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Mechanism for
International
Criminal Tribunals

Mécanisme pour les
Tribunaux Pénaux
Internationaux

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TO/A	<p>Prosecutor MICT/ Procureur du MTPI: Mr. H. Jallow</p> <p>Prosecutor Team MICT/ Équipe du Procureur du MTPI:</p> <p>Accused/ Accusé: Mr. R. Karadzic</p> <p>Registrar/ Greffier: Mr. J. Hocking</p> <p>Pro Se Legal Liaison Office/ Juriste chargé de la liaison avec l'accusé: V. Taseva</p> <p>OLAD/ Bureau de l'aide juridictionnelle et de la défense:</p> <p>Communication Services/ Service Communication:</p> <p>Courtroom Operations/ Opérations en salle d'audience: Mr. R. Doraiswamy</p> <p>Judicial Records Unit/ Service des dossiers judiciaires: Mr. S.R. Haider</p> <p>MICT Arusha Registry/ Greffe de la Division du MTPI à Arusha:</p> <p>President MICT/ Président du MTPI: Judge Meron</p>		
PLEASE FIND ATTACHED/VEUILLEZ TROUVER CI-JOINT			
Motion for Review of Decision on Assignment of Counsel on Appeal, submitted by Accused on 13 January 2016			
COMMENTS			
Mr. Peter Robinson for information.			

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THE RESIDUAL MECHANISM FOR
INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55

THE PRESIDENT

Before: Judge Theodor Meron

Registrar: Mr. John Hocking

Date: 13 January 2016

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR REVIEW OF DECISION ON
ASSIGNMENT OF COUNSEL ON APPEAL

The Office of the Prosecutor:
Mr. Hassan Jallow

The Accused:
Radovan Karadzic

Introduction

1. Dr. Radovan Karadzic respectfully moves, pursuant to Article 13 of the *Directive on Assignment of Defence Counsel*, for review of the Registrar's decision refusing the immediate assignment of counsel on appeal. Dr. Karadzic contends that his right to equality of arms entitles him to assignment of counsel for his appeal prior to the entry of the Trial Chamber's judgement where the prosecution team has already begun working on the appeal.

Procedural History

2. Dr. Karadzic's trial before the ICTY concluded on 7 October 2014. According to the ICTY President, the Trial Chamber will deliver its judgement in March 2016.¹

3. During the four-year trial, 585 witnesses were heard and 11,500 exhibits admitted. The record of the case includes 48,000 pages of trial transcript, approximately 93,000 pages of pleadings and approximately 150,000 pages of exhibits.²

4. Pursuant to Article 2(2) of the MICT Transitional Arrangements, Dr. Karadzic's appeal is to be heard by the Residual Mechanism.

5. In his progress report to the U.N. Security Council on 17 November 2015, MICT Prosecutor Hassan Jallow reported that "a team has now been established to prosecute the anticipated appeals in the *Seselj* and *Karadzic* cases of the International Tribunal for the Former Yugoslavia, which are before the Appeals Chamber of the Mechanism."³

6. On 8 December 2015, after learning that the prosecution had already started working on the appeal, Dr. Karadzic wrote to the Registrar and requested the immediate assignment of counsel on appeal.⁴

7. On 11 January 2015, the Registrar denied the request for assignment of counsel. On behalf of the Registrar, it was stated that:

In the absence of a trial judgement, appeal proceedings remain speculative. Thus, there is not currently an entitlement to counsel or legal aid for an appeal before the Mechanism. Consequently, the Registry considers your request as premature at this

¹ Judge Carmel Agius, *Address to the U.N. Security Council* (9 December 2015), p. 2, available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/151209_president_agius_un_sc_en.pdf

² UNSC Doc S/2015/874 (16 November 2015) at para. 15

³ UNSC Doc S/2015/883 (17 November 2015), Annex II at para. 13

⁴ Dr. Karadzic's letter is attached as Annex "A".

stage.⁵

Jurisdiction

8. Article 13 of the MICT *Directive on Assignment of Defence Counsel* provides that:

(A) The suspect whose request for assignment of counsel has been denied may, within 15 days from the date upon which he is notified of the decision, file a motion before the President for review of that decision. The President may either confirm the Registrar's decision or rule that a counsel should be assigned.

(B) The accused whose request for assignment of counsel has been denied or who has been found to have sufficient means to remunerate counsel in part, may within 15 days from the date upon which he is notified of that decision, file a motion to the Chamber before which he is due to appear for review of the Registrar's decision. The Chamber may:

- (i) confirm the Registrar's decision; or
- (ii) quash the Registrar's decision and rule that counsel be assigned; or
- (iii) direct the Registrar to reconsider the extent to which the accused is able to remunerate counsel.

9. Article 2 of the *Directive* defines "suspect" as "a person concerning whom the Mechanism possesses reliable information tending to show that the person may have committed a crime, and defines "accused" as "a person indicted by the ICTY, the ICTR, or the Mechanism, in accordance with Article 1 of the Statute."

10. Dr. Karadzic meets both definitions. Because there is no "Chamber before whom he is to appear" yet assigned, he believes that his motion is more appropriately heard by the President pursuant to Article 13(A) at this time. However, should the President believe that Article 13(B) applies, he is respectfully requested to assign a bench of the Appeals Chamber to consider this motion.

Standard of Review

11. The standard of review to be applied to the Registrar's decision is whether the Registrar (a) failed to comply with legal requirements, (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (c) took into account irrelevant material or failed to take into account relevant material; or (d) reached a conclusion which no sensible person who has properly

⁵ The letter is attached as Annex "B".

applied his mind to the issue could have reached.⁶

Argument

12. Article 6 of the MICT *Directive on the Assignment of Defence Counsel* provides that “a suspect or accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him and paid for by the Mechanism in accordance with this Directive.”

13. Dr. Karadzic’s argument is simple. The Tribunal has assigned a prosecution team to begin working on the appeal in his case as of at least October 2015. The principle of equality of arms entitles Dr. Karadzic to the assignment of a defence team to begin working on his appeal as well.

14. The Registrar’s decision took into account irrelevant material when considering that “appeal proceedings remain speculative”. The “speculative” nature of any appeal is irrelevant because regardless of the likelihood of an appeal, one side has had a team assigned to begin working on the appeal. It is simply unfair not to assign a team for the other side to begin working on the same appeal.

15. The Registrar’s decision is also unreasonable. The Prosecutor has sensibly determined that an appeal by one party or the other in this case is highly likely, and has sought to avoid delays in the appeal process by assigning a team to begin reviewing the voluminous record in this case prior to the trial judgement. The U.N. General Assembly and Security Council has approved a budget and allocated the resources for the prosecution to do so.

16. Indeed, of the 41 trials that have taken place at the ICTY since its inception, an appeal has been filed in 40 of them.⁷ In Dr. Karadzic’s own case, the prosecution already appealed his acquittal, at the end of the prosecution’s case, on Count One.⁸ In a high profile case such as Dr. Karadzic’s, it is unimaginable that one side or the other would not appeal.

17. Therefore, in considering that an appeal in this case is “speculative”, the Registrar considered irrelevant material and reached a conclusion which no sensible

⁶ *Decision on Request for Review of Registrar’s Decision* (8 October 2014) at para. 4; *Prosecutor v Kvočka et al*, No. IT-98-30/1-A, *Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003) at para. 13

⁷ Only the *Haradinaj* acquittal after retrial was not appealed.

⁸ *Prosecution Rule 98 bis Appeal Brief* (24 September 2012)

person who has properly applied his mind to the issue could have reached.

18. The Registrar also failed to consider relevant material—the principle of equality of arms. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee of the MICT and ICTY Statute.⁹ As a minimum, a fair trial, which includes a fair appeal, must entitle the accused to adequate time and facilities for his defence under conditions that do not place him at a substantial disadvantage as regards his opponent.¹⁰ Equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.¹¹

19. Dr. Karadzic is at a disadvantage when presenting his case if he is required to file his grounds of appeal with only 30 days to prepare, and his appeal brief with only 75 days to prepare, while the prosecution has had an additional five months. Dr. Karadzic's defence team will have to spend a considerable period of the time reviewing the voluminous record in this case, including hundreds of written decisions and scores of oral decisions, simply to identify potential grounds of appeal and then to identify parts of the record that support his case. Meanwhile, the prosecution will have done all of this work, and can concentrate on studying the judgement and researching its appeal issues. Dr. Karadzic is substantially disadvantaged by this inequity.

20. Dr. Karadzic accepts that equality of arms does not mean equality of resources.¹² This principle has been widely stated in the jurisprudence of the ICTY and ICTR. It is because the accused benefits from the presumption of innocence at the trial and the prosecution bears the burden of proof beyond a reasonable doubt.¹³

21. The Appeals Chamber has repeatedly explained that:

The prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged

⁹ *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 44

¹⁰ *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 47; *Prosecutor v. Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 175

¹¹ *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 48

¹² *Prosecutor v. Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149

¹³ *Prosecutor v. Perisic*, No. IT-04-81-PT, *Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms* (18 June 2007) at para. 7; *Prosecutor v. Prlic et al*, No. IT-04-74-T, *Decision on the Oral Request of the Accused Jadranko Prlic for Authorisation to Use a Laptop Computer at Hearings or to be Seated Next to his Counsel* (29 June 2006), pp. 3-4; *Prosecutor v. Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Decision Portant Attribution du Temps a la Defense Pour la Presentation des Moyens a Decharge* (1 July 2008) at para.39

beyond a reasonable doubt. Defense strategy, by contrast, often focuses on poking specifically targeted holes in the prosecution's case, an endeavor which may require less time and fewer witnesses.¹⁴

22. However, if Dr. Karadzic is convicted, he will lose the presumption of innocence and will bear the heavy burden of persuading the Appeals Chamber that the Trial Chamber had erred. As the Appellant, he will be in a similar position to the prosecution at trial, having the burden of identifying and specifying errors committed by the Trial Chamber, and persuading the Appeals Chamber to reverse those convictions.

23. Indeed, the Appeals Chamber will not consider arguments that fail to identify the challenged factual findings; mere assertions that the trial chamber must have failed to consider relevant evidence; challenges to factual findings where the relevance of the factual finding has not been explained by the appealing party; mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber; and mere assertions unsupported by any evidence, undeveloped assertions, or failure to articulate errors.¹⁵

24. If convicted, Dr. Karadzic will also have the burden of identifying and producing new evidence on appeal that could not have been discovered at trial through the existence of due diligence.

25. Therefore, under the Appeals Chamber's rationale, Dr. Karadzic would be entitled to proportionally greater time and resources than that of the prosecution, who would merely be "poking holes" in the defence's arguments.

26. If Dr. Karadzic is acquitted and the prosecution is the Appellant, Dr. Karadzic will nevertheless be entitled to a proportionate amount of time and resources allotted to the prosecution. Any time spent reviewing the record and preparing for the appeal before

¹⁴ *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 7; *Prosecutor v Karemera et al.*, Case No. ICTR-98-44-AR73, *Decision on Mathieu Ndirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008* (30 January 2009), at para. 29; *Prosecutor v Nyiramasuhuko et al.*, No. ICTR-98-42-AR73, *Decision on Joseph Kanyabashi's Appeal against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List*, (21 August 2007), at para. 26; *Prosecutor v Karemera et al.*, No. ICTR-98-44-AR15bis.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 28

¹⁵ *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015), at para. 14

the judgement would facilitate his being able to respond to the prosecution's appeal in a timely manner without the need for extensions.

27. The issue is not solely one of financial resources. The prosecution's assigned counsel and its team have access to the facilities of the Tribunal during this period, including confidential filings, transcripts of closed or private session, and exhibits under seal. Absent assignment of defence counsel, the accused has no such team and no such access. And, as noted, the prosecution will be at a great advantage in preparing and filing its notice of appeal and briefs with the additional time it is able to devote to the appeal before the judgement.

28. Despite Dr. Karadzic's request for assignment of counsel specifically referencing the equality of arms issue, the Registrar made no mention of it in his decision and gave it no consideration. He therefore failed to take into account relevant material. His conclusion, which puts Dr. Karadzic at a significant disadvantage at the outset of the appeal proceedings, is one which no sensible person who has properly applied his mind to the issue could have reached.

29. Dr. Karadzic has cooperated in this process from the outset, representing himself at trial with full respect for the process and its participants. By seeking the assignment of counsel on appeal, he wishes to continue to cooperate and have his case be an exemplary one for international justice. The Registrar's decision sets the appeal on a course of unfairness and inequality.

30. The President of the Mechanism has estimated that this case will be the most complex of the Mechanism's appeals and will take the longest to complete. He has also pledged to the U.N. Security Council that the Mechanism would continue to seek ways to improve its operations so as to facilitate the smooth and efficient fulfillment of its mandate.¹⁶ Assigning counsel to Dr. Karadzic at this stage of the proceedings, and ensuring equality of arms from the outset of this appeal, would promote these objectives.

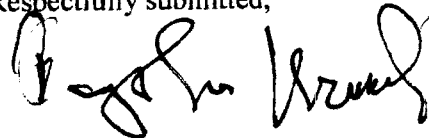
¹⁶ UNSC Doc S/2015/896 (20 November 2015) at paras. 4.15

Conclusion

31. The decision of the Registrar declining to assign counsel to Dr. Karadzic should be reversed.

Word count: 2444

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic

ANNEX “A”

Radovan Karadzic
International Criminal Tribunal for
the former Yugoslavia

8 December 2015

Mr. John Hocking
Registrar
Mechanism for International Criminal Tribunals

Re: *Prosecutor v Karadzic*
No. MICT-13-55

Dear Mr. Hocking,

I am hereby requesting the assignment of counsel and legal aid for appeal proceedings before the Mechanism for International Criminal Tribunals effective immediately.

In his progress report to the United Nations Security Council on 17 November 2015, the Residual Mechanism's Prosecutor Hassan Jallow reported that "a team has now been established to prosecute the anticipated appeals in the *Šešelj* and *Karadžić* cases of the International Tribunal for the Former Yugoslavia, which are before the Appeals Chamber of the Mechanism."

Now that the Mechanism has funded a team for the prosecution to begin working on the anticipated appeal, I am requesting that the Mechanism also fund a team for my defence to begin working on the anticipated appeal. I have attached a Request for Assignment of Counsel and Declaration of Means.

This request for assignment of counsel will have no effect on my self-represented status before the ICTY and I continue to represent myself throughout the ICTY proceedings.

Funding of my defence appeal team by the Mechanism at this time is necessary to provide for equality of arms. It would be unfair for the Mechanism to fund the prosecution's preparation of a potential appeal without also funding the defence's preparation of the same appeal.

If I receive legal aid funding, my counsel can use this time before the Trial Chamber judgement to review the voluminous record of pleadings, decisions, and transcripts in my case and prepare tools necessary to evaluate the judgement and have references to the record readily available for use in the appeal. This will reduce the amount of time needed after the judgement to perform these tasks and will avoid delays in complying with deadlines for the filing of grounds of appeal and briefs in this complex case.

Mr. John Hocking

--page two--

The Presiding Judge in my Trial Chamber has recently explained to the United Nations Security Council that:

The scope of the case is illustrated by the following: (a) the indictment in this case is based on allegations covering a four-year time frame and events in over 20 municipalities in Bosnia and Herzegovina, while the accused, who was at the apex of the civilian and military authorities of Republika Srpska (the self-proclaimed Bosnian-Serb entity within Bosnia and Herzegovina), is charged with participation in four separate joint criminal enterprises and liability for a vast array of crimes, including two counts of genocide; (b) the Chamber heard 585 witnesses and admitted 11,500 exhibits over a trial period of four years; and (c) the total number of transcript pages in the case is close to 50,000, while case filings amount to approximately 93,000 pages and exhibits to approximately 150,000 pages.¹

The President of the Mechanism has estimated that my case will be the most complex of the Mechanism's appeals and will take the longest to complete. He has also pledged that the Mechanism would continue to seek ways to improve its operations so as to facilitate the smooth and efficient fulfilment of its mandate.² Assigning and funding counsel to me at this stage of the proceedings, in addition to ensuring equality of arms, will be an important step in that direction.

I would appreciate it if you could advise me as soon as possible of the disposition of this request, so that I may take further steps if you are unwilling to assign and fund counsel for a potential appeal before the Mechanism.

Thank you very much for your cooperation.

Yours truly,



Radovan Karadzic

¹ UNSC Doc S/2015/874 (16 November 2015) at para. 15

² UNSC Doc S/2015/896 (20 November 2015) at paras. 4.15

ANNEX “B”

UNITED NATIONS
Mechanism for
International Criminal Tribunals



NATIONS UNIES
Mécanisme pour les
Tribunaux Pénaux Internationaux

MICT · MPI

OFFICE OF THE REGISTRAR / BUREAU DU GREFFIER

11 January 2016
MICT/A/IOI/2016/009

Dear Mr. Karadžić,

With reference to your letter to the Registrar of 8 December 2015, requesting the Registrar to assign counsel and legal aid for appeal proceedings before the Mechanism for International Criminal Tribunals ("Mechanism") effective immediately, I hereby respond to your query on behalf of the Registrar.

I note that you are currently awaiting the trial judgement in your case before the International Criminal Tribunal for the former Yugoslavia ("ICTY"). In the absence of a trial judgement, appeal proceedings remain speculative. Thus, there is not currently an entitlement to counsel or legal aid for an appeal before the Mechanism. Consequently, the Registry considers your request as premature at this stage.

Upon the issuance of the trial judgement, expected by March 2016, and in the event you or the OTP wish to challenge the judgement, the Registry shall revisit this matter and inform you accordingly.

Further, I note that you attached a Declaration of Means form to your letter of 8 December 2015. On 1 September 2015, the Registry informed you that the Mechanism will, in principle, recognise the indigency determination made by the ICTY. The Registry will nevertheless review the Declaration of Means submitted by you. However, please be advised that, in line with the above, the Registry will only reconsider the ICTY's determination of your indigency should the Declaration of Means include new information, unknown at the time of the original indigency determination or indicate that there is a relevant change of circumstances impacting on your ability to remunerate counsel.

Should you have any additional questions, please do not hesitate to contact my office.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'FR', followed by a horizontal line.

Fiana Reinhardt
Head of the Office for
Legal Aid and Defence Matters

To: Mr. Radovan Karadžić
UNDU

Cc: Mr. Peter Robinson
Legal Associate