

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-A

Date: 10 May 2016

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge William Hussein Sekule
Judge Vagn Prüsse Joensen
Judge José Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana

Registrar: Mr. John Hocking

Decision of: 10 May 2016

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON A MOTION FOR ACCESS TO
EX PARTE FILINGS IN COMPLETED CASES**

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for Mr. Radovan Karadžić:

Mr. Peter Robinson

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

NOTING the judgement issued in this case by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“Trial Chamber” and “ICTY”, respectively), on 24 March 2016 (“Trial Judgement”);²

BEING SEISED OF a motion filed on 1 April 2016 by Mr. Radovan Karadžić, in which he requests access to portions of two *ex parte* and confidential Prosecution motions filed in two ICTY cases, which “presumably” set forth the factual basis for the protective measures granted to two witnesses in the *Brđanin* and *Milošević* cases and which were continued in his case;³

NOTING that the Prosecution responded on 11 April 2016 opposing the Motion and Karadžić filed a reply on 14 April 2016;⁴

NOTING Karadžić’s submission that he has a legitimate forensic purpose to access the requested material as he is considering appealing the Trial Chamber’s decisions to delay disclosure of Witness KDZ490’s identity until after the trial had commenced⁵ and to deny protective measures to defence witnesses by applying a different standard than that applied with respect to Prosecution witnesses;⁶

NOTING ALSO Karadžić’s submission that any reasons justifying the *ex parte* status of the requested material during the *Brđanin* and *Milošević* trials do not warrant withholding this information from him at present, particularly given that the witnesses’ identity, prior statements, and testimony have been disclosed to him;⁷

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016.

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement issued on 24 March 2016, 24 March 2016.

³ Motion for Access to *Ex Parte* Filings in Completed Cases, 1 April 2016 (“Motion”), paras. 1, 4, 5, 10-12, 18, referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Prosecution’s Tenth Motion for Protective Measures for Victims and Witnesses, 21 March 2002 (confidential and *ex parte*); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54, Prosecution’s Motion for Protective Measures for Witness B-1524, 12 August 2003 (confidential and with an *ex parte* annexure); *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Tenth Motion for Protective Measures for Victims and Witnesses, 28 May 2002; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Protective Measures for Witness B-1524, 26 August 2003. To the extent that Karadžić seeks access to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Prosecution’s Motion for Further Trial Related Protective Measures for Witness B-161, 2 July 2003 (confidential and *ex parte*), his request is dismissed as unsubstantiated. See Motion, paras. 1, 16.

⁴ Prosecution’s Response to Motion by Radovan Karadžić for Access to *Ex Parte* Filings in Completed Cases, 11 April 2016 (“Response”), paras. 1-6; Reply Brief: Motion for Access to *ex parte* Filings in Completed Cases, 14 April 2016 (“Reply”), paras. 1-11.

⁵ Motion, paras. 6, 7, 14 referring to, *inter alia*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, 25 March 2010 (“*Karadžić* Decision 25 March 2010”).

⁶ Motion, paras. 8, 13, 14. See Reply, paras. 8, 9.

⁷ Motion, paras. 9, 15.

NOTING the Prosecution's response that Karadžić fails to meet the elevated threshold for gaining access to *ex parte* material as he does not demonstrate any legitimate forensic purpose and, in particular, fails to explain how the Trial Chamber's decision to delay disclosure of Witness KDZ490's identity could have impacted the verdict⁸ and that, contrary to his allegations, the Trial Chamber was bound to apply different legal tests in different circumstances: one when considering requests for granting protective measures and the other when continuing or modifying protective measures granted in other cases;⁹

NOTING Karadžić's reply that the delayed disclosure "significantly decreased the time and resources available [...] to confront [Witness KDZ490]" whose evidence the Trial Chamber relied upon for certain "pivotal" findings,¹⁰ that despite the different standards for ordering and continuing protective measures, the Trial Chamber's continuation of such measures may suggest that "it employed a double standard between protective measures available to prosecution and defence witnesses",¹¹ and that the Prosecution does not purport to show that granting access to the relevant material would prejudice either the Prosecution or the witnesses;¹²

CONSIDERING that, with regard to confidential material, the Mechanism must "find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses";¹³

RECALLING that a request for access to confidential material from another case can only be granted if the material sought has been identified or described by its general nature and a legitimate forensic purpose for gaining such access is shown;¹⁴

⁸ Response, para. 3.

⁹ The Prosecution submits that "the Trial Chamber was bound to apply different legal tests to the situation of KDZ490 – where it was faced with an application for modification of protective measures – versus the situation of requests for protective measures for Defence witness." See Response, para. 4. The Prosecution also notes that Witness KDZ490 did not consent to the requested modification of protective measures. See Response, para. 4, referring to Karadžić Decision 25 March 2010, para. 13. The Prosecution also submits that "KDZ059's protective measures were not ordered by the Karadžić Trial Chamber but were merely continued by automatic operation of ICTY Rule 75(F)(i)". See Response, para. 5.

¹⁰ See Reply, paras. 5, 6. Karadžić submits that Witness KDZ490 was relied upon for the purposes of the Trial Chamber's findings related to Sanski Most and that the witness was the sole witness supporting the finding that "the mosques in Sanski Most were destroyed pursuant to orders from the Crisis Staff [...] so that Bosnian Muslims would not return". See Reply, para. 5.

¹¹ Reply, para. 8.

¹² Reply, para. 10.

¹³ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the Brđanin Case, 24 January 2007 ("*Brđanin* Decision of 24 January 2007"), para. 10. See *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010 ("*Šainović* Decision of 16 February 2010"), para. 19.

¹⁴ See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case Nos. IT-05-88-A & IT-09-92-T, Decision on Motion by Ratko Mladić for Access to Confidential Material, 20 February 2013 ("*Popović* Decision of 20 February 2013"), p. 2; *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on Ildephonse Nizeyimana's Request for

RECALLING ALSO that the party seeking access to confidential material bears the burden to justify its request;¹⁵

RECALLING FURTHER that the requesting party must establish that such material is likely to assist its case materially, or that there is at least a good chance that it would, and that this standard may be met by showing the existence of a nexus between the applicant's case and the cases from which such material is sought;¹⁶

EMPHASIZING that, with regard to *ex parte* confidential material, the requesting party must meet a higher standard in order to establish a legitimate forensic purpose for accessing such material¹⁷ as it by its nature contains information that has not been disclosed *inter partes* because of, *inter alia*, "privacy interests of a person" and that, therefore, "the party on whose behalf the *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed";¹⁸

FINDING that Karadžić has sufficiently identified the material he wishes to access;

CONSIDERING that Karadžić has demonstrated a factual nexus in that the two witnesses from the *Brđanin* and *Milošević* cases testified in his case;

CONSIDERING, however, that Karadžić has offered no particular reasons that would constitute the heightened showing required to establish a legitimate forensic purpose justifying access to the confidential *ex parte* material from the *Brđanin* and *Milošević* cases;

CONSIDERING, therefore, that Karadžić has failed to demonstrate that his interest in obtaining the requested material outweighs the interests of the parties on whose behalf the *ex parte* status was granted;

FINDING, in light of the special considerations of confidentiality relating to *ex parte* material, that Karadžić has failed to meet the higher standard required to establish a legitimate forensic purpose for gaining access to the *ex parte* material;

HEREBY DENY the Motion in its entirety.

Access to Closed Session Transcripts, 31 March 2011 ("*Muvunyi* Decision of 31 March 2011"), para. 3; *Šainović* Decision of 16 February 2010, para. 9. See also *Eliézer Niyitegeka v. Prosecutor*, Case No. MICT-12-16, Decision on Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses, 29 January 2016, para. 8; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-R86.2, Second Decision on Motion for Access to Confidential Material from the *Nshogoza* Case, 9 November 2015, para. 4.

¹⁵ See *Brđanin* Decision of 24 January 2007, para. 14.

¹⁶ See *Popović* Decision of 20 February 2013, p. 2; *Muvunyi* Decision of 31 March 2011, para. 3; *Brđanin* Decision of 24 January 2007, para. 12.

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

Done this 10th day of May 2016,
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Mechanism]

¹⁷ *Brđanin* Decision of 24 January 2007, para. 14.

¹⁸ *Šainović* Decision of 16 February 2010, para. 10 and references cited therein.