

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 8 December 2015

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR DISCLOSURE OF
INFORMATION ON VARIATION
OF PROTECTIVE MEASURES

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Karadzic respectfully requests the Trial Chamber to order the Registrar to disclose to him a list of witnesses who have given evidence in the *Karadzic* case, whether orally or in writing pursuant to Rules 92 *bis* and *quater*, as to whom an application for variation of witness protection measures has been filed to enable disclosure of confidential material in connection with investigations or cases conducted by national authorities.

2. The ICTY Office of the Prosecutor recently reported to the United Nations Security Council that “in the period from 16 May 2015, the Office of the Prosecutor of the Tribunal responded to 5 Rule 75 (H) applications from judicial authorities in the region in relation to ongoing cases of the Tribunal.”¹ The MICT Office of the Prosecutor reported to the Security Council that “the branch filed submissions in nine completed cases of the International Tribunal for the Former Yugoslavia in relation to variations in protective measures for the purpose of domestic proceedings.”²

3. It has recently come to Dr. Karadzic’s attention that a large percentage of such applications are heard *ex parte*, without notice or an opportunity to be heard by the defence. Because of the *ex parte* nature of these applications, Dr. Karadzic is not in a position to seek to be heard on any specific application, or to seek to vacate any *ex parte* orders on the grounds that his right to be heard has been violated, without obtaining some basic information from the Registrar.

4. The defence has an important interest in being heard when variance of protective measures is sought regardless of whether the witness was called to testify by the prosecution or the defence.

5. Knowledge that a prosecution witness is giving evidence in another proceeding may assist the defence in discovering subsequent transcripts or statements of that witness in national proceedings that may reveal new facts or include inconsistent statements or the provision of benefits that could call into question the accuracy or credibility of the witness’ testimony in our case.

6. Where a protected prosecution witness consents to testify in another jurisdiction without protective measures, the defence may also be prompted to request

¹ UN Doc S/2015/874 at para. 47

² UN Doc S/2015/883 at p. 16, para C2

that the witness consent to rescission of his protective measures in the *Karadzic* case, thus promoting Dr. Karadzic's right to a public trial.

7. Finally, the defence may often be of genuine assistance to the applicant by calling to its attention other relevant evidence that the applicant may wish to consider that contradicts or impeaches the requested testimony of a prosecution witness.

8. Dr. Karadzic accepts that there may be situations where redactions in a Rule 75(H) application may be appropriate, but he cannot imagine any situation where the fact of the application must be withheld from the defence.

9. There are three aspects to a motion brought for variation of protective measures for disclosure in national investigations or cases—the identity of the witness whose material is sought, the identity of the individual who is the subject of the investigation or proceeding for which the testimony is sought, and the identity of the State seeking disclosure.

10. There is never any justification for withholding the identity of the protected witness whose testimony or evidence is sought, since the defence already knows the identity of the witnesses in his or her case.

11. There may be justification for redacting the name of the subject of the investigation or the proceeding if the moving party can make a showing that disclosure of that information to the defence may prejudice ongoing investigations or affect the security interests of the State.³ That may depend on the stage of the proceedings, and would be subject to change if an investigation resulted in public proceedings, for example.

12. There may also be justification for redacting the name of the State if there are so few Bosnians in that State that disclosing the fact that the State is investigating crimes from Bosnia may easily lead to the identity of the subject of the investigation. On the other hand, redacting the name of Bosnia, Serbia, Croatia, the United States, France, or Germany as the requesting State would serve no purpose since it would not reveal the identity of the subject of the investigation.

13. In each of the three aspects discussed above, there is no justification whatsoever for the matter being heard entirely *ex parte*.

³ See, for example, Rule 71(C)

14. The Appeals Chamber has held that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so as disclosure would be likely to prejudice the party making the application or some other person.⁴

15. The ICTR has held that as a general rule, applications must be filed *inter partes*. Such a rule finds its expression in the general principle of *audi alteram partem*. *Ex parte* proceedings should be entertained only where disclosure to the other party or parties would be likely to unfairly prejudice either the party making the application or some persons involved in or related to that application.⁵

16. At the International Criminal Court, it has been held that *ex parte* proceedings are only to be used exceptionally when they are truly necessary and when no other lesser procedures are available. Even when an *ex parte* procedure is used, the other party should be notified and its legal basis should be explained, unless to do so would risk revealing the very thing that requires protection.⁶ The existence of decisions issued in *ex parte* proceedings shall be made known to the public, unless specifically ordered postponed by the Chamber upon a showing of good cause.⁷

17. Therefore, a practice of allowing consideration of variation of witness protection measures to enable disclosure to national authorities without any notice whatsoever to the defence is contrary to these principles.

18. In order to be in a position for Dr. Karadzic to make individual motions for unsealing of *ex parte* filings relating to witnesses who gave evidence in his case, it is

⁴ *Prosecutor v. Blaskic*, No.:IT-95-14-R, *Decision on Defence's Request for Relief with Regard to Ex Parte Filings* (20 November 2006) at p. 4

⁵ *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Exclude Testimony of Prosecution Witness ADE* (30 March 2006) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 6

⁶ *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Decision on the Procedures to be Adopted for ex parte Proceedings* (6 December 2007) at para. 12

⁷ *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and 81(4) of the Statute* (19 May 2006) at para. 27; *Prosecutor v Lubanga*, No. ICC-01/04-01/06, *Judgment on the Prosecutor's Appeal of the Decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure ..."* (13 October 2006) at para. 67

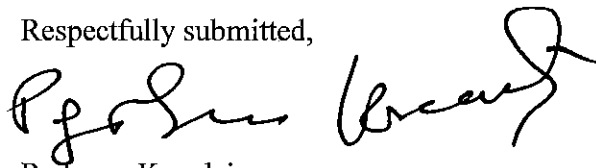
respectfully requested that the Trial Chamber order the Registrar to provide Dr. Karadzic with the pseudonym of any witness in the *Karadzic* case who has been the subject of an application for variation of protective measures for disclosure to national authorities, the date of the application and decision, and the ICTY or MICT case name and number if the protective measures for the *Karadzic* case witness originated, and thus were modified, in a different case.

18. This information will allow Dr. Karadzic to make individualised motions to this or other Chambers, or the President of the Mechanism, to obtain access to the pleadings in those instances where he believes he should have notice and a right to be heard. Disclosure of this minimal amount of information will also not reveal any information that would jeopardize ongoing investigations in national jurisdictions.

19. Therefore, Dr. Karadzic respectfully requests that the Trial Chamber order the Registrar to provide him with the requested information, and that, in the future, the Trial Chamber ensure that all such proceedings be conducted *inter partes*.

Word count: 1499

Respectfully submitted,



Radovan Karadzic