

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-
R86G.1

Date: 20 October 2017

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Pre-Appeal Judge

Registrar: Mr. Olufemi Elias

Decision of: 20 October 2017

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON A MOTION
FOR A REDACTED VERSION OF
“DECISION ON AN APPLICATION PURSUANT TO RULE 86(G)
AND ON A MOTION TO EXCEED WORD LIMIT”**

The Office of the Prosecutor

Mr. Serge Brammertz
Mr. Mathias Marcussen

Counsel for Mr. Radovan Karadžić

Mr. Peter Robinson
Ms. Kate Gibson

I, THEODOR MERON, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Pre-Appeal Judge in this case;¹

NOTING the “Decision on an Application pursuant to Rule 86(G) and on a Motion to Exceed Word Limit” issued confidentially and *ex parte* by the Appeals Chamber on 7 August 2017, which varied the protective measures granted by the International Criminal Tribunal for the former Yugoslavia to several witnesses (“Decision of 7 August 2017”);

BEING SEISED OF the “Prosecution Request for a Public Redacted Version of the 7 August 2017 Decision”, filed confidentially and *ex parte* on 22 September 2017 with a confidential and *ex parte* annex (“Motion”), in which the Office of the Prosecutor of the Mechanism (“Prosecution”) requests the issuance of a public redacted version of the Decision of 7 August 2017 to allow public access to relevant Mechanism jurisprudence on legal issues concerning applications for variations of protective measures;²

NOTING the Prosecution’s submission that there are no exceptional reasons to keep the Decision of 7 August 2017 confidential as the interests of the parties and witnesses involved can be safeguarded by redacting all information that potentially identifies the relevant domestic authorities, the subject matter of the proceedings, and the witnesses involved, including witness pseudonyms;³

RECALLING that all proceedings before the Mechanism shall be public unless exceptional reasons require keeping them confidential;⁴

RECALLING that, pursuant to Rule 86(F)(i) of the Rules, once protective measures have been ordered in proceedings before the ICTY, they shall continue to have effect *mutatis mutandis* in any proceedings before the Mechanism or another jurisdiction unless and until they are rescinded, varied, or augmented;⁵

CONSIDERING that the interests of the witnesses and parties involved in the Decision of 7 August 2017 can be safeguarded through appropriate redactions;

¹ Order Assigning a Pre-Appeal Judge, 21 April 2016; Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016, p. 2.

² Motion, paras. 1-4, 6.

³ Motion, paras. 1, 4, 5. *See also* Annex to the Motion, Registry Pagination 32-27.

⁴ *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge’s Decision of 10 December 2015, 17 February 2016, para. 8, *referring to* Article 18 of the Statute of the Mechanism and Rules 92 and 131 of the Rules.

⁵ *See Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion for Redacted Versions of Rule 86(F) Filings, 24 January 2017, p. 4.

FINDING that issuing a public redacted version of the Decision of 7 August 2017 will ensure the public nature of these proceedings to the extent possible and that the interests of the protected witnesses involved and the parties who designated their filings as *ex parte* can be adequately protected by appropriate redactions;

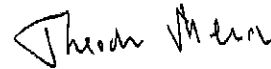
PURSUANT to Article 20 of the Statute of the Mechanism and Rules 55 and 86 of the Rules,

HEREBY

GRANT the Motion and **ISSUE**, as an annex to the present decision, a public redacted version of the Decision of 7 August 2017.

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

Done this 20th day of October 2017,
At The Hague,
The Netherlands



Judge Theodor Meron
Pre-Appeal Judge

[Seal of the Mechanism]

ANNEX

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-R86G.1

Date: 7 August 2017

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding

Registrar: Mr. Olufemi Elias

Decision of: 7 August 2017

PROSECUTOR

v.

RADOVAN KARADŽIĆ

[REDACTED]

**DECISION ON AN APPLICATION PURSUANT TO RULE 86(G)
AND ON A MOTION TO EXCEED WORD LIMIT**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Mathias Marcussen

I, **THEODOR MERON**, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Presiding Judge in this case;¹

BEING SEISED OF the “Prosecution Application for Variation of Protective Measures Pursuant to Rule 86(G)” (“Application”), filed by the Office of the Prosecutor of the Mechanism (“Prosecution”) on 7 June 2017, together with the “Prosecution Motion to Exceed Word Limit in Application for Variation of Protective Measures Pursuant to Rule 86(G)” (“Motion”), whereby the Prosecution seeks, pursuant to Rule 86(G) of the Rules, the variation of protective measures granted by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) to Witnesses [REDACTED] and [REDACTED], for the limited purpose of providing confidential information to the [REDACTED] (“[REDACTED]”) for use in its investigation of crimes committed by [REDACTED];²

NOTING that the Application exceeds the word limit prescribed by the Practice Direction on Lengths of Briefs and Motions (“Practice Direction”);³

RECALLING that the Practice Direction provides that a party must seek authorisation in advance to exceed the prescribed word limit and provide an explanation of the exceptional circumstances that necessitate the oversized filing;⁴

CONSIDERING the Prosecution submission that the “unique and complex nature” of the Application justifies the expanded filing as, in the interests of judicial economy and in order “to place the variation requests in proper context”, it seeks a single adjudication of the variation requests for two witnesses;⁵

¹ Order Assigning a Chamber to Consider an Application Pursuant to Rule 86, 13 June 2017 (confidential and *ex parte*); *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A (“*Karadžić case*”), Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016. In accordance with Rule 86(K) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), an application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber.

² Application, paras. 1, 5, 17. Specifically, the Prosecution requests an order directing the Registry to provide the [REDACTED] with: (i) the identity and contact details of Witnesses [REDACTED] and [REDACTED]; (ii) certified copies of the unredacted transcripts of Witness [REDACTED]’s testimony in the cases of *Prosecutor v. [REDACTED]*, Case No. [REDACTED] and [REDACTED] (“[REDACTED] case”), and *Prosecutor v. [REDACTED]*, Case No. [REDACTED] (“[REDACTED] case”), as well as materials tendered through Witness [REDACTED] in those proceedings; (iii) certified copies of materials tendered through Witness [REDACTED] in the [REDACTED] case; and (iv) an order requiring the [REDACTED] to ensure the confidentiality and non-disclosure of any information released pursuant to the Application, its limited use for the purpose of the investigation of crimes by [REDACTED], and the safety and security of the witnesses. *See* Application, para. 17. The Prosecution also indicates that, if the requested variation is granted, it will provide the [REDACTED] with copies of the unredacted statements from the two witnesses in its possession, which are not on the *Karadžić* trial record. *See* Application, para. 14.

³ Application, p. 10 (specifying that the Application is 5,130 words in length); Practice Direction, para. 15.

⁴ Practice Direction, para. 17.

⁵ Motion, paras. 1, 2. The Prosecution submits that, in seeking a single adjudication of the variation, it raises a novel jurisdictional issue, which is addressed in the expanded filing. *See* Motion, para. 2. The Prosecution also submits that it

FINDING that, in these circumstances, granting an extension of the word limit is warranted;

RECALLING that, pursuant to Rule 86(F) of the Rules, protective measures have effect *mutatis mutandis* in any other proceedings, before the Mechanism (“second proceedings”) or another jurisdiction, and that Rules 86(G) and 86(H) of the Rules set out the procedures for seeking to rescind, vary, or augment the protective measures in respect of the second proceedings and the proceedings before another jurisdiction, respectively;

NOTING that Rule 86(G) of the Rules provides for a party to the second proceedings to apply for variation of protective measures, but that it does not provide for such an application to be made on behalf of a party that is external to any proceedings before the Mechanism (“external party”);

RECALLING, however, that in circumstances where an external party is unable to file an application for variation of protective measures due to lack of, or erroneous, knowledge of a case before the ICTY in which the protected witness testified, the Mechanism has held that an application made by the Prosecution on behalf of the external party is the appropriate approach;⁶

CONSIDERING the Prosecution submission that it is appropriate to apply for the requested variation on behalf of the [REDACTED], which has no knowledge of Witness [REDACTED]’s closed session testimony before the ICTY and, therefore, cannot apply itself, and, given that the evidence of Witnesses [REDACTED] and [REDACTED] is “inextricably linked”, that it is therefore in the interests of justice for the requests to be dealt with in a single application.⁷

CONSIDERING ALSO the Prosecution submission that, in applying on behalf of the [REDACTED], it is acting pursuant to its statutory obligation to assist investigations and prosecutions by national authorities;⁸

CONSIDERING FURTHER the Prosecution submission that the unique circumstances underlying this application make a compelling case for the exercise of the Mechanism’s mandate to support the work of national authorities as the [REDACTED] request for assistance from the

was necessary to include information about a third witness in the Application, because the witnesses’ evidence is “inextricably linked” and the personal circumstances of the third witness are relevant to the assessment of the requests made in relation to the other two. See Motion, para. 2.

⁶ See [REDACTED]. See also *Prosecutor v. Tihomir Blaškić*, Case No. MICT-14-69-R86G.1, Decision on Prosecution’s Application pursuant to Rule 86(G), 19 September 2014 (confidential), para. 8; *Prosecutor v. Haradinaj et al.*, Case No. MICT-13-47-R86G.1, Decision on Prosecution’s Application for Variation of Protective Measures, 19 December 2013 (confidential), para. 7, n. 20.

⁷ Application, para. 15. Specifically, the Prosecution submits that access to the information and material in relation to one witness will inevitably impact upon the investigation of the crimes involving the other, and, moreover, if an application for variation of protective measures is denied in relation to one, the importance of gaining access to the evidence of the other will increase. See Application, para. 15.

Prosecution marks a significant step forward in [REDACTED] efforts to prosecute war crimes and is important to the ICTY completion strategy;⁹

FINDING, therefore, that it is appropriate in the present circumstances to accept the Prosecution's request submitted on behalf of the [REDACTED] as validly filed;

RECALLING the order filed on 23 June 2017, in which I ordered the Witness Support and Protection Unit of the Mechanism ("WISP") to contact Witnesses [REDACTED] and [REDACTED] to ascertain whether they consent to the requested variation of the protective measures after being advised of the consequences thereof, and to advise me of the witnesses' positions;¹⁰

NOTING the Registrar's Submission filed confidentially and *ex parte* on 6 July 2017, which indicates that Witness [REDACTED] does not consent to the requested variation, and that, despite numerous attempts, the WISP has been unable to contact Witness [REDACTED];¹¹

CONSIDERING that, pursuant to Rule 86(I) of the Rules, in the absence of a protected witness's consent to the variation of protective measures, a Judge may order *proprio motu* the variation of protective measures on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result;

CONSIDERING the Prosecution's submission that the evidence of Witnesses [REDACTED] and [REDACTED] is crucial to the [REDACTED]'s investigation of crimes committed by [REDACTED] as, to the Prosecution's knowledge, there are no other witnesses or evidence identifying [REDACTED] as the perpetrator of the offences committed against the two witnesses, the evidence of each is important to corroborate the evidence of the other, and without access to the complete evidence and identities of the witnesses, the [REDACTED] investigation will be in jeopardy;¹²

NOTING the Prosecution submission that the safety and security of Witnesses [REDACTED] and [REDACTED] will not be jeopardised through the requested variation of protective measures since

⁸ Application, para. 1.

⁹ Application, para. 3, referring to the [REDACTED].

¹⁰ Order for Submissions on an Application Pursuant to Rule 86(G), 23 June 2017, p. 1.

¹¹ Registrar's Submission in Relation to the Order of 23 June 2017, 6 July 2017 (confidential and *ex parte* with confidential and *ex parte* Annex) ("Registrar's Submission"), Annex, p. 1.

¹² Application, paras. 5, 8. The Prosecution also submits that the evidence of the two witnesses is "all the more critical" because Witness [REDACTED], who also was also subjected to crimes by [REDACTED]. See Application, paras. 6, 8.

the variation is sought only for the limited purpose of the [REDACTED] investigation, which is confidential, and the [REDACTED] will be bound by the conditions of confidentiality applicable to the release of the requested information and material;¹³

FINDING that the Prosecution has made a compelling showing of exigent circumstances warranting the requested variation of protective measures in the absence of the witnesses' consent;

PURSUANT TO Article 20 of the Statute of the Mechanism and Rule 86 of the Rules,

HEREBY GRANT the Motion and the Application;

VARY the protective measures of Witnesses [REDACTED] and [REDACTED] with respect to the [REDACTED] and for the purposes of its investigation into crimes committed by [REDACTED];

ORDER the Registry to disclose to the [REDACTED] the identity and currently available contact details of Witnesses [REDACTED] and [REDACTED] and to serve the [REDACTED] with certified copies of the unredacted transcripts of Witness [REDACTED]'s testimony in the cases of [REDACTED] and [REDACTED] as well as certified copies of materials tendered through Witness [REDACTED] in those proceedings, and with certified copies of materials tendered through Witness [REDACTED] in the [REDACTED] case;

ORDER that the information released to the [REDACTED] pursuant to this Decision shall be treated as confidential by the [REDACTED], and shall not be used for any other purpose than that for which it is released pursuant to this Decision;

ORDER that the [REDACTED] may not disclose the information that is released pursuant to this Decision to anyone, except to the judicial authorities involved in the investigation into crimes committed by [REDACTED], and provided that the [REDACTED] obtains assurances under the threat of criminal sanctions that the persons to whom the information is released will maintain its strict confidentiality;

ORDER that the [REDACTED] shall take all necessary measures, both legal and practical, in order to ensure the safety and security of the witnesses in question and shall ensure the same level of protection as that granted to them by the ICTY;

¹³ Application, para. 10.

ORDER that, should the [REDACTED] seek to rescind, vary, or augment the protective measures that apply to the information released by this Decision, it shall request such relief in an application to the President of the Mechanism.

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

Done this 7th day of August 2017,
At The Hague,
The Netherlands

Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]



**TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE
MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS/
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MÉCANISME POUR LES TRIBUNAUX PÉNAUX INTERNATIONAUX**

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Case Name/ Affaire :	Prosecutor v. Radovan Karadžić	Case Number/ Affaire n° :	MICT-13-55-R86G.1
Date Created/ Daté du :	20 October 2017	Date transmitted/ Transmis le :	20 October 2017
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Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclue</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
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