



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: 22 November 2011

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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: 22 November 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SIXTIETH, SIXTY-FIRST, SIXTY-THIRD, AND SIXTY-
FOURTH DISCLOSURE VIOLATION MOTIONS**

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 “Sixtieth Motion for Finding of Disclosure Violation and for Remedial Measures”, made orally on behalf of the Accused by his legal adviser on 20 October 2011 (“Sixtieth Motion”); the Accused’s “Memorandum in Support of Sixtieth Motion for Finding of Disclosure Violation (Ivo Atlija)”, filed publicly with confidential annexes on 21 October 2011 (“Sixtieth Motion Support Memorandum”); the Accused’s “Supplemental Memorandum in Support of Sixtieth Motion for Finding of Disclosure Violation (Ivo Atlija)” filed on 26 October 2011 (“Sixtieth Motion Supplement”);¹ the Accused’s “Sixty-First Motion for Finding of Disclosure Violation (Mevludin Sejmenović)”, filed publicly on 26 October 2011 (“Sixty-First Motion”);² the Accused’s “Second Supplemental Memorandum in Support of Sixtieth Motion for Finding of Disclosure Violation (Ivo Atlija)” filed publicly with a confidential annex on 8 November 2011 (“Sixtieth Motion Second Supplement”); the Accused’s “Sixty-Third Motion for Finding of Disclosure Violation (KDZ011)” filed publicly with a confidential annex on 8 November 2011 (“Sixty-Third Motion”); the Accused’s “Sixty-Fourth Motion for Finding of Disclosure Violation (Idriz Merdžanić)” filed publicly with a confidential annex on 10 November 2011 (“Sixty-Fourth Motion”),³ and hereby issues its decision thereon.

I. Submissions

A. Sixtieth Motion

1. In the Sixtieth Motion, made orally on 20 October 2011, 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 that day of three letters dating back to 1996 (“First Atlija Correspondence”).⁴ He observes that the First Atlija Correspondence was between the Prosecution and the government of the state where witness Ivo Atlija resided at the time, and that the Prosecution “requested and obtained permission for Mr. Atlija to remain in

¹ The Chamber notes that on 22 November 2011, it ordered the Accused to re-file the Sixtieth Motion Supplement with a public redacted version of confidential Annex B and ordered the Registry to reclassify the Sixtieth Motion Supplement so that the annex therein is made confidential. See T. 21686 (22 November 2011).

² The Chamber notes that on 22 November 2011, it ordered the Accused to re-file the Sixty-First Motion with a public redacted version of confidential Annex A and ordered the Registry to reclassify the Sixty-First Motion so that the annex therein is made confidential. See T. 21686 (22 November 2011).

³ Hereinafter, the Chamber shall refer to the Sixtieth Motion, the Sixtieth Motion Support Memorandum, the Sixtieth Motion Supplement, the Sixtieth Motion Second Supplement, the Sixty-First Motion, the Sixty-Third Motion, and the Sixty-Fourth Motion as the “Motions”. The Chamber notes that on 28 October 2011, the Accused withdrew the “Sixty-Second Motion for Finding of Disclosure Violation and for Remedial Measures (October 2011)” filed on the same day. See T. 20615 (28 October 2011).

⁴ Hearing, T. 20302 (20 October 2011); Sixtieth Motion Support Memorandum, paras. 1–3.

that country and not be repatriated to Bosnia as a result of his testimony on behalf of the [P]rosecution in ICTY cases”.⁵ The Accused submits that the First Atlija Correspondence goes to Atlija’s credibility as it refers to the provision of a benefit to the witness in exchange for his testimony.⁶

2. The Accused relies on a recent decision in the case of *Prosecutor v. Haradinaj et al.* “in which the Prosecution was found to have violated Rule 68 by failing to disclose the very same type of information that was in support of an asylum application in that case”.⁷ Following the *Haradinaj* Decision, on 18 October 2011, the Accused requested any material related to “any promises or benefits conferred upon witnesses”, which prompted the disclosure of the First Atlija Correspondence by the Prosecution.⁸

3. The Accused submits that he was prejudiced by the late disclosure as he was unable to review the First Atlija Correspondence before commencing his cross-examination of Atlija.⁹ He also asserts that he should have had this material before the trial commenced to assist in developing his defence strategy, including identifying which witnesses to challenge on the grounds of credibility.¹⁰ He requests the Chamber to make a finding that Rule 68 of the Rules had been violated and to exclude Atlija’s testimony “given the nature of the violation and the number of violations that have occurred in this case, or at the minimum postpone his cross-examination” to give the Accused sufficient time to review and incorporate the First Atlija Correspondence into his cross-examination.¹¹

4. The Prosecution provided a brief oral response to the Sixtieth Motion on 20 October 2011, stating that it responded “as quickly as possible” to what it deemed to be a Rule 66(B) request from the Accused, that the First Atlija Correspondence included very short documents that had already been “fully assimilated”, and that there was “more than ample time” to incorporate them into the Accused’s cross-examination strategy.¹²

5. On the same day, the Chamber held that it would not make a ruling as to whether the disclosure of the First Atlija Correspondence constituted a violation of Rule 68 of the Rules until

⁵ Hearing, T. 20302 (20 October 2011); Sixtieth Motion Support Memorandum, para. 2.

⁶ Hearing, T. 20303–20304 (20 October 2011); Sixtieth Motion Support Memorandum, para. 4.

⁷ Hearing, T. 20302 (20 October 2011) citing *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis, 12 October 2011 (“*Haradinaj* Decision”). See also Sixtieth Motion Support Memorandum, paras. 5–6.

⁸ Hearing, T. 20302–20303 (20 October 2011).

⁹ Sixtieth Motion Support Memorandum, para. 8.

¹⁰ Sixtieth Motion Support Memorandum, para. 8.

¹¹ Hearing, T. 20303 (20 October 2011); Sixtieth Motion Support Memorandum, paras. 9–10, 12.

¹² Hearing, T. 20304 (20 October 2011).

it had received written submissions on the issue.¹³ Nevertheless, considering the short length of the First Atlija Correspondence and that Atlija's testimony would not be concluded until 26 October 2011, the Chamber ruled that the Accused would have ample time to consider the First Atlija Correspondence and would therefore not be prejudiced by commencing Atlija's cross-examination on 20 October 2011.¹⁴ The Chamber thus denied the first part of the Sixtieth Motion.

6. In the Sixtieth Motion Supplement, the Accused contends that on 25 October 2011, after he had commenced Atlija's cross-examination, the Prosecution disclosed "four additional documents concerning its continuing efforts to assist its witness in avoiding repatriation to Bosnia" ("Second Atlija Correspondence").¹⁵ He submits that the Prosecution violated Rule 68 of the Rules by failing to disclose the Second Atlija Correspondence as soon as practicable and notes that the Second Atlija Correspondence makes reference to additional correspondence which has yet to be disclosed.¹⁶ The Accused asserts that the disclosure of the Second Atlija Correspondence indicates that the Prosecution "has intervened for many of its witnesses in order to prevent their repatriation" and that it has not yet disclosed other "similar material for any of its witnesses in this case".¹⁷ As a result the Accused requests the Chamber to:

- (A) Order the [P]rosecution to disclose forthwith all remaining items concerning its efforts on behalf of Mr. Atlija to avoid his repatriation to Bosnia and settle in another State;
- (B) Order the [P]rosecution to disclose all Rule 68 material of this nature for all of its witnesses by 31 October 2011; and
- (C) Order the [P]rosecution to explain why it has not disclosed material of this nature earlier in the trial.¹⁸

7. On 4 November 2011, the Prosecution filed the "Consolidated Response to Karadžić's Sixtieth and Sixty-First Motions for Findings of Disclosure Violations" ("Response to Sixtieth and Sixty-First Motions"), wherein it contends that the Sixtieth Motion, the Sixtieth Motion Supplement, and the Sixty-First Motion should be dismissed as the Accused has failed to show the exculpatory or mitigating nature of the material in question and has failed to demonstrate any prejudice warranting the relief sought.¹⁹ More specifically, the Prosecution does not

¹³ Hearing, T. 20305 (20 October 2011).

¹⁴ Hearing, T. 20305 (20 October 2011).

¹⁵ Sixtieth Motion Supplement, para. 2.

¹⁶ Sixtieth Motion Supplement, paras. 3–4.

¹⁷ Sixtieth Motion Supplement, paras. 5–6.

¹⁸ Sixtieth Motion Supplement, para. 7.

¹⁹ Response to Sixtieth and Sixty-First Motions, paras. 1–2, 10–11.

consider that the material which is the object of the Sixtieth Motion, the Sixtieth Motion Supplement, and the Sixty-First Motion “may” affect the credibility of the witnesses concerned. It contends that “measures of witness assistance that are within the boundaries of what is reasonable, expected—and contemplated within the Tribunal’s framework—to ensure the safety of witnesses and their ability to testify cannot, without more, undermine the credibility of the witness” and that measures of assistance that are not known to the witness can have no bearing on credibility.²⁰ The Prosecution equates the measures discussed in the disclosed material with “measures to restore a witness’s pre-existing level of safety or to assist the witness in being kept from harm in order to ensure his/her safety and continued participation in the judicial process”.²¹ In response to the Accused’s argument that additional documents may exist, the Prosecution submits that any further information that will be provided will in any event be substantially similar to the material already disclosed.²²

8. The Prosecution further submits that the *Haradinaj* Decision merely restates existing case-law on Rule 68 and in no way recognises a “category-based approach to Rule 68 determination”.²³ It further suggests that the case-law of the International Criminal Tribunal for Rwanda (“ICTR”) cited by the Accused does not support his position that all assistance-related material falls under the purview of Rule 68 but rather supports a case-by-case determination.²⁴

9. The Prosecution therefore concludes that the material at hand was disclosed in a timely manner pursuant to Rule 66(B) rather than Rule 68 of the Rules.²⁵ Accordingly, since the Prosecution has not violated its disclosure obligation and because the Accused has not suffered any prejudice, the requested relief is not warranted.²⁶

10. In the Sixtieth Motion Second Supplement, the Accused submits that on 2 November 2011 the Prosecution disclosed “five more documents concerning its continuing efforts to assist its witness in avoiding repatriation to Bosnia” (“Third Atlija Correspondence”).²⁷ He reiterates that the Prosecution violated Rule 68 of the Rules by failing to disclose the Third Atlija Correspondence as soon as practicable.²⁸ The Accused adds that the Prosecution’s multiple interventions for Atlija to be exempt from repatriation may affect his credibility as “it can be

²⁰ Response to Sixtieth and Sixty-First Motions, para. 4.

²¹ Response to Sixtieth and Sixty-First Motions, para. 6.

²² Response to Sixtieth and Sixty-First Motions, para. 13.

²³ Response to Sixtieth and Sixty-First Motions, paras. 5, 8.

²⁴ Response to Sixtieth and Sixty-First Motions, para. 9.

²⁵ Response to Sixtieth and Sixty-First Motions, para. 12.

²⁶ Response to Sixtieth and Sixty-First Motions, paras. 14–19.

²⁷ Sixtieth Motion Second Supplement, para. 3.

²⁸ Sixtieth Motion Second Supplement, para. 4.

plausibly contended that he has a motive to give testimony favourable to the [P]rosecution to perform his end of the bargain” so as to allow him to remain in the state in which he was residing at the time.²⁹ The Accused further adds, in response to the Prosecution’s argument in the Response to Sixtieth and Sixty-First Motions, that efforts to assist a witness in removal, deportation or repatriation proceedings are not akin to “routine payment of DSA and travel costs for the witness to come and testify to The Hague which may not fall within Rule 68”.³⁰ The Accused thus reiterates his request that Atlija’s evidence be excluded or, alternatively, asks that he be recalled.³¹

11. On 9 November 2011, the Prosecution filed its “Supplemental Response to the Accused’s ‘Second Supplemental Memorandum in Support of Sixtieth Motion for Finding of Disclosure Violation (Ivo Atlija)’” (“Response to Sixtieth Motion Second Supplement”), wherein it opposes the Sixtieth Motion Second Supplement as it submits the Third Atlija Correspondence is substantially similar to both the First Atlija Correspondence and the Second Atlija Correspondence. The Prosecution contends that all this correspondence resulted from Atlija’s legitimate need for protection arising from his status as a witness and may not necessarily affect his credibility.³² Finally, the Prosecution opposes the Accused’s request that Atlija be recalled as he failed to raise the matters arising from the Atlija related correspondence during his cross-examination.³³

B. Sixty-First Motion

12. In the Sixty-First Motion, the Accused argues that the Prosecution has violated Rule 68 of Rules in relation to the disclosure on 26 October 2011 of a letter dated 27 September 2001 from the Prosecution to the government of the state in which Sejmenović resided at the time (“Sejmenović Correspondence”) requesting that witness Mevludin Sejmenović be allowed to seek residence there.³⁴ The Accused observes that the Sejmenović Correspondence refers to two additional letters related to this issue and requests the Chamber to order that they be disclosed to him forthwith.³⁵ Relying again on the *Haradinaj* Decision, the Accused asserts that the

²⁹ Sixtieth Motion Second Supplement, para. 6.

³⁰ Sixtieth Motion Second Supplement, para. 9.

³¹ Sixtieth Motion Second Supplement, paras. 11–12.

³² Response to Sixtieth Motion Second Supplement, para. 7.

³³ Response to Sixtieth Motion Second Supplement, para. 9.

³⁴ Sixty-First Motion, paras. 1–2.

³⁵ Sixty-First Motion, para. 4.

Sejmenović Correspondence falls “squarely within the purview of Rule 68” as it affects the credibility of a Prosecution witness.³⁶

13. The Accused argues that he has been prejudiced by the late disclosure of the Sejmenović Correspondence, which was disclosed to him the day before Sejmenović was scheduled to start his testimony, that he was unable to review it “sufficiently in advance of his cross-examination”, and that he should have had this material before the trial commenced to assist him in developing his defence strategy, including identifying which witnesses to challenge on the grounds of credibility.³⁷ In addition to his request for a finding that Rule 68 has been violated, the Accused also asks that the Chamber order the exclusion of Mevludin Sejmenović’s evidence.³⁸ He contends that this extraordinary measure is warranted given the “pattern of disclosure violations in this case”.³⁹

14. The Chamber recalls that the Prosecution filed the Response to Sixtieth and Sixty-First Motions on 4 November 2011 and makes reference to its summary of the Prosecution’s submissions in paragraph 7 to 9 above.

C. Sixty-Third Motion

15. In the Sixty-Third Motion, the Accused argues that the Prosecution has again violated Rule 68 of the Rules by failing to disclose correspondence between the Prosecution and a state in relation to the repatriation proceedings of witness KDZ011 (“KDZ011 Correspondence”).⁴⁰ The Accused submits that the KDZ011 Correspondence was only disclosed on 8 November 2011, the day before the witness was scheduled to start his testimony. The Accused argues that he has been prejudiced by the late disclosure of the KDZ011 Correspondence as he was unable to review it “sufficiently in advance of his cross-examination” and that, as with the other material discussed above, he should have had it before the trial commenced.⁴¹ The Accused therefore requests that the Chamber find that Rule 68 has been violated and that KDZ011’s evidence be excluded.⁴²

16. The Prosecution filed the “Response to Sixty-Third Motion for Finding of Disclosure Violation (KDZ011)” on 9 November 2011 (“Response to Sixty-Third Motion”), in which it

³⁶ Sixty-First Motion, paras. 5–7.

³⁷ Sixty-First Motion, para. 9.

³⁸ Sixty-First Motion, paras. 10–11.

³⁹ Sixty-First Motion, paras. 11, 13.

⁴⁰ Sixty-Third Motion, paras. 1–2.

⁴¹ Sixty-Third Motion, para. 7.

⁴² Sixty-Third Motion, paras. 8–9.

opposes the Sixty-Third Motion. The Prosecution asserts that the Accused has neither demonstrated the exculpatory or mitigating nature of the KDZ011 Correspondence,⁴³ nor shown that he suffered any prejudice,⁴⁴ and that the exclusion of his evidence is therefore inappropriate.⁴⁵

D. Sixty-Fourth Motion

17. Similarly, in the Sixty-Fourth Motion, the Accused argues that the Prosecution has violated Rule 68 by failing to disclose correspondence between the Prosecution and the government of a state in relation to repatriation proceedings of witness Idriz Merdžanić (“Merdžanić Correspondence”).⁴⁶ The Accused submits that the Merdžanić Correspondence was only disclosed on 8 November 2011, a week before the witness was scheduled to start his testimony.⁴⁷ The Accused argues that he has been prejudiced by the late disclosure of the Merdžanić Correspondence as he was unable to review it “sufficiently in advance of his cross-examination” and that he should have had this material before the trial commenced.⁴⁸ The Accused therefore requests that the Chamber find that Rule 68 has been violated and order that Merdžanić’s evidence be excluded.⁴⁹

18. On 14 November 2011, the Prosecution filed its “Response to Sixty-Fourth Motion for Finding of Disclosure Violation (Idriz Merdžanić)” (“Response to Sixty-Fourth Motion”), where opposing the Sixty-Fourth Motion. The Prosecution contends that the Accused has neither demonstrated the exculpatory or mitigating nature of the Merdžanić Correspondence,⁵⁰ nor shown that he suffered any prejudice,⁵¹ and that a finding of Rule 68 violation is therefore inappropriate.⁵²

II. Applicable Law

19. The Chamber reiterates that 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 innocence or mitigate the guilt of the accused or affect the

⁴³ Response to Sixty-Third Motion, paras. 2–3.

⁴⁴ Response to Sixty-Third Motion, para. 9.

⁴⁵ Response to Sixty-Third Motion, para. 8.

⁴⁶ Sixty-Fourth Motion, para. 2.

⁴⁷ Sixty-Fourth Motion, para. 3.

⁴⁸ Sixty-Fourth Motion, para. 6.

⁴⁹ Sixty-Fourth Motion, paras. 7–8.

⁵⁰ Response to Sixty-Fourth Motion, paras. 2–3.

⁵¹ Response to Sixty-Fourth Motion, paras. 8–9.

⁵² Response to Sixty-Fourth Motion, para. 10.

credibility of Prosecution evidence”.⁵³ 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.⁵⁴

20. 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”.⁵⁵ 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.⁵⁶

21. 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.⁵⁷

III. Discussion

A. Whether the First Atlija Correspondence, Second Atlija Correspondence, Third Atlija Correspondence (together, “Atlija Correspondence”), Sejmenović Correspondence, KDZ011 Correspondence and Merdžanić Correspondence (altogether “Contested Correspondence”) constitute Rule 68 material

22. The Accused submits that the Contested Correspondence is exculpatory and affects the credibility of the respective witnesses. The Prosecution contends that it does not but rather that it is concerned with “routine assistance”.⁵⁸

23. The Chamber notes the finding in the *Haradinaj* Decision that “[e]vidence that the OTP has provided or may provide any objective form of assistance to a witness falls squarely within

⁵³ 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.

⁵⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”), para. 179.

⁵⁵ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, para. 11.

⁵⁶ Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, para. 39.

⁵⁷ *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268.

⁵⁸ Response to Sixtieth and Sixty-First Motions, para. 4; Response to Sixty-Third Motion, para. 6.

the purview of Rule 68”.⁵⁹ This finding was made in the context of specific factual circumstances, including the fact that the Prosecution in that case was found to have 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*”.⁶⁰ The Chamber has also taken note of the ICTR trial decisions referred to by the Accused in the Sixtieth Motion Support Memorandum and the Sixtieth Motion Second Supplement, which held that the payment of financial expenditures may have an effect on the witness’s credibility.⁶¹ This Chamber considers 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. The Chamber is thus of the view that the assessment as to whether “witness-assistance” related material falls under the purview of Rule 68 should be conducted on a case-by-case basis. The Chamber will therefore examine the Atlija Correspondence, Sejmenović Correspondence, KDZ011 Correspondence, and Merdžanić Correspondence in turn to assess whether the respective witnesses requested and/or received a benefit from being a Prosecution witness.

Atlija Correspondence

24. The Atlija Correspondence consists of 14 documents,⁶² dated between 1996 and 2004, exchanged between Atlija, the Prosecution, and the authorities of the state in which Atlija resided at the time. In the first document, dating back to 1996, Atlija asks that, for the purpose of prolonging his visa in the country in which he resided at the time, he be provided with a certificate that he is an “eyewitness” and that he had “testified”. This document does not specify whether it was addressed to the Prosecution. The remaining documents are requests by the said state for the purpose of repatriation proceedings, as to whether Atlija was still needed as a witness by the Prosecution, and the corresponding affirmative responses from the Prosecution. The last confirmation by the Prosecution to that effect dates back to 19 May 2004.

25. Having conducted its own review of the Atlija Correspondence, the Chamber considers that it establishes that Atlija requested and received a benefit, *ie.*, a temporary exemption from

⁵⁹ *Haradinaj* Decision, para. 85.

⁶⁰ *Haradinaj* Decision, para. 54 (emphasis added).

⁶¹ See for instance, *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on Joseph Nzirorera’s Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICRT Payments for the Benefit of Witnesses G and T, 29 May 2008, para. 15.

⁶² The Chamber notes that the Letter of 23 April 2002 from the Prosecution bearing ERN 06809947 and disclosed on 2 November 2011 is a signed version of the same document, which was already disclosed to the Accused as ERN 06808754 on 25 October 2011.

repatriation proceedings, by virtue of being a Prosecution witness. Accordingly, this material may affect his credibility. Thus, the Chamber considers that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose this correspondence as soon as practicable, given that it was produced between 1996 and 2004 but was only recently disclosed to the Accused.

Sejmenović Correspondence

26. The Sejmenović Correspondence is a letter from the Prosecution to the authorities of the state in which Sejmenović resided at the time dated 27 September 2001, in which the Prosecution states that it strongly supports Sejmenović's desire to emigrate to the said state and submits that "if Mr. Sejmenović and his family are not successful in gaining residence [there] (or elsewhere), he will not be in a position to testify because of fears of reprisals to himself and his immediate family living in Bosnia and Herzegovina".⁶³

27. Having conducted its own review of the Sejmenović Correspondence, the Chamber considers that it establishes the Prosecution's involvement in Sejmenović potentially receiving a benefit, *ie.*, obtaining legal residence in a third state, by virtue of being a Prosecution witness. Accordingly, the Chamber considers that the Sejmenović Correspondence may affect his credibility and therefore that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose it as soon as practicable, given that it was produced in 2001 but was only disclosed to the Accused on 26 October 2011.

KDZ011 Correspondence

28. The KDZ011 Correspondence consists of four letters from 1999 and 2000 between the Prosecution and the authorities of the state in which KDZ011 was residing at the time, in which the Prosecution, upon the said state's request, confirms that witness KDZ011 is required by the Prosecution as a witness "for the indefinite future, possibly for several years".⁶⁴ The state authorities then state that KDZ011 and his family can be provided with a temporary residence permit with a possible extension if KDZ011 continues to be required as a witness.

29. Having reviewed the KDZ011 Correspondence, the Chamber is of the view that it establishes that the Prosecution was involved in KDZ011 potentially receiving a benefit, *ie.*, obtaining a temporary residence permit in a state, from being a Prosecution witness. Accordingly, the KDZ011 Correspondence may affect KDZ011's credibility. The Chamber

⁶³ Sixty-First Motion, Annex A.

⁶⁴ Sixty-Third Motion, confidential Annex A.

therefore considers that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose this correspondence as soon as practicable, given that it was produced in 2001 but was only disclosed to the Accused on 8 November 2011.

Merdžanić Correspondence

30. The Merdžanić Correspondence consists of four letters, dated between 1998 and 2001, between the Prosecution and the authorities of the state in which Merdžanić was residing at the time, in which the Prosecution expresses its gratitude to the authorities of the said state for exempting from repatriation those individuals who continue to be needed as witnesses and confirms that Merdžanić is required by the Prosecution as a witness “for the indefinite future, possibly for several years”.⁶⁵

31. As was the case with the correspondence referred to above, the Chamber considers that the Merdžanić Correspondence also establishes that the Prosecution was involved in Merdžanić receiving a benefit, *ie.*, being temporarily exempt from repatriation, by virtue of being a Prosecution witness and that, therefore, this Correspondence may affect Merdžanić’s credibility. Accordingly, the Chamber considers that the Prosecution has violated its obligation under Rule 68 of the Rules by failing to disclose the Merdžanić Correspondence as soon as practicable, given that it was produced in 2001 but was only disclosed to the Accused on 8 November 2011.

B. Whether the Accused has suffered a prejudice from the late disclosure of the Contested Correspondence

Atlija Correspondence

32. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Atlija Correspondence, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the Atlija Correspondence and also observed that by the time the Accused started his cross-examination of Atlija on 20 October 2011, he had already been provided with the First Atlija Correspondence and was therefore aware that the witness had been exempted from repatriation. In addition, as stated above, on 20 October 2011, the Chamber considered that given the short length of the First Atlija Correspondence and the fact that the cross-examination would continue into 25 October 2011, the Accused would not suffer any prejudice from starting his cross-examination that day. Nevertheless, the Accused posed no questions on this issue. The Second Atlija Correspondence was disclosed to the Accused before the cross-examination

⁶⁵ Sixty-Fourth Motion, confidential Annex A.

concluded and yet again the Accused failed to ask any questions in relation thereto. While the Third Atlija Correspondence was only disclosed after Atlija's testimony was completed, the Chamber considers that the Accused was not prejudiced as it was similar to the First and Second Atlija Correspondence and the Accused therefore had sufficient material at his disposal to ask Atlija questions related to his exemption from repatriation. The Chamber therefore considers that the late disclosure of the Atlija Correspondence did not have a detrimental impact on the Accused's overall preparation for trial or his approach to Atlija's cross-examination.

Sejmenović Correspondence

33. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Sejmenović Correspondence, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the Sejmenović Correspondence and observed that it had been disclosed to the Accused by the time Sejmenović's cross-examination commenced on 27 October 2011. Given the short length of the material, the Accused could have posed a number of questions in relation to the Sejmenović Correspondence but failed to do so. The Chamber therefore considers that the late disclosure of the Sejmenović Correspondence did not have a detrimental impact on the Accused's overall preparation for trial or his approach to Sejmenović's cross-examination.

KDZ011 Correspondence

34. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the KDZ011 Correspondence, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the KDZ011 Correspondence and observed that it had been disclosed to the Accused prior to the start of KDZ011's testimony. The Accused was in a position to ask KDZ011 questions related to his temporary residence status and did so at the very end of the witness's cross-examination, after the time for cross-examination allocated by the Chamber had expired.⁶⁶ The Chamber therefore considers that the late disclosure of the KDZ011 Correspondence did not have a detrimental impact on the Accused's overall preparation for trial or his approach to KDZ011's cross-examination.

Merdžanić Correspondence

35. While the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Merdžanić Correspondence, the Chamber finds that the Accused has

⁶⁶ T. 21243–21246 (10 November 2011).

suffered no prejudice as a result of this violation. In reaching this conclusion, the Chamber reviewed the Merdžanić Correspondence and observed that it had been disclosed to the Accused one week prior to the start of Merdžanić's testimony. Given the length of the Merdžanić Correspondence, the Chamber considers that the Accused was not prejudiced by the late disclosure as he had a week to prepare his cross-examination on this issue. In fact, again at the very end of cross-examination, after the time allocated for cross-examination by the Chamber had expired, the Accused asked Merdžanić questions about his exemption from repatriation.⁶⁷ The Chamber therefore considers that the late disclosure of the Merdžanić Correspondence did not have a detrimental impact on the Accused's overall preparation for trial or his approach to Merdžanić's cross-examination.

C. Whether any relief is warranted

36. In light of the findings herein, the Chamber does not consider that excluding the evidence of any of the witnesses mentioned above is warranted. At this stage, and having examined all the submissions referred to herein, the Chamber does not consider it necessary to order the Prosecution to explain why it had not previously disclosed the material which is the subject of this decision. However, given its findings 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, the Chamber is of the view that the Prosecution should disclose any such in its possession that has not yet been disclosed to the Accused no later than 13 December 2011.

IV. Disposition

37. 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 dissenting⁶⁸, the Motions in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Contested Correspondence;

⁶⁷ T. 21482–21485 (17 November 2011).

⁶⁸ 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 motions should be dismissed in their entirety.

- b) **ORDERS** the Prosecution to disclose to the Accused no later than 13 December 2011 any material in its possession establishing that a witness in this case has requested and/or received a benefit from being a witness; and
- c) **DENIES** the Motions in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]