

**UNITED
NATIONS**

International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No. IT-95-5/18-
AR98bis.1
Date: 28 March 2013

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S MOTION TO
DISMISS APPEAL AND FOR APPOINTMENT OF *AMICUS
CURIAE* PROSECUTOR**

The Office of the Prosecutor:

Mr. Peter Kremer QC

The Accused:

Mr. Radovan Karadžić

Standby Counsel:

Mr. Richard Harvey

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

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v.

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**PROSECUTION RESPONSE TO KARADŽIĆ'S MOTION TO DISMISS
APPEAL AND FOR APPOINTMENT OF *AMICUS CURIAE* PROSECUTOR**

I. OVERVIEW

1. The Accused's Motion, comprising two requests, should be dismissed. The Prosecution sincerely regrets the disclosure oversight that gave rise to the Motion ("Late Disclosure"), which it treats seriously and has already taken measures to address.¹ But by requesting summary dismissal ("Request for Dismissal") of the Prosecution's appeal against the Judgement of Acquittal in relation to Count 1 ("Appeal"),² the Accused seeks to obtain from the Appeals Chamber a remedy for the same disclosure violation which the Trial Chamber recently found required none.³ Given the lack of prejudice at trial or in the context of this Appeal, the Accused is not entitled to any form of relief, let alone the Appeal's summary dismissal. In requesting a contempt investigation supervised by the Appeals Chamber ("Request for Investigation")⁴ for that same disclosure violation, the Accused shows neither reasons to believe contempt has been committed nor that the Appeals Chamber should order such investigation.

¹ *E.g.* Disclosure Report 2013, para.12; 19 March 2013: T.35542-35543, 35545.

² *See* Notice of Appeal; Prosecution Brief.

³ 78th Decision. The Accused does not consider the fact that the Trial Chamber found that the Prosecution had violated its disclosure obligations and granted his motion in part to amount to any remedy (Motion, para.15; 78th Decision, para.25(i)). *See further* 37th-42nd Decision, Partially Dissenting Opinion of Judge Kwon.

⁴ *See* Rule 77.

II. THE APPEAL SHOULD BE CONSIDERED ON ITS MERITS

2. The Appeal's summary dismissal is neither justified nor appropriate.⁵ Since the Accused has suffered no prejudice, as explained in detail below, there is no harm requiring remedy. If, on the contrary, the Appeals Chamber were to find prejudice, then summary dismissal is nevertheless disproportionate and misdirected as a form of relief.

A. The Accused has not been prejudiced, either in the Appeal or at trial

3. Insofar as the Request for Dismissal is framed by the Accused as the requested remedy for the Late Disclosure,⁶ it should be dismissed by the Appeals Chamber. The Accused has suffered no prejudice, either in this Appeal or at trial. The Rule 111 certification does not alter this fact. The Appeals Chamber must be satisfied that a disclosure violation has caused prejudice before it will consider whether remedy is appropriate.⁷

4. The circumstances of the Late Disclosure have already been litigated before the *Karadžić* Trial Chamber.⁸ To assist the Appeals Chamber, however, they are set out again here.

5. On 18 February 2013, under Rules 66(A)(ii) and 68, the Prosecution disclosed to the Accused an information report from an April 2009 interview with Defence witness General Vasiljević ("the Document"). This late disclosure occurred due to an inadvertent failure to enter the Document into the Prosecution evidence collection (in accordance with the standard procedure) at the time it was created. This failure prevented both its disclosure (again in accordance with the standard procedure) and its subsequent detection in the Prosecution's electronic searches. The oversight was discovered, investigated and remedied through the Senior Trial Attorney's personal efforts in February 2013.⁹

6. The Trial Chamber agreed that the Prosecution had violated its disclosure obligations¹⁰ (as had been conceded¹¹) but found that the Accused "was not

⁵ *Contra* Motion, paras.17, 27.

⁶ *See e.g.* Motion, paras.17, 27.

⁷ *See e.g.* *Lukić* AD, para.15; *Bralo* AD, para.31. *Contra* Motion, para.32 (dismissing the requirement to show prejudice as an "oft-invoked excuse").

⁸ *See generally* 78th Decision.

⁹ 78th Response, para.2; 19 March 2013: T.35545.

¹⁰ 78th Decision, para.20.

prejudiced by the late disclosure.”¹² It therefore declined to grant the remedies he sought.¹³ The Accused did not seek certification to appeal.

1. The Accused is not prejudiced for the purpose of the Appeal

7. The Motion essentially argues the same material circumstances as those put before the Trial Chamber one month ago, paraphrasing much of the trial motion filed by the Accused.¹⁴ The Accused has made limited adjustments to highlight the fact that the Document relates to Zvornik,¹⁵ one of the municipalities in which the Prosecution alleges genocide took place. Yet the fact that the Document may factually “implicate[] Count 1”¹⁶ is insufficient to demonstrate that the Accused has been prejudiced in the context of the Appeal, even if the Document falls within the scope of the Rule 111 certification.¹⁷ As addressed below, the Appeals Chamber should conclude that the Accused is not entitled to any remedy because he shows no prejudice.

8. The Accused fails to demonstrate that he has suffered any prejudice from the Late Disclosure specifically for the purpose of the Appeal. The Document is irrelevant to the Appeal and, in any event, the Accused already had substantially similar information in his possession.¹⁸

9. Since an appeal from a decision under Rule 98bis is concerned with the Prosecution evidence taken at its highest¹⁹—and General Vasiljević was not called as a Prosecution witness²⁰—the Document is irrelevant. Even assuming that the Accused could somehow have used the Document to elicit evidence favourable to him from

¹¹ 78th Response, para.1.

¹² 78th Decision, para.21.

¹³ 78th Decision, para.22 (declining to grant the Accused’s request for access to the Prosecution evidence collection and the temporary suspension of his trial). The Trial Chamber did require, *proprio motu*, further explanations from the Prosecution of the circumstances of the violation: 78th Decision, para.23.

¹⁴ Compare Motion, paras.9-14, with 78th Motion, paras.2-7.

¹⁵ Compare Motion, para.12, with 78th Motion, para.5 (focusing more specifically on Zvornik).

¹⁶ Motion, para.16.

¹⁷ The Prosecution accepts that the Document falls within the scope of the applicable Rule 111 certification, having regard to the Appeals Chamber’s direction: Decision on Motion to Strike, para.9 (“the Prosecution was required to include a Declaration [...] in relation to evidence concerning Count 1 of the Indictment”).

¹⁸ See *Lukić* AD, para.16 (the Prosecution may be relieved of its Rule 68 obligation “if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation”).

¹⁹ See *Jelisić* AJ, para.55; Prosecution Brief, para.9.

other Prosecution witnesses, it would still have been irrelevant to the Trial Chamber's assessment under Rule 98*bis* and therefore to the instant Appeal.²¹

10. In any event, as the Trial Chamber found "in light of other documents which had already been disclosed to the Accused",²² the Document does not contain "any significant new information that was not already contained in [that] material".²³

2. The Accused is not prejudiced for the purpose of the ongoing trial

11. To the extent that the Accused fails to show prejudice directly relevant to the Appeal, the only other context to which prejudice could attach is his trial. However, the Accused cannot use the Prosecution's Rule 111 certification as a second opportunity to litigate matters already adjudicated. The purpose of the Rule 111 certification is to "ensure the effectiveness of [Rule 68] in appeal proceedings"²⁴ by requiring the Prosecution to satisfy itself in good faith that disclosure obligations have been met. The fact that a disclosure violation comes to light after a Rule 111 certification has been made does not relieve the Accused of the obligation to show prejudice for that violation. The *Karadžić* Trial Chamber already addressed the Late Disclosure, found the Accused had not suffered prejudice as a result of it and concluded that it did not warrant any remedy. The Trial Chamber's decision is not certified for appeal. By invoking the Rule 111 certification, the Accused seeks to have the Appeals Chamber grant him a remedy where the Trial Chamber declined to do so in identical material circumstances. He should not be permitted to embark upon this type of "back-door" review of a Trial Chamber decision with which he disagrees.

²⁰ See 78th Decision, para.20.

²¹ See *Jelisić* AJ, para.55 ("the Trial Chamber was required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at it highest and could not pick and choose among parts of that evidence"). See also Prosecution Brief, para.9. In any event, Rule 98*bis* is "concerned with counts and not specific charges": Unproven Allegations Decision, para.3 (referring *inter alia* to the 2004 amendment of Rule 98*bis*). Apart from Zvornik, there are six more municipalities specifically identified in relation to Count 1: see Prosecution Brief, fn.3.

²² 78th Decision, para.21 (referring to 78th Response, Annex A). For the similarity between the 78th Motion and the instant Motion, see fn.14 above.

²³ 78th Decision, para.21. See 78th Response, para.3, fns.10, 12, and Annex A (enumerating 25 relevant documents previously disclosed to the Accused, of which at least 7 provided substantially similar information to that complained of in the 78th Motion).

²⁴ *Bralo* AD, para.32 (*mutatis mutandis*, discussing Rule 112).

12. The Accused also mischaracterises the history of disclosure in his trial²⁵ in order to urge that, “if there is ever an occasion for the Appeals Chamber to act, this is it.”²⁶ Far from this history compelling the Appeals Chamber’s intervention, it demonstrates instead that the Trial Chamber is actively managing disclosure.²⁷ Despite the numerous disclosure violation motions filed by the Accused and decided by the Trial Chamber, the Accused has not been prejudiced on a single occasion, whether considered individually or cumulatively.²⁸ The Trial Chamber has urged him to direct his efforts to any violation for which he could demonstrate prejudice.²⁹ Once again he has failed to do so.

B. Summary dismissal is not an appropriate measure in this case

13. Even if the Appeals Chamber finds that the Accused was prejudiced, ordering the Appeal’s summary dismissal would be inappropriate as a remedy or a sanction.

14. First, under the Rules and applicable case-law, the proper avenue to remedy any prejudice arising from late disclosure on appeal is “through the application of Rule 115 of the Rules to establish whether the material is admissible as additional evidence on appeal”.³⁰ The Accused should not be permitted to circumvent this practice, which he fails even to address.

15. Second, summary dismissal is inappropriate because dismissing the Appeal is disproportionate to a disclosure violation which caused no prejudice and has already been adjudicated. By contrast, dismissing the Appeal could have serious implications for the victims and for the objective of establishing full accountability for the crimes committed in certain municipalities of Bosnia-Herzegovina in 1992, namely the killing of thousands, the infliction of serious bodily and mental harm on countless

²⁵ Motion, paras.2-5, 25. The Accused’s history contains mischaracterizations in at least four respects: *see* New Trial Response, fn.10.

²⁶ Motion, para.25. Also, the Appeals Chamber has not lacked “opportunity to put into practice its pronouncements on the importance of disclosure” (Motion, para.16). The Accused mistakes “disapproving words” (Motion, para.26) for failure “to actually do something” (Motion, para.34). To the contrary, the Appeals Chamber has consistently upheld and elaborated the law on disclosure, and has corrected the Prosecution where necessary: *e.g.* Motion, para.19 (citing *inter alia* Appeals Chamber decisions in the *Krstić*, *Kordić* and *Lukić* cases).

²⁷ *See* New Trial Response, para.10.

²⁸ *See* New Trial Decision, paras.14, 16-17; 17 January 2013: T.32151-32152; 29 January 2013: T.32882; 78th Decision, paras.19, 21. *Cf.* Motion, para.5. The Trial Chamber has, moreover, imposed measures as necessary to “avert any potential prejudice”: *e.g.* New Trial Decision, paras.15-16.

²⁹ 78th Decision, para.24.

more, and the imposition of conditions of life calculated to bring about the physical destruction of Bosnian Muslims and Bosnian Croats in those municipalities.³¹

16. Third, purely as a sanction, summary dismissal is misdirected because it penalises not only the Prosecution but those whom the Prosecution represents: the victims and the international community.³²

III. THE REQUEST TO APPOINT AN *AMICUS CURIAE* PROSECUTOR SHOULD BE DISMISSED

17. The Accused's Request for Investigation is manifestly unfounded and procedurally flawed.

A. The Request for Investigation is manifestly unfounded

18. In the Motion, the Accused fails to show any "reason to believe"³³ that a knowing or wilful interference with the administration of justice³⁴ took place regarding either the Rule 111 certification or the Late Disclosure. Contrary to the Accused's submission, the Rule 111 certification was not known to be "untrue" at the time it was made.³⁵ In making the certification,³⁶ the Senior Trial Attorney relied on an extensive, thorough and significantly resourced system designed to meet the Prosecution's disclosure obligations in the challenging circumstances of the *Karadžić* case.³⁷ The fact that one document had not been disclosed—which the Senior Trial Attorney herself only had cause to discover, investigate and then correct months later³⁸—does not indicate any conduct amounting to contempt. Indeed, her conduct shows the very opposite.

³⁰ *Lukić* AD, para.17. *See also* para.22. *See further* Decision on Motion to Strike, para.8 (characterising the Appeal as an "appeal against a final judgement").

³¹ *See generally* Prosecution Brief.

³² *E.g. Prlić* AD, para.14; *Aleksovski* AD, para.25 (considering that "the Prosecution acts on behalf of and in the interest of the community, including the victims of the offences charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community)").

³³ Rule 77(C).

³⁴ Rule 77(A).

³⁵ *Contra* Motion, para.31.

³⁶ Corrigendum (dated 19 November 2012).

³⁷ 19 March 2013: T.35544, 35552. *See further* Disclosure Report 2011, paras.17-32, 34-39, 41, 43-44 (providing a general explanation of Prosecution systems for identifying and recording discloseable material).

³⁸ 19 March 2013: T.35544-35545.

19. The Accused also fails to demonstrate any basis for his Request for Investigation in relation to the Prosecution discharging its disclosure obligations in his case more generally. For example, despite the Accused's recent past request for the Trial Chamber to issue a Rule 46 warning to the Prosecution, the Trial Chamber found that the Prosecution acted in good faith.³⁹ Not only have similar findings been made on various previous occasions,⁴⁰ but even the Accused has acknowledged the good faith efforts of the Prosecution.⁴¹ Therefore, whether viewed in isolation or in the context of the history of disclosure in this case, the facts surrounding the Late Disclosure or the Rule 111 certification show no reasons to believe any knowing or wilful interference with the administration of justice.⁴²

B. The Request for Investigation does not comply with the Contempt Practice Direction

20. In any event, the Request not only lacks the necessary specificity for the Appeals Chamber to frame any investigation appropriately,⁴³ it is so vague that the Prosecution cannot tell with certainty what the scope of the investigation sought is meant to be. If viewed narrowly (*i.e.*, in the context of the Document and the Appeal alone),⁴⁴ the Accused's vague request is plainly unfounded;⁴⁵ if viewed broadly (*i.e.*,

³⁹ 74th Decision, para.12 (dismissing the Accused's request for a Rule 46 warning, the Trial Chamber was "satisfied that the Prosecution acted in good faith").

⁴⁰ *E.g.* 37th-42nd Decision, para.37 ("the Chamber is satisfied that the Prosecution acted in good faith"); 17th*bis* Decision, para.25 (referring to "the good faith demonstrated by the Prosecution"); 22nd/24th/26th Decision, para.37 ("the Prosecution has acted in good faith"); 17th Decision, para.21 ("the Chamber is satisfied that the Prosecution has acted in good faith").

⁴¹ *E.g.* 13 September 2010: T.6590 (Mr. Robinson describing the Prosecution approach to disclosure, notwithstanding the violations: "they are very cooperative with us, they do the best they can at addressing our requests, and we appreciate that"); 3rd-6th Decision, para.1 ("The Accused acknowledges [...] the good faith shown by the Prosecution"); 22 April 2010: T.1452 (Mr. Robinson: "I understand that it's a very difficult process of disclosure for the Prosecution, given the number of documents, and we've said repeatedly that they've done a very good job of trying to meet their disclosure obligations"). *See also* 3 September 2010: T.6123-6124 (Mr. Tieger for the Prosecution: "The Prosecution takes all of its disclosure obligations very seriously [...] I think the Defence is well aware of the fact that the Prosecution has been responsive to every effort for collaborative assistance. We have, I'm sure Mr. Robinson will confirm this, bent over backwards to assist the Defence where we could, where there was no requirement to do so. Mr. Robinson is aware that every good-faith effort is being made and has been made by the Prosecution").

⁴² *Contra* Motion, para.31.

⁴³ *See generally* Contempt PD, *especially* paras.4-11. This requirement of specificity also explains why such applications should be made confidentially: Contempt PD, para.5. Although the Prosecution has chosen to respond publicly to the Motion, it requests the Appeals Chamber to issue its decision confidentially (together with reclassifying the Motion and this response) should the Request be granted in whole or in part. *See* Contempt PD, paras.7-8.

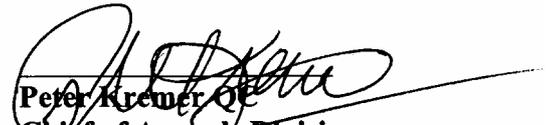
⁴⁴ Motion, paras.31 (alleging that the scope of the investigation pertains to the "Prosecutor and/or members of his office"), 33 (requesting investigation of "the violation of disclosure and inaccurate certification of compliance filed with the Appeals Chamber in this case").

to mean the entire history of trial disclosure in this case), it is impermissibly open-ended and brought in the wrong forum.⁴⁶

IV. CONCLUSION

21. For the reasons stated above, the Motion should be dismissed in its entirety.

Word Count: 2,827



Peter Kremer QC
Chief of Appeals Division

Dated this 28th day of March 2013
At The Hague, The Netherlands

⁴⁵ See paras.5, 18 above.

⁴⁶ See Contempt PD, para.5 (requiring a request for an investigation to be made “before the Chamber in which the contempt allegedly occurred”).

Glossary

Pleadings, Orders, Decisions etc. from Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR98bis.1

Abbreviation used in Prosecution Response	Full citation
Corrigendum	Corrigendum to Prosecution Rule 98bis Appeal Brief, 19 November 2012
Decision on Motion to Strike	Decision on Motion to Strike Prosecution's Brief, 9 November 2012
Motion	Motion to Dismiss Appeal and for Appointment of <i>Amicus Curiae</i> Prosecutor, 18 March 2013
Notice of Appeal	Prosecution Notice of Appeal of Judgement of Acquittal under Rule 98bis, 11 July 2012
Prosecution Brief	Notice of Filing of Public Redacted Version of Prosecution Rule 98bis Appeal Brief, 25 September 2012

Pleadings, Orders, Decisions etc. from Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T

Abbreviation used in Prosecution Response	Full citation
3 rd -6 th Decision	Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures, 20 July 2010
17 th Decision	Decision on Accused's Seventeenth Motion for Finding of Disclosure Violation and for Remedial Measures, 29 September 2010
17 th <i>bis</i> Decision	Decision on Accused's Seventeenth <i>bis</i> and Twenty-Eighth Disclosure Violation Motions, 16 December 2010
22 nd /24 th /26 th Decision	Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010
37 th -42 nd Decision	Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011
74 th Decision	Decision on Accused's Seventy-Fourth Disclosure Violation Motion, 6 November 2012
78 th Decision	Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013

Abbreviation used in Prosecution Response	Full citation
78 th Motion	78 th Motion for Finding of Disclosure Violation and for Suspension of the Trial, 20 February 2013
78 th Response	Prosecution Response to Karadžić's 78 th Motion for Finding of Disclosure Violation and for Suspension of the Trial, 1 March 2013
Disclosure Report 2011	Prosecution's Disclosure Report, 27 July 2011 (public with confidential appendices)
Disclosure Report 2013	Prosecution Periodic Disclosure Report with Public Appendix A and Confidential Annex B, 15 March 2013
New Trial Decision	Decision on Accused's Motion for New Trial for Disclosure Violations, 3 September 2012
New Trial Response	Prosecution Response to Motion for New Trial for Disclosure Violations, 27 August 2012
Unproven Allegations Decision	Decision on Accused's Motion for Order to Withdraw Unproven Allegations, 23 May 2012

Other ICTY authorities

Abbreviation used in Prosecution Response	Full citation
<i>Aleksovski AD</i>	<i>Prosecutor v. Zlatko Aleksovski</i> , Case No.IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999
<i>Bralo AD</i>	<i>Prosecutor v. Miroslav Bralo</i> , Case No.IT-95-17-A, Decision on Motions for Access to <i>Ex Parte</i> Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006
<i>Lukić AD</i>	<i>Prosecutor v. Milan Lukić and Sredoje Lukić</i> , Case No.IT-98-32/1-A, Decision on Milan Lukić's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011
<i>Jelisić AJ</i>	<i>Prosecutor v. Goran Jelisić</i> , Case No.IT-95-10-A, Judgement, 5 July 2001
<i>Prlić AD</i>	<i>Prosecutor v. Jadranko Prlić et al</i> , Case No.IT-04-74-AR73.4, Decision on Prosecution Appeal concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007

General Sources

Abbreviation used in Prosecution Response	Full citation
Contempt PD	Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, IT/227, 6 May 2004

Other Abbreviations

Abbreviation used in Prosecution Response	Full citation
fn.	footnote
para.	paragraph
paras	paragraphs
p.	page
pp.	pages
Rules	Rules of Procedure and Evidence
T.	Trial Transcript