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21 JULY 2014

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UNITED
NATIONS

Mechanism for International Criminal Tribunals

Case No. MICT-13-55-R90.3
IT-95-5/18-T

Date: 21 July 2014

Original: English

SINGLE JUDGE

Before Judge: Judge Vagn Joensen, *Single Judge*

Registrar: Mr. John Hocking

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION TO INVITE THE ICTY TRIAL CHAMBER IN THE KARADŽIĆ CASE TO DETERMINE WHETHER THERE IS "REASON TO BELIEVE" THAT CONTEMPT HAS BEEN COMMITTED BY MEMBERS OF THE OFFICE OF THE PROSECUTOR

The Office of the Prosecutor

Hassan B. Jallow
Mathias Marcussen

Applicant

Radovan Karadžić

INTRODUCTION

1. On 19 May 2014, Dr. Radovan Karadžić ("Karadžić") requested that the President of the Mechanism for International Criminal Tribunals ("Mechanism") appoint, pursuant to Rule 90 (C) of the Mechanism Rules of Procedure and Evidence, a Single Judge to "consider the appointment of an *amicus curiae* prosecutor to investigate whether members of the Office of the Prosecutor [of the International Criminal Tribunal for the former Yugoslavia (the "ICTY")] have wilfully interfered with the administration of justice at [the ICTY]" ("Request").[1]

2. On 21 May 2014, the Office of the Prosecutor of the Mechanism ("Prosecution") filed a motion to strike the Request ("Prosecution Motion to Strike") arguing that a Mechanism Single Judge could only be appointed if and when the Karadžić Trial Chamber determines that there is "reason to believe" that members of the ICTY Prosecution had wilfully interfered with the administration of justice in the Karadžić case ("Jurisdictional Issue").[2]

3. On 26 May 2014, Karadžić responded that he has no preference as to whether the ICTY or the Mechanism considers his Request.[3]

4. On 2 June 2014, the Prosecution filed a response with respect to the merits of the Request and stated that the Request should be dismissed because it fails to show that there is "reason to believe" that members of the ICTY Prosecution may be in contempt.[4]

5. By decision of 5 June 2014, the President of the Mechanism assigned me as Mechanism Single Judge to rule on the Jurisdictional Issue and the Karadžić Request.[5]

6. The present Decision only concerns the Jurisdictional Issue that arises from the Prosecution Motion to Strike.

APPLICABLE LAW

7. Article 1 (4) of the Statute of the Mechanism empowers the Mechanism to prosecute contempt of court with respect to proceedings before the ICTY, the International Criminal

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[1] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Request for Designation of Single Judge to Consider Appointment of *Amicus Curiae* Prosecutor to Investigate Contempt by Office of the Prosecutor, 19 May 2014, paras. 1, 30 ("Request").
[2] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Prosecution Motion to Strike Request for Designation of Single Judge to Consider Appointment of *Amicus Curiae* Prosecutor to Investigate Contempt by Office of the Prosecutor, 21 May 2014, paras. 1-2, 5-6 ("Prosecution Motion to Strike").
[3] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Response to Prosecution Motion to Strike, 26 May 2014, para. 2.
[4] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Prosecution Response to Karadžić's Request to Designate Single Judge to Consider Appointing an *Amicus Curiae* Prosecutor, 2 June 2014, paras. 1-2, 8.
[5] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Decision on Prosecution Motion to Strike and Assigning a Single Judge, 5 June 2014, p. 2.

Tribunal for Rwanda ("ICTR") and the Mechanism. Article 4 (2) of the Transitional Arrangements annexed to Security Council Resolution 1966 (2010) states, in part, that the ICTY and the ICTR shall have competence to conduct and complete all proceedings for contempt of court for which the indictment is confirmed before the commencement date of the respective branch of the Mechanism. The Mechanism has competence to conduct, and complete, such proceedings for which the indictment is confirmed on or after the commencement date for the Arusha and The Hague branches of the Mechanism. The commencement date of The Hague branch of the Mechanism was 1 July 2013.

8. Rule 90 (C) of the Mechanism Rules provides that if a Chamber or Single Judge has reason to believe that a person may be in contempt of the ICTY, ICTR, or the Mechanism the matter shall be referred to the President of the Mechanism who shall designate a Single Judge who may direct an enquiry into the matter and take further steps.[6] Rule 90 of the Mechanism Rules, thus, differs from its ICTY equivalent, Rule 77 of the ICTY Rules of Procedure and Evidence, in that Rule 77 empowers the Chamber to decide on all steps pertaining to the investigation and prosecution of contempt.

9. I note that the Mechanism is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTY and the ICTR, and where their respective Rules or Statutes are at issue, the Mechanism is bound to consider the relevant precedent of these tribunals when interpreting them.[7]

DISCUSSION

Jurisdiction of the ICTY to Make the "Reason to Believe" Determination

10. Article 4 (2) of the Transitional Arrangements provides that the competence to *conduct* and *complete* contempt proceedings lies with the Mechanism where no indictment has been confirmed before the commencement date of the respective branch of the Mechanism.

11. In *Sebureze* and *Turinabo* I, as specially appointed Mechanism Single Judge, ruled that the Mechanism, following an enquiry ordered by the ICTR Trial Chamber prior to the commencement date of the Arusha branch of the Mechanism, had exclusive jurisdiction to decide whether or not to instigate contempt proceedings since that decision had not been taken by the ICTR Trial Chamber prior to the commencement date of the Arusha branch of the Mechanism.[8] However, my decision in that case did not address whether the initial

[6] *See also* Rule 77 (C) of the ICTY Rules of Procedure and Evidence.
[7] *Phénéas Munyarugarama v. The 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.
[8] *In Re. Deogratias Sebureze and Maximilien Turinabo*, Case No. MICT-13-40-R90 & MICT-13-41-R90, Decision on Deogratias Sebureze and Maximilien Turinabo's Motions on the Legal Effect of the Contempt Decision and Order Issued by the ICTR Trial Chamber, 20 March 2013, paras. 9-13. *See also The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Allegations of Contempt, 21 February 2013. On 6 July 2010, Trial Chamber II of the ICTR directed the Registrar of the ICTR to appoint an *amicus curiae* to investigate possible violation of Rule 77 of the ICTR Rules of Procedure and Evidence. Pursuant to the report received from the *amicus curiae* in response to the 6 July 2010 order, the Trial Chamber decided on 21 February 2013, after the

"reason to believe" determination under Rule 90 (C) of the Mechanism Rules would fall under the "conduct and complete" provision referenced in the Transitional Arrangements.

12. I further note that when ruling on the ICTR Prosecutor's Motion for Reconsideration of the *Sebureze* and *Turinabo* Decision, I obiter held that "where a contempt matter arises before the ICTR (or ICTY) it will, on or after 1 July 2012 (or on or after 1 July 2013) be the ICTR (or ICTY) trial or appeal chamber seised with the underlying matter which is the "[c]hamber" that pursuant to MICT Rule 90(C) has the authority to determine whether there is reason to believe that a person may be in contempt, and shall refer the matter to the MICT President for the appointment of a Single Judge to deal with the further proceedings".[9] This case presents exactly what was envisaged by that decision and allows the Chamber presently seised of the underlying matter to make the "reason to believe" determination.

13. In accordance with the Prosecution's Motion to Strike, which is not opposed by Karadžić, I still find that the ICTY or ICTR Trial or Appeals Chamber seised with a case beyond the commencement date of the relevant branch of the Mechanism retains jurisdiction to make the "reason to believe" determination under Rule 90 (C) of the Mechanism Rules in matters which are closely linked to the on-going trial or appeals proceedings.[10]

14. When conferring control over the prosecution of contempt to the Chamber or Single Judge the Mechanism Rules as well as the ICTY [and ICTR] Rules refer to the inherent powers of Judges.[11] Thus, while the initiation of criminal proceedings is otherwise the prerogative of the Prosecution, the initiation of contempt proceedings cannot be left to the Prosecution alone because the Prosecution, as a party to the underlying proceedings, will often have a conflict of interest or, as in the case at hand, can be the subject of the contempt allegations.

15. Furthermore, in order to effectively control the trial or appeals proceedings and to ensure their integrity a Chamber or Single Judge must be empowered to initiate contempt proceedings in matters closely linked to those proceedings. It would be untenable if the competence to initiate contempt proceedings, which is considered an inherent power under the Rules of the ICTY, the ICTR and the Mechanism, only applied to cases where the "reason to believe" determination had been made prior to the commencement date of the respective branch of the Mechanism or when the underlying case is before the Mechanism.

16. Therefore, there is no basis to assume that the Security Council had any intention of reducing the power and ability of the ICTY and ICTR Chambers to control their proceedings through the Transitional Arrangements or Mechanism Statute. On the contrary, the Transitional

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commencement date of the Arusha branch of the Mechanism, that sufficient grounds exist for the Prosecution of Deogratias Sebureze and Maximilien Turinabo for contempt of the Tribunal, issued an order in lieu of an indictment against Sebureze and Turinabo, and directed the ICTR Registrar to refer the matter to the Mechanism to conduct and complete the proceedings.

[9] *In Re. Deogratias Sebureze and Maximilien Turinabo*, Case No. MICT-13-40-R90 & MICT-13-41-R90, Decision on ICTR Prosecutor's Motion for Reconsideration of 20 March 2013 Decision, 17 July 2013, para. 49.

[10] Prosecution Motion to Strike, para. 3; *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.3, Response to Prosecution Motion to Strike, 26 May 2014, para. 2.

[11] *See* Rule 90 (A) of the Mechanism Rules of Procedure and Evidence and Rule 77 (A) of the ICTY and ICTR Rules of Procedure and Evidence.

Arrangements and the Mechanism Statute recognise that Judges must be in control of contempt proceedings and Security Council Resolution 1966 (2010) specifies that the Mechanism Rules shall be based on the ICTY and ICTR Rules.[12] Thus, the language "conduct and complete" as used in Article 4 (2) of the Transitional Arrangements cannot be interpreted to include the initial determination as to whether there is "reason to believe" that a person may be in contempt of the ICTY, the ICTR, or the Mechanism.

17. I also recall that Karadžić has previously filed two other contempt related requests with the ICTY, one against former ICTY Prosecutor Carla Del Ponte and one against Officials of the United States of America.[13] In both instances, it was held that the ICTY did not have jurisdiction to consider the requests.[14] Both requests were subsequently filed with and completed by the Mechanism.[15] However, I find that both of these decisions are distinct from the present Request.

18. With respect to the request against Carla Del Ponte, Karadžić was referring to allegations of contempt committed by Carla Del Ponte in the *Prosecutor v. Slobodan Milosevic* case.[16] While this request raises questions of Karadžić's standing to assert a violation of Milosevic's rights, which is acknowledged by Karadžić[17] but not addressed in the decision from the Specially Appointed Chamber assigned to address this matter,[18] it is important to note that the *Milosevic* case was closed following his death on 11 March 2006.[19] As such, no Trial Chamber is presently seised of the *Milosevic* case and the Mechanism was the appropriate

[12] *See* executive paragraph 5 of Security Council Resolution 1966, S/RES/1966 (2010).
[13] *The Prosecutor v. Radovan Karadžić, The Prosecutor v. Slobodan Milosevic*, Case No. IT-95-05/18-T and IT-02-54-T, Request for Appointment of Special Chamber, 27 September 2013, paras. 1, 11; *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T, Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Officials of the United States of America, 9 December 2013, paras. 1, 22.
[14] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T and IT-02-54-T, Decision on Jurisdiction Following the Assignment of a Specially Appointed Chamber, 18 October 2013, p. 1; *The Prosecutor v. Radovan Karadžić*, Case Nos. IT-95-5/18-T and IT-02-54-T, Decision on Request for Appointment of Special Chamber, 11 November 2013, p. 1; *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T, Decision on Accused's Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Officials of the United States of America, 16 January 2014, p. 3.
[15] *The Prosecutor v. Radovan Karadžić, The Prosecutor v. Slobodan Milosevic*, Case No. MICT-13-55-R90.1 and 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, 27 November 2013; *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.2, 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 Supplemental Submissions, 13 March 2014.
[16] *The Prosecutor v. Radovan Karadžić's, The Prosecutor v. Slobodan Milosevic*, Case No., IT-95-05/18-T and IT-02-54-T, Request for Appointment of a Single Judge, 27 September 2013, paras. 3-4, 8, 10. I note that Karadžić's request in this instance relates to his case insofar as he argues that Slobodan Milosevic is not the only victim of the "disclosure of confidential information" as he [Karadžić] also has a personal interest in ensuring that mechanisms are in place to hold prosecutors accountable for disclosing confidential information about defence witnesses. Karadžić stated that "if a prosecutor can disclose confidential information about defence witnesses with impunity, then Dr. Karadžić can have no confidence that his filings are protected".
[17] *Id.*, para. 8.
[18] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T and IT-02-54-T, Decision on Jurisdiction Following the Assignment of a Specially Appointed Chamber, 18 October 2013.
[19] *The Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, 14 March 2006, Order Terminating the Proceedings, pg. 2.

forum in which to address this matter. In contrast, the Karadžić case is still on-going and the Request deals specifically with matters previously adjudicated by the Trial Chamber.

19. Similarly, the request to investigate contempt allegations by officials of the United States of America in the Karadžić case also does not directly relate to matters previously ruled upon by the Trial Chamber or matters dealing directly with witnesses or information specifically before the Trial Chamber.[20] Thus, when the request was subsequently filed with the Mechanism, the specially assigned Single Judge denied the request, in part, on the ground that the alleged circumstances "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".[21]

20. Finally, in both the Carla Del Ponte request and the request to investigate Officials of the United States of America an ICTY Chamber made a specific determination that it did not have jurisdiction over these matters.[22] The present case has seen no such determination because, in contrast to the requests in both the Carla Del Ponte request and the request to investigate Officials of the United States of America, Karadžić has filed the instant request directly with the President of the Mechanism.

21. In the present case, the Karadžić Trial Chamber is still seised of the trial and is the Chamber in which the contempt was allegedly committed. Furthermore, the conduct which Karadžić alleges may constitute contempt of court relates to a number of decisions rendered by the Trial Chamber on disclosure issues.[23] Moreover, the ICTY Trial Chamber in Karadžić has adjudicated all of Karadžić's disclosure violation complaints.[24] As such, the Karadžić Trial Chamber is not only best placed to make the initial "reason to believe" determination, but the matter is also closely linked to the proceedings before the Trial Chamber. I, therefore, find that the Karadžić Trial Chamber has retained jurisdiction to determine whether there is "reason to believe" that members of the ICTY Prosecution may be in contempt pursuant to Rule 90 (C) of the Mechanism Rules.

Jurisdiction of the Mechanism to Make the "Reason to Believe" Determination

22. As referenced above, Karadžić subsequently re-filed his requests with respect to the Carla

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[20] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T, Motion for Appointment of Amicus Curiae Prosecutor to Investigate Officials of the United States of America, 9 December 2013, paras. 1, 3, 22. In this request, Karadžić raises allegations of the apparent interception of confidential communications by Officials of the United States of America.

[21] *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.2, 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, 13 March 2014, para. 14.

[22] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T and IT-02-54-T, Decision on Jurisdiction Following the Assignment of a Specially Appointed Chamber, 18 October 2013, p. 1; *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T and IT-02-54-T, Decision on Request for Appointment of Special Chamber, 11 November 2013; *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-T, Decision on Accused's Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Officials of the United States of America, 16 January 2014, p. 3.

[23] Request, paras. 14, 18-24.

[24] Prosecution Motion to Strike, para. 3.

Del Ponte case and the case concerning Officials of the United States of America with the Mechanism after the respective ICTY Chambers stated that they did not have jurisdiction.[25] The specially appointed Single Judge, thereafter, asserted jurisdiction over both of these cases.[26] Therefore, I consider it established jurisprudence that I, as specially appointed Single Judge, can rule on the matter in the event that the Karadžić Trial Chamber declines to do so.

23. In the event that the Karadžić Trial Chamber declines this invitation to determine whether there is "reason to believe" that members of the ICTY Prosecution may be in contempt, I consider that as Mechanism Single Judge assigned to the matter I would have competence to make such a determination pursuant to Rule 90 (C) of the Mechanism Rules, and will do so if the Karadžić Trial Chamber decides not to make this initial determination.

FOR THE FOREGOING REASONS, I

I. **GRANT** the Prosecution Motion to Strike, in part, insofar as I invite the Karadžić Trial Chamber to determine whether there is "reason to believe" that contempt may have been committed by members of the ICTY Prosecution;

II. **REQUEST** the Karadžić Trial Chamber to inform me of its decision; and

III. **DECIDE** to remain seised of the matter.

Arusha, 21 July 2014, done in English and French, the English version being authoritative.

Judge Vagn Joensen
Single Judge

[Seal of the Mechanism]

[25] *The Prosecutor v. Radovan Karadžić, The Prosecutor v. Slobodan Milosevic*, Case No. MICT-13-55-R90.1 and MICT-13-58-R90.1, Request for Appointment of Single Judge, 4 November 2013; *The Prosecutor v. Radovan Karadžić'*, Request for Designation of Single Judge to Consider Appointment of *Amicus Curiae* Prosecutor to Investigate Officials of United States of America, 20 January 2014.

[26] *The Prosecutor v. Radovan Karadžić, The Prosecutor v. Slobodan Milosevic*, Case No. MICT-13-55-R90.1 and 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, 27 November 2013 ; *The Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.2, 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, 13 March 2014.