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: 30 January 2017

THE PROSECUTOR

V.

RADOVAN KARADZIC

Public

MOTION FOR INTER PARTES PROCEEDINGS

Office of the Prosecutor:

Laurel Baig Barbara Goy Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson Kate Gibson

- 1. Radovan Karadzic moves for an order that the two proceedings in his case with numbers MICT-13-55-R86F.4 and R86F.5 proceed on an *inter partes* basis and that the applicant be ordered to file a redacted version of its Rule 86(F) applications.
- 2. In its *Decision on a Motion for Redacted Versions of Rule 86(F)*, the Appeals Chamber provided public redacted versions of the President's orders assigning these two applications to the Appeals Chamber. In keeping with past practice on such applications, it is expected that the Appeals Chamber will make the application available to the Prosecution and Registrar and request their observations thereon. President Karadzic contends that the defence should also be part of these proceedings.
- 3. In the aforementioned decision, the Appeals Chamber declined President Karadzic's request to order that all Rule 86(F) applications be *inter partes* and found that such requests should be determined on a case-by-case basis.² Therefore, President Karadzic makes that request in the cases of MICT-13-55-R86F.4 and 5.
- 4. While the Appeals Chamber declined to make available the applications in the previous Rule 86(F) proceedings,³ it did order public redacted versions of the Prosecution and Registry filings.⁴ There is no principled reason why public or confidential redacted versions cannot be filed contemporaneously in matters 86F.4 and .5, rather than post-hoc applications for access to them being made by President Karadzic.
- 5. President Karadzic reiterates that he has a legitimate forensic purpose for access and participation in these proceedings. By knowing the witness who is the subject of the application, President Karadzic can take steps to request from the national authority the subsequent statements and testimony that the national authority obtains from that witness. This material will allow him to determine whether the witness has said anything that may give rise to an application for additional evidence on appeal.
- 6. President Karadzic did just this kind of follow-up when he was provided with redacted versions of Rule 75(H) proceedings before the Trial Chamber pursuant to the Appeals Chamber's order.⁵ As a result he obtained from the government of Bosnia two

¹ (24 January 2017)

² p. 5

³ p. 4

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⁴ p. 5

⁵ Decision on a Motion for Redacted Versions of Decisions Issued Under Rule 75(H) of the ICTY Rules (18 July 2016)

transcripts of the testimony of a prosecution witness who subsequently testified in national proceedings. Those materials, which are in BCS, were received on 18 January 2017 and are presently being reviewed by President Karadzic.⁶

- 7. While the Appeals Chamber, in its Rule 86(F) decision, helpfully reminded the Prosecution of its duty to disclose exculpatory material, the fact is that the Prosecution does not, as a matter of course, obtain subsequent statements or testimony of its witnesses in national proceedings. It has no obligation to disclose material not in its possession.
- 8. The Prosecution has, in fact, refused to obtain such material and the Appeals Chamber denied President Karadzic's motion requiring it to do so.⁷ Therefore, the Prosecution's duty to disclose exculpatory evidence is not an adequate substitute for access by President Karadzic to information that will allow him to know which witness is the subject of the Rule 86(F) motion.
- 9. Nor is the fact that the Appeals Chamber "does not have information on whether any of the persons identified in the Rule 86(F) applications have provided statements or domestic proceedings" dispositive of whether such statements or testimony have been or will be taken. The Appeals Chamber would not be expected to be informed of such developments. However, the very purpose of the Rule 86(F) application presupposes that such statements and/or testimony may be sought in national proceedings. That is the very forensic purpose for which national authorities are given access to the information.
- 10. President Karadzic's participation in the proceedings, rather than his exclusion from them, is also in the interests of justice. President Karadzic may have information useful to the applicant concerning the credibility of the witness and can share that with the applicant, enhancing its evaluation of the witness' evidence in national proceedings.
- 11. More importantly, exclusion of the defence from these proceedings raises the spectre of unfairness that can taint the fairness of the underlying appeal. The mere fact that the Appeals Chamber and the Prosecution are regularly in communication on matters related to the case to the exclusion of the defence is troubling.

⁶ They have also been disclosed to the Prosecution by the defence.

⁷ Decision on a Motion to Order the Prosecution to Obtain and Disclose Subsequent Statements (10 May 2016) at p. 2

⁸ Decision on a Motion for Redacted Versions of Rule 86(F)(24 January 2017), p. 4

- 12. The MICT is already a small institution and the spectre of *ex parte* communications between the Appeals Chamber and Prosecution can only raise unhealthy suspicions on the part of the accused and members of the public. The Appeals Chamber should be scrupulous in avoiding the appearance that the MICT is an institution at which the defence is not welcome or included.
- 13. For all of those reasons, the Appeals Chamber is respectfully requested to order that the proceedings in cases MICT-13-55-R86F.4 and 5 be conducted *inter partes* and that the applicant be ordered to file a redacted version of its applications.

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Respectfully submitted,

PETER ROBINSON

Counsel for Radovan Karadzic