect that some exculpatory material concerning the events that are the subject of the *Decision* may exist in the record of his case.

8. Because President Karadzic is not a party to Rule 86 proceedings, he further requests that the Appeals Chamber direct the Prosecution to include exculpatory material related to the events for which it seeks to share confidential material with national prosecutorial authorities, to the extent it exists in confidential transcripts and exhibits admitted under seal, in all future Rule 86(G) motions in his case.

Conclusion

9. The ICTY and ICTR Appeals Chambers have emphasised that the duty to disclose exculpatory material is as important as the duty to prosecute.⁵ The Mechanism should apply this principle to its decisions making confidential ICTY and ICTR material available to national authorities pursuant to Rule 86. It can do so by directing the Registry to disclose any exculpatory material contained in confidential testimony or exhibits under seal to the same national authorities that benefitted from the *Decision*, and by requiring future Rule 86(G) motions to include exculpatory material.

⁵ *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 40; *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72

Word count: 835

Respectfully submitted,

A handwritten signature in black ink, reading "Peter Robinson". The signature is written in a cursive style with large, rounded letters and a prominent initial "P".

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

23 October 2017

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

Re: *Prosecutor v Radovan Karadzic*

Dear Ms. Gustafson,

I would once again like to thank the Office of the Prosecutor for seeking the issuance of a public redacted version of the *Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed the Word Limit* (7 August 2017). I also commend the OTP for taking the initiative to seek to share information with national prosecuting authorities of which those authorities would otherwise be unaware.

As defence counsel, in the same spirit, I would like to assist my colleagues who are assigned to represent those accused in national proceedings in which relevant testimony was given in the *Karadzic* case. Because of the *ex parte* nature of the Rule 86 proceedings at the Mechanism, I am unable to do so directly, as I am not privy to the identity of the accused or suspect in those cases. Therefore, I would like to enlist your help in an effort not only to ensure that persons are brought to trial in the former Yugoslavia, but that those trials are fair.

I am requesting that, when disclosing material pursuant to Rule 86 to national authorities, the OTP also undertake to disclose to those national authorities all exculpatory material in its possession concerning the events that are the subject of the disclosure. The national authorities would then be in possession of that exculpatory material and could disclose it to the accused in accordance with its own rules and ethical responsibilities. In that way, the OTP can assure that when it hands over inculpatory material, it is also handing over exculpatory material, if such material exists.

Ms. Katrina Gustafson
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Given that the OTP identified and disclosed to us some 737,843 pages of exculpatory material during the course of the *Karadzic* trial,⁶ it is likely that considerable exculpatory material exists as to the events that are the subject of the Rule 86 disclosure. It seems only fair that when disclosing inculpatory material, the OTP also disclose, and seek variations of protective measures where necessary to disclose, the exculpatory material for those same events. This would include defence evidence that we offered or sought to offer at the trial.

I would appreciate it if the OTP would undertake to make such disclosure in the case which was the subject of the *Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed the Word Limit* (7 August 2017), as well in all future instances in which variation of protective measures for *Karadzic* witnesses are sought.

Should the OTP decline to make such an undertaking, please let me know so I can apply to the Appeals Chamber for an order compelling you to do so.

Thank you very much for your consideration of this request.

Respectfully submitted,



PETER ROBINSON
 Counsel for Radovan Karadzic

⁶ See Annex C to *Radovan Karadzic's Appeal Brief* (5 December 2016)

ANNEX “B”

14 November 2017

Dear Peter,

Apologies for not responding as promptly as we had intended!

We wish to inform you that the OTP declines to make the undertaking proposed in your letter dated 23 October 2017.

Kind regards,

Laurel

Laurel Baig | Senior Appeals Counsel, OTP | UN-MICT
M 220 Churchillplein 1 2517JW, The Hague | The Netherlands



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