

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No.: MICT-13-55-A

Date: 22 May 2017

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

Decision of:

22 May 2017

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON A MOTION TO COMPEL INSPECTION OF
PSEUDONYMS OF WITNESSES SUBJECT TO *EX PARTE* RULE 86
PROCEEDINGS**

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 (“Appeal”);³

BEING SEISED OF a motion filed on 15 April 2017 by Karadžić, in which he requests an order, pursuant to Rule 71(B) of the Rules of Procedure and Evidence of the Mechanism (“Rules”), compelling the Office of the Prosecutor (“Prosecution”) to allow him to inspect information in its possession concerning the pseudonyms of witnesses who are the subject of applications filed by authorities or parties to domestic proceedings under Rule 86 of the Rules;⁴

NOTING the Prosecution’s response filed on 25 April 2017 and Karadžić’s reply filed on 28 April 2017;⁵

NOTING Karadžić’s submission that he wishes to inspect the requested information to identify which Prosecution witnesses are the subject of requests from parties in domestic proceedings in order to determine if the witnesses have provided contradictory or exculpatory information which may be the subject of further investigation potentially leading to a motion to admit additional evidence in relation to one or more of grounds 28 to 46 of his Appeal;⁶

NOTING FURTHER Karadžić’s submission that pursuant to Rule 86(F)(ii) of the Rules, nothing prevents the Prosecution from discharging its disclosure obligations, including its obligation under

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 Motion to Compel Inspection of Pseudonyms of Witnesses Subject to *Ex Parte* Rule 86 Proceedings, 15 April 2017 (“Motion”), paras. 1, 19.

⁵ Prosecution’s Response to Karadžić’s Motion to Compel Inspection of Pseudonyms of Witnesses Subject to *Ex Parte* Rule 86 Proceedings, 25 April 2017 (“Response”); Reply Brief: Motion to Compel Inspection of Pseudonyms of Witnesses Subject to *Ex Parte* Rule 86 Applications, 27 April 2017 (“Reply”).

⁶ Motion, paras. 3, 4, 16. *See also* Reply, para. 4.

Rule 71(B) of the Rules to allow inspection of information material to the preparation of the defence;⁷

NOTING that the Prosecution opposes the Motion,⁸ and submits that: (i) the disclosure regime and, in particular, Rule 71(B) of the Rules is inapplicable since the pseudonyms that Karadžić wishes to inspect are not “books, documents, photographs, and tangible objects in the [Prosecution’s] custody or control”, but rather information contained in confidential and *ex parte* filings under the custody and control of the Appeals Chamber;⁹ (ii) Karadžić is not an accused in a “second proceeding” seeking disclosure of the evidence covered by protective measures granted in a prior proceeding in accordance with Rule 86(F)(ii) of the Rules;¹⁰ (iii) as with prior requests, the Motion is overly broad and speculative, repeats arguments previously rejected by the Trial Chamber and the Appeals Chamber, and fails to demonstrate the heightened showing required for access to *ex parte* material;¹¹ and (iv) revealing the identity of witnesses may impede ongoing domestic investigations and compromise the safety and security of those witnesses.¹²

NOTING Karadžić’s reply that: (i) the pseudonyms are contained in documents, such as Rule 86 applications that have been served on the Prosecution by order of the Appeals Chamber;¹³ (ii) in cases where protective measures of witnesses are disclosed to domestic authorities, they become the “prior proceedings” within the meaning of Rule 86(F) of the Rules as they are given separate case numbers and, consequently, Karadžić’s substantive appeal becomes “the second proceedings”;¹⁴ (iii) the Appeals Chamber has not determined that he is not entitled to know the pseudonym of a witness who is the subject of a Rule 86 application;¹⁵ (iv) the Prosecution’s suggestion that revealing the pseudonyms of the witnesses may impede investigations or endanger witnesses is

⁷ Motion, para. 18. *See also* Reply, paras. 6-14.

⁸ Response, paras. 1, 9.

⁹ Response, paras. 1-4.

¹⁰ Response, para. 3.

¹¹ Response, paras. 1, 4-7, *referring to* Decision on a Motion for Redacted Versions of Rule 86(F) Filings, 24 January 2017 (“Decision of 24 January 2017”), pp. 3, 4; Decision on a Motion for Redacted Versions of Decisions Issued under Rule 75(H) of the ICTY Rules, 18 July 2016 (“Decision of 18 July 2016”), p. 4; *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, 18 February 2016, p. 3.

¹² Response, para. 8.

¹³ Reply, para. 4.

¹⁴ Reply, paras. 8-10.

¹⁵ Reply, paras. 15-17. Karadžić adds that in one instance, the Appeals Chamber issued redacted versions of decisions pursuant to Rule 75 of the ICTY Rules in which the pseudonyms of certain witnesses were not redacted. *See* Reply, paras 15, 17, *referring to* Decision of 18 July 2016. In this respect, the Appeals Chamber recalls that in light of the varied circumstances of applications made under Rule 86 of the Rules, access to confidential *ex parte* material in such cases is determined on a case-by-case basis. *See* Decision of 24 January 2017, p. 5. With respect to the Decision of 18 July 2016, the Appeals Chamber only allowed the non-redaction of particular witness pseudonyms from the public redacted versions of the Trial Chamber decisions in specific instances where the Witness Support and Protection Unit of the Mechanism had advised that such disclosure would not undermine the effectiveness of the protective measures in force regarding those witnesses. *See* Decision on a Motion for *Inter Partes* Proceedings in Rule 86 Matters, 9 March 2017 (“Decision of 9 March 2017”), n. 15; Decision of 18 July 2016, pp. 4, 5.

unsupported;¹⁶ and (v) if the Appeals Chamber finds Rule 71(B) of the Rules to be inapplicable, he requests that the Registrar be ordered to provide him with access to such pseudonyms;¹⁷

RECALLING that pursuant to Rule 71(B) of the Rules, the Prosecution shall, on request, permit the Defence to inspect any books, documents, photographs, and tangible objects in its custody or control, which are material to the preparation of the defence;

CONSIDERING that the pseudonyms that Karadžić wishes to inspect are not books, documents, photographs, or tangible objects in the Prosecution's custody or control, but rather information contained in confidential and *ex parte* filings;

FINDING, therefore, that Rule 71(B) of the Rules is not applicable;

RECALLING that all proceedings before the Mechanism shall be public unless exceptional reasons require keeping them confidential;¹⁸

RECALLING FURTHER that, with regard to confidential material, the Mechanism must find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses and the confidentiality of sensitive information;¹⁹

EMPHASIZING that access to confidential *ex parte* material can only be granted when the requesting party demonstrates a heightened showing of a legitimate forensic purpose in order to protect the interests of the party on whose behalf the *ex parte* status has been granted and who enjoys a protected degree of trust that the *ex parte* material will not be disclosed;²⁰

RECALLING that the Appeals Chamber previously denied Karadžić's request for access to confidential and *ex parte* information identifying protected witnesses in his case who were involved in domestic proceedings on the basis that he had not demonstrated the heightened showing required to justify access to such information;²¹

RECALLING FURTHER that the Appeals Chamber issued public redacted versions of orders and decisions in Rule 86 proceedings in this case to ensure the public nature of the proceedings to the

¹⁶ Reply, paras. 19-22.

¹⁷ Reply, para. 24.

¹⁸ See Decision on a Motion for Public Redacted Versions of Rule 86(F) Jurisprudence, 6 April 2017 ("Decision of 6 April 2017"), p. 2; *Prosecutor v. Naser Orić*, Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 8, referring to Article 18 of the Statute of the Mechanism and Rules 92 and 131 of the Rules.

¹⁹ See Decision of 6 April 2017, p. 2; Decision on a Motion for Access to *Ex Parte* Filings in Completed Cases, 10 May 2016 ("Decision of 10 May 2016"), p. 2 and references cited therein.

²⁰ Decision of 18 July 2016, p. 4.

extent possible given the need to protect the interests of the parties who designated their filings as *ex parte*,²²

CONSIDERING that disclosing pseudonyms of protected witnesses in this case who were the subject of Rule 86 proceedings may reveal details about non-public investigations in other jurisdictions²³ which were communicated to the Mechanism on a confidential and *ex parte* basis;

FINDING that the Appeals Chamber already found that Karadžić had failed to demonstrate the heightened showing required to justify access to the information he seeks in his Motion and that he has not raised any new information in the Motion to justify such access;

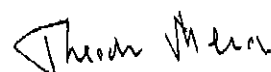
REITERATING the Prosecution's positive and continuous obligation under Rule 73(A) of the Rules to disclose to the Defence as soon as practicable any material which "in its actual knowledge" may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;²⁴

PURSUANT TO Article 20 of the Statute of the Mechanism and Rule 86 of the Rules,

HEREBY DENIES the Motion in its entirety.

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

Done this 22nd day of May 2017,
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Mechanism]

²¹ Decision of 24 January 2017, pp. 4, 5. *See also* Decision of 9 March 2017, para. 5. *Cf.* Decision of 18 July 2016, p. 4.

²² *See* Decision on a Motion for Redacted Versions of Rule 86(H) Filings, 1 May 2017, pp. 1-3, Annex; Decision of 9 March 2017, paras. 2, 6-8, Annex; Decision of 24 January 2017, pp. 4, 5, Annex. *Cf.* Decision of 18 July 2016, p. 4, Annex. In the Decision of 24 January 2017, the Appeals Chamber also instructed the Registry and the Prosecution to file public redacted versions of certain filings. *See* Decision of 24 January 2017, p. 5.

²³ *See* Response, para. 8.

²⁴ *See* Decision of 24 January 2017, p. 4; *Augustin Ngirabatware v. Prosecutor*, Case No. MICT-12-29-A, Decision on Augustin Ngirabatware's Motion for Sanctions for the Prosecution and for an Order for Disclosure, 15 April 2014, para. 12.