

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55-R86F.6

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: 21 February 2018

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REPLY BRIEF RE: MOTION FOR RECLASSIFICATION
AND FOR SERVICE OF MOTION

Defence Counsel for [REDACTED] before the Court of [REDACTED]
[REDACTED]

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson
Kate Gibson

1. Radovan Karadzic has moved for reclassification of the *Application Pursuant to Rule 86(F)(i) Rules of Procedure and Evidence MICT* filed in case no. MICT-13-55-R86F.6 on 26 April 2017 from *ex parte* to confidential,¹ and for an order that his motion be served upon the Applicant.² The Prosecution responded on 20 February 2018.³ President Karadzic now files this brief reply.

Service of the Motion on the Applicant

2. The *Practice Direction on Filings Made Before the Mechanism for International Criminal Tribunals* provides a procedure for distributing and reclassifying filings. Pursuant to Article 11, the Registrar is required to distribute filings to the parties. The Applicant is a party to Case No. MICT-13-55-R86F.6.

3. Article 13 allows the Registrar to temporarily restrict access to a filing while a change to the security level of the filing is sought. The Registrar never sought to change the security level of President Karadzic's *Motion for Reclassification* from "public" to "ex parte Rule 86(H) Applicant excluded". Therefore, it has not followed the procedure in the *Practice Direction* when refusing to serve the motion upon the Applicant.

4. The Prosecution's contention that serving the motion would "mislead the applicant"⁴ is irrelevant. The motion is a public document. Speculation as to how the Applicant would understand it, or what kind of communication might ensue between the Applicant and Defence Counsel,⁵ has no bearing on whether a filing should be served on a party. The Prosecution points to no authority in support of its position that the motion should not be served on the Applicant.

5. Therefore, regardless of the disposition of the merits of the motion, the Appeals Chamber should order it served on the Applicant forthwith.⁶

Reclassification

6. The Prosecution contends that President Karadzic lacks standing to seek reclassification of the application.⁷ President Karadzic agrees that pursuant to decisions

¹ *Motion for Reclassification* (6 February 2018)

² *Motion for Service of Reclassification Motion* (15 February 2018)

³ *Prosecution Response to Motion for Reclassification and Motion for Service of Reclassification Motion* (20 February 2018) ("Response")

⁴ *Response*, at para. 7

⁵ *Response* at paras. 8 and 9

⁶ Service should also include the *Motion for Service of Reclassification Motion*, the *Response*, and this Reply.

of the Appeals Chamber, he has no standing to make submissions on the merits of the application.⁸ However, as a party to the proceeding in which the protective measures were ordered, he has standing to enforce the provision of the *Practice Direction* that provides that he should have access to the application.⁹

7. The Prosecution is mistaken when it contends that the *Practice Direction* **requires** *ex parte* filing.¹⁰ The *Practice Direction* provides that:

All applications will be provided to the parties in the proceedings in which the protective measures were ordered. If there is a reason why an application should not be provided to one or more of the parties in the proceedings, the application should be submitted on an *ex parte* basis and the applicant must provide an explanation of the good cause for such specification.

8. The language of the *Practice Direction* makes it clear that *inter partes* filing in the norm, while *ex parte* filing is the exception. In order to come within that exception, the applicant must provide an explanation of good cause why the application should not be served upon the parties.

9. Under the *Practice Direction*, President Karadzic, as a party to the proceedings in which the protective measures were ordered, need not make a “heightened showing” to obtain the Application.¹¹ Rather, it is the Applicant who must make a heightened showing of “good cause” to file the Application *ex parte*.

10. If the Application in Case No. MICT-13-55-R86F.6 has made such a showing of good cause, the Appeals Chamber can easily deny President Karadzic’s motion. However, it is difficult to conceive of such good cause given that the applicant is the Defence and the late stage of the public national proceedings. The *Response* offers no explanation for why this Application needed to be filed *ex parte*.

11. Justifications previously offered for keeping Rule 86(F) and (H) applications secret have involved the fear that disclosure might jeopardise an ongoing national

⁷ *Response*, para. 2

⁸ *Prosecution v Karadzic*, No. MICT-13-55-A, *Decision on Motion for Inter Partes Proceedings* (9 March 2017), para. 7; *Prosecution v Karadzic*, No. MICT-13-55-A, *Decision on Motion for Disclosure of Exculpatory Material* (19 February 2018), p. 2

⁹ *Practice Direction on Procedure for 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* (23 April 2013), para. 6

¹⁰ *Response*, para. 5

¹¹ *Response*, para. 3

investigation by alerting the subject of the investigations, including former associates of President Karadzic, that they might be a target.¹² No such justification exists where public national proceedings are already underway and the Applicant is the Defence. The Prosecution has offered none, apart from generalities about the need to respect protective measures.¹³ If the Prosecution's argument were accepted, Rule 86 applications would never be served on the parties, vitiating the Practice Direction.

12. The Prosecution's claim that the instant motion is a request for reconsideration¹⁴ is misplaced. A review of the order and decision in case MICT-13-55-R86F.6 indicates that no consideration has yet been given to whether the Applicant had good cause to file its Application on an *ex parte* basis as required by the *Practice Direction*.¹⁵

13. For all of the above reasons, the Appeals Chamber is respectfully requested to examine whether the Applicant has shown the good cause required by the Practice Direction for filing the Application *ex parte*.¹⁶ If no such good cause has been shown, the Application should be reclassified as confidential and served upon President Karadzic.

Word count: 1227

Respectfully submitted,



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¹² *Prosecution v Karadzic*, No. MICT-13-55-A, *Prosecution's Response to Karadzic's Motion for Redacted Versions of Rule 75(H) Decisions* (24 May 2016), para. 5; *Prosecution's Response to Karadzic's Motion for Redacted Versions of Rule 86(F) Filings* (28 November 2016), para. 4; *Prosecution's Response to Karadzic's Motion for Inter Partes Proceedings* (9 February 2017), para. 8; *Prosecution's Response to Karadzic's Motion to Reclassify Filings* (12 May 2017), para. 3, fn. 9; *Prosecution Response to Karadzic's Written Submissions on the Conduct of Rule 86 Proceedings* (5 June 2017), para. 3

¹³ *Response*, para. 5

¹⁴ *Response*, paras. 2,4

¹⁵ *Order for Submissions on an Application pursuant to Rule 86(F)*(8 May 2017); *Decision on an Application pursuant to Rule 86(F)*(17 May 2017)

¹⁶ The MICT has provided a sample Rule 86 motion on its website which contains paragraphs in which a good cause showing must be made. http://www.unmict.org/sites/default/files/documents/rule-86h-application-pro-forma_en.doc. However, in the only Rule 86 application that has been disclosed to the Defence, which involved a national defendant seeking variance of protective measures for a defence witness, no effort whatsoever was made to show good cause for the *ex parte* filing.