

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-13-55-R86F.6

Date: 19 February 2018

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. Olufemi Elias

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO
MOTION FOR RECLASSIFICATION AND
MOTION FOR SERVICE OF RECLASSIFICATION MOTION**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Mr. Radovan Karadžić:

Peter Robinson
Kate Gibson

1. Karadžić’s Motion for Reclassification¹ (“Motion”) should be denied. It is in essence a request for access that seeks reconsideration of a prior Chamber decision without meeting the test for reconsideration. Moreover, it seeks access to *ex parte* material without demonstrating a legitimate forensic purpose for such access, instead relying on reasoning this Chamber has repeatedly rejected. Karadžić’s Motion for Service of Reclassification Motion (“Motion for Service”)² should also be denied because it would mislead the applicant (“Applicant”) and encourage breaches of protective measures.

I. KARADŽIĆ FAILS TO MEET THE TEST FOR RECONSIDERATION

2. Karadžić’s Motion ultimately seeks not reclassification but access to *ex parte* information: the identity of a protected Prosecution witness who is the subject of an *ex parte* Rule 86(F) application by defence counsel in a national proceeding.³ This Chamber has already denied Karadžić access to this information, and Karadžić makes no attempt to demonstrate that reconsideration is warranted. In any event, Karadžić would not have standing to move for reclassification of a filing in the Rule 86 proceeding.⁴

3. In its Decision on a Motion to Compel Inspection, the Chamber denied Karadžić’s request for the identification of protected Prosecution witnesses who are the subject of Rule 86 applications on the grounds that he had “failed to demonstrate the heightened showing required to justify access” to such *ex parte* material.⁵ That decision encompassed the Application at issue here.⁶ The Chamber stressed that it had already denied prior requests by

¹ Motion for Reclassification, 6 February 2018 (distributed 7 February 2018).

² *Prosecutor v. Karadžić*, Case No.MICT-13-55-R86F.6, Motion for Service of Reclassification Motion, 15 February 2018.

³ Motion, para.6. In assessing Karadžić’s prior requests for same or similar information—via motions for disclosure, for redacted versions of *ex parte* filings, for reclassification, for *inter partes* proceedings, and to “compel inspection of pseudonyms”—this Chamber has consistently looked to the substance of the request and recognised that each ultimately sought access to *ex parte* information. *See e.g.* Decision on a Motion for Redacted Versions of Rule 86(F) Filings, 24 January 2017, p.4; Decision on Motion for *Inter Partes* Proceedings in Rule 86 Matters, 9 March 2017 (“Decision on *Inter Partes* Proceedings”), para.5; Decision on a Motion to Compel Inspection of Pseudonyms of Witnesses Subject to *Ex Parte* Rule 86 Proceedings, 22 May 2017 (“Decision on a Motion to Compel Inspection”), p.3; Decision on a Motion to Reclassify Filings, 3 October 2017, pp.4-5. *See also* *Prosecutor v. Karadžić*, Case No.IT-95-5/18-T, Decision on Accused’s Motion for Disclosure of Information on Variation of Protective Measures, 18 February 2016 (“Decision on Motion for Disclosure”), p.2.

⁴ *See* Decision on *Inter Partes* Proceedings, para.7; Decision on a Motion for Disclosure of Exculpatory Material, 19 February 2018, p.2.

⁵ Decision on a Motion to Compel Inspection, pp.3-4.

⁶ In its 22 May 2017 Decision on a Motion to Compel Inspection, the Chamber denied what it deemed in substance to be a motion by Karadžić for access to the pseudonyms of protected witnesses who are the subject of Rule 86 applications. This decision thereby encompassed the earlier Rule 86(F) Application at issue here. *Prosecutor v. Karadžić*, Case No.MICT-13-55-R86F.6, Application Pursuant to Rule 86(F)(i) Rules of Procedure and Evidence MICT, 26 April 2017 (“Application”).

Karadžić for this information on the same grounds, and that Karadžić had failed to “raise[] any new information [...] to justify such access.”⁷

4. Karadžić now effectively requests partial reconsideration of this denial while failing to acknowledge multiple prior adverse decisions and making no attempt to show a clear error in reasoning or particular circumstances justifying reconsideration.⁸ This repeated disregard for this Chamber’s rulings and the applicable standard for reconsideration⁹ wastes Defence, Prosecution and Mechanism resources and should be denied.

II. KARADŽIĆ FAILS TO SHOW THAT THE APPLICATION’S *EX PARTE* STATUS WAS IMPROPER OR THAT HE HAS A LEGITIMATE FORENSIC PURPOSE FOR ACCESS

5. To the extent Karadžić’s Motion challenges whether the Application was properly filed *ex parte*,¹⁰ his claims are speculative and misconceived. The Practice Direction on which Karadžić relies in fact *requires ex parte* filing where “there is a reason why an application should not be provided to one or more parties”.¹¹ In this regard, Rule 86(F) applications are frequently and properly filed *ex parte* to protect the sensitive material contained therein, including witness identities and confidential details concerning domestic proceedings which are routinely included in such applications¹² and which may be subject to confidentiality restrictions in the national proceedings. As such, the Applicant may not be able to simply “voluntarily agree” to reclassification, contrary to Karadžić’s suggestion.¹³ That an application relates to a witness known to the defence in ongoing national proceedings does not obviate the need for such *ex parte* protections.¹⁴

6. As with his prior requests, Karadžić fails to demonstrate a legitimate forensic purpose for access to this *ex parte* material.¹⁵ This Chamber has repeatedly rejected as insufficient¹⁶ Karadžić’s claimed interest in obtaining hypothetical witness evidence from national

⁷ Decision on a Motion to Compel Inspection, pp.3-4.

⁸ See Decision on *Inter Partes* Proceedings, para.5 (setting out test for reconsideration).

⁹ See e.g. Decision on *Inter Partes* Proceedings, para.5; Decision on a Motion to Compel Inspection, pp.3-4. See also Decision on a Motion to Reclassify Filings, pp.4-6.

¹⁰ Motion, paras.2, 4-5.

¹¹ *Contra* Motion, para.2.

¹² Decision on Motion for Disclosure, p.3.

¹³ *Contra* Motion, para.3.

¹⁴ See Decision on a Motion to Reclassify Filings, pp.5-6. *Contra* Motion, paras.4-5.

¹⁵ *Contra* Motion, para.6.

proceedings or in providing national defence counsel with access to material from Tribunal proceedings.¹⁷ Karadžić's recycling of the same rationale rejected in the decision¹⁸ of which he now seeks reconsideration further highlights the wasteful nature of this Motion.

III. SERVICE OF THE MOTION SHOULD BE DENIED BECAUSE IT WOULD MISLEAD THE APPLICANT AND COULD ENCOURAGE BREACHES OF WITNESS PROTECTIVE MEASURES

7. Karadžić's Motion for Service of Reclassification Motion¹⁹ on the Applicant should be denied. Karadžić's purported reclassification request is in fact a motion for access, and in any event he has no standing to seek reclassification in this Rule 86 matter.²⁰ Service would therefore mislead the Applicant as to both the nature of the request and Karadžić's status in the Rule 86 matter.

8. In addition, Karadžić's counsel's proposed letter to the Applicant annexed to the Motion²¹ solicits cooperation that could breach witness protective measures. In the letter, Karadžić's counsel asks the defence counsel Applicant for assistance in obtaining any subsequent evidence by the witness in the national proceedings, offers to assist the Applicant in obtaining material about the witness from this Tribunal, and generally seeks to "cooperate" concerning the witness.²² However, as Karadžić's counsel is aware, the Appeals Chamber has ordered the Applicant not to "disclose the information that is released pursuant to this [decision granting the Rule 86(F) Application] except to parties or persons involved in the preparation or conduct" of the national proceedings at issue.²³ In addition, as Karadžić's counsel is also aware, this witness now likely has protective measures before the national

¹⁶ See e.g. Decision on Motion for Redacted Versions of Rule 86(F) Filings, pp.1, 4; Decision on *Inter Partes* Proceedings, para.2; Decision on Motion to Compel Inspection, p.4. See also Decision on Motion for Disclosure, p.2.

¹⁷ Motion, para.6. In any event, Karadžić's concerns are misplaced where, as here, national defence counsel submitted the Rule 86 Application and may, if desired, request a variation of protective measures and access to the witness's Tribunal evidence. See also Decision on Response to Motion for Disclosure of Exculpatory Material to National Authorities.

¹⁸ Decision on a Motion to Compel Inspection, p.4.

¹⁹ In relation to para.4 of this filing, the Prosecution notes that the Application Decision makes clear at p.1 that it is a defence counsel in the national proceedings who is the Applicant, not the national court itself. Furthermore, Karadžić assumes the identity of the national court. This Chamber expressly denied Karadžić access to such information. See Decision on a Motion for Redacted Versions of Latest Rule 86(F) Decisions, 24 January 2018, Annex *appending Prosecutor v. Karadžić*, Case No.MICT-13-55-R86F.6, Decision on an Application Pursuant to Rule 86(F) (public redacted version) ("Application Decision"), Registry Page 6201.

²⁰ See above para.2.

²¹ Motion, Annex A.

²² Motion, Annex A.

²³ Application Decision, Registry Page 6201.

court identical to those granted by this Tribunal, because that was the purpose of the Application.²⁴

9. It is difficult to envision how Karadžić's counsel and the Applicant could have even a basic conversation about the witness without the Applicant revealing identifying information regarding the witness, presumably in breach of the witness's protective measures before the relevant national court. Similarly, it is difficult to fathom how Karadžić's counsel could provide even non-confidential information about the witness to the Applicant without implicitly revealing the identity of a pseudonym-protected witness before this Tribunal, thereby breaching the witness's protective measures here.

Word Count: 1456



Katrina Gustafson
Senior Appeals Counsel

Dated this 19th day of February 2018
At The Hague, The Netherlands

²⁴ Motion, para.4.



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