

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: 1 April 2016

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR ACCESS TO *EX PARTE* FILINGS
IN COMPLETED CASES

The Office of the Prosecutor:
Mr. Serge Brammertz

Counsel for Radovan Karadzic:
Mr. Peter Robinson

1. Dr. Radovan Karadzic hereby moves, pursuant to Rule 86(G)(ii) for access to portions of the following documents:

- (A) *Prosecutor v Brdjanin: Tenth Motion for Protective Measures for Victims and Witnesses* (20 March 2002)
- (B) *Prosecutor v Slobodan Milosevic: Motion for Further Trial Related Protective Measures for Witness B-161* (2 August 2003)

2. On 16 April 2009, Dr. Karadzic filed his *Motion for Access to Confidential Material in Completed Cases*. In that motion, he sought access to *inter partes* confidential filings in a number of completed cases, including the *Brdjanin* and *Slobodan Milosevic* cases. He did not seek access to *ex parte* filings at that time, consistent with the jurisprudence of the Tribunal that a higher standard was required to obtain access to *ex parte* material.¹

3. On 5 June 2009, the ICTY Trial Chamber in this case granted the motion in part. It noted that Dr. Karadzic was not seeking access to *ex parte* material and made no ruling on his right to such material.²

Witness KDZ490

4. Prosecution Witness KDZ490 was the beneficiary of protective measures applied *mutatis mutandis* from the *Brdjanin* Trial Chamber's *Decision on Prosecution's Tenth Motion for Protective Measures for Victims and Witnesses* (28 May 2002). The decision, which was filed confidentially, and to which Dr. Karadzic has access, provides no information concerning the facts upon which the protective measures were granted for Witness KDZ490.³

5. The factual basis for the protective measures was presumably set forth in the *Prosecution's Tenth Motion for Protective Measures for Victims and Witnesses* (20 March 2002). The prosecution has advised that this motion was filed *ex parte*. Dr. Karadzic seeks to know the factual basis for the protective measures granted to Witness

¹ *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motion for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 17

² *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Motion for Access to Confidential Material in Completed Cases* (5 June 2009) at para. 31

³ Witness BT21 in *Brdjanin*

KDZ490.

6. Dr. Karadzic has two legitimate forensic purposes for access to the factual basis of the protective measures granted to Witness KDZ490.

7. First, as a potential ground of appeal, Dr. Karadzic is considering challenging his Trial Chamber's decision to delay disclosure of Witness KDZ490's identity until after the trial had commenced.⁴ The justification for the protective measures for Witness KDZ490 in the *Brdjanin* case, which was applied *mutatis mutandis* by Dr. Karadzic's Trial Chamber, is necessary and relevant to that potential ground of appeal.

8. Second, as a potential ground of appeal, Dr. Karadzic is considering challenging the Trial Chamber's denial of protective measures for Dr. Karadzic's defence witnesses. That denial was based on the grounds that an objectively grounded risk to the safety or welfare of the witness was not shown.⁵ Dr. Karadzic may wish to contend that the Trial Chamber erred in applying a different standard than was applied to protective measures granted or continued for prosecution witnesses. In order to do so, he has a right to know the factual basis for the protective measures for the prosecution's witnesses, including KDZ490.

9. Whatever reasons existed for filing this motion *ex parte* during the *Brdjanin* trial in 2002 do not justify withholding the information from Dr. Karadzic in 2016, considering that Witness KDZ490 has now testified in Dr. Karadzic's case and Dr. Karadzic has had disclosure of his identity and his prior statements and testimony.

10. Therefore, Dr. Karadzic respectfully requests that he be given access to the portion of the *Tenth Motion for Protective Measures for Victims and Witnesses* (20 March 2002) in the *Brdjanin* case that pertains to Witness KDZ490.

⁴ *Prosecution's Fourth Notification on Protective Measures for Witnesses Currently in Force* (17 June 2009) in accordance with *Decision on Protective Measures for Witnesses* (30 October 2008), para. 21; *Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492* (25 March 2010). See *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 80-85

⁵ *Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543* (1 November 2012), para. 13; *Decision on Accused's Motion for Video Link and Consideration of Protective Measures for Witness KW533* (9 November 2012), para. 15; *Decision on Accused's Motions for Protective Measures for Witness KW492* (23 November 2012), para. 6; *Decision on Accused's Motions for Protective Measures for Witness KW402* (8 January 2013), para. 7

Witness KDZ059

11. Prosecution Witness KDZ059⁶ was the beneficiary of protective measures applied *mutatis mutandis* from the *Slobodan Milosevic* Trial Chamber's *Decision on Prosecution Motion for Protective Measures for Witness B-1524* (26 August 2003). The decision, which was filed publicly, provides no information concerning the facts upon which the protective measures were granted for Witness KDZ059.

12. The factual basis for the protective measures was presumably set forth in the *Prosecution's Motion for Protective Measures for Witness B-1524* (12 August 2003). The prosecution has advised that the facts in support of this motion were filed *ex parte*. Dr. Karadzic seeks to know the factual basis for the protective measures granted to Witness KDZ059.

13. Dr. Karadzic has a legitimate forensic purpose for access to the factual basis of the protective measures granted to Witness KDZ059.

14. As a potential ground of appeal, Dr. Karadzic is considering challenging the Trial Chamber's denial of protective measures for Dr. Karadzic's defence witnesses. That denial was based on the grounds that an objectively grounded risk to the safety or welfare of the witness was not shown.⁷ Dr. Karadzic may wish to contend that the Trial Chamber erred in applying a different standard than it applied to protective measures granted or continued for prosecution witnesses. In order to do so, he has a right to know the factual basis for the protective measures for the prosecution's witnesses, including KDZ059.

15. Whatever reasons existed for filing this motion *ex parte* during the *Milosevic* trial in 2003 do not justify withholding the information from Dr. Karadzic in 2016, considering that Witness KDZ059 has now testified in the *Milosevic* trial and Dr. Karadzic has had disclosure of his identity and his prior statements and testimony.

⁶ Witness KDZ59's written evidence was admitted pursuant to Rule 92 *bis*. *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony...* (10 November 2009)

⁷ *Decision on Accused's Motions for Protective Measures for Witnesses KW289, KW299, KW378, and KW543* (1 November 2012), para. 13; *Decision on Accused's Motion for Video Link and Consideration of Protective Measures for Witness KW533* (9 November 2012), para. 15; *Decision on Accused's Motions for Protective Measures for Witness KW492* (23 November 2012), para. 6; *Decision on Accused's Motions for Protective Measures for Witness KW402* (8 January 2013), para. 7

16. Therefore, Dr. Karadzic respectfully requests that he be given access to the portion of the *Prosecution's Motion for Protective Measures for Witness B-1524* (12 August 2003) in the *Milosevic* case that pertains to Witness KDZ059.

Word Count: 1246

Respectfully submitted,

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

PETER ROBINSON

Counsel for Radovan Karadzic