

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR98bis.1

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding  
Judge Patrick Robinson  
Judge Liu Daqun  
Judge Khalida Rachid Khan  
Judge Bakhtiyar Tuzmukhamedov

Registrar: Mr. John Hocking

Date: 2 April 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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REPLY RE: MOTION TO DISMISS APPEAL AND  
FOR APPOINTMENT OF AMICUS CURIAE PROSECUTOR

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The Office of the Prosecutor:  
Mr. Peter Kremer QC

The Accused:  
Radovan Karadzic

1. Dr. Radovan Karadzic has moved to dismiss the prosecution's appeal as a sanction for violation of its disclosure requirements, and for the appointment of an *amicus curiae* prosecutor to investigate whether the prosecution's disclosure violations and its certification that it had complied with its disclosure obligations constitute contempt of this Tribunal.

2. On 28 March 2013, there was filed the *Prosecution Response to Karadzic's Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor*.

3. Dr. Karadzic now replies.

4. The prosecution has conceded that its certification to this Chamber that "the Prosecutor has disclosed to the Accused all material under Rule 68(i) relating to Count 1 which has come into his actual knowledge..."<sup>1</sup> was not correct, in that it failed to disclose material relevant to Count One under Rule 68(i) which was in its possession at the time of the certification.<sup>2</sup>

5. Thus the only issue in dispute is the remedy.

6. The prosecution seeks to avoid the remedy of dismissal on the grounds that Dr. Karadzic has not been prejudiced by its violation. By citing to authorities where Chambers have declined to impose remedies for disclosure violations, the prosecution ignores the gravamen of its offence—that it made a certification to this Chamber which was not true.

7. The prosecution has cited no case in which the Appeals Chamber has required a showing of prejudice when a party makes a false certification to the Chamber. Indeed, the authorities are unanimous that no prejudice need be shown under such circumstances.<sup>3</sup>

8. Dr. Karadzic contends that dismissal of the appeal is an appropriate sanction given that the certification was untrue and that this was not an isolated incident, but the

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<sup>1</sup> *Corrigendum to Prosecution's Rule 98 bis Appeal Brief*

<sup>2</sup> *Response* at para 1 and fn 17

<sup>3</sup> *Prosecutor v Seselj*, No. IT-03-67-R77 2, *Judgement on Allegations of Contempt* (24 July 2009). *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009), *Prosecutor v Seselj*, No. IT-03-67-R77 3, *Judgement* (31 October 2011); *Prosecutor v Margetic*, No. IT-95-14-R77 6, *Judgement on Allegations of Contempt* (7 February 2007); *Prosecutor v Marjagic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006), *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007); *In the matter of Vojislav Seselj*, No. IT-03-67-R77.4, *Judgement* (28 June 2012)

latest in a series of at least 62 documented violations of the prosecution's disclosure obligations. Indeed, causing the prosecution to lose just one count of an eleven count indictment is a modest remedy.

9. The prosecution's use of the interests of the victims as a shield<sup>4</sup> is unworthy and unpersuasive. The interests of those same victims are being fully vindicated in the continuing prosecution of Dr. Karadzic for persecution, murder, extermination, forcible transfer, and deportation. No victim would want the prosecution to make false representations in order to obtain a conviction, nor would s/he expect a court to condone it.

10. Therefore, Dr. Karadzic respectfully contends that the prosecution's efforts to avoid the remedy of dismissal should be rejected.

11. The prosecution also seeks to avoid the remedy of the appointment of an *amicus curiae* prosecutor to investigate its false certification.

12. If the prosecution has acted in good faith, as it claims, it has nothing to fear from an investigation. Where a *prima facie* case has been made out that an inaccurate certification was made before the Appeals Chamber, it is only right that an independent investigation be undertaken to determine the circumstances, including the *mens rea* of the prosecution.

13. The prosecution makes several factual assertions in its *Response*: that the non-disclosure was inadvertent, that it resulted from the report of investigation not being entered in the prosecution's database, and that the error was discovered by the Senior Trial Attorney who made the certification before the Appeals Chamber and who had participated in the interview whose report had not been disclosed.<sup>5</sup> These facts are impossible to verify absent an investigation.

14. Dr. Karadzic notes that on several occasions over the past two and one-half years, the prosecution has offered the same excuse for violating its disclosure obligations.

15. In its *Prosecution's Response to Accused's Sixth Motion for Finding of Disclosure Violations and for Remedial Measures* (12 July 2010), it acknowledged the failure to disclose two proofing notes of prosecution witnesses and stated that "the

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<sup>4</sup> *Response* at para 16

<sup>5</sup> *Response* at paras. 5,18

prosecution has assigned a person to supplement the existing inter-case communication regarding witness disclosure by following up regarding the production of proofing notes (including their prompt assignment of evidence reference numbers)<sup>6</sup>

16. The prosecution reported in its *Prosecution's Submission of Report Concerning Additional Measures Related to Rule 66(A)(11) Disclosure* (20 August 2010), that this measure has been completed.<sup>7</sup>

17. In its *Prosecution's Response to Karadzic's Forty-Eighth Motion for Finding of Disclosure Violation and Sanctions* (16 May 2011), the prosecution said that its failure to disclose three interview reports were due to the fact that the reports had not been entered into its database, but were contained in the prosecution's internal computer network.

18. In its *Prosecution's Response to Karadzic's Forty-Ninth Motion for Finding of Disclosure Violation and Motion for Seventh Suspension of Proceedings* (8 June 2011), the prosecution said that "the transcript of the interview with General Vlado Lizdek was not properly entered into the Office of the Prosecutor's Evidence Unit when it was received in April 2001, due to human error. For this reason, the transcript did not appear in the Prosecution's systematic searches of the OTP's evidence collection."<sup>8</sup>

19. In its *Prosecution Response to Accused's Fifty-Sixth Motion for Finding of Disclosure Violation and for Sanctions* (18 August 2011), the prosecution explained that the proofing note of the witness had not been recorded in the disclosure log by another trial team and had therefore not been discovered.<sup>9</sup>

20. In its *Prosecution Response to Accused's Fifty-Sixth Motion for Finding of Disclosure Violation and for Sanctions* (7 September 2011), the prosecution explained that a transcript of the witness' testimony in another ICTY case had not been discovered because of "human error."<sup>10</sup>

21. The instant violation was not the first disclosure violation concerning General Vasiljevic. In its *Prosecution Response to Karadzic's Seventy-First Motion for Disclosure Violation* (15 May 2012), the prosecution conceded that it failed to timely

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<sup>6</sup> para 6

<sup>7</sup> para 6

<sup>8</sup> para. 4

<sup>9</sup> Confidential Appendix A, at para 1

<sup>10</sup> Confidential Appendix A, at para. 1

disclose a 2005 information report of an interview between one of its investigators and General Vasiljevic.<sup>11</sup> The prosecution never explained why its previous searches did not locate this material, stating only that it was discovered by another trial team within the Office of the Prosecutor.<sup>12</sup>

22. Given this pattern of non-disclosure, an investigation is warranted.

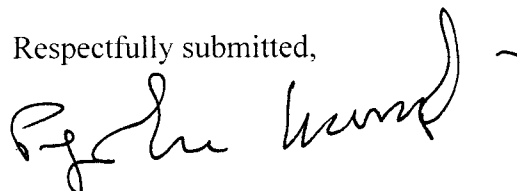
23. An *amicus curiae* prosecutor can conduct interviews with prosecution staff, review internal prosecution documents, and report the results of his/her investigation to the Appeals Chamber. The fact of such an investigation, and the accountability it would bring, would, in and of itself, have a salutary effect upon the prosecution and deter future violations in this case and others.

24. If the prosecution's position is accepted, there would be no investigation, no dismissal, and no remedy for its violation of its disclosure obligations and its inaccurate certification before the Appeals Chamber. In all of the cases in which the Appeals Chamber has warned the prosecution of consequences for disclosure violations, *Krstic*, *Kordic*, *Lukic and Mugenzi*<sup>13</sup>, the violations did not rise to the level of those in this case: a false certification and 61 other disclosure violations.

25. No remedy? If not now, when?

Word count: 1354

Respectfully submitted,



Radovan Karadzic

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<sup>11</sup> para 3

<sup>12</sup> Annex A to *Seventy First Disclosure Violation Motion*

<sup>13</sup> See *Motion to Dismiss* at paras. 20-24