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CASE/AFFAIRE NO. MICT-13-55-R90.1 (KARADZIC) **DATE** 14 November 2013

FROM/DE CARLINE AMEERALI, DEPUTY CHIEF CMSS

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0 Trial Chamber/ <i>Chambre de 1ère instance</i>		<input checked="" type="checkbox"/> Legal Advisers/ Conseillers juridiques MR. P. ROBINSON MR. M. SLADOJEVIĆ MR. A. STEVANOVIĆ MR. A. VUJIĆ
0 Specially Appointed Chamber/ <i>Chambre spécialement désignée</i>		<input checked="" type="checkbox"/> Standby Counsel MR. R. HARVEY
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**UNITED
NATIONS**

United Nations Mechanism for International Criminal Tribunals	Case Nos.	MICT-13-55-R90.1 MICT-13-58-R90.1
	Date:	14 November 2013

BEFORE A SINGLE JUDGE

Before: Judge Bakone Justice Moloto

Registrar: Mr. John Hocking

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S CONTEMPT
ALLEGATIONS**

The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. Mathias Marcussen

The Applicant:

Mr. Radovan Karadžić

Standby Counsel:

Mr. Richard Harvey

**THE UNITED NATIONS MECHANISM FOR INTERNATIONAL
CRIMINAL TRIBUNALS**

Case No. MICT-13-55-R90.1

Case No. MICT-13-58-R90.1

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC

**PROSECUTION'S RESPONSE TO KARADŽIĆ'S CONTEMPT
ALLEGATIONS**

I. Introduction

1. Mr. Karadžić's assertion that the cable attached as Annex A (Cable) to his Request¹ contains evidence of contempt on the part of the former ICTY Prosecutor, Ms. Carla Del Ponte, is unfounded. Contrary to Mr. Karadžić's claim,² even assuming

¹ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-R90.1, Request for Appointment of Single Judge, 4 November 2013; *Prosecutor v. Slobodan Milošević*, Case No. MICT-13-58-90.1, Request for Appointment of Single Judge, 4 November 2013. The two Requests are identical and will be herein after referred to as Requests.

² Requests, para.5.

the accuracy of all the representations in the Cable, it contains no indication that Ms. Del Ponte disclosed information in knowing violation of an order of a Chamber and does not reveal any evidence of contempt.

2. As a preliminary matter, the Prosecution should be heard on this matter. Mr. Karadžić – who acknowledges he has no standing in the *Milošević* case³ – has made detailed submissions alleging contempt on the part of Ms. Del Ponte in that case. In these circumstances, the Prosecution, who was a party to the *Milošević* case and whose former principal is the subject of these contempt allegations, should have a right to be heard.

II. Discussion

3. The Cable describes a meeting with U.S. Embassy officials in The Hague at which Ms. Del Ponte purportedly identified a number of senior U.S. officials listed on Mr. Milošević's witness list, which the Cable notes was filed confidentially. From this, Mr. Karadžić jumps to the conclusion that there is "reason to believe that Prosecutor Del Ponte violated ICTY Rule 77(A)(ii) by 'disclosing information ... in knowing violation of an order of a Chamber'".⁴

4. There is no proper basis for this conclusion. While Mr. Milošević filed his witness list confidentially,⁵ it was not made confidential by any Chamber order. Furthermore, none of the U.S. officials identified in the Cable were the subject of any protective measures orders preventing the disclosure of their identity as ICTY witnesses. In short, the Cable does not reveal any violation of a Chamber order on the part of Ms. Del Ponte.⁶

5. The mere filing by a party of a document on a confidential basis does not by itself reflect that the document is protected by a court order subject to ICTY Rule

³ Requests, para.8.

⁴ Requests, para.5.

⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Confidential List of Witnesses, filed in English on 1 June 2004. See also, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Internal Memorandum from the Registry, filed on 26 April 2004 and dated 13 April 2004, noting that Mr. Milošević submitted a "Confidential List of Witnesses" on 13 April 2004.

⁶ Trial Chambers have confirmed that a violation of ICTY Rule 77(A)(ii) requires proof of a Chamber order, or orders, that would be breached by the disclosure of the information in question. See, *Prosecutor v. Marijčić and Rebić*, Case No. IT-95-14-R77.2, Judgment, 10 March 2006, para.17; *Prosecutor v. Jović*, Case No. IT-95-14 & IT-95-14/2-R77, Judgment, 30 August 2006, para.19; *Prosecutor v. Haxhiu*, Case No. IT-04-84-R77.5, Judgment, 24 July 2008, para.10; *Prosecutor v. Hartmann*, Case No. IT-02-54-R77.5, Judgment, 14 September 2009, para.20.

77(A)(ii) or Rule 90(A)(ii), nor is it transformed into one. This is not only obvious, it is reflected by Mr. Karadžić's own practice. Mr. Karadžić filed his witness list confidentially,⁷ yet regularly publicly discloses the names of non-protected witnesses from that list without seeking permission from the Trial Chamber or taking any other step that would suggest a belief on his part that the names on that list (other than those subject to pre-existing protective measures orders) are protected by Court order.⁸ Although Mr. Karadžić and his Defence team are clearly aware of the distinction between a confidential filing by a party and Court-ordered confidentiality protections, they attempt to blur this distinction in their contempt accusations against Ms. Del Ponte.⁹

6. Although there may be circumstances where a party's disclosure of confidential information that is not otherwise protected by an order of a Chamber may warrant a judicial remedy – and may even constitute contempt under other grounds¹⁰ – no such circumstances are reflected in the Cable.

7. The Cable describes a 16 April 2004 meeting in which Ms. Del Ponte, in a confidential setting, discussed with U.S. government representatives Mr. Milošević's intention to call a number of senior U.S. officials to testify. The knowledge of the U.S. government – and indeed its involvement and co-operation – was a necessary and inevitable part of securing the testimony of the officials in question. Furthermore, the meeting took place in a context in which Mr Milošević had already publicly

⁷ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Submission Pursuant to Rule 65ter and Related Motions, 27 August 2002, Confidential Annex A; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Supplemental Submission Pursuant to Rule 65ter, 11 September 2012, Confidential Annex C; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Further Revised Rule 65ter Witness List, 31 January 2013, Confidential Annex F; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Further Revised Rule 65ter Witness List, 26 February 2013, Confidential Annex G.

⁸ *See, e.g., Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Witness List: Week of 5 November 2012, 1 November 2012; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Witness List: Week of 26 November 2012, 20 November 2012; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Witness List: Week of 28 January 2013, 23 January 2013; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Witness List: Week of 11 February 2013, 6 February 2013; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Witnesses for December 2012, 20 November 2012; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Witnesses for March 2013, 20 February 2013; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Defence Witnesses for April 2013, 19 March 2013.

⁹ All the judgements that Mr. Karadžić cites in support of his claim that the Tribunal takes the "disclosure of confidential information seriously" dealt with situations where Mr. Karadžić's disclosure of information or other conduct violated a Court order. Request, para.9, fn.3.

¹⁰ *Prosecutor v. Slobodan Milošević*, Decision on Initiation of Contempt Investigations, Case No. IT-02-54-MISC.5 & IT-02-54-MISC.6, 18 July 2011 ("Milošević Contempt Decision"), paras.10-11, 13 (noting that the disclosure of confidential information could constitute contempt if it amounted to an interference with the Tribunal's administration of justice and that where such disclosure does not amount to contempt it can be addressed by other judicial and non-judicial remedies).

announced his intention to call senior U.S. officials in his defence.¹¹ In other words, the Cable simply reflects Ms. Del Ponte's notification to the U.S. government of information that they would inevitably receive and act upon in the course of the Defence case and moreover had already been partially alerted to by Mr. Milošević himself. In these circumstances, although a purported reference to the names on the list may have been inappropriate, it could not reasonably be said to have "an impact on the judicial proceedings"¹² much less amount to interference with the Tribunal's administration of justice pursuant to Rule 90(A) and thus could not constitute contempt.

8. Finally, while Mr. Karadžić complains about Ms. Del Ponte's disclosure in a confidential setting of the material in question, to a select group of officials who had an obvious and legitimate interest in the material, Mr. Karadžić has deliberately and repeatedly disseminated this same material to the public at large.¹³ Thus, if Mr. Karadžić were correct that the disclosure of names from Milošević's confidentially-filed Defence witness list constitutes contempt, then there is reason to believe that Mr. Karadžić, his legal advisor and/or other members of his Defence team are guilty of contempt for their public dissemination of the Cable and the information contained therein.¹⁴ The decision of Mr. Karadžić and his Defence team to publicly disclose this material suggests that they do not believe their own argument that such conduct

¹¹ In his opening statement Mr. Milošević declared (IT-02-54, T.355 (15 February 2002)): I'm going to call witnesses here and I want it to be possible for me to question Clinton and Albright and Kinkel and Schroeder and Kohl and Dini and Vollebaek and Kofi Annan and Sharping and Dole and the American team at the Dayton Accords, and all those who were present during the signing of the Paris Agreement...

See also, T.22872 (19 June 2003); T.34645-34646 (16 Dec 2004); T.48949-48950 (27 Feb 2006).

¹² Milošević Contempt Decision, para.12 (finding that the disclosure of certain categories of confidential information "could have an impact on the judicial proceedings", but that in the circumstances it did not amount to an interference with the Tribunal's administration of justice).

¹³ Even though the ICTY Prosecution pointed this out to Mr. Karadžić in its response to his initial Rule 77 motion before the ICTY (*Prosecutor v. Radovan Karadžić*, Case No.IT-95-5/18-T, Request for Appointment of Special Chamber, 27 September 2013; *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-T, Request for Appointment of Special Chamber, 27 September 2013), he has chosen to re-file the Request and Annex A (the Cable) before the MICT publicly. Mr. Milošević's witness list remains a confidential filing.


¹⁴ In this regard, as the Appeals Chamber has made clear in judgements cited by Mr. Karadžić (Requests, para.9, fn.3) the fact that information protected by a Chamber order may have been disclosed by another party does not mean that this information is no longer protected, and subsequent violations of that order may still constitute contempt: *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgment, 15 March 2007, para.30; *Prosecutor v. Hartmann*, Case No.IT-02-54-R77.5-A, Judgment, 19 July 2011, paras.91-92.

constitutes contempt. It also undermines Mr. Karadžić's claim that his Request is motivated by a desire to protect the confidentiality of defence filings.¹⁵

III. Conclusion

9. For the reasons set forth above, there is no reason to believe that Ms. Del Ponte may be in contempt of the Tribunal within the meaning of Rule 90(C) and therefore no contempt investigation is warranted. If a Single Judge reaches the opposite conclusion, and decides to initiate an investigation, that investigation must necessarily encompass the conduct of Mr. Karadžić, his legal advisor and his Defence team in filing the Request and the Cable publicly.

Word Count: 1,691


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Dated this 14th day of November 2013
At The Hague, The Netherlands

¹⁵ Requests, para.10 ("If a prosecutor can disclose confidential information about defence witnesses with impunity, then Dr. Karadzic can have no confidence that his filings are protected.")