

MICT-13-58-R90.1
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UNITED NATIONS
27 November 2013

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Mechanism for International Criminal Tribunals

Case Nos MICT-13-55-R90.1
MICT-13-58-R90.1

Date: 27 November 2013

Original: English

BEFORE THE SINGLE JUDGE

Before: Judge Bakone Justice Moloto

Registrar: Mr. John Hocking

Decision of: 27 NOVEMBER 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC

**DECISION ON KARADŽIĆ REQUESTS TO APPOINT
AN *AMICUS CURIAE* PROSECUTOR TO
INVESTIGATE CONTEMPT ALLEGATIONS AGAINST
FORMER ICTY PROSECUTOR CARLA DEL PONTE**

The Office of the Prosecutor

Mr. Hassan Bubacar Jallow
Mr. Mathias Marcussen

Applicant

Mr. Radovan Karadžić

Standby Counsel:

Mr. Richard Harvey



I. PROCEDURAL HISTORY

1. On 27 September 2013, Radovan Karadžić (“Applicant”) requested the President of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to appoint a Special Chamber to consider whether to appoint an *amicus curiae* prosecutor to investigate possible contempt of the ICTY by former Prosecutor Carla Del Ponte.¹ On 1 October 2013, the ICTY President ordered a Specially Appointed Chamber be assigned to this request.² On 18 October 2013, the Specially Appointed Chamber found that it did not have jurisdiction to consider the request, and referred it back to the ICTY President.³

2. On 4 November 2013, the Applicant filed with the Mechanism for International Criminal Tribunals (“Mechanism”) one “Request for Appointment of Single Judge” in two cases, *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.1, and the *Prosecutor v. Slobodan Milošević*, Case No. MICT-13-58-R90.1 (“Requests”), in which he requests the President of the Mechanism (“President”) to appoint a Single Judge to “consider whether to appoint an *amicus curiae* prosecutor to investigate possible contempt by former ICTY Prosecutor Carla Del Ponte” in the ICTY case of *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T.⁴ On 12 November 2013, the President assigned the Requests to the Single Judge.⁵ On 14 November 2013, the Prosecution filed its Response to the Requests (“Response”).⁶

II. SUBMISSIONS OF THE PARTIES

3. The Applicant points to a cable from Legal Officers of the United States Embassy in The Hague describing a meeting they had with ICTY Prosecutor Carla del Ponte on 16 April 2004.⁷ According to the cable, del Ponte identified during that meeting various witnesses listed in a defence witness list Slobodan Milošević filed confidentially with the ICTY Trial Chamber.⁸ The

¹ Request for Appointment of Special Chamber, *Prosecutor v. Radovan Karadžić*, *Prosecutor v. Slobodan Milošević*, Case Nos IT-95-05/18-T and IT-02-54-T, 27 September 2013, para. 1.

² Order Assigning a Specially Appointed Chamber, *Prosecutor v. Radovan Karadžić*, *Prosecutor v. Slobodan Milošević*, Case Nos IT-95-05/18-T and IT-02-54-T, 1 October 2013.

³ Decision on Jurisdiction Following the Assignment of a Specially Appointed Chamber, *Prosecutor v. Radovan Karadžić*, Case Nos IT-95-05/18-T and IT-02-54-T, 18 October 2013.

⁴ Request for Appointment of Single Judge, *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.1, 4 November 2013, para. 12; Request for Appointment of Single Judge, *Prosecutor v. Slobodan Milošević*, Case No. MICT-13-58-R90.1, 4 November 2013, para. 12.

⁵ Order Assigning a Single Judge, *Prosecutor v. Radovan Karadžić*, *Prosecutor v. Slobodan Milošević*, Case Nos MICT-13-55-R90.1 and MICT-13-58-R90.1, 12 November 2013.

⁶ Prosecution’s Response to Karadžić’s Contempt Allegations, *Prosecutor v. Radovan Karadžić*, *Prosecutor v. Slobodan Milošević*, Case Nos MICT-13-55-R90.1 and MICT-13-58-R90.1, 12 November 2013.

⁷ Requests, paras 2-3; Requests, Annex A.

⁸ Requests, paras 2-3; Requests, Annex A.

Applicant adds that the cable, which was made available on the Wikileaks web site, further specifies that del Ponte “has agreed to keep us [US embassy officials] informed of developments with respect to Milošević’s witness requests.”⁹ The Applicant argues that in disclosing witnesses’ identities, this cable provides reason to believe that del Ponte violated Rule 90(A) of the Mechanism’s Rules of Procedure and Evidence (“Rules”) by, *inter alia*, “disclosing information...in knowing violation of an order of a Chamber.”¹⁰ He concedes that he does not have legal standing to assert a violation of the rights of the deceased Slobodan Milošević, but asserts that a strict application of the concept of standing would prevent this serious matter from being addressed by the Mechanism.¹¹ He adds that as he is currently being tried before the ICTY, he nevertheless possesses a personal interest in ensuring that confidential information about defence witnesses is not divulged to unauthorized entities.¹²

4. In its Response, the Prosecution asserts that as a party to the *Slobodan Milošević* case and whose former principal is the subject of the present contempt allegations, it has a right to be heard.¹³ The Prosecution argues that while Milošević filed his witness list confidentially, it was not made confidential by any Chamber order, and none of the US officials identified as potential defence witnesses in the cable were the subject of any protective measures preventing the disclosure of their identity as potential ICTY witnesses.¹⁴ It submits that the meeting del Ponte had with the officers of the US embassy in The Hague was necessary in order to secure the testimony of the officials in question, and merely constituted a notification of information that the US embassy would eventually receive in the course of the defence case.¹⁵ It considers that while a reference to the names may have been inappropriate, such disclosure could not reasonably be said to have had an impact on the judicial proceedings, much less amount to interference with the ICTY’s administration of justice pursuant to Rule 90(A) of the Rules.¹⁶

III. APPLICABLE LAW

5. Rule 90(A)(ii) of the Rules provides:

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

⁹ Requests, para. 4; Requests, Annex A.

¹⁰ Requests, para. 5.

¹¹ Requests, paras 8-10.

¹² Requests, para. 10.

¹³ Response, para. 2.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, para. 5.

who knowingly and wilfully interfere with the administration of justice, including any person who:

....

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

6. Rule 90(C) of the Rules reads as follows:

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.

7. The Single Judge recalls that the Mechanism is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (“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.¹⁷ The *actus reus* of contempt under ICTY Rule 77(A)(ii), which is essentially identical to Rule 90(A)(ii) of the Rules, is “the physical act of disclosure of information relating to proceedings before the Tribunal, where such disclosure breaches an order of a Chamber.”¹⁸ The *mens rea* required for this form of contempt consists of “disclosure of particular information in knowing violation of a Chamber’s order.”¹⁹

¹⁷ *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.

¹⁸ *In the Case against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para. 20. See also *In the Matter of Vojislav Šešelj*, Public Redacted Version of Judgement issued on 28 June 2012, Case No. IT-03-67-R77.4, 28 June 2012, para. 41.

¹⁹ *In the Case against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para. 22. See also *In the Case against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 128.

IV. DISCUSSION

8. At the outset, the Single Judge notes that Rule 90(C) of the Rules conceives of a situation where a Chamber or a Single Judge finds reason to believe that a person may be in contempt of the ICTY, ICTR or the Mechanism, and such Chamber or Single Judge then refers the matter to the President. 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.

9. In relation to the present situation, however, Karadžić filed the Requests directly with the President, who then referred the matter to the Single Judge. In the President's Order of referral, no finding was made that there was reason to believe that del Ponte was in contempt of the ICTY.²⁰ Moreover, while the President is requested to "appoint a Single Judge to determine whether appointment of an *amicus curiae* prosecutor to investigate possible contempt by former Prosecutor Carla Del Ponte is warranted", the Single Judge deems such evaluation to pertain to the determination of sufficient grounds to proceed under Rule 90(D) of the Rules, whereas the Single Judge must first have reason to believe that a person is in contempt of the ICTY under Rule 90(C) of the Rules. Accordingly, the Single Judge is of the view that he is presently called to determine whether there is reason to believe that del Ponte was in contempt of the ICTY. The Single Judge considers Rule 90(C) of the Rules to be clear that if he does not have reason to believe that del Ponte was in contempt of the ICTY, then he cannot proceed to direct the Prosecutor or appoint an *amicus curiae* to investigate the matter, or initiate contempt proceedings himself.

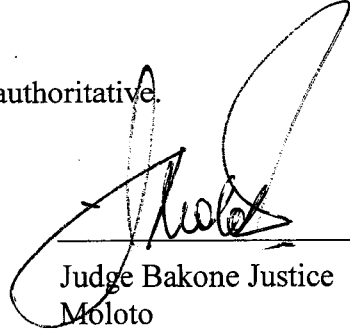
10. In considering whether there is reason to believe that del Ponte was in contempt of the ICTY, the Single Judge must ascertain whether an order of the *Slobodan Milošević* Trial Chamber was violated when certain names on Slobodan Milošević's witness list, which was filed confidentially, were disclosed to officials of the US embassy in The Hague. Karadžić does not point to any such order, and instead argues on the mere basis of the confidential filing of the Milošević defence witness list. Karadžić likewise does not allege that any of the individuals identified were protected witnesses. The Single Judge therefore finds that there was no order by the *Slobodan Milošević* Trial Chamber that was violated by such disclosure. The existence of an order prohibiting the disclosure of information being an element of the *actus reus* of contempt under Rule 90(A)(ii) of the Rules, and therefore a condition *sine qua non* for contempt to arise, the Single Judge finds that he does not have reason to believe that del Ponte was in contempt of the ICTY.

²⁰ Order Assigning a Single Judge, *Prosecutor v. Radovan Karadžić, Prosecutor v. Slobodan Milošević*, Case Nos MICT-13-55-R90.1 and MICT-13-58-R90.1, 12 November 2013.

V. DISPOSITION

11. Pursuant to Article 1(4)(a) of the Mechanism's Statute, and Rules 90(A)(ii) and 90(C) of the Rules, the Single Judge **FINDS** that there is no reason to believe that Carla del Ponte was in contempt of the ICTY and **DENIES** the Requests.

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



Judge Bakone Justice
Moloto

Dated this twenty-seventh day of November 2013

At The Hague

The Netherlands

[Seal of the Mechanism]

