



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-PT

Date: 10 March 2009

Original: English

IN THE TRIAL CHAMBER

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

Acting Registrar: Mr. John Hocking

Decision of: 10 March 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTIONS FOR DISCLOSURE OF RULE 68 MATERIAL
AND RECONSIDERATION OF DECISION ON ADEQUATE FACILITIES**

Office of the Prosecutor

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

The Accused

Mr. Radovan Karadžić

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 “Motion for Disclosure of Rule 68 Material”, filed on 6 February 2009 (“Motion”), the “Prosecution Response to Karadžić’s Motion for Disclosure of Rule 68 Material”, filed on 17 February 2009 (“Response”), and the “Registry Submission Regarding the Electronic Disclosure System”, filed on 5 March 2009 (“Registry EDS Submission”), as well as of the “Registrar’s Submission pursuant to Rule 33(B) on Access by the Accused’s Defence Team to Confidential Information”, filed on 23 February 2009 (“Registry Submission”), and the Accused’s “Response to Registrar’s Submission on Access to Confidential Information and Motion for Reconsideration of Decision on Adequate Facilities” filed on 3 March 2009 (“Motion for Reconsideration”), and hereby renders its decision thereon.

I. Submissions

1. In the Motion, the Accused requests the Trial Chamber to “make a finding that the prosecution is in breach of its obligations under Rule 68” and to order the Prosecution “to immediately furnish all Rule 68 material to the accused in CD Rom and DVD format”.¹ In Annex B to the Motion, the Accused provides a letter dated 5 February 2009 from the Prosecution to the Accused, stating that it intends to continue its practice of disclosing Rule 68 material through the Electronic Disclosure Suite (“EDS”). The Accused argues that the Prosecution’s disclosure obligations under Rule 68 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) are not fulfilled by posting materials on the EDS. In support, the Accused cites jurisprudence of the Appeals Chamber in *Karemera* on Rule 68.² The Accused further cites a finding of the Trial Chamber in *Lukić* on the disclosure obligation under Rule 66(A)(ii), which he argues must equally be applicable to the disclosure obligation under Rule 68.³

2. The Accused further argues that he is prejudiced by the failure of the Prosecution to provide Rule 68 material to him outside the EDS, given that (i) although his two legal associates are allowed access to the EDS, they lack the time and resources to search the EDS, while his other “team members” are allowed access to confidential material and could work with such material if it

¹ Motion, para. 8.

² *Prosecutor v. Karemera et al.*, Case No. ICRT-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* Appeals Decision”).

³ *Prosecutor v. Lukić et al.*, Case No. I-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 November 2008 (“*Lukić* Decision”).

was provided on CDs or DVDs;⁴ and (ii) the Prosecution would be in a position to know the strategy of the defence as it “can monitor the time and frequency of defence team members’ access to the EDS, as well as the content that they are searching for.”⁵

3. The Registry Submission brings to the attention of the Chamber some concerns about the definition of “Defence team” in cases of a self-represented Accused. Specifically, the Registry notes that any *pro bono* advisers who assist a self-represented Accused *might* be considered part of his “Defence team” and thereby have access to confidential material, without there being any control over such individuals. The practice so far has been that, where the Registrar has been informed of such *pro bono* assistants, he has invited the Accused to ensure that they sign the same confidentiality undertaking required for those assistants who are assigned by the Registry. The Registrar proposes that the Accused and his recognised legal associates might be required to arrange the signing of written non-disclosure agreements by any individuals, such as *pro bono* advisers, to whom they disclose confidential information, and that such agreements could be filed periodically with the Registry.

4. In the Motion for Reconsideration, the Accused argues that “the Registrar’s reluctance to provide access to confidential information to defence team members in the absence of an accountable team member is a new fact which was not considered by the Trial Chamber”⁶ when making its “Decision on Accused’s Motion for Adequate Facilities and Equality of Arms: Legal Associates” of 28 January 2009 (“Decision on Adequate Facilities”). He argues, therefore, that that Decision should be reconsidered to prevent the injustice of inadequate facilities being provided to the Accused, and requests the Chamber to order that his legal associate who meets the Rule 45 requirements be responsible for the disclosure of confidential information to other “defence team members”, and that he be remunerated accordingly.⁷

5. The Prosecution submits that it is in full compliance with its obligations under Rule 68 and relevant Appeals Chamber jurisprudence and requests that the Motion be dismissed. The Prosecution contends that it discloses Rule 68 material to the Accused and his legal associates via a specific folder on the EDS to which only they have access, and which is distinct from the general folder to which all Defence teams have access.⁸ The Prosecution further submits that, depending on the number of documents uploaded, it either lists the added documents in the written notice

⁴ Motion, para. 6.

⁵ Motion, para. 7.

⁶ Motion for Reconsideration, para 12.

⁷ Motion for Reconsideration, para 13.

⁸ Response, para. 3.

informing the Accused of the materials added to the folder, or provides the Accused with a CD containing an electronic index of the added documents.⁹ The Prosecution submits that it thereby follows the exact practice envisaged by the *Karemera* Appeals Decision.¹⁰ As to the *Lukić* Decision cited in the Motion, the Prosecution claims that this decision dealt with a situation that is distinguishable from the present case.¹¹

6. With regard to the Accused's submissions concerning the lack of resources of his legal associates and the degree of access to the EDS accorded to other people assisting in his defence, the Prosecution states that it would not oppose a request by the Accused to the Office of Legal Aid and Detention within the Registry for further access to the EDS for a reasonable number of his "team members", subject to those members obtaining the required security clearance.¹²

7. Against the Accused's argument that the Prosecution would be in a position to know his defence strategy, the Prosecution contends that EDS is operated by the Registry and that the role of the Prosecution is limited to giving instructions to the Registry as to what materials to place onto or remove from the EDS, while it does not have access to any usage information and any instructions from the Prosecution to the Registry to pass on such information would be rejected.¹³

8. Since the volume of the relevant material is such that it would have to be distributed over several CDs or DVDs, the Prosecution argues that burning Rule 68 material onto searchable CDs or DVDs would increase the burden on the Accused as the same search would have to be conducted on each of the CDs or DVDs, while the process of burning the materials onto and running a search capability over each of the CDs or DVDs would place an unnecessary burden on the Prosecution.¹⁴

9. The Registry EDS Submission confirms that the Prosecution does not have access to usage information that would allow it to monitor the time and frequency of "defence team members" access to the EDS, as well as the content for which they are searching.¹⁵ The Submission stresses that the technical operation of the EDS is exclusively in the hands of the Registry and that any removal or addition of material is performed by the Registry, upon direction from the Prosecution.¹⁶ The Registry further submits that the Prosecution's access to the EDS is limited to

⁹ Response, para. 3.

¹⁰ Response, para. 4.

¹¹ Response, para. 5.

¹² Response, para. 6.

¹³ Response, para. 7.

¹⁴ Response, para. 8-9.

¹⁵ Registry EDS Submission, paras. 3-4.

¹⁶ Registry EDS Submission, para. 4.

allow it to review the disclosure material currently on the EDS,¹⁷ that the usage information kept on the server is available only to the Registry System Administrator,¹⁸ and that the Registry does not disclose usage information, as all searches performed by the defence are confidential.¹⁹

10. The Registry further clarifies that, in cases of represented accused, EDS accounts are created for Lead and Co-Counsel only, whereas, in the case of self-represented accused, such an account is created for the accused himself. In the present case, the Registrar has, in addition, granted access to confidential material to two of the Accused's legal associates, who also have access to the EDS.²⁰ The Registry submits that, if the Prosecution is prepared to provide access to material contained in the EDS to other persons assisting the Accused, the Registrar would facilitate such access. However, the Registrar suggests that this issue be resolved in accordance with the other Registry Submission.²¹

II. Applicable Law

11. In relevant part, Rule 68 of the Rules provides as follows:

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;

...

12. With regard to Rule 68(ii), the Appeals Chamber in the *Šešelj* case did not find that the Trial Chamber incorrectly exercised its discretion,²² when it ruled that

[t]he crucial question is whether the principle of fairness is breached by providing material in electronic format. The Trial Chamber is of the view that, so long as such assistance as is reasonable and necessary in the circumstances is given to the Accused for the purpose of accessing, retrieving, and, in general, effectively utilizing material disclosed in electronic format, no unfairness results.²³

¹⁷ Registry EDS Submission, para. 4.

¹⁸ Registry EDS Submission, para. 5.

¹⁹ Registry EDS Submission, para. 6.

²⁰ Registry EDS Submission, para. 7.

²¹ Registry EDS Submission, para. 9.

²² *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, paras. 19–20.

²³ *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Form of Disclosure, 4 July 2006, ("*Šešelj* Decision"), para. 12.

13. The Appeals Chamber held that under Rule 68 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, which is virtually identical to Rule 68 of the Rules, the Prosecution alone has a positive obligation to disclose exculpatory material and that it is responsible to determine what material meets Rule 68 disclosure requirements.²⁴ With regards to disclosure on the EDS, the Appeals Chamber found that

the Prosecution's Rule 68 obligation to disclose extends beyond simply making available its entire evidence collection in a searchable format. A search engine cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession.²⁵

14. Furthermore, in the light of the plain wording and the drafting history of Rule 68, the Appeals Chamber found that the second paragraph of Rule 68 "does not establish a distinct disclosure obligation. Rather, it simply provides for a possible modality of conveying exculpatory material to the defence, in an electronic format, after the Prosecution identifies it as "relevant material" which is subject to disclosure under Rule 68."²⁶ The Appeals Chamber held that the obligation under Rule 68 was not met by merely granting the defence access to an electronic database containing a large amount of documents, only a few of which are potentially exculpatory.

15. The Appeals Chamber has accepted that the Prosecution may be relieved of its Rule 68 obligation if—upon a careful examination of the relevant circumstances—it was established that (i) the existence of the relevant exculpatory material is known to the Defence and (ii) it is reasonably accessible through the exercise of due diligence.²⁷ After finding that the EDS does not make documents reasonably accessible as a general matter, the Appeals Chamber suggested that—in determining whether material on the EDS is reasonably accessible—"[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."²⁸

16. Rule 66(A)(ii) of the Rules provides as follows

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

...

²⁴ *Karemera* Appeals Decision, para. 9.

²⁵ *Karemera* Appeals Decision, para. 10.

²⁶ *Karemera* Appeals Decision, para. 12.

²⁷ *Karemera* Appeals Decision, para. 15. See also *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004, p. 4; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 20 July 2004, para. 296.

²⁸ *Karemera* Appeals Decision, para. 15. See also *Prosecutor v. Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to Exparte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 35.

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 bis, Rule 92 ter, and Rule 92 quater; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

17. In the case of *Lukić et al.*, the Prosecution failed to disclose the notes of the interview of a Prosecution witness within a specific time limit, but submitted that the document was placed on the EDS on an earlier date.²⁹ The Trial Chamber found that “[s]imply placing the Interview Notes on the EDS was not sufficient for the Prosecution to discharge its positive obligation under Rule 66(A)(ii).”³⁰

18. The Appeals Chamber has articulated the legal standard for reconsideration of a decision as follows: “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 do so to prevent injustice.’”³¹

III (a). Request for reconsideration

19. With regard to the Accused’s request for reconsideration, the Trial Chamber notes that he has not accurately represented the Registrar’s position. The Registry Submission does not indicate that the Registry is unwilling to provide access to confidential material to individuals assisting the Accused in his defence, in addition to his legal associates, but rather simply suggests a manner of monitoring who has such access. The Accused has, therefore, stated no basis upon which it is appropriate for the Chamber to reconsider its decision.

III (b). Disclosure of Rule 68 material through EDS

20. With regard to the Accused’s request to be provided with Rule 68 materials on CDs or DVDs rather than through the EDS, the Trial Chamber notes that the finding of the *Karemera* Appeals Chamber, that the EDS does not make documents reasonably accessible as a general matter,³² was based on the fact that the EDS then simply contained a large quantity of documents potentially relevant to all accused before the ICTR and that the Prosecution had merely allowed the

²⁹ *Prosecutor v. Lukić et al.*, Case No. I-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 November 2008 (“*Lukić Decision*”), para. 15.

³⁰ *Lukić Decision*, para. 17.

³¹ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204).

³² *Karemera Appeals Decision*, para. 15.

defence to search this general database for exculpatory material.³³ By contrast, in the present case, the Prosecution has placed the case-specific Rule 68 material in a distinct folder on the EDS to which only the Accused and his legal associates have access. Furthermore, the Accused is being informed by the Prosecution of the materials added to the folder by written notice or through a CD containing an electronic index of the added documents. Thus, the Prosecution has respected the suggestions set out in the *Karemera* Appeals Decision by creating a special folder for Rule 68 material and drawing the attention of the Accused to such material, as well as continuously updating the folder and the written notice to the Accused. The Chamber is, therefore, satisfied that the existence of Rule 68 materials on the EDS is known to the Accused and that these materials are reasonably accessible to him. Accordingly, the Chamber finds that the Prosecution has not breached its disclosure obligations under Rule 68.

21. The Trial Chamber notes that the Accused does not further explain his contention that the finding of the Trial Chamber in the *Lukić* Decision concerning Rule 66(A)(ii) is necessarily applicable to disclosure under Rule 68. While the wording of Rules 66(A)(ii) and 68(ii) of the Rules is the same when it comes to the obligation of the Prosecutor to “make [materials] available to the defence”, the Trial Chamber notes that it is an essential element of Rule 66(A)(ii) that the disclosure must occur within a specific time limit. The crucial issue in the *Lukić* Decision was that the Prosecution had not met the deadline until which the interview notes in question should have been disclosed. What the *Lukić* Trial Chamber considered as insufficient was that the Prosecution had merely placed the interview notes on the EDS at an earlier date and argued that these were available to the Defence from the time they were informed of the identity of the witness.³⁴ Furthermore, it was undisputed that the interview notes had merely been “placed in the General Collection of the EDS – accessible by all cases at the Tribunal”.³⁵ The Chamber considers that the finding that simply placing this type of material on the EDS does not fulfil the Prosecution’s disclosure obligation must be viewed in light of these specific circumstances. Unlike in *Lukić*, in the present case there has been no failure by the Prosecution to diligently fulfil its disclosure obligation under Rule 68, and the Prosecution has promptly informed the Accused of new materials placed on the EDS, which are located in a special folder separate from the general collection of the EDS. Therefore, the Chamber does not accept the parallel drawn by the Accused and finds that the reasoning in the *Lukić* Decision cannot be applied to the present case.

³³ *Karemera* Appeals Decision, paras. 2, 10 and 13.

³⁴ *Lukić* Decision, para. 15.

³⁵ See *Prosecutor v. Lukić et al.*, Case No. I-98-32/1-T, Milan Lukić’s Motion to Suppress Testimony for Failure of Timely Disclosure With Confidential Annexes A and B, 30 September 2008, para. 7.

22. The Trial Chamber is mindful that, in order to guarantee the right of the Accused to a fair trial, he must be given reasonable and necessary assistance for the purpose of accessing, retrieving, and effectively utilising material disclosed in electronic format.³⁶ However, the Chamber considers that, in the present circumstances, it is not necessary to provide the Accused with searchable CDs or DVDs containing Rule 68 material. The benefits from providing these—that the people assisting in his defence that cannot access the EDS may work with such materials—are outweighed by the additional burdens this would place upon the Prosecution and the Accused himself. Furthermore, the Chamber notes that the Prosecution would not oppose an application by the Accused to the Registry for granting access to the EDS to a further reasonable number of people assisting him, and that the Registrar would facilitate such access. The Chamber's principal concern is to ensure that the confidentiality of materials available on the EDS is not compromised. The Chamber, therefore, encourages the Parties and the Registry to reach an arrangement satisfactory to all to allow access to the EDS, including confidential material thereon, to a reasonable number of others assisting the Accused in his defence. This process should be triggered by the Accused making a specific request to the Registry identifying the person or persons for whom he seeks such authority. Before granting such access, the Chamber would expect the Registry to require the person in question to sign an undertaking similar to that signed by the assigned legal associates that they will respect the confidentiality of all relevant material contained in the system.

23. With regard to the Accused's contention that the Prosecution can monitor the time and frequency of his and his defence team's access to the EDS, as well as the content that they are searching for, and would therefore be in a position to know the strategy of the defence, the Trial Chamber is satisfied by the Registry EDS Submission that, while such usage information is kept on the server, only employees of the Registry have access to it. The Prosecution does not have access to the EDS in a way that would allow it to view and retrieve such information. The technical operation of the EDS remains strictly in the hands of the Registry and the role of the Prosecution is limited to instructing the Registry as to the addition of materials to the EDS or their removal. Moreover, the Chamber has no reason to believe that the Prosecution would request usage information from the Registry, nor that the Registry would disclose such information.

24. Accordingly, the Trial Chamber finds that the Accused is not prejudiced by the disclosure of Rule 68 material through EDS in the manner described above.

³⁶ See *Šešelj* Decision, para. 12.

III (c). Access to confidential information

25. In light of the Registry Submission and the Accused's response thereto, the Chamber considers it appropriate to clarify some aspects of its "Decision on Protective Measures for Witnesses", filed on 30 October 2008 ("Protective Measures Decision"). In general, the reference in paragraph 34(p) of that Decision to the Accused's "Defence team (if any)" applies to any team of counsel and co-counsel that the Accused might engage, and others engaged by them for his defence. Recognising, however, that the Accused has elected to represent himself in these proceedings, and that, thus far, two legal associates and an investigator have been assigned to assist him by the Registry and have signed undertakings in which they agreed to be bound by certain rules and regulations and to respect the confidentiality of all case-related documents,³⁷ the Chamber considers that they are members of the Defence team within the meaning of paragraph 34(p). Indeed, the Registry has already permitted the two legal associates access to certain confidential material, either through the Accused in the United Nations Detention Unit, through the Tribunal's Judicial Database, or through the EDS.³⁸ Anybody similarly assigned by the Registry to assist the Accused in his defence, from whom the same undertaking is obtained, would also be considered to be members of the Defence team.

26. For the purposes of the Protective Measures Decision and any future decision concerning confidential information, any other *pro bono* advisers or others assisting in the Accused's defence are to be considered members of the "public" as defined in paragraph 34(p), and should the Accused consider it necessary to disclose confidential material to them in the circumstances envisaged in paragraph 34(l) of the Protective Measures Decision, then the conditions of that subparagraph would apply.

³⁷ Registry Submission, para. 5.

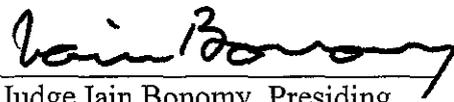
³⁸ Registry Submission, para. 10; Registry EDS Submission, para. 8.

IV. Disposition

27. For the reasons outlined above, the Trial Chamber, pursuant to Rules 54 and 68 of the Rules, hereby:

- a. **DENIES** the Motion; and
- b. **DENIES** the Motion for reconsideration.

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


Judge Iain Bony, Presiding

Dated this tenth day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]