

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: 2 December 2017

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF: 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

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 confidential testimony in the *Karadzic* trial.¹ A public redacted version of that decision was issued on 20 October 2017.²

2. On 14 November 2017, President Karadzic moved 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 the same events; and (2) directing the Prosecution to include exculpatory material in all future Rule 86(G) motions.³

3. The Prosecution responded on 27 November 2017.⁴ President Karadzic now replies.

4. The Prosecution first contends that President Karadzic lacks standing to bring this motion.⁵ While it is correct that, pursuant to Appeals Chamber jurisprudence, President Karadzic lacked standing to be heard on the Rule 86(G) motion filed by the Prosecution,⁶ there is no authority that prevents the Defence from bringing its own motion to vary protective measures of witnesses to enable disclosure to national authorities.

5. Rule 86 (A) provides that:

A Chamber may, proprio motu or **at the request of either Party**, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
(emphasis added)

6. Rule 86 (G) provides that:

(G) A Party to the second proceedings seeking to rescind, vary, or augment

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

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 *Motion for Disclosure of Exculpatory Material to National Authorities* (14 November 2017)

⁴ *Prosecution Response to Motion for Disclosure of Exculpatory Material to National Authorities* (27 November 2017) ("Response"), notified to the Defence on 28 November 2017.

⁵ *Response*, para. 2

⁶ *Decision on a Motion for Inter Partes Proceedings in Rule 86 Matters* (9 March 2017), para. 7

protective measures ordered in the first proceedings must apply:
 (i) to any Chamber, however constituted, remaining seised of the first proceedings; or
 (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

7. The Appeals Chamber has held that the Prosecution had standing to make a motion under Rule 86(G) where an external party lacks the requisite knowledge to do so.⁷ There is no reason why the Defence should not have standing to make a motion under Rule 86(G) as well. The Appeals Chamber should so hold.

8. The Prosecution next contends that President Karadzic's motion should be denied because it encompasses "broad and vaguely defined categories of material."⁸ President Karadzic is indeed unable to specify the witnesses for whom protective measures should be varied to facilitate disclosure of the exculpatory material to national authorities. This is because the Prosecution chose to submit its Rule 86(G) motion *ex parte* and the public redacted version redacted the pseudonyms of the witnesses who were the subject of the Prosecution's motion.

9. Had the pseudonyms of the witnesses been disclosed to President Karadzic, he could have easily specified the protected witnesses who provided exculpatory material about the same events and made his own Rule 86(G) motion for variance of their protective measures. The Prosecution should not be allowed to conceal the information that prevents President Karadzic from narrowing his request and then turn around and claim that the request should be denied because it is too broad.

10. Should the Appeals Chamber believe that it is too difficult for the Registry or the Prosecution to identify exculpatory material, as the Prosecution claims,⁹ it is respectfully requested to issue a confidential redacted version of its Rule 86(G) decision and disclose the pseudonyms of the witnesses to the Defence. Upon receipt of the pseudonyms, President Karadzic will file his own Rule 86(G) motion.

11. The Prosecution's claim that it is not in a position to identify exculpatory

⁷ *Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed Word Limit* (7 August 2017), p. 2; *Prosecutor v. Blaskic*, No. MICT-14-69-R86G.1, *Decision on Prosecution's Application pursuant to Rule 86(G)* (19 September 2014), para. 8; *Prosecutor v. Haradinaj et al.*, No. MICT-13-47-R86G. I, *Decision on Prosecution's Application for Variation of Protective Measures* (19 December 2013) para. 7, n. 20.

⁸ *Response*, para. 3

⁹ *Response*, para. 4

material for national authorities is misguided. It had enough facts about the national authorities' investigation to realize that there was other inculpatory material in the trial record that could assist the national authorities. Using those same facts, there is no reason why it could not identify evidence presented at the trial that dealt with those same events that might be exculpatory.

12. For example, suppose the Office of the Prosecutor of Bosnia and Herzegovina had requested variance of protective measures for one witness who had evidence relevant to the involvement of the Crisis Staff in a particular municipality in expelling Bosnian Muslims. The MICT Prosecutor knows of two other protected witnesses who also have relevant evidence to the involvement of the Crisis Staff, and properly files a Rule 86(G) motion to vary the protective measures for those witnesses to enable their evidence to be disclosed to the national authorities.

13. But, suppose that a protected Defence witness testified that the Crisis Staff of that municipality did not participate in expelling Muslims. During the witness' testimony, exhibits admitted under seal include orders from the Crisis Staff prohibiting anyone from aggressing or expelling Bosnian Muslims from the municipality. That information is not included in the Prosecution's Rule 86(G) motion.

14. That is the situation that President Karadzic's motion seeks to remedy. It is only fair, to both the national authorities and any suspects, that the national authorities have exculpatory, as well as inculpatory material. If the auspices of the Mechanism are being used to only provide national authorities with inculpatory material and not exculpatory material, the Mechanism is a party to injustice.

15. President Karadzic filed his motion only after the Prosecution refused to voluntarily seek a variation of protective measures to facilitate disclosure of exculpatory as well as inculpatory material.¹⁰ He now turns to the Appeals Chamber to ensure that justice is done. It has both the power and obligation to do so.

¹⁰ See Annex B to the *Motion*.

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Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Robinson". The signature is written in a dark ink and is positioned centrally on the page.

PETER ROBINSON

Counsel for Radovan Karadzic



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