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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-04-84*bis*-T

Date: 12 October 2011

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IN TRIAL CHAMBER II

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Burton Hall
Judge Guy Delvoie

Registrar: **Mr. John Hocking**

Decision of: **12 October 2011**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON JOINT DEFENCE MOTION FOR RELIEF FROM RULE 68 VIOLATIONS BY THE PROSECUTION AND FOR SANCTIONS PURSUANT TO RULE 68*BIS*

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Accused:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen M. Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

THIS CHAMBER of the International Criminal 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 "Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68*bis*", filed publicly with a confidential Annex on 12 September 2011 ("Motion").

I. BACKGROUND AND SUBMISSIONS

1. This Motion concerns the Prosecution's alleged failure to disclose materials relating to Witness 75, a Prosecution witness from Kosovo, currently residing in an undisclosed country where he is seeking asylum ("Undisclosed Country"). The following summary is based on submissions and accompanying documents from the Parties.

2. On 5 November 2010, Witness 75's asylum lawyer wrote to an investigator of the Office of the Prosecutor ("OTP") about Witness 75's asylum case. He informed the said investigator that Witness 75 had recently been denied political asylum, partly because the relevant authority in the said country had held that the conditions in Kosovo had changed so that Witness 75 would no longer be subjected to political persecution, as he had been in the past, if he were deported back to Kosovo, and that the authority's decision was then pending appeal.[1]

3. The asylum lawyer asked the OTP for a letter mentioning Witness 75's "cooperation" with the OTP and stating the OTP's "opinion as to whether [Witness 75] has reason to fear political persecution if deported to Kosovo".[2]

4. On 18 November 2010, Mr. Paul Rogers, the Prosecution's Senior Trial Attorney in this case, provided a letter to the asylum lawyer in response to his request of 5 November 2010 ("Letter"). Mr. Rogers confirmed that Witness 75 had given "a voluntary witness statement" to the OTP on 16 October 2010 in relation to the *Haradinaj et al.* re-trial. He stated that Witness 75 "was fully co-operative throughout, and provided helpful and important information to us", prior to briefly describing the allegedly incriminating evidence that Witness 75 had given.[3]

5. Mr. Rogers' Letter further stated: "I cannot comment on whether [Witness 75] has reason to fear political persecution should he be returned to Kosovo, but I can share some objective and adjudicated facts relating to witness intimidation in this case and intimidation in Kosovo generally".

[1] Email from Asylum lawyer to OTP Investigator, 5 November 2010, filed under Confidential Annex A to Motion, Appendix 1.
[2] Ibid.
[3] Letter, filed under Confidential Annex A to Motion, Appendix 2.

Mr. Rogers noted that a serious problem of witness intimidation in Kosovo had been recognised in the original Trial Judgement and subsequent Appeals Judgement in this case, parts of which Mr. Rogers cited. Finally, Mr. Rogers provided his opinion and that of the OTP on the question of Witness 75's safety: "we consider that [Witness 75] and members of his family are at risk of such intimidation once he is known as a potential witness in this case. We consider [that] these risks are greater if [Witness 75] were to be residing in Kosovo".[4]

6. On 27 January 2011, Mr. Richard Harvey, counsel for Mr. Bahimaj, wrote to Mr. Rogers requesting disclosure of material concerning "any and all promises, threats or inducements made or offered to any such witness [the Prosecution expected to call in the re-trial], including [...] [r]elocation of the witness, their family members, friends or associates".[5]

7. On 2 February 2011, Witness 75 sent an email to an OTP investigator ("Email"). Witness 75 admitted that he had previously lied to his asylum lawyer and was concerned about the outcome of his asylum petition:

> I told my attorney that my brother was killed in the war, this is not true, you know the truth, but I did this for the safety of my family in Kosovo and my self and my wife in [Undisclosed Country]. [...] My attorney is telling me, way [sic] you did not tell me the truth, the reason is that I was afraid again for the safety of my family there and here, especially for my self [...] My case here is in limbo, I need your help for the safety of my life and my family.[6]

8. That same day, the investigator answered: "I do understand your concerns and will inform the Prosecutor about it".[7]

9. On 7 February 2011, Mr. Rogers responded to Mr. Harvey's request for disclosure of 27 January 2011. Mr. Rogers stated "[w]e do not believe any such information exists" and assured that he would disclose such material if it came to light.[8] On 22 February 2011 and again on 23 March 2011, Mr. Rogers reiterated substantially the same information in another message to the Defence.[9]

[4] Ibid.
[5] Request for Disclosure by Richard Harvey, 27 January 2011, filed under Confidential Annex A to Motion, Appendix 3.
[6] Email, filed under Confidential Annex A to Motion, Appendix 4.
[7] Ibid.
[8] Message from Mr. Rogers to Defence Counsel, 7 February 2011, filed under Confidential Annex A to Motion, Appendix 5.
[9] Message from Mr. Rogers to Defence Counsel, 22 February 2011, filed under Confidential Annex A to Motion, Appendix 6; Confidential Annex A to Motion, para. 14.

10. On 18 July 2011, the Prosecution provided the Defence with Witness 75's interview statement and extracts of statements made by Witness 75 to the authorities of the Undisclosed Country.[10]

11. On 26 August 2011, an appellate authority of the Undisclosed Country made a decision on Witness 75's previously-denied asylum petition. The appellate authority notably held that the asylum proceedings should be reopened because Witness 75 had submitted new relevant evidence. Mr. Rogers' Letter was the first of the two new pieces of evidence it mentioned. The appellate authority noted that Witness 75 had willingly given a factual declaration to the OTP, that the OTP expected to have him testify, and that the dangers faced by witnesses in Kosovo had been documented. It found that Witness 75 had made a *prima facie* demonstration that he may face harm if deported to Kosovo, and that his asylum case therefore should be remanded to a lower authority for further proceedings.[11]

12. On 29 August 2011, Mr. Rogers began the Prosecution's direct examination of Witness 75 in the present case.

13. On 30 August 2011, the asylum lawyer sent to Mr. Rogers a copy of the appellate authority's decision to reopen Witness 75's asylum case partly based on the Letter that he had provided.[12]

14. That same day, Mr. Harvey sent another request for disclosure to Mr. Rogers, asking him to reveal Witness 75's immigration status. The request inquired: "has he been granted asylum or refugee status, refused such status, is a decision pending, or does he hold any other status?"; and also asked whether the OTP had made any "interventions" in relation to Witness 75's immigration status or taken "measures" to assist him "in obtaining asylum, refugee status, resettlement or any such protection or benefit".[13]

15. On 31 August 2011, shortly before Witness 75's testimony was set to resume, Mr. Rogers responded as follows:

> [...] we understand that a review of the witness's immigration status is under consideration by [the Undisclosed Country].
>
> [...] the Prosecution is unclear as to what you mean by žintervention'. The witness's asylum lawyer did approach us after the witness provided his statement to ask if we could provide a letter

[10] Confidential Annex A to Motion, para. 15.
[11] Decision by Appellate Court of Undisclosed Country, 26 August 2011, filed under Confidential Annex A to Motion, Appendix 8.
[12] Email from Asylum lawyer to Mr. Rogers, 30 August 2011, filed under Confidential Annex A to Response, Tab 22.
[13] Email from Mr. Harvey to Mr. Rogers, 30 August 2011, filed under Confidential Annex A to Motion, Appendix 9.

> regarding the witness's co-operation with the OTP and, if possible, an opinion as to whether the witness had reason to fear political persecution if deported to Kosovo. Please find attached my response.[14]

16. Mr. Rogers attached his Letter of 18 November 2010 to his response, disclosing it to the Defence for the first time.[15] He did not, however, disclose at the same time the 5 November 2010 request that his Letter was an answer to, nor the appellate authority's decision to reopen Witness 75's asylum case, which he had received by email the day before.[16]

17. At a subsequent court hearing on 31 August 2011, the Defence alleged that Mr. Rogers had violated Rule 68 by failing to disclose his Letter until then, and by withholding additional material relating to Witness 75's asylum case. The Defence submitted that these matters were relevant to Witness 75's credibility.[17]

18. Mr. Rogers answered that his Letter was written "after the witness had provided his statement and not in exchange for it" and cannot "be considered to affect the credibility of the witness".[18] He stated that he had not formerly disclosed it to the Defence because it did not fall within the scope of Mr. Harvey's request for disclosure of 27 January 2011. The Letter allegedly did not contain any information that could "objectively be considered any form of promise or threat or inducement in relation to this witness' testimony, and that is why it was not disclosed to Mr. Harvey in response to his request".[19]

19. Mr. Rogers emphasised that he had no intention to engage in misconduct[20] and underlined that he had dutifully abided by Rule 68 in the past by disclosing Witness 75's "asylum documents" to the Defence. In his view, the "asylum documents" were relevant to his credibility in light of factual inconsistencies between his statements to the Undisclosed Country's authorities and his statements to the OTP.[21] Mr. Rogers drew a distinction between Witness 75's "asylum documents" and his Letter: "[What is stated in the asylum documents] clearly is relevant to his credibility. I do not see the same criteria apply to the letter that was written for the reasons that I've already explained. [...] I do not consider it to be an issue that arose under Rule 68 at the time and—nor do I presently [...] We do not see it as a Rule 68 matter".[22] He specified that he had only disclosed the

[14] Email from Mr. Rogers to Defence Counsel, 31 August 2011, filed under Confidential Annex A to Motion, Appendix 10.
[15] Confidential Annex A to Motion, para. 22.
[16] Confidential Annex A to Motion, para. 22.
[17] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-T, Transcript ("T.") at 879-881, 888-890 *et seq.*
[18] T. 884.
[19] T. 884.
[20] T. 886-883, 892-893.
[21] T. 951.
[22] T. 951-952.

Letter "so that we could be clear about what had happened. But not because I considered that it had any relevance to the question of credibility".[23]

20. The Defence countered that this information concerned Witness 75's motivations to testify for the Prosecution and therefore fell under the scope of Rule 68 and the Defence's prior disclosure requests.[24] It stressed that Mr. Rogers violated Rule 68 regardless of whether his violation was intentional.[25] The Defence equally noted that Mr. Rogers had a duty to disclose this information irrespective of whether the Defence had requested it.[26]

21. Once the Prosecution's direct examination of Witness 75 resumed, Mr. Rogers ultimately proceeded to ask the witness the following question: "Has [asylum] ever been granted to you and then reviewed or withdrawn?"[27] Later that day, Mr. Harvey wrote another request for disclosure to Mr. Rogers, stating that "[i]n the light of the questions you asked of [Witness 75] [...] it is evident that you are in possession of further information concerning this witness' application for asylum [...]". Mr. Harvey asked Mr. Rogers to urgently reveal "all documents and information in your possession concerning [Witness 75's] application for asylum / refugee status" and its "progress" or "outcome", as well as correspondence between the OTP and Witness 75's asylum lawyer and the Undisclosed Country's immigration authorities. Mr. Harvey indicated that he intended to use this material in his cross examination of Witness 75.[28]

22. On 1 September 2011, moments before the start of the scheduled court session, Mr. Rogers responded to Mr. Harvey's latest request and disclosed: i) the decision by the Undisclosed Country's appellate authority to reopen the asylum case partly based on Mr. Rogers' Letter; and ii) Witness 75's Email of 2 February 2011, wherein he sought the OTP's help with his asylum case and admitted to having lied to his asylum attorney.[29]

23. At the commencement of that day's court session, the Defence argued that the late disclosure of these materials constituted another serious violation of Rule 68, and asked that Mr. Rogers be sanctioned by reprimand under Rule 68*bis*.[30] Mr. Rogers acknowledged that he should

[23] T. 954. *See also* T. 1001, 1006 (further challenging the relevance of this material).
[24] T. 886-890, 893-894. *See also* Motion, para. 20.
[25] T. 894.
[26] T. 889.
[27] T. 916.
[28] Email from Mr. Harvey to Mr. Rogers, 31 August 2011, filed under Confidential Annex A to Motion, Appendix 11.
[29] Email from Mr. Rogers to Defence Counsel, 1 September 2011, filed under Confidential Annex A to Motion, Appendix 12.
[30] T. 978-996 *et seq.*

have disclosed the Email at an earlier time[31] but insisted that the remaining information pertaining to Witness 75's asylum case was irrelevant.[32]

24. The Defence orally requested that the Chamber order Mr. Rogers to disclose the request in response to which his Letter had been written[33] (*i.e.* the aforesaid 5 November 2010 message from the asylum lawyer to the OTP).[34] Mr. Rogers disclosed this evidence after the Presiding Judge asked him to do so:

MR. EMMERSON:	We've asked him to give it to us, he hasn't given it. So we're asking you to order it.
JUDGE MOLOTO:	Mr. Rogers, are you still refusing to give this letter?
MR. ROGERS:	No, Your Honour. It's not a question of refusing to give it.
JUDGE MOLOTO:	Are you prepared to give it to them now?
MR. ROGERS:	It's a question of trying to deal with it in the round. That's all.
JUDGE MOLOTO:	My question to you are you prepared to give it to them now? Yes or no?
MR. ROGERS:	Yes.
JUDGE MOLOTO:	Okay. Give it to them.[35]

25. The Chamber thereafter invited the Parties to file written submissions on the matter and ordered that Witness 75's testimony be adjourned until the Parties' Rule 68 submissions were decided upon.[36]

26. On 12 September 2011, the Defence filed its Motion, wherein it submits that the Prosecution committed a grave violation of Rule 68 and asks that Mr. Rogers be reprimanded under Rule 68*bis*.[37] The Defence argues that the Accused were prejudiced by the violation because the Defence has been deprived of materials relevant to its cross examination of Witness 75, thereby violating the Accused's right to a fair and expeditious trial.[38] The Defence asks the Chamber to draw reasonable inferences in favour of the Accused with respect to the disclosed evidence.[39]

[31] T. 1000.
[32] T. 1001, 1006.
[33] T. 1005-1010.
[34] Email from Asylum lawyer to OTP Investigator, 5 November 2010, filed under Confidential Annex A to Motion, Appendix 1.
[35] T. 1009-1010.
[36] T. 1016-1017.
[37] Motion, paras 27, 30-33.
[38] Motion, para. 28.
[39] Motion, para. 29.

27. The Defence moves the Chamber to order the Prosecution to disclose any remaining material concerning Witness 75's asylum proceedings, as well as disclose "all communications and contact between the Prosecution and Witness 75 that precede and follow the witness' Email of 2 February 2011, all communications and contact between the Prosecution and Witness 75's lawyer that precede and follow Mr. Rogers' letter of 18 November 2010, and all records and documentation relating to Witness 75's immigration proceedings".[40] The Defence adds that the Prosecution should "prepare a report on all of the steps it has taken to review its files in respect of Witness 75 and identify any problems with disclosure that it has encountered and what steps may be taken to address these matters".[41] The Defence equally demands the implementation of a new procedure whereby the Prosecution would submit a "disclosure report" at least seven days prior to the testimony of each of its remaining witnesses.[42]

28. On 20 September 2011, the Prosecution responded to the Motion, opposing Rule 68*bis* sanctions and any remedy beyond the adjournment of Witness 75's testimony that had already been ordered by the Chamber.[43] The Prosecution posits that the only violation of Rule 68 was the late disclosure of Witness 75's Email, an "oversight", although it specifies that the earliest date on which it should have been disclosed was 18 July 2011 because Witness 75 was a delayed disclosure witness.[44] The Prosecution argues that the Accused have not suffered material prejudice as a result of the late disclosure of the Email, especially given the adjournment of Witness 75's cross examination.[45]

29. The Prosecution otherwise reemphasises its prior position that the Email is only relevant to Rule 68 because it states that Witness 75 had lied to his asylum lawyer, whereas the remaining information about his asylum case is irrelevant.[46] It adds that nothing "suggest[s] a motivation on Witness 75's part to provide beneficial evidence to the Prosecution" in exchange for its support in his asylum case.[47] The Prosecution underscores that it did not "advocate an outcome in Witness 75's asylum proceedings".[48]

30. Attached to the Prosecution's Response is a confidential Annex that it "has exceptionally filed [...] in order to properly address the unfounded allegations which the Accused raise in the

[40] Motion, para. 34.
[41] Motion, para. 35.
[42] Motion, para. 37-38.
[43] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-T, Prosecution Response to Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68*bis*, filed publicly with a confidential Annex on 20 September 2011 ("Response").
[44] Response, paras 3, 9-10.
[45] Response, paras 4-5, 22-25.
[46] Response, paras 9-11.
[47] Response, paras 2-3.

Motion". This Annex includes a record of the OTP's contacts and correspondence with Witness 75 and his asylum lawyer,[49] described below.

31. The Prosecution also acknowledges that it has had "contacts" with "the immigration authorities of the country where Witness 75 is seeking asylum".[50] This reportedly was "[t]he only material in the Prosecution's possession relating to Witness 75's immigration status which [it did not file in the Annex to its Response]".[51] The Prosecution stipulates that it "took steps to obtain [the Undisclosed Country's] consent for the exceptional purpose of filing these contacts with this Response in order to demonstrate that the allegations in the Motion are unfounded, but [the Undisclosed Country] refused to give its consent".[52]

32. On 23 September 2011, the Defence sought leave to reply because "the Prosecution had disclosed for the first time in its Response a large body of new materials relating to Witness 75" in the Annex to its Response.[53] The Defence notably remonstrates that the Prosecution "only disclosed these materials 'exceptionally' and only to show they were never discloseable in the first place".[54] The Defence remarked that "it appears that Mr. Rogers would not disclose similar materials for any of the remaining witnesses".[55]

33. The Defence adds that the Undisclosed Country has provided "[no] reasons" for refusing to disclose this material and that its position "amounts to a blanket refusal to disclose any information to the Defence, which is not permitted under Rule 70".[56] It notes that the Undisclosed Country "ha[s] not invoked Rule 70 or any other provision of the Statute or Rules".[57] According to the Defence, "[n]othing in the materials provided by the Prosecution indicates that the Prosecution have informed the Government of the background to this request and the specific reasons for it".[58] The

[48] Response, para. 2. See also ibid at 14,
[49] Response, para. 6.
[50] Prosecution Response to Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68*bis*, 20 September 2011 ("Response"), para. 7.
[51] Ibid.
[52] Ibid.
[53] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-T, Joint Defence Request for Leave to Reply and Reply to Prosecution Response to Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68*bis*, filed publicly on 23 September 2011 ("Reply"), para. 2.
[54] Reply, para. 6.
[55] Reply, para. 16.
[56] Joint Defence Request for Leave to Reply and Reply to Prosecution Response to Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68*bis*, filed publicly on 23 September 2011 ("Reply"), para. 18.
[57] Ibid.
[58] Ibid.

Defence has directly contacted the Undisclosed Country with a request for these materials, although it had not yet received a response by the time it filed its Reply.[59]

34. The Defence requests that the parts of the hearings on 31 August and 1 September concerning disclosure issues in respect of Witness 75 be made public save for the redaction of confidential information.[60] The Prosecution does not oppose this request in principle.[61] The Defence suggests that the Parties "seek to agree [on] the necessary redactions and report back to the Trial Chamber so that the appropriate order can then be made".[62]

35. Lastly, on 6 October 2011, the Defence provided supplemental information to the Chamber regarding Witness 75.[63] The information in question was: i) Mr. Harvey's direct request to the asylum lawyer, sent on 20 September 2011, to disclose the asylum appeal document that he had filed on behalf of Witness 75; ii) an email from the asylum lawyer to Mr. Rogers, asking him whether he could disclose this document to the Defence; iii) Mr. Rogers' response to the asylum lawyer, copied to Mr. Harvey, whereby Mr. Rogers essentially said he would not take a position on the matter ("you must do as you consider appropriate"); iv) Mr. Harvey's response to the asylum lawyer stating that the document would be treated confidentially and alleging that the lawyer had previously submitted a copy of the asylum appeal document to Mr. Rogers; v) a subsequent email from the asylum lawyer, dated 4 October 2011, assenting to Mr. Harvey's request and attaching the asylum appeal document; and vi) a copy of the asylum appeal document, which mentioned Mr. Rogers' Letter at length.[64]

36. The Prosecution filed a response where it underlines that the asylum lawyer's appeal document misattributed to Mr. Rogers statements of the original Trial Chamber that Mr. Rogers had quoted in his Letter.[65] The Prosecution also denies that the asylum lawyer had previously submitted a copy of the asylum appeal document to Mr. Rogers, attaching another email from Mr. Rogers to establish its point.[66] The Chamber accepts from the Prosecution's submission that the Prosecution was not in possession of the asylum appeal document.

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[59] Reply, para. 19.
[60] Motion, para. 40.
[61] Response, para. 31.
[62] Reply, para. 23.
[63] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-T, Supplemental Information Concerning Witness 75, filed confidentially on 6 October 2011 ("Supplemental Information from Defence").
[64] Ibid at Confidential Annexes A-D.
[65] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84*bis*-T, Prosecution's Submission on Brahimaj's Supplemental Information Concerning Witness 75, filed confidentially on 7 October 2011, para. 3.
[66] Ibid at para. 2.

II. APPLICABLE LAW

37. Rule 68(i) provides that "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".

38. The Appeals Chamber has specified that "[m]aterial will affect the credibility of the Prosecution's evidence if it undermines the case presented by the Prosecution at trial".[67] The scope of Rule 68 "includes *all information which in any way* tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of Prosecution evidence, as well as material which may put an accused on notice that such material exists".[68] In other words, "[t]he standard for assessing whether material is considered to be exculpatory within the meaning of Rule 68(A) of the Rules is whether there is *any possibility*, in light of the submissions of the Parties, that the given information could be relevant to the defence of the accused".[69]

39. "The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached".[70] The Appeals Chamber has underlined that it "will not tolerate anything short of strict compliance with disclosure obligations".[71]

40. In *Krstić*, the Prosecution claimed that evidence does not fall under the scope of Rule 68 unless it is exculpatory "on its face".[72] The Appeals Chamber rejected that argument:

> The Appeals Chamber is conscious that a broader interpretation of the obligation to disclose evidence may well increase the burden on the Prosecution, both in terms of the volume of material to be disclosed, and in terms of the effort expended in determining whether material is exculpatory. Given the fundamental importance of disclosing exculpatory evidence, however, it would be against the interests of a fair trial to limit the Rule's scope for application in the manner suggested by the Prosecution.[73]

41. As an additional example from the Tribunal's jurisprudence, the Trial Chamber in *Furundžija* found that the Prosecution had engaged in "serious misconduct" by not disclosing Rule 68 material until after closing arguments, while the trial Judgement was pending.[74] The material in question was an approximately three-year old certificate indicating that a Prosecution witness had

[67] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeals Judgement"), para. 178.
[68] Ibid, para. 179 (emphasis added).
[69] *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-T, Confidential Decision on Milan Lukić's Motion for Remedies Arising Out of Disclosure Violations by the Prosecution, 12 May 2011 ("*Lukić* Decision"), para. 14 (emphasis added).
[70] *Krstić* Appeals Judgement, para. 180.
[71] Ibid, para. 215. *See also Lukić* Decision, para. 23.
[72] *Krstić* Appeals Judgement, para. 179.
[73] Ibid.
[74] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Decision, 16 July 1998 ("*Furundžija* Decision"), para. 16.

received mental treatment.[75] The Trial Chamber held that this evidence "clearly had the potential to affect the credibility of prosecution evidence" because it related to the state of the witness' memory.[76] The Defence was prejudiced because it was unable to cross examine Prosecution witnesses or introduce evidence about the matter.[77] In order to allow the Defence to do so, the Trial Chamber decided to re-open the trial proceedings in the interests of justice.[78]

42. When the Prosecution has been found in violation of Rule 68, a Chamber must examine whether the Defence has been prejudiced by the violation before considering whether a remedy is appropriate.[79]

43. As a remedy for a Rule 68 violation, the Trial Chamber in *Orić*, for instance, ordered the Prosecution to conduct a comprehensive search for Rule 68 material and to provide the Trial Chamber with a declaration stating what searches had been made, where they had been made, and the results of such searches.[80] The Pre-Trial Chamber in *Krnojelac* imposed a different remedy, ordering the Prosecution to file a signed report by a member of its trial team certifying, *inter alia*, that a full search had been conducted "throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence".[81]

44. Rule 68*bis* also indicates that "the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules".

III. DISCUSSION

A. Whether the Prosecution Violated Rule 68

1. Relevance of Witness 75's Asylum Case to Rule 68

45. At the outset, the Chamber finds that evidence pertaining to Witness 75's asylum petition is clearly relevant to his credibility. Obtaining asylum is a matter of critical importance to Witness 75 and his family. Witness 75 and his asylum lawyer have repeatedly informed the OTP that its support could help secure approval for the asylum petition. Mr. Rogers' Letter was indeed a factor

[75] Ibid para. 2.
[76] Ibid paras 17-18.
[77] Ibid para. 19.
[78] Ibid para. 21.
[79] *Lukić* Decision, para. 15.
[80] *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005 ("*Orić* Decision"), p. 5.
[81] *Prosecutor v. Krnojelac*, Case No. IT-97-25-PT, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, para. 11.

in the decision of the Undisclosed Country's appellate authority to reopen his asylum case. All of these facts are manifestly relevant to assessing Witness 75's credibility, namely whether he may feel obliged to return the favour by testifying favourably for the Prosecution.

46. As part of his repeated assertion that this evidence is irrelevant to Witness 75's credibility,[82] Mr. Rogers stresses that his Letter "was not written to advance Witness 75's asylum claim".[83] Yet, regardless of what Mr. Rogers' subjective intent may have been at the time he wrote the Letter, the mere existence of the Letter is relevant to Rule 68. While the Defence overstates the facts in claiming that Mr. Rogers had submitted "a letter of reference"[84]—he did not argue that Witness 75 deserved asylum or comment favourably on his character—his Letter did provide significant assistance to Witness 75's application. Evidence that the OTP has provided or may provide any objective form of assistance to a witness falls squarely within the purview of Rule 68.[85]

47. The Chamber recalls that Witness 75 gave a statement to the OTP on 16 October 2010; that his lawyer subsequently requested a letter from Mr. Rogers regarding Witness 75's cooperation with the OTP, indicating that Witness 75 had recently been denied asylum and that his case was pending appeal; and that Mr. Rogers provided his Letter in response to this request. An appeal was lodged by Witness 75's lawyer on 25 November 2010, based, *inter alia*, on Mr. Rogers' Letter, which led the appellate authority to reopen Witness 75's case. It is clear from these circumstances that the material relating to the OTP's involvement in Witness 75's asylum case could "affect the credibility of Prosecution evidence",[86] may "undermine[] the case presented by the Prosecution at trial",[87] and therefore should have been disclosed under Rule 68. Mr. Rogers knew that Witness 75's asylum case was pending appeal and that the letter he provided would be used in an appeal. The Chamber finds that Mr. Rogers should have been aware that the material in question was relevant to Rule 68.

2. The Prosecution's Failure to Disclose Materials Related to Witness 75's Asylum Case

48. The Chamber finds that the Prosecution has violated Rule 68 by failing to disclose relevant, specific material to the Defence in a timely manner.

[82] T. 884, 951-952, 954, 1001, 1006; Response, paras 11, 21.
[83] Response, paras 12-14. *See also* T. 884.
[84] Motion, para. 31.
[85] *See, e.g. Krstić* Appeals Judgement, paras 178-180.
[86] Rule 68.
[87] *Krstić* Appeals Judgement, para. 178. *See also* ibid at 179-180; *Lukić* Decision, para. 14; *Furundžija* Decision, paras 16-21.

49. The Prosecution recognises that its failure to disclose Witness 75's Email of 2 February 2011 was a violation of Rule 68, although it posits that it was only in violation insofar as Witness 75 admitted therein that he had lied to his asylum lawyer about the circumstances under which his brother died.[88] However, the failure to disclose the Email was also in violation of Rule 68 because Witness 75 had explicitly asked therein for the OTP's help in his asylum case. Because Witness 75 was a late disclosure witness, the Prosecution should have disclosed the Email on 18 July 2011.

50. The Prosecution contends that its failure to disclose this particular email was "[t]he only disclosure violation".[89] That is incorrect.

51. Firstly, the Prosecution should have disclosed Mr. Rogers' Letter to the Defence by 18 July 2011. It did not disclose the Letter until 31 August 2011, during the course of Witness 75's testimony. Secondly, the Prosecution should have disclosed to the Defence, by 18 July 2011, the request from the asylum lawyer in response to which Mr. Rogers wrote his Letter.[90] Mr. Rogers only disclosed it after being prompted to do so by the Presiding Judge on 1 September 2011.[91] Thirdly, the Prosecution should have immediately disclosed that the appellate authority of the Undisclosed Country had reopened Witness 75's asylum case on the basis of Mr. Rogers' Letter. Mr. Rogers received this information on 30 August 2011[92] but did not disclose it until 1 September 2011[93] after another pressing request by the Defence[94] while Witness 75 was in the process of testifying. The Defence was kept in the dark about this information while Witness 75 was testifying on 31 August 2011. Fourthly, the Prosecution should also have disclosed by 18 July 2011, or if received after that date immediately upon receipt, additional evidence that it disclosed for the first time in its Response. The evidence in question is:

a) A 17 November 2010 email from Witness 75's asylum lawyer to Mr. Rogers, stating that the OTP could help strengthen the asylum application by writing a letter on Witness 75's behalf: "Your letter will only be given to [the Undisclosed Country's authorities] *in order to help strengthen [Witness 75's] asylum claim.* Thank you for *your assistance* in this matter".[95]

[88] Response, para. 10.
[89] Response, p. 3.
[90] Email from Asylum lawyer to OTP Investigator, 5 November 2010, filed under Confidential Annex A to Motion, Appendix 1.
[91] T. 1009-1010.
[92] Email from Asylum lawyer to Mr. Rogers, 30 August 2011, filed under Confidential Annex A to Response, Tab 22.
[93] Email from Mr. Rogers to Defence Counsel, 1 September 2011, filed under Confidential Annex A to Motion, Appendix 12.
[94] Email from Mr. Harvey to Mr. Rogers, 31 August 2011, filed under Confidential Annex A to Motion, Appendix 11.
[95] Email from Witness 75's Asylum lawyer to Mr. Rogers, 17 November 2010, filed under Confidential Annex A to Response, Tab 5 (emphasis added).

b) An 18 November 2010 email from Witness 75's asylum lawyer to Mr. Rogers expressing gratitude to Mr. Rogers for having supplied his Letter, stating: "On behalf of my client, [Witness 75], I thank you for *your assistance*".[96]

c) A 2 February 2011 email by Witness 75 to an OTP investigator, entitled "For my case!!" [sic], wherein Witness 75 asked the OTP to call him "as soon as possible", stressing: "I have something very important to discuss with you on [sic] regard for my case". Witness 75 sent this message only a few hours prior to his Email stating that his asylum case was "in limbo".[97] This evidence tends to confirm that Witness 75 was desperate about obtaining asylum. In this regard, it is also relevant that the investigator equally received a voicemail from Witness 75 around that time but that he "never managed" to return Witness 75's call because Witness 75 called him again shortly afterwards in a pressing effort to discuss his asylum case and seek the OTP's help. Witness 75 "sounded very upset" about the case.[98]

d) A 30 August 2011 email from Witness 75's asylum lawyer to Mr. Rogers, sent while Witness 75 was in the process of testifying. The asylum lawyer asked Mr. Rogers to provide, in due course, another letter to assist with the asylum petition: "I hope that [Witness 75] has been of assistance to your case. [...] After the conclusion of the trial, I would greatly appreciate your letter concerning [Witness 75's] testimony and your opinion as to any danger he might face if deported to Kosovo".[99] Mr. Rogers ultimately responded that he could not provide an additional letter,[100] as discussed below. The asylum lawyer replied that he was "still requesting a letter from [Mr. Rogers] verifying that [Witness 75] gave testimony to the ICTY in the Haradinaj case".[101] The Prosecution submits that such letters are given to Tribunal witnesses as a matter of "routine" and that "Witness 75's desire to secure such a letter does not affect his credibility".[102] To the contrary, the Chamber finds that Witness 75's expectation that he would receive an additional letter showing that he testified at the Tribunal may be of benefit to him in his

[96] Email from Asylum lawyer to Mr. Rogers, 18 November 2010, filed under Confidential Annex A to Response, Tab 7 (emphasis added).
[97] Email from Witness 75 to OTP Investigator, 2 February 2011, filed under Confidential Annex A to Response, Tab 11.
[98] Declaration of OTP Investigator, 8 September 2011, paras 10-13, 15, filed under Confidential Annex A to Response, Tab 14.
[99] Email from Asylum lawyer to Mr. Rogers, 30 August 2011, filed under Confidential Annex A to Response, Tab 22.
[100] Email from Mr. Rogers to Asylum lawyer, 1 September 2011, filed under Confidential Annex A to Response, Tab 25.
[101] Email from Asylum lawyer to Mr. Rogers, 1 September 2011, filed under Confidential Annex A to Response, Tab 26.
[102] Response, para. 21.

asylum case, and consequently may affect his credibility. The asylum lawyer would not make an effort to obtain such a letter if it was irrelevant to the outcome of the asylum case. For instance, such a letter may be used to bolster a claim that Witness 75 cooperated with the OTP and may face repercussions if he was deported to Kosovo due to having testified in the *Haradinaj et al.* case. The asylum lawyer's 30 August 2011 email therefore constitutes Rule 68 material as well.

52. The Prosecution is incorrect in claiming that it cannot disclose information that it may or may not have given to the Undisclosed Country's immigration authorities about Witness 75 due to the country's request that all its communications with the OTP be kept confidential.[103] The Undisclosed Country did not invoke Rule 70 in its answer to the Prosecution's inquiry. Even if that had been the case, this rule applies to information that "has been provided *to the Prosecutor* on a confidential basis" by a State,[104] not information that the OTP may have provided to a State. In addition, Rule 70 does not simply absolve the Prosecution of its Rule 68 obligations.[105] The Prosecution must therefore disclose to the Defence any information about Witness 75 that it may or may not have given to the Undisclosed Country's immigration authorities.

53. Finally, it is unclear from the Prosecution's submissions whether the Undisclosed Country's immigration authorities demanded confidentiality on their communications with the OTP at the time when they gave the OTP information, and, if so, when and on what basis confidentiality was demanded. Under these circumstances, the Chamber invites the Prosecution to disclose the material in question to the Defence or to make an application to be relieved from its disclosure obligations in accordance with the Rules.

3. Conclusion

54. In sum, the Chamber finds that the Prosecution has committed several serious violations of Rule 68 by failing to disclose, in a timely fashion, materials relevant to assessing Witness 75's credibility. The Prosecution had the duty to disclose to the Defence all the materials in its possession concerning Witness 75's asylum case because Witness 75 requested and, in fact, did receive a benefit from being a Prosecution witness.

55. The material in question fell under the scope of the Defence's request for disclosure of 27 January 2011, which asked for material relating to any "promises" or "inducements" concerning the

[103] *See* Response, para. 7.
[104] Rule 70(B).

"relocation" of the witness and his family.[106] The Defence made several additional requests for such Rule 68 material. In any event, Mr. Rogers had the duty to disclose such evidence, by 18 July 2011, irrespective of whether the Defence had expressly requested it.

B. Assessment of the Prejudice to the Defence

56. The Chamber finds that the Defence has suffered prejudice because the Prosecution's disclosure of the aforementioned materials occurred at an improperly late stage. The Defence was kept in the dark about the fact that Witness 75 requested and did receive a benefit from being a Prosecution witness, an issue relevant to his credibility. The Defence was entitled to disclosure of this information so it could properly prepare for trial and cross examine Witness 75 about the matter. Yet, the Prosecution did not disclose the materials in time for the Defence to do so.

57. However, the Chamber finds that the prejudice has been remedied by its decision to adjourn Witness 75's testimony in order to allow the Defence to prepare its cross examination. Further, the Chamber considers that the delays caused by the Prosecution's violations are not, in and of themselves, such as to have violated the Accused's right to a fair and expeditious trial. That being noted, the Chamber underlines that the Prosecution's unduly narrow interpretation of Rule 68 may result in additional prejudice to the Defence insofar as it leads the Prosecution to withhold analogous Rule 68 material related to other witnesses.

C. Whether Mr. Rogers Should be Sanctioned

58. The Chamber has found that the Prosecution's failure to disclose material about its involvement in Witness 75's asylum case in a timely manner was a violation of Rule 68. The Defence submits that there has been misconduct on the part of Mr Rogers for which it requests that he be reprimanded. In considering this request, the Chamber notes that Mr. Rogers did not disclose the materials about the OTP's involvement in Witness 75's asylum case before the testimony of Witness 75 was underway; and only reluctantly disclosed them in several instalments after the Defence made multiple pressing demands. Mr. Rogers also did not disclose the 5 November 2010

[105] *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Confidential and *Ex Parte* Decision on Prosecution's Notification Regarding Rule 70 Material, 18 May 2004, pp 4-5; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paras 19-20.
[106] Request for Disclosure by Richard Harvey, 27 January 2011, filed under Confidential Annex A to Motion, Appendix 3.

request from the asylum lawyer[107] until he was prompted to do so in court by the Presiding Judge.[108]

59. While Mr. Rogers' failure to disclose Witness 75's Email of 2 February 2011[109] may have been an "oversight",[110] he decided not to disclose the remaining material in a timely manner based on his view that it was *irrelevant* to Rule 68, a point on which he was adamant.[111] Mr. Rogers' argument suggests that he has an unduly narrow interpretation of the Prosecution's obligations under the rule. All material that may taint a witness' evidence must be disclosed pursuant to Rule 68. In particular, the Prosecution's obligations pursuant to Rule 68 are not limited to those perpetrated with the intention to threaten, promise or induce a witness.

60. Mr. Rogers could not have reasonably believed that he had no duty to disclose that Witness 75 requested and actually received assistance in his asylum case as a result of being a Prosecution witness. Further, even though Mr. Rogers insists that his Letter was not intended to help Witness 75 secure asylum,[112] the record shows that the OTP was not disinterested in the outcome of the asylum case. Mr. Rogers was mindful of the risk that Witness 75 would be deported back to Kosovo[113] and specified that his Letter was written "out of concern for Witness 75's safety and security".[114] In addition, an OTP investigator acknowledged that the OTP's "objective" was to have Witness 75 come testify in person in The Hague because the asylum lawyer had reported that Witness 75 would not be allowed to travel unless his asylum case was finalised.[115] In other words, the OTP shared a mutual interest with Witness 75 in avoiding his deportation to Kosovo, which would have made it more difficult for the OTP to secure Witness 75's testimony.

61. While Mr Rogers' failure to disclose his Letter was a violation of Rule 68, the Chamber notes that it was not improper for Mr. Rogers to write the Letter itself. The evidence before the Chamber does not establish that Mr. Rogers made an agreement with Witness 75, whereby he would testify in exchange for the OTP's help with his asylum case. In particular, after Mr. Rogers had already submitted the Letter to the Undisclosed Country's authorities, the asylum lawyer informed an OTP investigator that the resolution of the asylum case would be expedited if the OTP

[107] Email from Asylum lawyer to OTP Investigator, 5 November 2010, filed under Confidential Annex A to Motion, Appendix 1.
[108] T. 1009-1010.
[109] Email, filed under Confidential Annex A to Motion, Appendix 4.
[110] Response, para. 10.
[111] T. 884, 951-952, 954, 1001, 1006; Response, paras 11, 21.
[112] Response, paras 12-14; T. 884.
[113] T. 884.
[114] Response, para. 12.
[115] Declaration by OTP Investigator, 9 September 2011, para. 6, filed under Confidential Annex A to Response, Tab 8. The asylum lawyer's reported statement seems partly erroneous because Witness 75 was allowed to come testify in The Hague, notwithstanding the fact that his asylum application is still pending.

took a more active role in support of Witness 75.[116] According to the investigator, the OTP decided against this course of action, and therefore did not contact the local official handling the asylum case against Witness 75 as a result of this request.[117]

62. On 1 February 2011, after another query from the asylum lawyer, Mr. Rogers directly informed him that the OTP would "take no position" with regard to Witness 75's asylum case. "This is not a matter for us," Mr. Rogers stressed, "and we will not advocate for any particular outcome for him".[118] Moreover, while Witness 75 was in the process of testifying before the Chamber, Mr. Rogers was notified by the asylum lawyer that the asylum petition had been reopened for further proceedings. The asylum lawyer asked Mr. Rogers to relay this information to Witness 75. Mr. Rogers correctly declined to do so: "[Witness 75] is presently giving evidence and I am unable to communicate with him".[119] Mr. Rogers also declined the asylum lawyer's request for another letter to be submitted to the Undisclosed Country's officials as part of Witness 75's asylum application:

> For the avoidance of doubt, and as I have stated before, I want to make it clear that the OTP does not and will not act to support any person's application for asylum or refugee status in any country. This is a matter for you and the immigration authorities. I have already provided an assessment of risk in my letter of 18 November 2010. There is nothing more I can add.[120]

63. Nevertheless, the fact that Mr. Rogers did not make an agreement with Witness 75 or advocate in his favour to the Undisclosed Country's authorities does not excuse his repeated violations of Rule 68. Mr. Rogers should have readily conceded the obvious relevance of this evidence and acknowledged that he had committed several Rule 68 violations. Rather, Mr. Rogers has repeatedly insisted, unconvincingly, that such evidence is irrelevant to the testimony of Witness 75 and presumably to the testimony of any other witness as well.

64. Rule 68*bis* stipulates that violations of Rule 68 are sanctionable. The Chamber considers that a reprimand is warranted given Mr. Rogers' serious failure to abide by Rule 68 and his unwillingness to recognise his violations of the rule.

D. Measures to Ensure Compliance with Rule 68

65. As a preliminary matter, the Chamber reemphasises that the Prosecution has a standing obligation to disclose Rule 68 material regardless of whether the Defence has requested it.

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[116] Declaration by OTP Investigator, 9 September 2011, para. 6, filed under Confidential Annex A to Response, Tab 8.
[117] Ibid.
[118] Email from Mr. Rogers to Asylum lawyer, 1 February 2011, filed under Confidential Annex A to Response, Tab 10.
[119] Email from Mr. Rogers to Asylum lawyer, 30 August 2011, filed under Confidential Annex A to Response, Tab 23.
[120] Email from Mr. Rogers to Witness 75's Asylum lawyer, 1 September 2011, filed under Confidential Annex A to Response, Tab 25.

66. The Chamber has decided to order the Prosecution to file a report confirming that it has comprehensively searched for Rule 68 material in its possession, in relation to all its witnesses in this trial, specifying what searches have been made, where they have been made, and the results of such searches.[121] The Prosecution shall file the report seven days following the issuance of this decision. The duty to file this report shall not absolve the Prosecution of its permanent duty to immediately disclose to the Defence any Rule 68 material in its possession.

67. In addition, the Chamber instructs the OTP to take steps to ensure that all staff working on this case are made fully aware of the Chamber's decision and reminded of Rule 68 obligations.

68. Because the Chamber considers these measures sufficient at this time, the Chamber declines to follow the Defence's request for a new procedure whereby the Prosecution would submit a "disclosure report" at least seven days prior to the testimony of each of its remaining witnesses.[122]

E. The Defence's Request that Hearings be Made Public

69. The Parties agree in principle that the court transcripts of 31 August and 1 September 2011 can be made public save for the redaction of confidential information. The Chamber instructs the Parties to seek an agreement on what the necessary redactions may be, and to report to the Chamber on this matter by way of a formal filing within 14 days of the issuance of this decision.

F. The Defence's Request for Materials from the Undisclosed Country

70. Because the Defence has directly contacted the Undisclosed Country with a request for materials concerning Witness 75,[123] the Chamber shall take no action on this matter at this stage. The Chamber invites the Defence to raise the matter with the Chamber, if and when it deems it necessary.

IV. DISPOSITION

71. For the foregoing reasons, the Chamber hereby

a. **GRANTS** the Parties' respective requests to have their written submissions exceed the ordinary word limit;

[121] *See Orić* Decision, p. 5.
[122] Motion, para. 37-38.
[123] Reply, para. 19.

b. **GRANTS** the Defence's request for leave to reply and takes note of the content of the Reply;

c. **GRANTS** the Motion in part;

d. **HOLDS** that the Prosecution has violated Rule 68;

e. **REPRIMANDS** Mr. Rogers pursuant to Rule 68*bis*;

f. **ORDERS** the Prosecution to disclose, in accordance with this decision, all Rule 68 material in its possession with respect to Witness 75 and all remaining Prosecution witnesses within seven days of the filing of this Decision and simultaneously file a report specifying what searches have been made, where they have been made and the results of such searches;

g. **INSTRUCTS** the OTP to take steps to ensure that all staff working on this case are made fully aware of the Chamber's decision and reminded of Rule 68 obligations;

h. **DENIES** the Motion in other respects;

i. **INSTRUCTS** the Parties to seek an agreement on what the necessary redactions to the transcripts of 31 August and 1 September 2011 may be, and to report back to the Chamber within 14 days.

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

Judge Bakone Justice Moloto,
Presiding

Dated this 12th day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]