D161

United Nations
Nations Unies

Mechanism for International Criminal Tribunals

Mécanisme pour les Tribunaux Pénaux Internationaux

CASE/*AFFAIRE* NO.	MICT-13-55-R90.2 (KARADZIC)	DATE	13 March 2014

FROM/*DE* CARLINE AMEERALI, DEPUTY CHIEF CMSS

TO/*A*

X Office of the President/ *Le Bureau du Président*	X Office of the Prosecutor/ *Le Bureau du Procureur*	0 Defense Counsel/Conseil de la Défense
0 Appeals Chamber/ *Chambre d'appel*		X Self-representing Accused/ Accusé assurant lui-même sa défense **MR. R. KARADŽIĆ (1)**
0 Trial Chamber/ *Chambre de 1ère instance*		X Legal Advisers/ Conseillers juridiques **MR. P. ROBINSON** **MR. M. SLADOJEVIĆ** **MR. A. STEVANOVIĆ** **MR. A. VUJIĆ**
0 Specially Appointed Chamber/ *Chambre spécialement désignée*		X Standby Counsel **MR. R. HARVEY**
X Single Judge/*Juge unique*		

0 Embassy/*Ambassade*

0 Other/*Autre*

X *Pro Se* Legal Liaison Officer/*Juriste chargé de la liaison avec l'accusé*
MS. V. TASEVA

X Office of the Registrar/*Le Bureau du Greffier*	X WISP
X Senior Legal Officer/*Juriste hors-classe* **MR. P. DYGEUS/MR. R. SANDOVAL**	0 UNDU
X Communications Service/*Service Communication*	X OLAD

PLEASE FIND ATTACHED/*VEUILLEZ TROUVER CI-JOINT*

X ~~Order/Warrant~~/Decision issued by ~~Appeals Chamber/Trial Chamber/Specially Appointed Chamber~~/Judge on
Ordonnance/Mandat/Décision émis(e) par la Chambre d'appel/la Chambre de 1ère instance/la Chambre spécialement designee un Juge le 13/03/14

0 Order/Decision issued by the President on/*Ordonnance/Décision émise par le Président le* ____/____/____

0 Motion/Request/Application submitted by Prosecution/Defence Counsel/Accused/ Third Party on
Motion/Requête/Demande présentée par l'Accusation/le Conseil de la défense/l'Accusé/le tiers le ____/____/____

0 Response/Reply/Brief submitted by Prosecution/Defence Counsel/Accused on
Réponse/Réplique/Mémoire présenté(e) par l'Accusation/le Conseil de la défense/Accusé le ____/____/____

0 Decision of the Registrar on/*Décision du Greffier le* ____/____/____

0 Other/*Autre*

RECEIVED/RECU	FILED/ENREGISTRE
X Office hours/*heures ouvrables* Date: **13/03/2014**	X Office hours/*heures ouvrables* Date: **13/03/2014**
0 Outside Office hours/*en dehors des heures ouvrables* Date: ____/____/____. Time/*Heure*: ____h____.	0 Outside Office hours/*en dehors des heures ouvrables* Date: ____/____/____. Time/*Heure*: ____h____.

MICT-13-55-R90.2
D100-D94
13 MARCH 2014

100

UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-13-55-R90.2
Date: 13 March 2014
Original: English

BEFORE THE SINGLE JUDGE

Before: **Judge Bakone Justice Moloto**

Registrar: **Mr. John Hocking**

Decision of: **13 March 2014**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON KARADŽIĆ'S REQUEST TO APPOINT AN *AMICUS CURIAE* PROSECUTOR TO INVESTIGATE OFFICIALS OF UNITED STATES OF AMERICA AND ON PROSECUTION MOTIONS TO STRIKE KARADŽIĆ'S SUPPLEMENTAL SUBMISSIONS

The Applicant

Mr Radovan Karadžić

The Office of the Prosecutor

Mr Hassan Bubacar Jallow
Mr Mathias Marcussen

I, BAKONE JUSTICE MOLOTO, Judge of the Mechanism for International Criminal Tribunals ("Mechanism"), am seised of the "Request for designation of Single Judge to consider appointment of *amicus curiae* prosecutor to investigate officials of United States of America", filed publicly by Radovan Karadžić ("Applicant") on 20 January 2014 ("Request"), the "Prosecution motion to strike Karadžić's supplemental submission in support of appointment of *amicus curiae* prosecutor to investigate officials of United States of America", filed publicly by the Office of the Prosecutor ("Prosecution") on 5 February 2014 ("First Prosecution Motion"), and the "Prosecution motion to strike Karadžić's second supplemental submission in support of appointment of *amicus curiae* prosecutor to investigate officials of United States of America", also filed publicly by the Prosecution on 20 February 2014 ("Second Prosecution Motion").

I. Procedural history

1. On 21 January 2014, the President of the Mechanism assigned the Request to me.[1] On 28 January 2014, the Prosecution responded to the Request.[2] On 3 February 2014, the Applicant filed a first supplemental submission.[3] On 11 February 2014, the Applicant responded to the First Prosecution Motion.[4] On 17 February 2014, the Applicant filed a second supplemental submission.[5] On 24 February 2014, the Applicant responded to the Second Prosecution Motion.[6]

II. Submissions

1. Request

2. The Applicant requests the appointment of an *amicus curiae* prosecutor to investigate whether officials and employees of the government of the United States of America ("USA") have wilfully interfered with the administration of justice at the International Criminal Tribunal for the former Yugoslavia ("Tribunal") in violation of Rule 90(A) of the Mechanism's Rules of Procedure and Evidence ("Rules").[7] The Applicant contends that there is reason to believe that such interference was committed by intercepting privileged communications of participants in

[1] Order assigning a Single Judge, issued publicly on 21 January 2014.
[2] Prosecution response to Karadžić's request for appointment of *amicus curiae* prosecutor to investigate officials of the United States of America, filed publicly on 28 January 2014 ("Prosecution Response").
[3] Supplemental submission in support of appointment of *amicus curiae* prosecutor to investigate officials of United States of America, filed publicly on 3 February 2014 ("First Supplemental Submission").
[4] Response to Prosecutor's motion to strike supplemental submission, filed publicly on 11 February 2014 ("First Karadžić Response").
[5] Second supplemental submission in support of appointment of *amicus curiae* prosecutor to investigate officials of United States of America, filed publicly on 17 February 2014 ("Second Supplemental Submission").
[6] Response to Prosecutor's motion to strike second supplemental submission, filed publicly on 24 February 2014 ("Second Karadžić Response").
[7] Request, paras 1, 25.

proceedings before the Tribunal.[8] The Applicant argues that interception of privileged communications contravenes the lawyer-client privilege enshrined in Rule 97 of the Tribunal's Rules of Procedure and Evidence. The Applicant further argues that interception "would interfere with the administration of justice at the ICTY by providing the USA with an unfair advantage in litigation before the ICTY and with the possibility to provide such information to the ICTY Prosecutor, from whom it received confidential information."[9] In the Applicant's view, to the extent that the USA intercepted the communications of Tribunal judges, it provides the USA with the means to pressure and influence the Tribunal's judgements and decisions.[10]

3. The Applicant submits that on 28 October 2013, he requested the USA to disclose whether it had intercepted any of his communications or those of his legal advisor, Peter Robinson.[11] On 6 December 2013, the USA responded that the request was not relevant to the determination of the Applicant's guilt or innocence on the charges against him in his case.[12]

4. The Prosecution responds that the Request should be denied since it fails to provide any reason to believe that officials and employees of the USA have knowingly and wilfully interfered with the administration of justice.[13] The Prosecution argues that the Request refers to an array of unrelated documents and items, and that the Applicant only provides speculative assertions.[14]

5. In his first supplemental submission, the Applicant adds that on 7 January 2014, he requested the government of the United Kingdom of Great Britain and Northern Ireland ("UK") to disclose any information in its possession that would indicate that communications of persons at the

---

[8] Request, paras 6, 24. To be more specific, the Applicant submits that former Tribunal Judge Frederik Harhoff was quoted in a Danish newspaper article saying that all the judges' e-mail correspondence was being monitored, a suspicion which the reporter stated was shared by several other judges. *See* Request, para. 9. The Applicant adds that, in the case of the *Prosecutor v. Slobodan Milošević* (Case No. IT-02-54-T), the USA obtained information from intercepted communications between Slobodan Milošević and his wife and between Slobodan Milošević and his legal advisors, which was documented in a cable reporting on a meeting between officials of the USA and Timothy McFadden, former commander of the United Nations Detention Unit. *See* Request, para. 11, Annex C. The Applicant also adds that the USA obtained information about the confidential witness list in Slobodan Milošević's case from former Tribunal Prosecutor Carla del Ponte. *See* Request, para. 13, Annex D. The Applicant further argues that the USA's interest in the Applicant's case is "well documented" and there is every reason to believe that the privileged communications between the Applicant and his legal advisor, Peter Robinson, have been intercepted by the USA. *See* Request, paras 14, 21, 24. The Applicant submits that the USA conducted a diplomatic campaign to maintain sanctions in place against the Applicant's family and friends. *See* Request, paras 14-15, Annexes E, F. The Applicant adds that he and Mr Robinson have tried to prove that USA's Special Envoy Richard Holbrooke promised the Applicant immunity from prosecution at the Tribunal. *See* Request, para. 16. The Applicant further submits that he has been engaged from 2008 to 2013 in correspondence and litigation with the USA to obtain information necessary to his defence before the Tribunal. *See* Request, paras 17-20. The Applicant adds that the recent revelations by Edward Snowden to *The Guardian* newspaper indicate the extensive nature of the interception of electronic communications by the USA. *See* Request, para. 21.

[9] Request, paras 22, 24.

[10] Request, para. 23.

[11] Request, para. 7, Annex A.

[12] Request, para. 7, Annex B.

[13] Prosecution Response, paras 1, 3.

[14] Prosecution Response, para. 2.

Tribunal had been intercepted by the USA.[15] On 29 January 2014, the UK responded to him stating that his request was not relevant to the charges against him.[16] The Applicant submits that the UK's refusal of the requested information provides additional support for the Request.[17]

6. In his second supplemental submission, the Applicant submits that on 15 February 2014, *The New York Times* newspaper revealed that the USA's National Security Agency ("NSA") intercepted privileged communications of lawyers working on international legal issues related to trade.[18] He further submits that *The Nation* magazine also revealed that privileged communications between lawyers and clients had been intercepted by the NSA in international criminal cases.[19] The Applicant argues that these articles show ongoing interception of privileged communications by officials and employees of the USA.[20]

2. Prosecution Motions

7. The Prosecution requests that the supplemental submissions be ignored and struck from the record.[21] In its view, the supplemental submissions are not authorised under the Rules, nor has the Applicant sought leave or shown good cause for filing them.[22]

8. The Applicant responds that the First Prosecution Motion and the Second Prosecution Motion should be denied.[23] He submits that the UK's response was received and the articles were published after filing the Request and that there is no provision in the Rules which prohibits parties from supplementing motions with materials which they received after the filing of motions.[24]

III. Applicable law

9. Rule 90 of the Rules provides, in relevant parts, as follows:

> (A) The Mechanism in the exercise of its inherent power may, with respect to proceedings before the ICTY, the ICTR, or the Mechanism, hold in contempt those who knowingly and wilfully interfere with the administration of justice, including any person who:
>
> (i) being a witness before a Chamber or a Single Judge, contumaciously refuses or fails to answer a question;

[15] First Supplemental Submission, para. 6, Annex F.
[16] First Supplemental Submission, para. 7, Annex G.
[17] First Supplemental Submission, para. 8.
[18] Second Supplemental Submission, para. 7, Annex H.
[19] Second Supplemental Submission, para. 7, Annex I.
[20] Second Supplemental Submission, paras 6, 8.
[21] First Prosecution Motion, paras 1, 3; Second Prosecution Motion, para. 1.
[22] First Prosecution Motion, para. 2; Second Prosecution Motion, para. 2.
[23] First Karadžić Response, para. 4; Second Karadžić Response, para. 4.
[24] First Karadžić Response, paras 2-3; Second Karadžić Response paras 2-3.

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber or a Single Judge;

(iii) without just excuse fails to comply with an order by a Chamber or a Single Judge, including an order to attend before or produce documents before a Chamber or a Single Judge;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber or a Single Judge, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Chamber or a Single Judge.

[...]

(C) When a Chamber or a Single Judge has reason to believe that a person may be in contempt of the ICTY, the ICTR, or the Mechanism, it shall refer the matter to the President who shall designate a Single Judge who may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Single Judge, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Single Judge as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings himself.

IV. Discussion

10. With respect to the First Prosecution Motion and the Second Prosecution Motion, I note that there is no provision in the Rules which prohibits parties from filing supplementary submissions. I further note that the Applicant sent his request to the UK on 7 January 2014, thus before filing the Request on 20 January 2014, but that the UK only responded on 29 January 2014. I also note that the articles were published after the filing of the Request. For these reasons, I consider the supplemental submissions to be validly before me and I will, therefore, deny the First Prosecution Motion and the Second Prosecution Motion.

11. Rule 90(C) of the Rules conceives of a situation where a Chamber or a Single Judge of the Mechanism has reason to believe that a person may be in contempt of the Tribunal and then refers the matter to the President of the Mechanism. The President shall then designate a Single Judge who may direct the Prosecutor, or an *amicus curiae* to investigate the matter, or to initiate contempt proceedings himself. In view of the fact that the Applicant filed the Request directly with the President, who referred it to me without making a determination under Rule 90, I consider that I am called upon to determine whether there is reason to believe that officials and employees of the USA

have acted in contempt of the Tribunal by allegedly intercepting confidential or otherwise privileged communications of participants in proceedings before the Tribunal.[25]

12. The Mechanism is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the Tribunal and the International Criminal Tribunal for Rwanda. Where their respective Rules or Statutes are at issue, the Mechanism is bound to consider the relevant precedent of these tribunals when interpreting them.[26] Examples of conduct constituting contempt of the Tribunal are listed in Rule 90(A) of the Rules. While none of the enumerated acts applies to the allegations made by the Applicant, the list of acts in Rule 90(A)(i)-(v) of the Rules is non-exhaustive. Contempt can also be committed by knowingly and wilfully interfering with the administration of justice in other ways.[27] The meaning of the term "administration of justice" in Rule 90(A) of the Rules is to be interpreted in light of Rule 90, generally, which concerns matters closely related to the functioning of the judicial proceedings before the Tribunal and the Mechanism in order to ensure that the exercise of jurisdiction is not frustrated and that basic judicial functions are safeguarded.[28] Interception of confidential or otherwise privileged communications of participants in proceedings before the Tribunal does not *per se* constitute contempt of the Tribunal pursuant to Rule 90(A) of the Rules absent a showing that there was a knowing and wilful interference with the administration of justice.

13. The Applicant argues that the alleged interception by the USA of privileged communications of participants in the Tribunal's proceedings, including purportedly those between the Applicant and his legal advisor, amounts to interference with the administration of justice at the Tribunal as this would provide the USA "with an unfair advantage in litigation before the ICTY and with the *possibility* to provide such information to the ICTY Prosecutor".[29] I note at the outset that the Tribunal adjudicates individual criminal responsibility, with the only parties to its proceedings being the accused and the Prosecution, not States.

14. I find that the material submitted by the Applicant merely amounts to speculative assertions concerning the USA's alleged interception of privileged or otherwise confidential communications

---

[25] *Prosecutor v. Radovan Karadžić, Prosecutor v. Slobodan Milošević*, Case No. MICT-13-55-R90.1, MICT-13-58-R90.1, Decision on Karadžić request to appoint an *amicus curiae* prosecutor to investigate contempt allegations against former ICTY prosecutor Carla del Ponte, filed on 27 November 2013 ("Previous Decision"), paras 8-9.

[26] *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para. 6.

[27] *Prosecutor v. Zlatko Aleksovski*, Case no. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, para. 39; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-Misc.5 & IT-02-54-Misc.6, Decision on the Initiation of contempt investigations, 18 July 2011 ("*Milošević* Decision"), para. 11; *In the Case Against Florence Hartmann*, Case no. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para. 19.

[28] *Prosecutor v. Duško Tadić*, Case no. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 13; *Milošević* decision, para. 11.

and the provision thereof to parties before the Tribunal. Even if I were to consider *arguendo* that there is reason to believe that the USA intercepted such communications, I am of the view that the material which the Applicant has submitted, relating as it does to interception of trade matters between States, does not support a finding that there is reason to believe that there has been interference with the administration of justice before the Tribunal. I further find that the USA's acquisition of information on Slobodan Milošević and the witness list in his case, the USA's actions to maintain sanctions in place against the Applicant's family and friends and Snowden's revelations as reported in the material submitted by the Applicant are not relevant to the determination of whether there is reason to believe that there has been interference with the administration of justice in this case.[30] For these reasons, I find that the Applicant has failed to demonstrate that there is reason to believe that officials and employees of the USA have acted in contempt of the Tribunal.

V. Disposition

15. Pursuant to Article 1(4)(a) of the Mechanism's Statute and Rules 90(A) and 90(C) of the Rules, I **DENY** the Request, the First Prosecution Motion, and the Second Prosecution Motion.

Done in English and French, the English version being authoritative.

Judge Bakone Justice Moloto

Dated this thirteenth day of March 2014
At The Hague
The Netherlands

[Seal of the Mechanism]

[29] Request, para. 22 (emphasis added).
[30] I note that the Applicant's request that a Trial Chamber appoint an *amicus curiae* prosecutor to investigate Timothy McFadden was denied on the basis that there was no reason to believe that Mr McFadden's conduct interfered with the Tribunal's administration of justice. *See Milošević* Decision, paras 12, 14. I also note that the Applicant's request that I appoint an *amicus curiae* prosecutor to investigate Carla del Ponte was also denied on the basis that there was no reason to believe that she was in contempt of the Tribunal. *See* Previous Decision, paras 10-11.