

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-A

Date: 3 October 2017

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding Judge
Judge William Hussein Sekule
Judge Vagn Prüsse Joensen
Judge José Ricardo de Prada Solaesa
Judge Graciela Susana Gatti Santana**

Registrar:

Mr. Olufemi Elias

Decision of:

3 October 2017

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON A MOTION
TO RECLASSIFY FILINGS**

The Office of the Prosecutor

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for Mr. Radovan Karadžić

Mr. Peter Robinson
Ms. Kate Gibson

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

NOTING the judgement issued in this case by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (“Trial Chamber” and “ICTY”, respectively) on 24 March 2016;²

NOTING the appeal against the Trial Judgement filed by Mr. Radovan Karadžić (“Karadžić”) on 22 July 2016;³

NOTING the appeal against the Trial Judgement filed by the Office of the Prosecutor of the Mechanism (“Prosecution”) on 22 July 2016;⁴

RECALLING the decisions issued in proceedings with case numbers MICT-13-55-R86H.1 and MICT-13-55-R86H.5 (“Relevant Proceedings”), granting applications for variation of protective measures of a witness in the *Karadžić* case and, *inter alia*, ordering the applicant (“Applicant”) not to disclose the information released to it to anyone except to the judicial authorities and parties or persons involved in the preparation or conduct of the domestic proceedings referred to in the applications (“Domestic Proceedings”), provided that the Applicant obtains assurances under the threat of criminal sanctions that the parties or persons to whom the information is released will maintain its strict confidentiality;⁵

RECALLING the “Decision on a Motion for Redacted Versions of Rule 86(H) Filings”, granting, in part, Karadžić’s motion of 29 January 2017 for the issuance of public redacted versions of filings made in his case pursuant to Rule 86(H) of the Rules and issuing public redacted versions of the orders and decisions issued *inter alia* in the Relevant Proceedings;⁶

¹ Order Assigning Judges to a Case Before the Appeals Chamber, 20 April 2016.

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016, 24 March 2016 (“Trial Judgement”).

³ Radovan Karadžić’s Notice of Appeal, 22 July 2016 (public with a confidential annex). *See also* Radovan Karadžić’s Appeal Brief, 5 December 2016 (confidential). Karadžić filed a revised public redacted version of his appeal brief on 23 December 2016.

⁴ Prosecution’s Notice of Appeal, 22 July 2016. *See also* Prosecution Appeal Brief, 5 December 2016 (confidential). The Prosecution filed a public redacted version of its appeal brief on 11 January 2017.

⁵ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.5, Decision on an Application pursuant to Rule 86(H), 6 April 2017 (public redacted version issued on 1 May 2017) (“Decision of 6 April 2017”), p. 3; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.1, Decision on an Application pursuant to Rule 86(H), 20 October 2016 (public redacted version issued on 1 May 2017) (“Decision of 20 October 2016”), p. 3.

⁶ Decision on a Motion for Redacted Versions of Rule 86(H) Filings, 1 May 2017 (“Decision of 1 May 2017”), pp. 1-3.

BEING SEISED OF the “Motion to Reclassify Filings” filed on 2 May 2017 (“Motion”), in which Karadžić requests an order reclassifying the confidential *ex parte* filings by the Applicant, the Prosecution, and the Registry in the Relevant Proceedings;⁷

NOTING Karadžić’s submission that the confidential and *ex parte* status of the filings in the Relevant Proceedings is no longer justified because the sensitive information in them “has likely now been disclosed” to the defence in proceedings before a domestic jurisdiction and thus any concern that disclosure might interfere with ongoing investigations in such a jurisdiction is no longer valid;⁸

NOTING Karadžić’s further submission that reclassification is not only in the interests of transparency but also of justice, since it would allow him to learn the pseudonym of the witness who was the subject of the application and request the witness’s subsequent testimony and statements from the jurisdiction in which such proceedings are taking place to determine whether the witness has provided any information that may warrant a request for admission of additional evidence on appeal in his case before the Mechanism;⁹

NOTING that the Prosecution opposes the Motion, submitting that it is a renewed attempt to obtain access to confidential *ex parte* Rule 86 material that was previously denied by the Appeals Chamber and that, as in previous instances, Karadžić fails to meet the test for reconsideration or make the heightened showing required to access confidential and *ex parte* Rule 86 material;¹⁰

NOTING FURTHER the Prosecution’s submission that the fact that a particular defendant in domestic proceedings may have received information identifying a protected witness would not warrant reconsideration of the Appeals Chamber’s decision denying Karadžić’s request for public

⁷ Motion, paras. 1, 15, 16, referring to *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.1, Application of the Prosecutor’s Office of [REDACTED] for Variation of Protective Measures pursuant to Rule 86(H) of the Rules of Procedure and Evidence, 26 September 2016 (confidential and *ex parte*); (ii) *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.1, Registrar’s Submission in Relation to the Order of 3 October 2016, 14 October 2016 (confidential and *ex parte*); (iii) *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.1, Prosecution’s Submission in Relation to Application of the Prosecutor’s Office of [REDACTED] Pursuant to Rule 86(H), 14 October 2016 (confidential and *ex parte*); (iv) *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.5, Application of the Prosecutor’s Office of [REDACTED] for Variation of Protective Measures pursuant to Rule 86(H) of the Rules of Procedure and Evidence, 14 March 2017 (confidential and *ex parte*); (v) *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.5, Registrar’s Submission in Relation to the Order of 20 March 2017, 28 March 2017 (confidential and *ex parte*); (vi) *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R86H.5, Prosecution’s Submission in Relation to Application of the Prosecutor’s Office of [REDACTED] Pursuant to Rule 86(H), 30 March 2017 (confidential and *ex parte*), (“Relevant Filings”, collectively). Karadžić notes that, to the extent that the Relevant Filings reveal the identity of the witness, the Appeals Chamber can reclassify them as confidential and issue public redacted versions. See Motion, para. 21. Karadžić also requests an order instructing the Applicant to notify the Mechanism when the identity of the witness is disclosed to the defence in the domestic proceedings. See Motion, para. 18.

⁸ Motion, paras. 17, 20, 22.

⁹ Motion, paras. 19, 20.

¹⁰ Prosecution’s Response to Karadžić’s Motion to Reclassify Filings, 12 May 2017 (“Response”), paras. 1-3, 4-6.

redacted versions of these filings or disclosure of information about ongoing investigations and proceedings to the general public or to Karadžić;¹¹

NOTING Karadžić's reply filed on 15 May 2017, in which Karadžić submits that: (i) he is not requesting reconsideration of the Decision of 1 May 2017, which concerned his "global" request for access to all Rule 86(H) filings, but access to filings in two proceedings in which disclosure was made to defendants in domestic proceedings; (ii) the Prosecution fails to distinguish between investigations that have not yet resulted in charges being filed and proceedings in which charges have already been filed, in which case the investigation has become publicly known; and (iii) there is no reason for the Mechanism to maintain the confidentiality of information about ongoing investigations and proceedings that are public;¹²

RECALLING the "Order Related to a Motion to Reclassify Filings" issued confidentially and *ex parte* by the Pre-Appeal Judge in this case on 23 June 2017, inviting the Applicant, the Prosecution, and the Registry to state whether maintaining the confidential and *ex parte* status of their respective submissions in the Relevant Proceedings is warranted and, if so, to state the reasons;¹³

NOTING the "Response to the Order Related to a Motion to Reclassify Filings", filed confidentially and *ex parte* by the Applicant on 14 July 2017, in which the Applicant submits that the Motion should be dismissed as "exceptional reasons" require maintaining the confidentiality of its submissions and given that public disclosure would interfere with its investigations of war crimes cases and put the security and safety of witnesses involved in such proceedings at risk;¹⁴

NOTING the "Registrar's Submission in Relation to the Order of 23 June 2017", filed confidentially and *ex parte* on 21 July 2017, in which the Registrar submits that the confidential and *ex parte* status of its submissions in the Relevant Proceedings should be maintained as they contain information about protective measures, public disclosure of which could assist in identifying protected witnesses, that issuing a redacted version would not serve any meaningful purpose due to the extent of redactions that would be necessary to protect sensitive information, and that Karadžić

¹¹ Response, para. 3. The Prosecution requests that, should the Appeals Chamber be inclined to grant any part of Karadžić's request, the Applicant, the Registry, and the Prosecution be consulted in relation to any proposed redactions. See Response, para. 7.

¹² Reply, paras. 3-5.

¹³ Order Related to a Motion to Reclassify Filings, 23 June 2017 (confidential and *ex parte*), p. 3.

¹⁴ Response to the Order Related to a Motion to Reclassify Filings, 14 July 2017 (confidential and *ex parte*) ("Applicant's Submission"), Registry Pagination ("RP.") 5709, 5708.

has not demonstrated the heightened showing required to justify access to the confidential *ex parte* material in its submissions;¹⁵

NOTING the “Prosecution’s Notice Regarding the 23 June 2017 Order Related to a Motion to Reclassify Filings”, filed confidentially and *ex parte* on 21 July 2017, in which the Prosecution maintains its opposition to any reclassification of its submissions, which, in its view, would not serve any meaningful purpose due to the extent of the sensitive information that would need to be redacted;¹⁶

RECALLING the “Second Order Related to a Motion to Reclassify Filings”, issued confidentially and *ex parte* by the Pre-Appeal Judge in this case on 31 August 2017, ordering the Applicant to state: (i) whether the Domestic Proceedings are being conducted in public; and (ii) whether it objects to the Mechanism disclosing to Karadžić the Applicant’s identity as well as the pseudonym of the witness who was the subject of the applications in the Relevant Proceedings and, if so, to state the reasons for its objection;¹⁷

NOTING the “Response to the Second Order Related to a Motion to Reclassify Filings” filed confidentially and *ex parte* by the Applicant on 7 September 2017, in which the Applicant submits that the Domestic Proceedings are being conducted in public and expressly objects to disclosure to Karadžić of its identity as the applicant in the Relevant Proceedings and the pseudonym of the relevant witness as “exceptional reasons” for non-disclosure still exist, the witness expressly requested that the witness’s identity not be disclosed to anyone except the participants in the Relevant Proceedings, and any disclosure would “certainly” interfere with its investigations in war crimes cases, putting at risk the security and safety of witnesses and increasing the possibility of influencing witnesses;¹⁸

RECALLING that, in its Decision of 1 May 2017, the Appeals Chamber considered and, except as to orders and decisions, denied Karadžić’s request for issuing redacted versions of confidential *ex*

¹⁵ Registrar’s Submission in Relation to the Order of 23 June 2017, 21 July 2017 (confidential and *ex parte*) (“Registrar’s Submission”), paras. 3, 4.

¹⁶ Prosecution’s Notice Regarding the 23 June 2017 Order Related to a Motion to Reclassify Filings, 21 July 2017 (confidential and *ex parte*) (“Prosecution’s Notice”), paras. 1, 2. The Prosecution also submits that it was not served with the Applicant’s response, which was filed *ex parte*, and is therefore unable to comment on any impact that it may have had on the Prosecution’s views. See Prosecution’s Notice, para. 1.

¹⁷ Second Order Related to a Motion to Reclassify Filings, 31 August 2017 (confidential and *ex parte*), p. 3.

¹⁸ Response to the Second Order Related to a Motion to Reclassify Filings, 7 September 2017 (confidential and *ex parte*) (“Applicant’s Second Submission”), RP. 5847, 5846.

parte filings made in this case pursuant to Rule 86(H) of the Rules, which included the filings made in the Relevant Proceedings that are the subject of the Motion;¹⁹

FINDING, therefore, that Karadžić's present request amounts to a request for partial reconsideration of the Decision of 1 May 2017;

RECALLING that a party requesting reconsideration of a decision must satisfy the chamber of the existence of a clear error of reasoning in the impugned decision, or of particular circumstances justifying reconsideration in order to avoid injustice;²⁰

RECALLING ALSO that circumstances that may merit reconsideration include new facts and that, to succeed on that basis, an applicant must demonstrate how any new facts justify reconsideration;²¹

CONSIDERING that, in support of the Motion, Karadžić asserts as a new fact the possibility that the sensitive information in the relevant filings has been disclosed to the defence in the Domestic Proceedings and that these proceedings are being conducted in public;

CONSIDERING that the Applicant has confirmed that the Domestic Proceedings are being conducted in public with protective measures as appropriate to guarantee the confidentiality of protected information;²²

CONSIDERING that the Applicant, the Prosecution, and the Registry maintain their position that the confidential and *ex parte* status of their respective submissions is warranted to protect investigations and/or the security and safety of protected witnesses;²³

CONSIDERING ALSO that the filings in the Relevant Proceedings contain confidential *ex parte* information that does not relate to or concern the proceedings against Karadžić before the Mechanism and is therefore of no potential use to his defence;²⁴

¹⁹ Decision of 1 May 2017, p. 3.

²⁰ Decision on a Motion for *Inter Partes* Proceedings in Rule 86 Matters, 9 March 2017 ("Decision of 9 March 2017"), para. 5; *Prosecutor v. Jean-Paul Akayesu*, Case No. MICT-13-30, Decision on a Motion for Reconsideration, 30 June 2016, p. 1; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33-AR90/108.1, Decision on Kamuhanda's Appeal of Decision on Motion for Appointment of *Amicus Curiae* Prosecutor to Investigate Prosecution Witness GEK, 8 December 2015, para. 16.

²¹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. MICT-15-96-PT, Decision on Motion for Partial Reconsideration of Decision on Stanišić's Request for Stay of Proceedings, 7 April 2017, para. 7; *Prosecutor v. 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, para. 18; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2.

²² Applicant's Second Submission, RP. 5847; Applicant's Submission, RP. 5710.

²³ See Applicant's Second Submission, RP. 5847; Prosecution's Notice, para. 2; Registrar's Submission, para. 3; Applicant's Submission, RP. 5709; Response, para. 3.

CONSIDERING that, in these circumstances, Karadžić's interests do not outweigh the interests of the parties who designated their filings as confidential and *ex parte*;

CONSIDERING therefore that neither the authorized disclosure of information identifying a protected witness to the defence in the Domestic Proceedings nor the fact that the Domestic Proceedings are being conducted in public with appropriate measures protecting confidential information, constitute particular circumstances justifying reconsideration in order to avoid injustice;

FINDING that Karadžić has not demonstrated that reconsideration of the Decision of 1 May 2017 is warranted;

PURSUANT to Article 20 of the Statute of the Mechanism and Rules 55 and 86 of the Rules,

HEREBY DENIES the Motion.

Done in English and French, the English version being authoritative.

Done this 3rd day of October 2017,
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]

²⁴ See also Decision of 9 March 2017, para. 7.



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