

**UNITED  
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-13-55-A

Date: 27 November 2017

Original: English

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**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**

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**PROSECUTION RESPONSE TO  
MOTION FOR DISCLOSURE OF EXCULPATORY  
MATERIAL TO NATIONAL AUTHORITIES**

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**The Office of the Prosecutor:**

Laurel Baig  
Barbara Goy  
Katrina Gustafson

**Counsel for Mr. Radovan Karadžić:**

Peter Robinson  
Kate Gibson

1. Karadžić’s Motion<sup>1</sup> requesting the Appeals Chamber<sup>2</sup> to order the Registry and Prosecution to identify and disclose confidential exculpatory evidence to national authorities<sup>3</sup> should be dismissed. Karadžić lacks standing to bring the Motion, requests relief that is beyond the scope of the Rules through a procedure that would be impossible to implement, misconstrues the purpose of Rule 86(G) applications, and ignores existing mechanisms that enable national authorities and defence counsel to request access to public and confidential ICTY and MICT evidence relevant to their specific cases and defences.

2. First, the Karadžić Defence lacks standing to be heard in Rule 86 matters concerning Prosecution witnesses. The Appeals Chamber has emphasized that such Rule 86 applications “concern the application of witness protection measures in domestic proceedings, not Karadžić’s appeal.”<sup>4</sup> Karadžić fails to demonstrate the relevance of the Rule 86(G) Decision to any issue pending in his appeal.

3. Second, Karadžić provides no authority for the remedy sought. He points to nothing in Rule 86 or any other Rule that contemplates the issuance of orders to provide confidential material to national authorities that does not form part of any Rule 86 request, particularly where the order would encompass broad and vaguely defined categories of material.<sup>5</sup>

4. Third, Karadžić’s attempt to impose on the MICT Registry and Prosecution the obligation to identify and “disclose” exculpatory material in relation to domestic proceedings reflects a fundamental misunderstanding of the MICT’s functions *vis-à-vis* national investigations and proceedings. It is within neither the Registry’s nor the Prosecution’s mandate to determine what material could be considered exculpatory in a national prosecution, particularly one which is only at the investigative stage.<sup>6</sup> In addition, neither organ possesses the detailed knowledge of domestic

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<sup>1</sup> *Prosecutor v. Radovan Karadžić*, Case No.MICT-13-55-A, Motion for Disclosure of Exculpatory Material to National Authorities, 14 November 2017 (“Motion”).

<sup>2</sup> While Karadžić filed his Motion before the full Appeals Chamber, the underlying Rule 86(G) Decision and related decision on the motion for a redacted version were issued by Judge Meron as the Presiding and Pre-Appeal Judge, respectively.

<sup>3</sup> In the Motion at paras.3, 5-9, Karadžić asks the Appeals Chamber to (1) order the Registry to disclose to national authorities all confidential exculpatory evidence from the *Karadžić* case file relating to events concerning witnesses that were subject of a recent Rule 86(G) decision (*Prosecutor v. Radovan Karadžić*, Case 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 (“Rule 86(G) Decision”) *annexing* Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed Word Limit, 7 August 2017 (public redacted version)), and (2) to direct the Prosecution to provide confidential exculpatory evidence in all future Rule 86(G) applications in this case.

<sup>4</sup> *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion for *Inter Partes* Proceedings in Rule 86 Matters, 9 March 2017, para.7.

<sup>5</sup> In addition, while Karadžić refers to his requests as seeking “disclosure” to national authorities, MICT Rule 73 governing the disclosure of exculpatory evidence does not apply to national proceedings.

<sup>6</sup> As indicated in the Rule 86(G) Decision, the national case is in the investigation stage and the variation of protective measures was requested for this limited purpose. Rule 86(G) Decision, Annex, p.1.

proceedings needed to identify exculpatory material in any given case. Even assuming for the sake of argument that such an exercise is plausible, the Prosecution and Registry resources required to undertake such a task would vastly exceed those allocated to the MICT to discharge its reduced mandate.<sup>7</sup>

5. Fourth, Karadžić also fails to explain how the relief he requests—orders to the Registry to “disclose” unspecified confidential exculpatory material to national authorities—could be accomplished without seeking variations of any number of underlying protective measures orders and other confidentiality orders. Contrary to Karadžić’s suggestion,<sup>8</sup> such orders could not simply be varied as a result of the original request concerning different material. Variation of witness protection orders would involve consultation with the affected witnesses and/or a judicial assessment of exigent circumstances in accordance with Rule 86(I), and variation of the status of under seal exhibits could require, for example, consultation with the Rule 56 or 76 providers.

6. Fifth, Karadžić mischaracterizes the Appeals Chamber’s Rule 86(G) Decision in asserting that the Appeals Chamber “directed the Registry to disclose the inculpatory evidence identified by the Prosecution.”<sup>9</sup> The Prosecution requested access for the national authorities to “the complete evidence” of the witnesses,<sup>10</sup> which the Chamber ordered in the form of unredacted transcripts and materials tendered through the witnesses.<sup>11</sup> As such, disclosed materials were not limited to inculpatory evidence, but also included cross-examination and evidence put to the witnesses by the Defence. Providing the witnesses’ identities also enabled the national authorities to consider ICTY Trial Chamber assessments of witness credibility based on the totality of the evidence, including arguments and exculpatory evidence put forward by the Defence in ICTY proceedings.

7. Sixth, Karadžić wrongly suggests<sup>12</sup> that the Rule 86 framework is a one-sided mechanism designed to assist only national investigation and prosecution authorities.<sup>13</sup> To the contrary, Rule 86 and other mechanisms for submitting requests for assistance<sup>14</sup> expressly provide for procedures

<sup>7</sup> MICT Statute, Articles 14(5), 15(4).

<sup>8</sup> See Motion, paras.3, 6, 9.

<sup>9</sup> Motion, para.6.

<sup>10</sup> Rule 86(G) Decision, Annex, p.3.

<sup>11</sup> Rule 86(G) Decision, Annex, p.4.

<sup>12</sup> See Motion, paras.5-6.

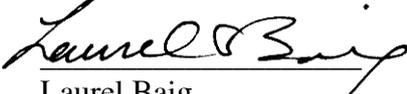
<sup>13</sup> See e.g. *Prosecutor v. Krajišnik*, Case No.IT-00-39-A, Decision on Prosecutor’s Applications for Variation of Protective Measures Submitted on Behalf of the Prosecutor’s Office of Bosnia and Herzegovina, 4 March 2008 (“*Krajišnik* Decision”) (public redacted version), para.7 (noting, in relation to ICTY Rule 75(H), that the objective of requiring both national prosecutors and defence counsel to obtain national judicial authorization prior to seeking access from the Tribunal to protected material is “to ensure equal footing” to both parties).

<sup>14</sup> See MICT Rule 86(H) (referring to “parties in another jurisdiction authorized by an appropriate judicial authority” (emphasis added)); Practice Direction on Procedure for the Variation of Protective Measures pursuant to Rule 86(H) of the Mechanism’s Rules of Procedure and Evidence for Access to Confidential ICTY, ICTR and Mechanism Material, MICT/8, 23 April 2013; Access Policy for the Records Held by the Mechanism for International Criminal Tribunals,

through which both prosecuting authorities and defence counsel of accused persons in national jurisdictions may request relevant evidence, including confidential evidence.<sup>15</sup> Karadžić's Motion proposes circumventing these procedures in favour of an unworkable process that falls outside the scope of Rule 86.

8. For the foregoing reasons, the Motion should be dismissed.

Word Count: 1110

  
Laurel Baig  
Senior Appeals Counsel

Dated this 27<sup>th</sup> day of November, 2017  
At The Hague, The Netherlands

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MICT/17, 12 August 2016. *See also* MICT website, providing for procedures to request certified court documents including transcripts, audio-video recordings, exhibits, motions, orders, judgements, etc.: <http://www.unmict.org/en/about/functions/requests-assistance>.

<sup>15</sup> *See Krajišnik* Decision, para.7.



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