

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: 24 June 2017

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

WRITTEN SUBMISSIONS ON THE CONDUCT OF RULE 86 PROCEEDINGS

Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadzic:

Peter Robinson
Kate Gibson

Introduction

1. At the Status Conference held on 23 June 2017, counsel for President Karadzic made two suggestions for the future conduct of Rule 86 proceedings in this case: (1) that contemporaneous public redacted decisions be issued as a matter of course; and (2) that an *amicus curiae* defence counsel be assigned to make submissions on non-routine Rule 86 motions.

2. The Presiding Judge requested that those submissions be presented in writing.¹ They are not submitted as a formal motion, since President Karadzic is not aware of any specific Rule 86 matters presently pending in his case. Nor will President Karadzic be made aware when such motions are filed in the future. Therefore, these submissions are presented as general suggestions for the future conduct of Rule 86 proceedings in his case.

Contemporaneous Public Redacted Versions of Rule 86 Decisions

3. Motions filed pursuant to Rule 86 by national prosecution authorities (and sometimes the accused in national criminal proceedings) for disclosure of protected witness information are considered by the Mechanism on a confidential, *ex parte* basis without disclosure to the public or participation by the defence.

4. The Appeals Chamber in this case has, acting on motions filed by President Karadzic, ordered the filing of public redacted versions of the decisions of the Trial Chamber under ICTY Rule 75,² and its own decisions under Rule 86(F)³ and Rule 86(H).⁴ The Appeals Chamber also undertook to issue a public redacted version of its decision in a pending Rule 86(H) proceeding,⁵ and did so soon thereafter.⁶

5. As President Karadzic has no reliable means of finding out when a Rule 86 motion is filed in his case, he would have to periodically continue to file motions for public redacted decisions unless the Appeals Chamber were to undertake to issue contemporaneous public redacted decisions on Rule 86 motions *sua sponte*.

¹ T47 (23 June 2017)

² *Decision on a Motion for Redacted Versions of Decisions issued under Rule 75(H) of the ICTY Rules* (18 July 2016).

³ *Decision on a Motion for Redacted Versions of Rule 86(F) Filings* (24 January 2017)

⁴ *Decision on a Motion for Redacted Versions of Rule 86(H) Filings* (1 May 2017).

⁵ *Id.*, fn. 9

⁶ *Decision on an Application pursuant to Rule 86(H)* (25 May 2017)

6. Counsel for President Karadzic believes that this would be a good approach, not only in this case, but in all cases before the Mechanism. The Mechanism's President reported to the United Nations Security Council earlier this month that some 45% of all decisions of the Mechanism related to requests for variation of protective measures or access to confidential evidence or information.⁷ Since virtually all decisions on such requests are issued confidentially, a great portion of the Mechanism's jurisprudence is not available to the parties and public. Issuing contemporaneous public redacted versions of Rule 86 decisions would be a positive step towards making the work of the Mechanism more transparent.

Assignment of *Amicus Curiae* Defence Counsel

7. Under the Appeals Chamber's current practice in this case, and the practice of the Mechanism as a whole, motions from national authorities to obtain the identity and transcripts of the private or closed session trial testimony of a protected witness are filed *ex parte* and not made available to the parties. After the motion is assigned to a Single Judge or Chamber, that Judge or Chamber issues an *Order for Submissions* asking the Registrar to contact the witness to determine if the witness consents to disclosure to the national authorities.

8. In the case of a witness who testified for the Prosecution, which appears to comprise more than 90% of the requests in President Karadzic's case, the motion is also provided to the Office of the Prosecutor for its comments on the desirability of disclosing the witness' identity to the national authorities. The defence is not provided with the motion, nor given an opportunity to make submissions, and is unaware of even the existence of the motion at this stage. The Appeals Chamber has ruled in this case that the defence has no standing to be heard in such matters.⁸

9. The rationale for proceeding in this manner is that disclosure of an ongoing national investigation to an accused or appellant might jeopardize that investigation. However, the result is that the Judge or Appeals Chamber hears only one position before deciding. Both the national prosecutors and the MICT Office of the Prosecutor have the

⁷ Address to the UN Security Council, Judge Theodor Meron, President, Mechanism for International Criminal Tribunals (7 June 2017) accessed at <http://www.unmict.org/sites/default/files/statements-and-speeches/170607-president-meron-sc-en.pdf>

⁸ *Decision on a Motion for Inter Partes Proceedings in Rule 86 Matters* (9 March 2017) at para. 7.

same interest—to assist in prosecuting crimes in national jurisdictions. They thus have the same position: encouraging the Chamber or Judge to allow disclosure of the identity of the witness.

10. It is respectfully submitted that the Chamber might benefit from hearing the perspective of the defence. For example, in one instance, when the Appeals Chamber asked the Registrar to determine whether the witness consented to disclosure of his identity and testimony, the Registrar reported that the witness could not be located. Nevertheless, the Appeals Chamber, acting at the request of both the national prosecutor and the MICT Office of the Prosecutor, granted disclosure of the witness' identity to national authorities.⁹

11. Had submissions been requested from the defence, the issue of whether exceptional circumstances existed to disclose the witness' identity in light of the fact that s/he could not be found may have been contested. How could the national prosecution call the witness to testify if s/he couldn't be located? And if the national prosecution could locate the witness, would it not be preferable for the Registrar to be informed of his/her whereabouts and ask the witness if s/he consented? While these arguments may or may not have carried the day, there is value in having them made and considered. No one raised them in the *ex parte* proceeding.

12. Therefore, while the Appeals Chamber does not believe it is appropriate for an accused be privy to information about an ongoing investigation revealed in a Rule 86 motion filed by national authorities, in cases that are not routine, such as where the witness does not consent to disclosure of his identity to national authorities, or cannot be found, the Appeals Chamber should consider appointing an *amicus curiae* defence counsel. Such counsel can make submissions on the legal issues involved while maintaining the confidentiality of the information from the accused.

13. The submissions of the *amicus curiae* defence counsel could be made simultaneously with those made by the Office of the Prosecutor and need not delay the provision of information to national authorities.

⁹ *Prosecutor v Karadzic*, No. MICT-13-55-R86H.1, *Decision on an Application Pursuant to Rule 86(H)* (20 October 2016)

14. Given that some 45% of the jurisprudence of the Mechanism is being made without the benefit of hearing from two sides on an issue, it is respectfully submitted that it would be beneficial for the Appeals Chamber to receive the defence perspective while at the same time maintaining the confidentiality of ongoing investigations *vis a vis* the Defence in the current proceedings.

Conclusion

15. It is hoped that the Appeals Chamber will avail itself of the opportunity to implement these suggestions should the occasion arise.

Word count: 1304

Respectfully submitted,

A handwritten signature in black ink, reading "Peter Robinson". The signature is written in a cursive, flowing style with large, connected letters.

PETER ROBINSON

Counsel for Radovan Karadzic