

**UNITED
NATIONS**

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

Case No. IT-95-5/18-PT
Date: 17 February 2009

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S MOTION FOR
DISCLOSURE OF RULE 68 MATERIAL**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

Case No. IT-95-5/18-PT

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION RESPONSE TO KARADŽIĆ'S MOTION FOR
DISCLOSURE OF RULE 68 MATERIAL**

1. The Prosecution objects to Karadžić's "Motion for Disclosure of Rule 68 Material" ("Motion").¹ As discussed below, the practice adopted by the Prosecution for the disclosure of Rule 68 material fully complies with the requirements of Rule 68 of the Rules of Procedure and Evidence of the Tribunal ("the Rules"). It does not prejudice Karadžić in any way. Contrary to Karadžić's submissions, the Prosecution cannot monitor the Defence's usage of the Electronic Disclosure System ("EDS"). In addition, burning the Rule 68 material on CD or DVD would not benefit the Defence, and would place an unnecessary burden on the Prosecution. Furthermore, it would render searches more time-consuming for the Defence.

A. *The Prosecution is conforming with its Rule 68 obligations and Appeals Chamber jurisprudence*

2. Karadžić seeks the disclosure of Rule 68 material on CD or DVD and submits that Rule 68 disclosure on the EDS results in a breach of the Prosecution's Rule 68 obligations.²

3. To fulfil its obligations under Rule 68 of the Rules, the Prosecution discloses Rule 68 material to Karadžić and his legal associates via a specific Rule 68 folder³ on

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Motion for Disclosure of Rule 68 Material, 6 February 2009.

² Motion, paras.1, 4, 8.

the EDS to which only they have access.⁴ This folder is distinct from the general collection folder⁵ on the EDS to which all Defence have access. The Prosecution provides the Registry with the materials which are to be placed in Karadžić's Rule 68 folder, and the Registry (the administrator of the EDS), uploads the materials into the folder. The Prosecution then provides Karadžić with written notice of the materials added to the specific Rule 68 folder. Depending on the number of documents uploaded, the Prosecution either lists the added documents in the written notice or provides a CD containing an electronic index of the added documents. As of 16 February 2009, the Prosecution has disclosed via the EDS Rule 68 folder 13 batches totalling over 9,000 documents and over 90,000 pages.

4. Karadžić claims that the Prosecution's practice contravenes Appeals Chamber jurisprudence.⁶ However, far from contravening Appeals Chamber jurisprudence, the Prosecution's practice is in conformity with it. In *Karemera*, the Appeals Chamber considered that just because the Prosecution has placed a particular piece of material on the EDS, it has not necessarily made that material reasonably accessible to an accused.⁷ It then noted: "[i]t might be helpful if the Prosecution either separates a special file for Rule 68 material or draws the attention of the Defence to such material in writing and permanently updates the special file or the written notice."⁸ This is the exact practice adopted by the Prosecution in this case.

5. Karadžić also refers to a decision of the Trial Chamber in the *Lukić* case.⁹ However, that decision dealt with a completely different situation from the one presented here. The Trial Chamber in *Lukić* held that the Prosecution should have completed its Rule 66(A)(ii) disclosure in relation to a witness as soon as the trial date in that case had been announced, and that the Prosecution's placement on the EDS of interview notes amounting to a statement of the witness was insufficient to satisfy the

³ Karadžić's Rule 68 folder is titled "EDS2_IT-95-5-18_Karadzic_R68."

⁴ In addition, there is a folder titled "EDS2_IT-95-5-18_Karadzic" into which other material relevant to the Karadžić case may be placed.

⁵ The General Collection folder is titled "EDS2_General_Collection."

⁶ Motion, para.4.

⁷ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("Karemera Appeal Decision"), para.15. This Decision referred to the production of Rule 68 materials via the General Collection folder on the EDS.

⁸ Karemera Appeal Decision, para. 15.

⁹ Motion, para.5.

requirements of Rule 66(A)(ii) of the Rules.¹⁰ In this case, the Prosecution is placing Rule 68 material in a specific Rule 68 folder for Karadžić, in compliance with appellate jurisprudence on the issue.

B. Access to the EDS - Defence search history is unavailable to the Prosecution

6. Karadžić's submissions in paragraph 6 of the Motion are unclear. He appears to take issue with the degree of access to the EDS accorded members of his team. The Prosecution, however, is not required to make the material in question available to the whole Defence team. Should Karadžić seek access for other members of his team, he should make an application to the Office of Legal Aid and Detention within the Registry; as noted above, the Registry administers the EDS. The Prosecution would not oppose a request for further access to the EDS for a reasonable number of Karadžić's team members, subject to those members obtaining the required security clearance.

7. Karadžić misrepresents what the Prosecution can access on the EDS.¹¹ The Prosecution has verified the following information with the Chief of ITSS. The EDS was specifically designed to make monitoring by the OTP impossible. The EDS is operated by the Registry, not the OTP, and the OTP does not have access to any usage information. The OTP is limited to giving instructions to the Registry as to what material goes onto or is removed from the EDS, and any instructions from the OTP to the Registry to pass on usage information would be rejected. Thus, the Prosecution cannot view or monitor the Defence's search history.

C. Disclosure via EDS is a fully searchable electronic process

8. In addition, burning Rule 68 material onto searchable CDs or DVDs would add to the Defence's burden and be more labour-intensive, in that Karadžić would have to conduct the same search on each of the CDs or DVDs. By contrast, a search of all indices in the EDS general collection only has to be conducted once.

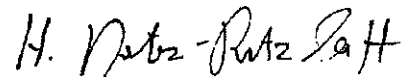
¹⁰ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukić's Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 Nov. 2008, paras. 15-17 ("Lukić Decision"). The Prosecution in that case submitted that the interview notes were placed on the EDS on 26 July 2005 and were available to the Defence from the time they were informed of the identity of the witness, that is, on 4 July 2008. This was five days prior to the start of trial.

¹¹ Motion, para.7.

9. Thus, while the Defence would not benefit from burning the Rule 68 material onto CD and DVD, it would place an unnecessary burden on the Prosecution. Whereas disclosure via EDS is a fully electronic process, disclosure via CD or DVD would require the Prosecution to burn the material onto CDs or DVDs and run a search capability over each of the CDs or DVDs, which is a more time-consuming process.

10. The Motion should be dismissed for the reasons set out above.

Word Count: 1270 words



Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 17th day of February 2009
At The Hague
The Netherlands