

**UNITED
NATIONS**



Mechanism for International Criminal
Tribunals

Case No: MICT-13-55-A

Date: 1 December 2016

Original: English

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. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION'S MOTION FOR LEAVE TO FILE SUR-
REPLY AND SUR-REPLY TO KARADŽIĆ'S REPLY BRIEF:
MOTION FOR REDACTED VERSIONS OF RULE 86(F)
FILINGS**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadžić:

Peter Robinson
Kate Gibson

1. The Prosecution seeks leave to file a Sur-Reply to answer various new arguments raised by Karadžić in his reply,¹ namely: that the existence of *ex parte* communications between the Prosecution and the Appeals Chamber on Rule 86(F) applications “strikes at the legitimacy of this institution”;² that the disclosure of witness pseudonyms in Rule 86(F) applications “will not lead to the disclosure of confidential information” to Karadžić;³ and that the President should ensure that no new Rule 86(F) applications are filed and considered on an *ex parte* basis in this case.⁴ This Sur-Reply should be accepted because the Prosecution has not had the opportunity to respond to Karadžić’s new arguments.⁵

2. Karadžić’s new arguments are unfounded and should be dismissed. They are largely premised on his unsubstantiated claim that the mere existence of filings that are *ex parte* Karadžić is unfair and illegitimate. Established jurisprudence demonstrates that a party can be excluded from *ex parte* proceedings and that there is no injustice inherent in this.⁶

3. Likewise, he fails to show any impropriety in the existence of *ex parte* filings in the Rule 86(F) context. The MICT Practice Direction on procedures pursuant to the related Rule—Rule 86(H)—expressly provides for *ex parte* proceedings.⁷ *Ex parte* proceedings under Rule 86 are justified because national authorities who make use of this Rule are typically engaged in sensitive and confidential investigations or proceedings whose success may be jeopardized through unnecessary disclosures. By accepting these applications as filed, the President affirms the appropriateness of their *ex parte* status.⁸ To the extent necessary, the Presiding or Single Judge may then

¹ *Prosecutor v. Radovan Karadžić*, Case No.MICT-13-55-A, Reply Brief: Motion for Redacted Versions of Rule 86(F) Filings, 29 November 2016 (“Reply Brief”).

² Reply Brief, para.5.

³ Reply Brief, para.10.

⁴ Reply Brief, para.18.

⁵ See *Prosecutor v. Popović et al.*, Case No.IT-05-88-A, Public Redacted Version of 2 May 2014 Decision on Vujadin Popović’s Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014, para.14.

⁶ See, e.g., *Prosecutor v. Miroslav Bralo*, Case No.IT-95-17-A, Decision on Motion for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 (“*Bralo* Decision”), para.15; *Prosecutor v. Milan Milutinović et al.*, Case No.IT-99-37-I, Decision on Application by Dragoljub Ojdanić for Disclosure of *Ex Parte* Submissions, 8 November 2002 (“*Ojdanić* Decision”), paras.21-23.

⁷ 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 (“Practice Direction”), MICT/8, 23 April 2013, para.6.

⁸ See *Prosecutor v. Vlastimir Đorđević*, Case Nos.IT-05-87/1-PT & IT-02-54, Decision on Vlastimir Đorđević’s Motion for Access to Translations, Exhibits and Documents in *Prosecution v. Slobodan Milošević*, Case No.IT-02-54, 6 February 2008, para.14 (The Chamber held that “it must be borne in mind that this extraordinary protection had been bestowed on the original proceedings for the reason

invite a party to respond concerning the witness who is the subject of the application, given the party's ability to provide relevant information. It is therefore appropriate, when the application concerns a Prosecution witness, that the Prosecution—which may have information not in the possession of the Registry from its extensive and substantive contact with its witnesses—is invited to make submissions. By the same token, the Prosecution understands that when the application concerns a defence witness, the practice in the MICT has been that the defence is invited to make submissions and the application remains *ex parte* the Prosecution. In other words, the same procedure applies to both parties.

4. Karadžić's claim that he "has a particular interest in knowing what the Prosecution's representations are concerning witnesses who testified at the trial"⁹ is unsubstantiated, undeveloped, and reveals no legitimate forensic purpose in relation to these submissions. Rule 86(F) matters concern witnesses' protective measures and security situation, not the substance of their evidence or of this case. Karadžić's suggestion that the *ex parte* nature of these submissions serves to block him from accessing information that may assist him in his appeal¹⁰ is unfounded. It is also misconceived: if the Prosecution were to receive exculpatory information in the context of a Rule 86(F) proceeding, the Prosecution would, in accordance with its obligations, independently disclose that information to Karadžić.

5. Karadžić's claim that the disclosure of witnesses' pseudonyms to him through the provision of redacted Rule 86(F) filings "will not lead to the disclosure of confidential information" because he already knows the witnesses' identities¹¹ is incorrect. It would inform Karadžić that particular witnesses are actually or potentially involved in domestic investigations or proceedings that may be sensitive and confidential.¹² His prior knowledge of the identity and evidence of these witnesses would inform him of the subject matter of the domestic proceeding. There is no legitimate basis for Karadžić to have this information, which relates to proceedings in other jurisdictions and has no bearing on this case.

that a previous Chamber of Judge had ruled that the material should not be provided to the Party to the proceeding"). *Contra* Reply Brief, para.17.

⁹ Reply Brief, para.13.

¹⁰ Reply Brief, para.13.

¹¹ Reply Brief, para.10.

¹² *Contra* Reply Brief, para.10.

6. Finally, Karadžić's request that the President should ensure that no new Rule 86(F) applications are filed and considered on an *ex parte* basis is misconceived. It is premised on the unfounded assumption of an inherent impropriety in the existence of *ex parte* Rule 86(F) applications.¹³ It also disregards jurisprudence supporting the common sense proposition that it is not possible or appropriate to limit the circumstances under which *ex parte* proceedings may be necessary.¹⁴ It is therefore inappropriate for the President to promulgate a general practice requiring that no Rule 86(F) applications are filed or considered on an *ex parte* basis in this case.¹⁵

7. The new arguments should be dismissed. In the event that the Appeals Chamber considers granting Karadžić's request for any future Rule 86(F) applications, the Prosecution urges the Appeals Chamber to first seek the input of any relevant domestic authorities.

Word Count: 1017



Katrina Gustafson
Senior Appeals Counsel

Dated this 1st day of December 2016
At The Hague, The Netherlands

¹³ See above paras.2-3.

¹⁴ See *Bralo* Decision, paras.15-16; *Ojdanić* Decision, para.23.

¹⁵ *Contra* Reply Brief, para.18.