



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: 4 July 2013

Original: English

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

Decision of: 4 July 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON 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 APPEALS CHAMBER of the 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 (“Appeals Chamber” and “Tribunal”, respectively);

NOTING the oral judgement of acquittal on Count 1 of the Indictment¹ rendered by Trial Chamber III of the Tribunal (“Trial Chamber”), pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”), on 28 June 2012 in the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T (“Judgement of Acquittal”);²

NOTING the “Prosecution Rule 98*bis* Appeal Brief”, filed confidentially by the Office of the Prosecutor of the Tribunal (“Prosecution”) on 24 September 2012 (“Prosecution Brief”),³ in which the Prosecution appeals the Judgement of Acquittal;⁴

BEING SEISED OF the “Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor”, filed by Radovan Karadžić (“Karadžić”) on 18 March 2013 (“Motion”);

NOTING Karadžić’s submission that on 18 February 2013 the Prosecution disclosed for the first time information provided by Aleksandar Vasiljević on 8 April 2009 (“Witness Statement”) in violation of its disclosure obligations;⁵

NOTING Karadžić’s contention that the Witness Statement pertains to Count 1 of the Indictment, contains “exculpatory information”, and should have been disclosed pursuant to Rule 66(A)(ii) and Rule 68(i) of the Rules;⁶

NOTING that, according to Karadžić, this disclosure violation contradicts the Prosecution’s declaration filed on 19 November 2012 in its appeal against the Judgement of Acquittal pursuant to Rule 111(B) of the Rules, that it had “disclosed to the Accused all material under Rule 68(i) relating to Count 1” which had come into its actual knowledge (“Rule 111(B) Declaration”);⁷

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution’s Marked-Up Indictment, 19 October 2009, Appendix A, paras 36-40.

² T. 28 June 2012 p. 28774. *See also* T. 28 June 2012 pp. 28762-28770.

³ A public version of the Prosecution Brief was filed on 25 September 2012. *See also* Prosecution Notice of Appeal of Judgement of Acquittal under Rule 98*bis*, 11 July 2012.

⁴ *See* Prosecution Brief, paras 1, 116.

⁵ Motion, paras 9-10. *See* Motion, para. 11.

⁶ Motion, para. 11. *See also* Motion, paras 10-16.

⁷ Motion, para. 8, *referring to* Corrigendum to Prosecution Rule 98*bis* Appeal Brief, 19 November 2012. *See also* Motion, paras 6-7, 30.

NOTING Karadžić's submission that this disclosure violation was part of a broader pattern of the Prosecution's violations of its disclosure obligations in his case;⁸

NOTING FURTHER Karadžić's request that the Appeals Chamber: (i) dismiss the Prosecution Brief as a sanction for the Prosecution's violation of its disclosure obligations ("Dismissal Request");⁹ and (ii) appoint an *amicus curiae* prosecutor pursuant to Rule 77(C) of the Rules to investigate whether the Prosecution's disclosure violations and its "untrue" Rule 111(B) Declaration constitute contempt of the Tribunal ("Investigation Request");¹⁰

NOTING the "Prosecution Response to Karadžić's Motion to Dismiss Appeal and for Appointment of *Amicus Curiae* Prosecutor", filed by the Prosecution on 28 March 2013 ("Response"), in which it opposes the Motion¹¹ and submits that its late disclosure of the Witness Statement was a regrettable "oversight";¹²

NOTING the "Supplemental Submission in Support of Motion to Dismiss Appeal and for Appointment of *Amicus Curiae* Prosecutor", filed with confidential annexes by Karadžić on 10 June 2013 ("Supplemental Submission");

NOTING Karadžić's submission that the Prosecution violated its disclosure obligations, as required pursuant to Rule 68(i) of the Rules, by disclosing for the first time on 6 June 2013 exculpatory information provided in 2003 by a crime technician for the Banja Luka police ("Notes");¹³

NOTING Karadžić's request that the Appeals Chamber consider the Supplemental Submission when deciding whether "to dismiss [the Prosecution Brief] or appoint an *amicus curiae* prosecutor" as requested in the Motion;¹⁴

NOTING the "Prosecution Response to Karadžić's Supplemental Submission in Support of Motion to Dismiss Appeal and for Appointment of *Amicus Curiae* Prosecutor", filed by the Prosecution on

⁸ Motion, para 31. *See also* Motion, paras 3-5, 25-26, 34; Supplemental Submission, para 8

⁹ Motion, paras 1, 17-19, 25-28

¹⁰ Motion, paras 1, 29-33.

¹¹ Response, paras 1, 3, 21.

¹² Response, para. 1. *See also* Response, para. 5. The Prosecution also responds that the Trial Chamber has already adjudicated this matter, that Karadžić has not been prejudiced by the late disclosure, and that the Investigation Request is unfounded and procedurally flawed. Response, paras 1-8, 11-12, 17-20

¹³ Supplemental Submission, paras 3-6. The Appeals Chamber notes that Karadžić has filed the Supplemental Submission without obtaining prior leave. As the Prosecution has responded to the Supplemental Submission and would not suffer any prejudice should it be considered at this stage, the Appeals Chamber finds that it is in the interest of expeditiousness to address these submissions herein.

¹⁴ Supplemental Submission, para 8.

20 June 2013 (“Response to Supplemental Submission”), in which it opposes the Supplemental Submission and responds that Karadžić fails to show any prejudice;¹⁵

NOTING that, in both his replies to the Response and Response to Supplemental Submission, Karadžić reiterates his request that the Prosecution Brief be dismissed and that an *amicus curiae* prosecutor be appointed to investigate the disclosure violations;¹⁶

RECALLING Rule 111(B) of the Rules, which provides that “[w]here the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant’s brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief”;

UNDERSCORING that the Prosecution’s disclosure obligations are of paramount importance;¹⁷

RECALLING, however, that a judgement of acquittal entered at the Rule 98 *bis* stage concerns evidence adduced at trial by the *Prosecution*, taken at its highest;¹⁸

CONSIDERING that as neither the Notes nor the Witness Statement were a part of the Prosecution’s case at trial,¹⁹ the Prosecution’s violation of Rule 111(B) of the Rules does not involve matters material to the appeal against the Judgement of Acquittal, the Dismissal Request would constitute an excessively punitive remedy;

RECALLING that Rule 77 of the Rules authorizes the Tribunal to “hold in contempt those who knowingly and wilfully interfere with its administration of justice”²⁰ and allows the Chamber to direct the Registrar to appoint an *amicus curiae* to investigate the matter if the Prosecution is perceived to have a conflict of interest with respect to the relevant conduct;²¹

¹⁵ Response to Supplemental Submission, paras 1-7. The Prosecution also responds that the Trial Chamber is “actively managing the disclosure issues in the case against the Accused”. Response to Supplemental Submission, para. 6.

¹⁶ See Reply Re: Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor, 2 April 2013; See also Reply Re: Supplemental Submission in Support of Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor, 24 June 2013, para. 10.

¹⁷ See, e.g., *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 14 December 2004, para. 183; *Prosecutor v. Milan Lukić and Sredoje Lukić*, 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 (confidential but made public pursuant to the Appeals Chamber’s order of 11 May 2012), para. 23.

¹⁸ See Rule 98 *bis* of the Rules. See also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 434; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, paras 37, 55.

¹⁹ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013 (“Decision of 11 March 2013”), para. 20. The Appeals Chamber also notes that the material contained in the Witness Statement was not used by Karadžić when Aleksander Vasiljević testified on behalf of the Defence. Decision on 11 March 2013, para. 21. See also Response to Supplemental Submission, para. 4, n. 12.

²⁰ Rule 77(A) of the Rules.

²¹ Rule 77(C)(ii) of the Rules.

NOTING paragraph 5 of the Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, which provides that “[t]he request for an investigation shall be made *ex parte* and confidentially before the Chamber in which the contempt allegedly occurred”;²²

CONSIDERING the Decision of 11 March 2013, in which the Trial Chamber found, *inter alia*, that the Prosecution had violated its disclosure obligations for its late disclosure of the Witness Statement but that Karadžić was not prejudiced as a result;²³

RECALLING that pursuant to Rule 73(B) of the Rules “[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber”;²⁴

CONSIDERING that Karadžić did not seek certification to appeal the Decision of 11 March 2013 pursuant to Rule 73(B) of the Rules;

CONSIDERING further that litigation regarding the Notes is pending before the Trial Chamber, and that the Prosecution “regrets” the late disclosure of the Notes;²⁵

CONSIDERING that the allegations of contempt advanced by Karadžić²⁶ appear to be based on disclosure violations that occurred before the Trial Chamber²⁷ and that, consequently, per the Practice Direction, any request for a related contempt investigation should be filed before that Chamber;

CONSIDERING that the Investigation Request, while referencing the Prosecution’s inaccurate certification before the Appeals Chamber, is focused on disclosure violations that occurred before the Trial Chamber;²⁸

CONSIDERING that in these circumstances, the Investigation Request is best directed to the Trial Chamber;²⁹

HEREBY DENIES the Motion and the Supplemental Submission in their entirety.

²² IT/227, 6 May 2004 (“Practice Direction”).

²³ Decision of 11 March 2013, paras 20-21.

²⁴ The Appeals Chamber notes its holding that the Witness Statement is not relevant to the Prosecution’s appeal of the Judgement of Acquittal, thus it is not covered by any relevant certifications.

²⁵ See Response to Supplemental Submission, para. 1.

²⁶ See Motion, paras 4-5, 9-16, 29-33; Supplemental Submission, paras 2, 4-5, 7.


²⁷ See Decision of 11 March 2013, paras 2-7, 12-13. See also Motion, para. 15.

²⁸ See Motion, paras 4-5, 9-16, 29-33. See also *supra*, p. 3.

²⁹ See Practice Direction, para. 5.

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

Done this 4th day of July 2013,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]