

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-13-55-A

Date: 23 November 2017

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. Olufemi Elias

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO
ASSOCIATION OF DEFENCE COUNSEL
MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

ADC-ICT:

Branko Lukić, President

Counsel for Mr. Radovan Karadžić:

Peter Robinson
Kate Gibson

1. The Appeals Chamber should deny the ADC-ICT's Motion for Leave to Appear as *Amicus Curiae*¹ because the ADC-ICT has not made the requisite showing that its proposed submissions would assist the Appeals Chamber, as required for *amicus curiae* status.²

2. The ADC-ICT seeks to argue that the remedies granted for disclosure violations in Karadžić's case were inadequate and that this directly affected his fair trial rights.³ However, *amicus curiae* submissions are generally limited to questions of law.⁴ The questions on which the ADC-ICT seeks to intervene concern the Trial Chamber's detailed factual assessments of *inter alia* whether Karadžić was prejudiced by any given disclosure violation and, if so, whether the remedy provided was adequate to address that prejudice.⁵ As such, in each instance the Trial Chamber had to consider the material at issue in light of the totality of the trial record, the conduct of the proceedings, the lines of defence advanced by the Accused and other materials in his possession.⁶ These were factual determinations falling squarely within the discretion of the Trial Chamber,⁷ not "institutional or systemic" matters that "transcend[] any individual case".⁸ Such fact-specific inquiries are not the proper subject of *amicus* submissions.⁹

¹ Association of Defence Counsel Practising Before the International Courts and Tribunals (ADC-ICT) Motion for Leave to Appear as *Amicus Curiae*, 15 November 2017 ("Motion").

² See e.g. *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Decision on Application by the Republic of Croatia for Leave to Appear as *Amicus Curiae* and to Submit *Amicus Curiae* Brief, 18 July 2016 ("*Prlić* 2016 *Amicus* Decision"), para.7; *Prosecutor v. Gotovina and Markač*, Case No.IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012 ("*Gotovina Amicus* Decision"), para.3; ICTY Information Concerning the Submission of *Amicus Curiae* Briefs, Doc. No.IT/122/Rev.1, 16 February 2015 ("*Amicus* Practice Direction"), para.4(f). In the absence of MICT authority, the relevant ICTY direction is persuasive.

³ Motion, para.1.

⁴ See e.g. *Prlić* 2016 *Amicus* Decision, para.7; *Gotovina Amicus* Decision, para.3; *Amicus* Practice Direction, para.9(a).

A disclosure violation warrants a remedy only if it causes prejudice. See e.g. *Kordić* Appeal Judgement, paras.179, 242; *Krstić* Appeal Judgement, para.214. Accordingly, assessing the adequacy of any given remedy necessarily first requires an assessment of whether the accused was prejudiced, and then, if so, whether the specific remedy granted was sufficient to redress that prejudice.

⁶ See e.g. Decision on Accused's Seventeenth *bis* and Twenty-eighth Disclosure Violation Motions, 16 December 2010, paras.21, 24-25, 27; Decision on Accused's Thirty-second, Thirty-third, Thirty-fifth and Thirty-sixth Disclosure Violation Motions, 24 February 2011, paras.19, 22; Decision on Accused's Forty-third to Forty-fifth Disclosure Violation Motion, 8 April 2011, paras.29, 33, 35; Decision on Accused's Seventy-first Disclosure Violation Motion, 1 June 2012, paras.12-13; Decision on Accused's Eighty-ninth and Ninetieth Disclosure Violation Motions, 16 April 2014, para.20.

⁷ See e.g. *Prosecutor v. Niyitegeka*, Case No.MICT-12-16-R, Decision on Appeals of Decisions Rendered by a Single Judge, 9 August 2017, para.14 (noting that decisions related to disclosure of evidence are discretionary); *Prosecutor v. Šešelj*, Case No.IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para.14 (disclosure decisions are discretionary and must be accorded deference); *Ndindiliyimana* Appeal Judgement, para.22 (affirming the trial chamber's discretion to determine the appropriate remedy where an accused has been prejudiced by disclosure violations).

⁸ *Contra* Motion, para.6.

⁹ See e.g. *Prlić* 2016 *Amicus* Decision, paras.8, 11 (denying the application and finding the proposed submissions would not assist the chamber because the applicant sought to address factual issues and provide its own

3. The ADC-ICT would not in any event be in a position to assist the Chamber in these inquiries. The ADC-ICT does not claim to have familiarity with the complex procedural history or vast amount of material relevant to the prejudice assessments conducted in this case. The ADC-ICT is not even privy to the full case record on disclosure matters, a portion of which is confidential and redacted from public filings, including key parts of Ground 6.¹⁰ The examples cited of the ADC-ICTY serving as *amicus curiae* in different cases in different contexts addressing different issues do not advance the ADC-ICT's argument that *amicus* status is appropriate here.¹¹

4. Moreover, the adequacy of remedies for disclosure violations was heavily litigated at trial¹² and fully briefed on appeal, and the ADC-ICT fails to explain how it could further assist the Chamber on the issue,¹³ particularly given its lack of knowledge concerning the complex procedural history. Instead, the ADC-ICT simply repeats Karadžić's allegations of prejudice and inadequate remedies,¹⁴ after acknowledging that it is seeking *amicus* status in order to "support" Karadžić's Appeal Brief arguments.¹⁵

5. Finally, the ADC-ICT fails to note that Defence Co-Counsel in *Karadžić* is a member of the ADC-ICT's Amicus Committee, which is responsible for drafting ADC-ICT *amicus curiae* submissions at the request of defence teams and judges.¹⁶

interpretation of evidence, thereby repeating the tasks undertaken by the chamber and the parties); *Gotovina Amicus* Decision, paras.11, 13 (same).

¹⁰ See Karadžić Appeal Brief, 23 December 2016 (Revised Public Redacted Version), paras.103-105; Prosecution Response Brief, 15 March 2017 (Revised Public Redacted Version), paras.61-62.

¹¹ *Contra* Motion, para.5. For example, in *Brdanin* the Appeals Chamber invited the ADC-ICTY to make *amicus* submissions on a legal issue of general importance that was not being addressed by the defence because it had no impact on the verdict. *Prosecutor v. Brdanin*, Case No.IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, pp.3, 5.

¹² See e.g. *Prosecutor v. Karadžić*, Case No.IT-95-5/18-T, Decision on Accused's 107th Disclosure Violation Motion, 14 March 2016, para.16 (noting that "frivolous" disclosure violation motions are "being used as a pure litigation tactic"). See also Prosecution Response Brief, Ground 6.

¹³ See e.g. *Amicus* Practice Direction, para.4(f).

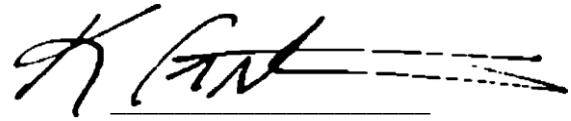
¹⁴ Compare e.g. Motion, paras.7-9 with Karadžić Appeal Brief, paras.73-77, 86, 93-99, 100-111. See e.g. *Prlić* 2016 *Amicus* Decision, paras.8, 11 (denying the application and finding the proposed submissions would not assist the chamber because the applicant sought to address factual issues and provide its own interpretation of evidence, thereby repeating the tasks undertaken by the Chamber and the parties); *Gotovina Amicus* Decision, paras.11, 13 (same); *Prosecutor v. Karadžić*, Case No.IT-95-5/18-AR98bis.1, Decision on Application for Leave to Submit an *Amicus Curiae* Brief, 21 September 2012, p.2.

¹⁵ Motion, para.1.

¹⁶ See <<https://www.adc-ict.org/amicus-committee>> last accessed on 21 November 2017. The Prosecution notes that an applicant seeking *amicus curiae* status must provide "a statement identifying and explaining any contact or relationship the Applicant had, or has, with any party to the case". *Amicus* Practice Direction, para.4(g). See also *Gotovina Amicus* Decision, para.12 (rejecting *amicus curiae* brief in part because of applicants' prior association with the Defence team and the failure to disclose this relationship).

6. For the foregoing reasons, the Appeals Chamber should deny the Motion.

Word Count: 1117

A handwritten signature in black ink, appearing to read 'K Gustafson', written over a horizontal line.

Katrina Gustafson
Senior Appeals Counsel

Dated this 23rd day of November 2017
At The Hague, The Netherlands



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