



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-T

Date: 12 January 2012

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 12 January 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SIXTY-FIFTH DISCLOSURE VIOLATION MOTION

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL 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 (“Tribunal”) is seised of the Accused’s “Sixty-Fifth Motion for Finding of Disclosure Violation (November 2011)”, filed publicly with confidential annexes on 28 November 2011 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused argues that the Office of the Prosecutor (“Prosecution”) has violated Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in relation to the disclosure on 8 November 2011 of correspondence between the Prosecution and a State (“Correspondence”).¹ In the Accused’s submission, in the Correspondence, the Prosecution encouraged the State “not to repatriate a number of individuals and their families to Bosnia because of their expected testimony” as Prosecution witnesses.² He contends that the Correspondence pertains to six witnesses who have already testified in this case (“92 *ter* Witnesses”)³, seven 92 *bis* witnesses (“92 *bis* Witnesses”),⁴ and one witness who is yet to testify (together, “Witnesses”).⁵ He observes that the Chamber, in the Decision on Accused’s Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions filed on 22 November 2011 (“Consolidated Decision”), has already held that the Prosecution’s “failure to disclose this type of material as soon as practicable violates Rule 68”.⁶

2. The Accused requests a specific finding that the Prosecution has violated Rule 68 of the Rules by failing to disclose the Correspondence as soon as practicable.⁷ In addition as a further remedy he seeks the exclusion of the Witnesses’ testimony or, in the alternative, that each of the Witnesses be “called or recalled for cross examination so that the promises made to them, and the impact of those promises on their credibility, can be explored”.⁸

3. On 12 December 2011, the Prosecution filed the “Prosecution’s Response to Sixty-Fifth Motion for Finding of Disclosure Violation” with confidential annexes A and B (“Response”). The Prosecution seeks leave to exceed the word limit for responses by 4,128 words given the number of witnesses referred to in the Motion and the further information it sought to provide

¹ Motion, paras. 1–3.

² Motion, para. 2.

³ Motion, para. 4, referring to KDZ017, KDZ052, KDZ310, KDZ605, Nusret Sivac, and Ibro Osmanović.

⁴ Motion, para. 5, referring to KDZ010, KDZ023, KDZ038, KDZ054, KDZ092, KDZ303, and Nermin Karagić.

⁵ Motion, para. 6, referring to KDZ045.

⁶ Motion, para. 7.

⁷ Motion, para. 8.

⁸ Motion, paras. 9–10.

for the Witnesses in the annexes to the Response.⁹ Guided by the Consolidated Decision, the Prosecution acknowledges that the majority of the Correspondence, relating to 12 of the 14 Witnesses, falls within the scope of Rule 68 given the similarities with material which the Chamber recently found may affect the credibility of witnesses.¹⁰ In any event the Prosecution opposes the granting of any relief given the failure by the Accused to show or even assert prejudice with respect to the disclosure of the Correspondence.¹¹

4. More specifically, the Prosecution contends that the material relating to Osmanović and KDZ038 does not fall within the ambit of Rule 68.¹² With respect to Osmanović, the Prosecution observes that the disclosed material “only confirms the objective circumstance that he had testified in a trial before this Tribunal and was expected to do so again. It makes no representation or request to the addressee, and is no more than certification of a fact of public knowledge”.¹³ Given these circumstances the Prosecution submits that the Motion so far as it relates to Osmanović should be denied.¹⁴ The Prosecution observes that the document disclosed with respect to KDZ038, mentions the same family name but does not actually refer to KDZ038 or KDZ038’s immediate family.¹⁵ It also identifies three other documents which were mistakenly disclosed to the Accused as pertaining to Nusret Sivac and KDZ054 but which actually refer to other people with the same family name.¹⁶ The Prosecution acknowledges that the Correspondence contains other Rule 68 material which relates to Nusret Sivac and KDZ054.¹⁷

5. With respect to the 92 *ter* Witnesses, the Prosecution observes that the Accused did not argue the effect of the Correspondence on their evidence and that in fact “the witnesses’ accounts in their testimony and prior statements have remained consistent irrespective of events described” in the Correspondence.¹⁸ Given this observation, the Prosecution submits that even if the Accused had been able to ask an additional question of each witness, the content of the Correspondence is not of such significance that its late disclosure had a detrimental effect on the

⁹ Response, fn. 4.

¹⁰ Response, paras. 1–3.

¹¹ Response, paras. 1–2, 6.

¹² Response, para. 1.

¹³ Response, para. 4.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, para. 5.

¹⁷ Response, para. 5.

¹⁸ Response, para. 7.

Accused's cross-examination of the affected witnesses or that it prejudiced his overall defence strategy or approach.¹⁹

6. With respect to the 92 *bis* Witnesses, the Prosecution argues that despite the Accused's general opposition to Rule 92 *bis* applications, the Chamber decided to admit their evidence pursuant to Rule 92 *bis*.²⁰ It observes that the Chamber found that the evidence of the 92 *bis* Witnesses was cumulative, "crime-base" evidence which, "although relevant to the charges against the Accused, did not pertain to his acts and conduct, did not go to establish that he participated in a JCE or shared with the perpetrators the requisite intent for the crimes charged, and did not describe conduct of others sufficiently proximate to the Accused to require the witnesses to appear for cross-examination".²¹ The Prosecution argues that under these circumstances receipt of the Correspondence would not have changed the overall strategy of the Accused and that even if the Chamber had called the 92 *bis* Witnesses for cross-examination, "the impact on his defence as a whole would have been negligible".²²

7. The Prosecution contends that the exclusion of relevant evidence is at the extreme end of a scale of measures available to the Chamber, and given that in similar factual circumstances the Chamber found that exclusion was not warranted, it should reject the Accused's request that the evidence of the Witnesses be excluded in this case.²³ Similarly, the Prosecution argues that given the Accused suffered no prejudice and also failed to show good cause, the request to recall the Witnesses should also be denied.²⁴ In support of this submission, the Prosecution observes that "there is no material inconsistency in the witnesses' numerous statements and testimonies" and that any explanation the Witnesses would give about the Correspondence "would add nothing to the documents themselves".²⁵

8. In relation to KDZ045, the Prosecution submits that since he has yet to testify, the Accused has failed to show "any prejudice because he is fully able to raise in cross-examination the matters in the relevant documents appended to his Motion" and that therefore the request to recall with respect to this witness is moot.²⁶

¹⁹ Response, para. 7.

²⁰ Response, para. 8.

²¹ Response, para. 8.

²² Response, para. 8.

²³ Response, para. 10, citing Consolidated Decision, para. 36.

²⁴ Response, paras. 11–14.

²⁵ Response, para. 12.

²⁶ Response, paras. 9–11.

9. In confidential annexes A and B to the Response, the Prosecution details the nature of the documents disclosed with respect to each of the Witnesses, identifies if and when the witness provided statements prior to the relevant Correspondence and whether they had testified in other cases before the Tribunal.²⁷ The Prosecution observes that ten of the Witnesses had provided statements prior to the dates of the relevant Correspondence and that there was no “substantial deviation” in the content of their evidence “across these statements” and that their evidence was consistent with their testimony in other cases.²⁸ The ten witnesses are KDZ017, KDZ023, KDZ045, KDZ052, KDZ054, KDZ310, KDZ605, KDZ303, Nermin Karagić, and Nusret Sivac.²⁹

10. The Prosecution also identifies whether or not the particular witness requested the Prosecution’s assistance or whether the assistance was provided by the Prosecution without any record of such a request.³⁰ The Prosecution acknowledges that KDZ010 and KDZ092 only gave statements and testified after the date of the Correspondence relating to them.³¹ It stresses that KDZ092 is a vulnerable protected witness, who has been subject to threats and has testified consistently about her experiences including as a victim of multiple rapes.³²

11. The Prosecution further observes that the Correspondence would not be significant to assessing an important part of the Witnesses’ evidence and that the Accused would be able to elicit any favourable information contained in the Correspondence through a bar table motion.³³ It states that the Chamber should also “consider the fairness to the witnesses concerned of any order to call or recall them”, particularly given that the majority of the Witnesses who were granted protective measures involved “objectively grounded risks to their security or welfare or that of their families”.³⁴ Finally the Prosecution contends that the Accused’s request for a specific finding that it has violated its disclosure obligations pursuant to Rule 68 should also be denied.³⁵

II. Applicable Law

12. Rule 68 of the Rules imposes a continuing obligation on the Prosecution to “disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the

²⁷ Response, confidential annexes A and B.

²⁸ Response, confidential annex A, paras. 18, 20, 23, 26, 28, 33, 35, 37, 40, 43.

²⁹ Response, confidential annex A, paras. 18, 20, 23, 26, 28, 33, 35, 37, 40, 43.

³⁰ Response, confidential annex A, paras. 17, 19, 21, 24, 27, 29, 32, 34, 36, 38, 41, 44.

³¹ Response, confidential annex A, paras. 16, 30–31.

³² Response, confidential annex A, para. 30.

³³ Response, para. 12.

³⁴ Response, para. 13.

innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.³⁶ In order to establish a violation of this obligation by the Prosecution, the Accused must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.³⁷

13. The Chamber reiterates that regardless of the Prosecution’s internal practices, there is a clear obligation to disclose potentially exculpatory material “as soon as practicable” and that the “ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly”.³⁸ The Chamber also recalls that while typically the decision about what material is potentially exculpatory and should be disclosed pursuant to Rule 68 is a fact-based assessment left within the discretion of the Prosecution, there can be examples where the Prosecution’s view of what is not potentially exculpatory does not accord with the view of the Accused or the Chamber.³⁹

14. Rule 68 *bis* provides that a Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on a party which fails to comply with its disclosure obligations under the Rules. In determining the appropriate remedy (if any), the Chamber has to examine whether or not the accused has been prejudiced by the relevant breach.⁴⁰

III. Discussion

15. Given the number of witnesses and documents addressed in the Motion and the interest of the Chamber in being comprehensively informed about the specific issues relating to the Witnesses, the Prosecution was granted leave to exceed the word limit for the Response.⁴¹

16. The Chamber recalls its recent decision that “any material in the possession of the Prosecution establishing that a witness requested and/or received a benefit from being a Prosecution witness may affect the credibility of the said witness and therefore should be disclosed pursuant to Rule 68”.⁴² This requires a case-by-case assessment of whether “witness-

³⁵ Response, para. 14.

³⁶ Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009, para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004 (“*Blaškić* Appeal Judgement”), para. 267.

³⁷ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

³⁸ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

³⁹ Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para. 39.

⁴⁰ *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

⁴¹ Decision on Motion to Reject Prosecution Responses, 6 January 2012, paras. 8, 10.

⁴² Consolidated Decision, para. 23.

assistance” related material falls under the purview of Rule 68 of the Rules.⁴³ The Prosecution itself has acknowledged that with the exception of the material relating to Osmanović and KDZ038 and three other documents which were mistakenly disclosed to the Accused as pertaining to Nusret Sivac and KDZ054, the remainder of the Correspondence fall within Rule 68 of the Rules (“Remaining Correspondence”).⁴⁴ On this basis and having conducted its own review, the Chamber considers that the nature of the Remaining Correspondence indicates involvement of the Prosecution in securing a benefit for the Witnesses. Under these circumstances, the Chamber considers that the Remaining Correspondence may affect the credibility of the Witnesses. Accordingly, the Chamber finds that the Prosecution violated its obligation under Rule 68 of the Rules by failing to disclose the Remaining Correspondence as soon as practicable, given that it dates back as far as 1998 but was only disclosed to the Accused on 8 November 2011.

17. With respect to the material disclosed for Osmanović, the Chamber observes that it is merely a letter to relevant authorities confirming that Osmanović had previously testified at the Tribunal and was expected to testify in another upcoming trial.⁴⁵ This letter without any further material which suggests that a request for or provision of any assistance occurred cannot be considered to potentially affect Osmanović’s credibility. The Chamber therefore finds that the Prosecution did not violate its disclosure obligations with respect to the disclosure of this letter. The Chamber also finds that the Prosecution did not violate its disclosure obligations with respect to the disclosure of the document disclosed with respect to KDZ038 given that it mentions the same family name but does not actually refer to KDZ038 or KDZ038’s immediate family. Similarly there was no disclosure violation with respect to three other documents which were mistakenly disclosed to the Accused as pertaining to Nusret Sivac and KDZ054 but which actually refer to other people with the same family name.

18. The Chamber will treat the Accused’s request that the 92 *bis* Witnesses be called for cross-examination as a request for reconsideration of its original decision that their evidence be admitted pursuant to Rule 92 *bis* without the need for cross-examination.⁴⁶ The Chamber recalls that “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to

⁴³ Consolidated Decision, para. 23.

⁴⁴ Response, paras. 1, 5.

⁴⁵ Motion, confidential annex A.

⁴⁶ The Chamber notes that this does not apply to KDZ038, given that no material pertaining to this witness was actually disclosed in the Remaining Correspondence.

do so to prevent injustice”⁴⁷ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.⁴⁸

19. The late disclosure of the Remaining Correspondence constitutes a new circumstance and the question is whether the Chamber would have allowed the evidence of the 92 *bis* Witnesses to be admitted pursuant to Rule 92 *bis* without the need for their cross-examination had it known about the content of the Remaining Correspondence.

20. The Chamber found that the evidence of the 92 *bis* Witnesses could be admitted pursuant to Rule 92 *bis* on the basis that the proposed evidence was relevant to a number of charges against the Accused and had probative value, that their testimony consisted largely of crime-base evidence, and that their evidence was cumulative with the evidence of a number of witnesses.⁴⁹ The Chamber in reaching that conclusion found that the 92 *bis* Witnesses’ evidence did not pertain to the acts and conduct of the Accused as charged in the Third Amendment Indictment (“Indictment”) and that it did not “go to establish that the Accused participated in a join criminal enterprise” as charged in the Indictment or that he had the requisite intent for those crimes.⁵⁰ The Chamber also found that there were no other factors that would weigh against the admission of their prior testimony pursuant to Rule 92 *bis* or which would require them to appear for cross-examination.⁵¹

21. Given the Chamber’s original assessment that the 92 *bis* Witnesses were not required for cross-examination, the Chamber finds that the Accused’s has failed to show that the Remaining Correspondence in and of itself, is of such significance to assessing their evidence that it is

⁴⁷ Decision on Prosecution Motion for Admission of Evidence of Witness KDZ595 pursuant to Rule 92 *Quater* and Accused’s Motion for Reconsideration, 6 December 2011 (“KDZ595 Decision”), para. 7 citing, Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108*bis*.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

⁴⁸ KDZ595 Decision, para. 7 citing, *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; *see also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

⁴⁹ Further Decision on Prosecution’s First Rule 92 *bis* Motion (Witnesses for Eleven Municipalities), 9 February 2010 (“KDZ010 Decision”), paras. 13, 16–17; Decision on Prosecution’s First Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), 10 November 2009 (“KDZ023 Decision”), paras. 21, 23, 27, 30; Decision on Prosecution’s Second Motion for Admission of Statements and Transcripts of Evidence in Lieu of *Viva Voce* Testimony pursuant to Rule 92 *bis* (Witnesses ARK Municipalities), 18 March 2010 (“ARK Decision”), paras. 28, 33–36, 40 which relates to KDZ092, KDZ054, KDZ092, KDZ303, and Nermin Karagić.

⁵⁰ KDZ010 Decision, para. 18; KDZ023 Decision, paras. 23, 25–26; ARK Decision, paras. 31, 37, 47.

⁵¹ KDZ010 Decision, para. 25; KDZ023 Decision, paras. 28, 33, 35; ARK Decision, paras. 37, 43, 47, 49.

necessary to reconsider this decision to prevent an injustice. In reaching that conclusion, the Chamber observed that according to the Prosecution five of the seven 92 *bis* Witnesses had provided statements prior to the dates of the relevant Remaining Correspondence and that there was no “substantial deviation” in the content of their evidence “across these statements” and that the statements were consistent with their testimony in other cases.⁵² The Chamber is not in a position to assess the consistency of statements made prior to and after the dates of the Remaining Correspondence. However, in the absence of submissions which point to any such inconsistency, the Chamber is not convinced that the Accused has demonstrated that the content of the Remaining Correspondence is of such significance to assessing the evidence of the 92 *bis* Witnesses that its late disclosure justifies reconsideration of its original decision that they be not called for cross-examination. Reconsideration of that decision in light of the new circumstance relating to the disclosure of the Remaining Correspondence is not necessary in order to prevent an injustice.

22. With respect to KDZ010 and KDZ092, the Chamber observes that their statements and testimony post-date the Correspondence which relates to them. However, even with respect to these two witnesses, having considered its original assessment that they were not required for cross-examination, the Chamber is not convinced that the Remaining Correspondence, in and of itself, is of such significance to assessing their evidence that the Chamber would have required them to be called for cross-examination if the Remaining Correspondence had been brought to its attention when it made its original decision. It follows that reconsideration of the Chamber’s decision that the 92 *bis* Witnesses not be required for cross-examination is not necessary in order to prevent an injustice. As such, the Chamber also considers that the Accused has not been prejudiced by the late disclosure of the Remaining Correspondence and therefore shall not exclude the evidence of the 92 *bis* Witnesses.

23. With respect to the 92 *ter* Witnesses, while the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Remaining Correspondence, the Chamber finds that the Accused has suffered no prejudice as a result of this violation.⁵³ In reaching that conclusion, the Chamber observed that according to the Prosecution all of the 92 *ter* Witnesses had provided statements prior to the dates of the relevant Remaining Correspondence and that there was no “substantial deviation” in the content of their evidence “across these statements” and that the statements were consistent with their testimony in other

⁵² Response, confidential annex A, paras. 18, 20, 23, 26, 28, 33, 35, 37, 40, 43.

⁵³ This does not apply to Ibro Osmanović given the finding of the Chamber that there was no disclosure violation with respect to this witness.

cases.⁵⁴ As discussed above, while the Chamber is not in a position to assess the consistency of statements made prior to and after the Remaining Correspondence, in the absence of submissions which point to any such inconsistency, the Chamber is not convinced that the content of the Remaining Correspondence is of such significance to assessing the evidence of the *92 ter* Witnesses that the Accused has been prejudiced by its late disclosure.

24. The Chamber also notes that at the date of the Motion, KDZ045 had yet to testify, and the Accused had a full opportunity to cross-examine this witness on the issues raised in the Remaining Correspondence if he so wished. The Accused did in fact put one question to KDZ045 on the issue raised in the Remaining Correspondence and the Chamber admitted the relevant letters which pertained to KDZ045.⁵⁵

25. In the absence of any prejudice to the Accused, there is no basis to order that the evidence of the Witnesses be excluded or to order that the *92 ter* Witnesses be re-called for cross-examination on the issues raised in the Remaining Correspondence.

⁵⁴ Response, confidential annex A, paras. 18, 20, 23, 26, 28, 33, 35, 37, 40, 43.

⁵⁵ Hearing, T. 22688–22689 (10 January 2012) and Exhibit D1988 (under seal).

IV. Disposition

26. For the foregoing reasons, the Trial Chamber, pursuant to Rules 54, 68, and 68 *bis* of the Rules, hereby:

- a) **GRANTS**, by majority, Judge Kwon dissenting⁵⁶, the Motion in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Remaining Correspondence; and
- b) **DENIES** the Motion in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this twelfth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁶ Judge Kwon refers to his Partially Dissenting Opinion in the Decision on Accused's Thirty-Seventh to Forty-Second Disclosure Violation Motions with Partially Dissenting Opinion of Judge Kwon, 29 March 2011. While Judge Kwon agrees with the majority that there has been a violation of Rule 68 of the Rules, in the absence of prejudice to the Accused, he considers that the motion should be dismissed in its entirety.