

THE RESIDUAL MECHANISM FOR  
INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-55

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. John Hocking

Date: 30 March 2016

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

---

MOTION FOR ORDER TO PROSECUTION TO  
OBTAIN AND DISCLOSE SUBSEQUENT STATEMENTS

---

The Office of the Prosecutor:  
Mr. Serge Brammertz

Counsel for Radovan Karadzic:  
Mr. Peter Robinson

1. Dr. Radovan Karadzic respectfully moves, pursuant to Rule 55, for an order directing the prosecution to obtain and disclose to him statements and testimony of prosecution witnesses in subsequent national proceedings.

2. Proceedings before the Mechanism are supposed to be public unless there are exceptional reasons for keeping them confidential,<sup>1</sup> However, national authorities and counsel have regularly filed requests for variation of protective measures and for disclosure of statements and testimony of protected prosecution witnesses for use in national criminal investigations and proceedings *ex parte* and without notice to the defence.<sup>2</sup>

3. The defence has an interest in knowing when such applications are being made, as they indicate the high likelihood that the witness will be asked to provide an interview or testimony in those national proceedings. Such subsequent statements or testimony are material to the preparation of the defence on appeal under Rule 71(B), as they may contain new or contradictory information of an exculpatory nature and, where significant, may be the subject of a motion to admit additional evidence on appeal pursuant to Rule 142.

4. On 8 December 2015, Dr. Karadzic requested the ICTY Trial Chamber to direct the Registrar to disclose to him a list of prosecution witnesses in his case as to whom an application for variation of witness protection measures has been filed by national authorities.<sup>3</sup>

5. On 18 February 2016, the Trial Chamber refused to do so.<sup>4</sup>

---

<sup>1</sup> *Prosecutor v Lukic*, No. MICT-14-67-R.1, *Decision on Sreten Lukic's Application for Review* (8 July 2015) at para. 8; *Prosecutor v Kamuhanda*, No. MICT-12-33-R86.1, *Decision on a Motion to Reclassify a Submission by the Registry* (5 February 2016), p. 2; *Prosecutor v Oric*, No. MICT-14-79, *Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015* (17 February 2016) at para. 8

<sup>2</sup> See e.g. *Prosecutor v Lukic & Lukic*, No. MICT-13-52-R86.1, *Public Redacted Version of the 14 May 2014 Decision on Prosecution Motion for Reconsideration or Certification of Decision on Application Pursuant to Rule 86(H)* (10 February 2016); *Prosecutor v Delic*, No. MICT-14-74-R86H.1, *Public Redacted Version of the 7 August 2015 Decision on Application pursuant to Rule 86(H)* (11 February 2016); *Prosecutor v Hadzihasanovic & Kubura*, No. MICT-13-50-R86H.2, *Public Redacted Version of the 18 December 2013 Decision on the Application pursuant to Rule 86(H) by the Prosecutor's Office of [REDACTED]* (10 February 2016)

<sup>3</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Motion for Disclosure of Information on Variation of Protective Measures* (8 December 2015)

<sup>4</sup> *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disclosure of Information on Variation of Protective Measures* (18 February 2016)

6. On 22 February 2016, Dr. Karadzic requested that, in light of this decision, the prosecution make an inquiry of all domestic authorities who have been provided with disclosure of confidential information related to prosecution witnesses in his case to determine if the witness has subsequently provided a statement or testimony in the domestic proceedings, and if so, to obtain a copy of that statement or testimony and to disclose it to Dr. Karadzic.<sup>5</sup>

7. On 25 February 2016, the Office of the Prosecution indicated that it was unwilling to do so.<sup>6</sup>

8. Dr. Karadzic now moves for an order compelling the prosecution to obtain and disclose such statements.

9. Because of the *ex parte* nature of the proceedings, Dr. Karadzic has no way of knowing when material is being sought or disclosed to national authorities or to which witnesses such requests pertain. Therefore, he is unable to contact national authorities on his own to obtain any subsequent statements or testimony from prosecution witnesses who have testified in his case.

10. While the prosecution's duty of disclosure is normally limited to material currently in its possession, under similar circumstances, where the prosecution has superior access to material relevant to the preparation of the defence, ICTR Trial Chambers have exercised their Rule 55 powers (former Rule 54) to order the prosecution to obtain such material from national authorities and disclose it to the defence.<sup>7</sup> This is in line with the ICTY Appeals Chamber's oft-cited language from the *Tadic* case that "a Chamber shall provide every practicable facility it is capable of granting under the Rules

---

<sup>5</sup> A copy of this letter is Annex "A".

<sup>6</sup> A copy of this letter is Annex "B".

<sup>7</sup> *Prosecutor v. Simba*, No. ICTR-2001-76-T, *Decision on Matters Related to Witness KDD's Judicial Dossier* (1 November 2004) (at para. 15; *Prosecutor v. Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (16 December 2003) at para 7; *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003) at para. 11; *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 20

and Statute when faced with a request by a party for assistance in presenting its case...<sup>8</sup>

11. Dr. Karadzic has exhausted his efforts to obtain information by which he could identify the witnesses who are likely to have made subsequent statements or given subsequent testimony in national proceedings and to request such material on his own. He now turns to the Appeals Chamber to use its power to order the prosecution to provide this assistance to Dr. Karadzic in presenting his case on appeal.

Word Count: 1025

Respectfully submitted,

A handwritten signature in cursive script that reads "Peter Robinson". The signature is written in dark ink and is positioned above the printed name.

PETER ROBINSON

Counsel for Radovan Karadzic

---

<sup>8</sup> *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999), para. 52

# **ANNEX A**

Radovan Karadzic  
International Criminal Tribunal for  
the former Yugoslavia

22 February 2016

Ms. Hildegard Uertz-Retzlaff  
Office of the Prosecutor

Re: Prosecution Witnesses and Domestic Proceedings

Dear Ms. Uertz-Retzlaff,

In light of the Trial Chamber's *Decision on Accused's Motion for Disclosure of Information on Variation of Protective Measures* (18 February 2016), I am requesting that the prosecution make an inquiry of all domestic authorities who have been provided with disclosure of confidential information related to prosecution witnesses who have testified in my case or whose written evidence has been admitted. That inquiry would be to determine if the witness has subsequently provided a statement or testimony in the domestic proceedings, and if so, to obtain a copy of that statement or testimony and to disclose it to me.

These items are material to my defence because subsequent statements of prosecution witnesses may contain information inconsistent with the testimony given in my case, or may contain new information which I can use to seek to re-open my case or admit additional evidence on appeal. As an example, you may recall that General Krstic received a reduction in his sentence when a subsequent interview with a prosecution witness revealed that the term "up there" in an intercept had a meaning significantly different than that ascribed to it by the Trial Chamber in its judgement.<sup>9</sup>

Since I have no way of knowing when material is being disclosed to domestic authorities, or to which witnesses the requests for disclosure from domestic authorities pertain, I am not able to do this myself.

While the prosecution's duty of disclosure pursuant to Rules 66(A)(ii), 66(B), and 68 is normally limited to items within their possession, Trial Chambers have ordered the prosecution to affirmatively seek such items from domestic authorities when the prosecution has an advantage over the defence in access to such material.<sup>10</sup> That is the

---

<sup>9</sup> *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 73

<sup>10</sup> *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003); *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 20

Ms. Hildegard Uertz-Retzlaff

--page two--

case here, where the Trial Chamber has declined to order the Registry to provide me the information from which I can make requests to domestic authorities on my own.

I hope that, out of a sense of fairness, the Office of the Prosecutor is willing to make the inquiries I have requested. Please let me know your position on that.

Thank you very much for your consideration of this request.

Yours truly,

/s/

Radovan Karadzic

# **ANNEX B**



United Nations  
Nations Unies



International  
Criminal Tribunal  
for the Former  
Yugoslavia

Tribunal Pénal  
International pour  
l'ex-Yougoslavie

**Office of the  
Prosecutor**

**Bureau du  
Procureur**

**Case No. IT-95-5/18-T**

**25 February 2016**

**Subject: Your letter of 22 February 2016 regarding Prosecution Witnesses**

Dear Mr Karadžić,

In the above mentioned letter, you request that the Prosecution “make an inquiry of all domestic authorities who have been provided with disclosure of confidential information related to prosecution witnesses who have testified in my case or whose written evidence has been admitted.” In this context you have referred to the Trial Chamber’s Decision on Accused’s Motion for Disclosure of Information on Variation of protective Measures of 18 February 2016 (“Decision”).

The Prosecution is not willing to undertake the requested inquiries and notes that in its Decision the Trial Chamber has already found that your effort to obtain this "hypothetical additional material" is "speculative".

Yours sincerely,

Hildegard Uertz-Retzlaff  
Senior Trial Attorney