

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-13-55-A

Date: 24 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

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S MOTION FOR
REDACTED VERSIONS OF RULE 75(H) DECISIONS**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Karadžić:

Peter Robinson

I. OVERVIEW

1. The Prosecution opposes Karadžić's request for the issuance of public redacted versions of *ex parte* Rule 75(H) decisions rendered by the Trial Chamber in the *Karadžić* case.¹ The Trial Chamber has already rejected a similar request by Karadžić to obtain the identity of the Prosecution witnesses referred to in those decisions. In any event, Karadžić has failed to demonstrate any legitimate interest in such material that would outweigh its *ex parte* status.

II. THE TRIAL CHAMBER HAS ALREADY RULED ON THIS ISSUE

2. In the Motion, Karadžić acknowledges that he is seeking redacted versions of the relevant decisions in order to learn the identity of witnesses that were the subject of Rule 75(H) proceedings.² The Trial Chamber has effectively already ruled on this issue by denying Karadžić's request for a list of witnesses in relation to whom an application for variation of protective measures had been filed. The Trial Chamber found that Karadžić had not demonstrated a legitimate interest in obtaining this information which would outweigh its *ex parte* nature.³ Thus, despite his assertion to the contrary,⁴ Karadžić is in substance seeking reconsideration of the Trial Chamber Decision. Karadžić failed to take steps to appeal this decision or seek reconsideration in the appropriate forum.⁵ The decision is thus *res judicata* and his Motion should be dismissed.⁶ In any

¹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Motion for Redacted Versions of Rule 75(H) Decisions ("Motion"), 14 May 2016. The reference to Rule 75(H) is a reference to Rule 75(H) of the ICTY Rules of Procedure and Evidence (Rule 86(H) of the MICT Rules of Procedure and Evidence).

² Motion, paras.16-19. While the requested relief is framed as a general request for public redacted Rule 75(H) decisions (Motion, paras.1, 20), it is clear that Karadžić is seeking public redacted decisions in which witness pseudonyms are made public, as he has brought this Motion for the express purpose of obtaining this witness information (Motion, paras.16-19).

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused's Motion for Disclosure of Information on Variation of Protective Measures ("Trial Chamber Decision"), 18 February 2016, p.3.

⁴ Motion, para.14.

⁵ *Prosecutor v. Jovica Stanišić et al.*, Case Nos. IT-03-69-A & IT-95-5/18-T, Decision on Motion by Radovan Karadžić for Reconsideration of Decision on Motion for Access to Confidential Materials in the *Stanišić and Simatović* Case, 16 February 2015, p.2 (noting that "a request for reconsideration, by definition, has to be made before the chamber that rendered the impugned decision"); *Prosecutor v. Milan Lukić et al.*, Case No. IT-98-32/1-A & IT-95-5/18-T, Decision on the Prosecution's "Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's 'Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Lukić and Lukić* Case' of 10 July 2009", 7 December 2009, para.4 (also noting that a request for reconsideration "has to be made before the same Chamber that rendered the impugned decision").

⁶ *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Decision on (1) Application by Stevan Todorović to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para.9 (finding that where a party does not seek appeal from a decision, the principle of *res judicata* prevents that party from raising that specific issue again in the proceedings between the same parties unless the Chamber which rendered the decision is prepared to reconsider it); *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records, 23 July 2008, para.9 (finding that once a matter has already been heard and decided upon by a trier of fact, the same matter cannot be re-litigated).

event, he has not demonstrated a clear error of reasoning or that reconsideration is necessary to prevent an injustice.⁷

III. KARADŽIĆ HAS FAILED TO DEMONSTRATE A LEGITIMATE INTEREST IN *EX PARTE* WITNESS INFORMATION

3. Even assuming for the sake of argument that the *res judicata* principle or the reconsideration standard does not apply here, Karadžić once again fails to demonstrate a legitimate interest in obtaining this information which outweighs the special interests justifying its *ex parte* status.⁸ Karadžić's first claim, that the information will allow him to seek disclosure of any subsequent statements or testimony of Prosecution witnesses from national authorities,⁹ was specifically rejected by the Trial Chamber, which found that Karadžić's efforts to "obtain[] hypothetical additional material" did not amount to a legitimate interest outweighing the *ex parte* nature of that information.¹⁰ This reasoning applies with greater force at the appeals stage, where there is an even more remote possibility that such material could alter the outcome of a case.¹¹ Likewise, the Appeals Chamber has rejected Karadžić's request to require the Prosecution to take steps to obtain material falling within this very same category, finding that Karadžić had failed to identify any specific information that needed to be investigated to avoid a miscarriage of justice.¹²

4. Karadžić's second assertion, that review of the relevant decisions will allow him to assess which Prosecution witnesses were affected by the *ex parte* submissions and their impact on the conduct of trial and credibility assessments in the Trial Judgement,¹³ is also misconceived. Karadžić fails to identify any potential ground of appeal that could arise from a Trial Chamber decision disclosing confidential protected witness material to national judicial authorities for their own law enforcement purposes. In the highly unlikely event that Rule 75/86(H)¹⁴ litigation should give rise

⁷ See e.g. *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras.6, 18; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-MISC.1, Decision on Strugar's Request to Reopen Appeal Proceedings, 7 June 2007, para.22.

⁸ Trial Chamber Decision, p.3 (noting that for access to be granted to *ex parte* material, a showing must be made that the need of the requesting party for the material outweighs the special interests grounding its *ex parte* status).

⁹ Motion, para.18.

¹⁰ Trial Chamber Decision, p.3.

¹¹ Even assuming that the Defence were able to obtain any useful material through such a process, the Defence would then be required to demonstrate, at a minimum, that such material could have been a "decisive factor" in reaching the decision at trial, in order to have such evidence admitted. See eg, MICT Rules of Procedure and Evidence, Rule 142(C).

¹² *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion to Order the Prosecution to Obtain and Disclose Subsequent Statements, 10 May 2016, p.2. See also *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion for Access to *Ex Parte* Filings in Completed Cases, 10 May 2016, p.3 (denying Karadžić's request for *ex parte* witness information, finding 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").

¹³ Motion, para.19.

¹⁴ Karadžić requests ICTY Rule 75(H) decisions from the past and access to MICT Rule 86(H) proceedings going forward.

to exculpatory information, the Prosecution would be obliged to disclose such information in accordance with standard procedure.

IV. REVEALING WITNESS PSEUDONYMS IN PUBLIC DECISIONS RISKS DISCLOSING SENSITIVE INFORMATION AND CONTRADICTS THE WEIGHT OF MICT PRACTICE

5. The Trial Chamber has already determined that Karadžić has no legitimate interest in *ex parte* Rule 75/86(H) witness information. Karadžić's reliance upon the *Kamuhanda* decision¹⁵ is misplaced: a decision in a different case rendered under different circumstances cannot justify reversing in substance the Trial Chamber's decision denying the Accused access to such information in this case. Moreover, the weight of MICT practice has been to redact witness pseudonyms when issuing public Rule 86(H) decisions.¹⁶ The rationale for this practice is sound: revealing witness pseudonyms in such public redacted decisions risks disclosing sensitive information about domestic investigations or proceedings¹⁷ and increases the risk that members of the public could identify protected witnesses. Disclosing witness pseudonyms also risks alerting the subjects of such investigations that they may be a target. It may also create additional dangers for the witnesses themselves if they are connected with providing evidence in a particular case or investigation.

6. The Prosecution would not, in theory, oppose the issuance of public redacted Rule 75(H) decisions that are limited to the legal reasoning and do not reveal information pertaining to an investigation or proceedings such as witness pseudonyms. However, the issuance of such decisions

¹⁵ *Prosecutor v. Jean de Dieu Kamuhanda*, Case Nos. MICT-13-33 & MICT-13-58, Decision on a Motion for a Public Redacted Version of the 27 January 2010 Decision on Application of the Prosecutor of the Tribunal for Variation of Protective Measures, 10 May 2016. *See also* *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Application of the Prosecutor of the Tribunal for Variation of Protective Measures, 10 May 2016 (public redacted version).

¹⁶ *Prosecutor v. Dragoljub Kunarac et al.*, Case Nos. MICT-15-88-R86H.1 & MICT-15-88-R86H.2, Public Redacted Version of 16 July 2015 Decision on Applications Pursuant to Rule 86(H), 9 February 2016; *Prosecutor v. Milan Lukić et al.*, Case No. MICT-13-52-R86H.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. Enver Hadžihanović et al.*, Case No. MICT-13-50-R86H.2, Public Redacted Version of the 18 December 2013 Decision on Application Pursuant to Rule 86(H) by the Prosecutor's Office of [REDACTED], 10 February 2016; *Prosecutor v. Rasim Delić*, Case 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. Rasim Delić*, Case No. MICT-14-74-R86F.1, Public Redacted Version of the 12 November 2015 Decision on Application Pursuant to Rule 86, 11 February 2016. *Contra*, *Prosecutor v. Jean-Baptiste Gatete*, Case No. MICT-13-42, Public Redacted Version of Decision in Respect to the Application for Variation of Protective Measures, 16 May 2013.

¹⁷ For example, the disclosure of witness pseudonyms would in many instances allow members of the public to glean information about the proceeding by connecting the pseudonyms to the contents of the witnesses' testimony through public transcripts, exhibits, filings or judgements.

would serve no purpose in the present case, as Karadžić has made clear that he is seeking public redacted decisions in order to obtain a list of affected witnesses.¹⁸

V. KARADŽIĆ'S REQUEST FOR A BLANKET PROSPECTIVE ORDER SHOULD BE DISMISSED

7. The Prosecution also opposes Karadžić's request for an order that all future motions for the disclosure of confidential material to national authorities be heard on an *inter partes* basis in the *Karadžić* case.¹⁹ For the reasons outlined above, Karadžić fails to identify any legitimate interest in such material. As noted by the Trial Chamber, Rule 75(H) requests "include sensitive detailed information" regarding domestic investigations or proceedings.²⁰ Accordingly, there generally exists a well-founded basis for the *ex parte*, confidential status of Rule 75/86(H) filings. Further, the request for such a prospective order is misconceived, as it cannot account for the varied circumstances of future filings which may warrant an *ex parte* status.

VI. CONCLUSION

8. For these reasons, the Motion should be dismissed.

9. However, should the Appeals Chamber be inclined to grant Karadžić's request for public redacted versions of Rule 75(H) decisions that reveal witness pseudonyms, the Prosecution urges the Chamber to first seek case-specific input of the Witness Support and Protection Unit, the Office of the Prosecutor and relevant domestic authorities on the potential risks of exposing confidential information.

Word Count: 1940



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Dated this 24th day of May, 2016
At The Hague, The Netherlands

¹⁸ See above fn.2.

¹⁹ Motion, para.21.

²⁰ Trial Chamber Decision, p.3.