



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-04-84bis-T  
Date: 27 March 2012  
Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Decision:** 27 March 2012

**PROSECUTOR**

v.

**RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ**

*PUBLIC*

**DECISION ON PROSECUTOR'S MOTION FOR  
RECONSIDERATION OF RELIEF ORDERED PURSUANT TO  
RULE 68BIS  
WITH PARTIALLY DISSENTING OPINION OF JUDGE HALL**

**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 TRIAL 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 (“Chamber” and “Tribunal” respectively) is seised of the Prosecutor’s “Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis” (“Motion”), filed publicly on 26 October 2011. The Prosecutor seeks vacation of the personal reprimand of the Senior Trial Attorney in the *Haradinaj et al.* retrial.

## I. PROCEDURAL BACKGROUND

1. Haradinaj, Balaj, and Brahimaj filed the “Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed pursuant to Rule 68bis”, on 12 September 2011 (“Defence Rule 68 Motion”).<sup>1</sup> The Prosecution filed its Response to the Defence Rule 68 Motion on 20 September 2011, and the Defence replied, jointly, on 23 September 2011.<sup>2</sup>

2. On 12 October 2011, the Chamber issued its “Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68bis”, in which it found that the Prosecution had violated Rule 68.<sup>3</sup> The Chamber, *inter alia*, (i) reprimanded Mr. Paul Rogers, the Prosecution’s Senior Trial Attorney in the *Haradinaj et al.* retrial; (ii) ordered the Prosecution to disclose all Rule 68 material in its possession with respect to Witness 75 and all remaining Prosecution witnesses, and to file a report giving details of the Prosecution’s searches for such material; and (iii) instructed the Office of the Prosecutor to take steps to ensure that all staff working on this case are made fully aware of the Chamber’s decision and reminded of their Rule 68 obligations.<sup>4</sup>

3. The Motion presently under consideration was filed by the Prosecutor on 26 October 2011. On 27 October 2011, Brahimaj filed publicly “Lahi Brahimaj’s Response to Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis”.<sup>5</sup> On 8 November 2011, Balaj filed publicly “Idriz Balaj’s Response to the Prosecutor’s ‘Motion for Reconsideration of Relief Ordered

<sup>1</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68bis, with confidential Annex A, and confidential Appendices 1-12, 12 September 2011.

<sup>2</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-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 68bis, with confidential Annexes A-D, 20 September 2011 (“Prosecution Rule 68 Response”); 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 68bis, 23 September 2011 (“Defence Rule 68 Reply”).

<sup>3</sup> *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 to be Imposed Pursuant to Rule 68bis, 12 October 2011 (“Impugned Decision”), para. 71.

<sup>4</sup> Impugned Decision, para. 71.

<sup>5</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Lahi Brahimaj’s Response to Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis (“Brahimaj Response”).

Pursuant to Rule 68bis”<sup>6</sup>. On 9 November 2011, Haradinaj filed publicly the “Defence Response on Behalf of Ramush Haradinaj to Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis”.<sup>7</sup>

## II. SUBMISSIONS

### A. The Motion

4. The Prosecutor requests the Chamber to vacate the personal reprimand of the Senior Trial Attorney in the *Haradinaj et al.* retrial.<sup>8</sup> He “accepts the measures ordered and the validity of the Chamber’s objective, namely to ensure the fairness of the proceedings”, but seeks reconsideration of the nature of the reprimand, in particular the fact that it was addressed personally to Mr. Rogers, as opposed to a reprimand directed to the Prosecutor himself, or to the Office of the Prosecutor.<sup>9</sup>

#### 1. Alleged error of reasoning

5. The Prosecutor argues that the Chamber committed a clear error of reasoning, in that it acted pursuant to Rule 68bis,<sup>10</sup> while a personal reprimand is beyond the Chamber’s powers under this provision.<sup>11</sup>

6. The Prosecutor submits that the permissible object of the Chamber’s reprimand was restricted to either “the Prosecution as a party to the proceedings, or the Prosecutor”.<sup>12</sup> The Prosecutor argues that sanctions pursuant to Rule 68bis may only be imposed by the Chamber upon “a party” which fails to comply with Rule 68, not specific individuals.<sup>13</sup> The Prosecutor submits that the definition of “a party” in Rule 2 encompasses “the Prosecutor and the Defence”.<sup>14</sup> The Prosecutor contends that “the Prosecutor” means “the Prosecutor appointed pursuant to Article 16 of the Statute”.<sup>15</sup> He submits that the Tribunal’s approach to Rule 68 violations “recognises

<sup>6</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Idriz Balaj’s Response to the Prosecutor’s Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis, 8 November 2011 (“Balaj Response”).

<sup>7</sup> *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Defence Response on Behalf of Ramush Haradinaj to Motion for Reconsideration of Relief Ordered Pursuant to Rule 68bis, 9 November 2011 (“Haradinaj Response”).

<sup>8</sup> Motion, para. 20.

<sup>9</sup> Motion, para. 1.

<sup>10</sup> Motion, fn. 3, referring to Impugned Decision, paras 26, 44, 64, 71.

<sup>11</sup> Motion, para. 6.

<sup>12</sup> Motion, paras 7, 8.

<sup>13</sup> Motion, paras 7, 8.

<sup>14</sup> Motion, para. 7.

<sup>15</sup> Motion, para. 7, referring to Rule 2 of the Rules and Article 16 of the Statute of the Tribunal (“Statute”). The Prosecutor also argues that the terms “Prosecutor” and “Prosecution” are used interchangeably in the jurisprudence of the ICTY and ICTR, and the definitions of both refer to “the office and/or office-holder mandated by the Statute”. Motion, fn. 8.

corrective remedies when necessary to preserve a fair trial,<sup>16</sup> but that Rule 68bis neither contemplates attributing responsibility to individuals, nor contains the necessary safeguards for such a process.<sup>17</sup>

7. The Prosecutor avers that this argument is supported further by the jurisprudence of both the ICTR and ICTY, in that both Tribunals consistently direct any actions to the Prosecution as a whole when addressing compliance with disclosure obligations.<sup>18</sup> It is submitted that this is the case even where the wrongful disclosure practice at issue is associated with a particular individual.<sup>19</sup>

8. The Prosecutor contends that the Defence's request for a personal reprimand<sup>20</sup> was made pursuant to Rule 68bis, but the arguments of the parties focused on Rule 46.<sup>21</sup> As such, the Prosecutor argues that the Chamber did not have the benefit of clear submissions from the parties on this point.<sup>21</sup> In addition, the Prosecutor submits that the authority cited in support of the imposition of a personal reprimand either pre-dates the adoption of Rule 68bis, or originates from tribunals without a provision equivalent thereto.<sup>22</sup> He also contends that this authority confirms the principle that sanctions for disclosure violations should be addressed to a party, and not to an individual.<sup>23</sup>

9. The Prosecutor avers that a disclosure violation could amount to misconduct by an individual pursuant to Rule 46, but that this is rare and would be the case only where an individual's

<sup>16</sup> Motion, para. 9, referring to *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules, 13 December 2005 (“*Orić* Decision of 13 December 2005”), para. 32; *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Judgement, paras 76, 77; *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 of 27 October 2005”), pp 3, 5.

<sup>17</sup> Motion, para. 9.

<sup>18</sup> Motion, paras 8, 10, 11, referring to *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para. 43; *Prosecutor v. Ndindiyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor's Obligations Pursuant to Rule 69, 22 September 2008 (“*Ndindiyimana et al.* Decision of 22 September 2008”), paras 22, 59, 61; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution, 19 October 2006 (“*Karemera* Decision of 19 October 2006”), para. 17, fn. 30; *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Alleged Prosecution Non-Compliance with Disclosure Obligations under Rule 66(B) and 68(i), 29 September 2005, p. 3; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Decision, 16 July 1998 (“*Furundžija* Decision of 16 July 1998”), para. 16.

<sup>19</sup> Motion, para. 10, referring *Furundžija* Decision of 16 July 1998, paras 10, 16.

<sup>20</sup> Motion, paras 6, 10, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions to be Imposed Pursuant to Rule 68bis, 12 September 2011 (“*Rule 68 Motion*”), paras 3, 10-12; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-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 68bis, 20 September 2011 (“*Prosecution Response to Rule 68 Motion*”), para. 28.

<sup>21</sup> Motion, para. 6.

<sup>22</sup> Motion, para. 10, referring to Cainnech Lussiaà-Berdou and Kate Gibson, “Disclosure of Evidence” in Karim A. A. Khan *et al.*, (eds) *Principles of Evidence in International Criminal Justice* (Oxford University Press: Oxford, 2010), p. 337.

<sup>23</sup> Motion, para. 10.

conduct exhibits impropriety, meaning a deliberate or bad faith breach of disclosure obligations.<sup>24</sup> The Prosecutor argues that in *Krstić*, the Appeals Chamber was “reluctant to act under Rule 46” outside of such circumstances.<sup>25</sup> The Prosecutor contends that “the *Krstić* approach” of addressing violations of disclosure obligations through Rule 68bis measures directed at “the Prosecutor, not the individual prosecutor” has been reflected in subsequent practice at this Tribunal.<sup>26</sup>

## 2. Alleged need to avoid an injustice

10. The Prosecutor submits, further, that reconsideration is necessary in order to avoid an injustice, as the reprimand connotes personal malfeasance, whereas no such conduct was alleged by the Defence<sup>27</sup> and the Chamber did not find that the Senior Trial Attorney acted in bad faith.<sup>28</sup>

11. The Prosecutor contends that “procedural safeguards” must accompany the imposition of personal sanctions, and that this did not occur in the present case.<sup>29</sup> The Prosecutor avers that the issuance of a personal reprimand constitutes a sanction pursuant to Rule 46,<sup>30</sup> and counsel who are subject to sanctions under Rule 46 must receive the necessary protections provided by that Rule.<sup>31</sup> Specifically, the Prosecution argues that, prior to the imposition of sanctions, counsel must be given an express warning of impending sanctions, as well as an opportunity to explain their conduct and offer an apology.<sup>32</sup> Further, the Prosecutor submits that approval from the President of the Tribunal must be obtained prior to the communication of the misconduct to the professional body in the counsel’s state of admission.<sup>33</sup> The Prosecutor argues that the Senior Trial Attorney was not afforded these protections, thus reconsideration is necessary to prevent injustice.<sup>34</sup>

<sup>24</sup> Motion, paras 12, 13, referring to Rule 46(A); *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor’s Rule 68(D) Application and Joseph Nzirorera’s 12<sup>th</sup> Notice of Rule 68 Violation, 26 March 2009, paras 20, 24, 26, 27, and p. 11; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, paras 174, 175, 188, 211.

<sup>25</sup> Motion, para. 13, referring to *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004, paras 213-215. See also Motion, fn. 28, referring to *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 299, fn. 604.

<sup>26</sup> Motion, para. 14.

<sup>27</sup> Motion, para. 16, referring to Rule 68 Motion, paras 12, 21, 26, 32; Prosecution Rule 68 Response, fn. 59; Defence Rule 68 Reply, para. 11; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, 31 August 2011, Procedural Matters, T. 887.

<sup>28</sup> Motion, paras 15-16, referring to Impugned Decision, paras 56-60, 63.

<sup>29</sup> Motion, paras 9, 15, 18, 19.

<sup>30</sup> Motion, para. 17.

<sup>31</sup> Motion, para. 18, referring to Rule 46(A).

<sup>32</sup> Motion, para. 18, referring to Rule 46(A); *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Prosecution Motion for Reconsideration and/or Certification of the Trial Chamber’s Warning to the Prosecution Pursuant to Rule 46, 15 June 2011, para. 29, p. 9; *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-T, Oral Order Warning Prosecution, 6 May 2009.

<sup>33</sup> Motion, para. 18, referring to referring to Rule 46(B).

<sup>34</sup> Motion, paras 15, 17-18.

## **B. The Responses**

12. Haradinaj, Balaj, and Brahimaj argue that the Prosecutor has failed to establish any grounds for reconsideration of the object of the reprimand, that the Chamber did not err in rendering the Impugned Decision.<sup>35</sup> They thereby submit that the Motion should be denied.<sup>36</sup> In the alternative, Brahimaj requests that the Chamber grant the Prosecutor's motion in part and reprimand the Prosecutor, Mr. Brammertz, pursuant to Rule 68bis, for the serious breaches of Rule 68 committed by Mr. Rogers and for failing to exercise appropriate control over his office in keeping it in conformity with Rule 68.<sup>37</sup>

13. Balaj and Brahimaj contend that the Prosecution should properly have addressed the issue of personal sanctions under Rule 68bis in its Response to the Defence Rule 68 Motion,<sup>38</sup> or at the very latest on 23 September 2011; 14 days after the filing of the Defence Rule 68 Motion.<sup>39</sup> They argue that the Motion should be denied as an attempt by the Prosecution to inappropriately remedy its failure to raise certain arguments in prior submissions.<sup>40</sup> Haradinaj and Balaj argue that Mr. Rogers has had every opportunity to present his submissions on the issues at hand,<sup>41</sup> as indicated in the Impugned Decision.<sup>42</sup> They aver that, during the court session on 1 September 2011, Mr. Rogers expressly acknowledged the "highly personal nature" of the Defence applications regarding his conduct and was permitted to deal with the matter in writing<sup>43</sup> and that in his oral and written submissions he argued that no sanctions should be imposed under Rule 68bis, referring to certain of the same cases cited in the present Motion.<sup>44</sup>

14. Haradinaj, Balaj, and Brahimaj submit that the Prosecutor errs in asserting that Rule 68bis permits the Chamber to sanction either the Office of the Prosecutor as an organ of the Tribunal or

<sup>35</sup> Haradinaj Response, paras 4, 9; Balaj Response, para. 1; Brahimaj Response, para. 34.

<sup>36</sup> Haradinaj Response, paras 4, 18; Balaj Response, para. 39; Brahimaj Response, paras 1, 35.

<sup>37</sup> Brahimaj Response, para. 36.

<sup>38</sup> Balaj Response, paras 9-11, referring to Prosecution Rule 68 Response, paras 9-21, 26-29.

<sup>39</sup> Brahimaj Response, para. 12, referring to Rule 126bis.

<sup>40</sup> Brahimaj Response, paras 12-13. See also Balaj Response, para. 12, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić* Appeal Decision of 3 November 2009"), p. 3.

<sup>41</sup> Haradinaj Response, paras 4, 10; Balaj Response, paras 33, 34, 36, 37.

<sup>42</sup> Balaj Response, para. 34, 35, referring to Impugned Decision, paras 2-24; referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Procedural Matters, 31 August 2011, T. 879-900.

<sup>43</sup> Haradinaj Response, para. 4; Balaj Response, para. 37, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Procedural Matters, 1 September 2011, T. 999, T.1004.

<sup>44</sup> Haradinaj Response, para. 10, referring to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Procedural Matters, 1 September 2011, T.1001-1004; Prosecution Rule 68 Response, paras 26-29. See also Balaj Response, paras 35, 36.

the Prosecutor himself, but not to reprimand personally an individual prosecutor.<sup>45</sup> Their specific arguments are set forth below.

### 1. Chamber's powers under Rule 68bis

15. Haradinaj and Brahimaj argue that the Chamber has broad discretion under Rule 68bis regarding the measures and sanctions it imposes, which allows it to determine the most appropriate sanction on a case-by-case basis.<sup>46</sup> Haradinaj contends that there is no provision, and that the Prosecution has identified no case law, preventing the reprimand of a prosecuting counsel.<sup>47</sup> Haradinaj argues that Rule 68bis permits the Chamber to impose sanctions against any party to the proceedings,<sup>48</sup> and that Mr. Rogers, as prosecuting counsel, is a party to the proceedings.<sup>49</sup>

16. Balaj submits that the Trial Chamber acted precisely as provided for under Rule 68bis, deciding, "*proprio motu*, or at the request of either party, on sanctions to be imposed on a party which failed to perform its disclosure obligations pursuant to the Rules".<sup>50</sup> Balaj submits that in practice, the prosecutors assigned to individual cases are personally responsible for fulfilling Rule 68 disclosure obligations.<sup>51</sup> He argues that, where a Chamber finds repeated violations of Rule 68, nothing in the language of Rule 68bis prevents a Chamber from directing a sanction at the individual prosecutor who was personally responsible for those violations.<sup>52</sup> Balaj contends that it is a *non sequitur* to conclude that sanctions may not be directed at an individual prosecutor in this case because prior decisions of the ICTY and the ICTR have directed sanctions for disclosure violations to "the Prosecution" or "the Prosecutor".<sup>53</sup>

### 2. Procedural safeguards under Rule 68bis vis-à-vis Rule 46

17. Brahimaj argues that Mr. Rogers was reprimanded under Rule 68bis, and that neither the Rules nor the jurisprudence require that a person sanctioned under Rule 68bis be afforded the "safeguards" specific to Rule 46.<sup>54</sup> Brahimaj notes that Rule 46 should be distinguished from Rule 68bis in relation to the need for procedural safeguards because of the severity of the sanctions

<sup>45</sup> Haradinaj Response, para. 9; Balaj Response, para. 14, referring to Motion, paras 7, 8; Brahimaj Response, paras 20, 24.

<sup>46</sup> Haradinaj Response, para. 9, referring to Motion, para. 8 citing *Krstić Appeals Judgement*, para. 212; Brahimaj Response, para. 33.

<sup>47</sup> Haradinaj Response, para. 9.

<sup>48</sup> Haradinaj Response, para. 9.

<sup>49</sup> Haradinaj Response, para. 9.

<sup>50</sup> Balaj Response, paras 16-17.

<sup>51</sup> Balaj Response, para. 18.

<sup>52</sup> Balaj Response, para. 19. Balaj notes that Rule 68bis specifically provides that a Chamber may decide on the particular sanctions to impose on a party and may do so *proprio motu* (Balaj Response, para. 20).

<sup>53</sup> Balaj Response, paras 21, 22.

<sup>54</sup> Brahimaj Response, para. 30, referring to Motion, paras 17-19.

available to a Chamber under the former provision.<sup>55</sup> He contends that Rule 68bis allows a Chamber to determine the most appropriate sanction on a case-by-case basis, and that in view of these differences between Rules 46 and 68bis, there is no need for the “safeguards”, to which the Prosecutor refers, when acting pursuant to Rule 68bis.<sup>56</sup>

18. Haradinaj, Balaj, and Brahimaj submit further that the Prosecutor’s references to Rule 46 are inapposite, as the Chamber acted on the basis of Rule 68bis.<sup>57</sup> Brahimaj submits that Rule 68bis provides the appropriate mechanism, contending that the Rule 46 situation, where counsel have been generally offensive or abusive in some way,<sup>58</sup> is not analogous to the circumstances of the Impugned Decision, where “counsel [...] failed in his duty as an administrator of justice by blatantly and repeatedly violating the fair trial rights of the accused by withholding Rule 68 material.”<sup>59</sup>

19. Brahimaj submits that Rule 68bis does not require a finding that the offending party has acted in bad faith,<sup>60</sup> and that the Impugned Decision does not cause any injustice with respect to any connotation of personal malfeasance.<sup>61</sup>

20. Balaj submits that the Prosecutor’s arguments regarding the possibility that Mr. Rogers’ conduct be communicated to the professional body in his State of admission is a remedy under Rule 46 and are not relevant to the merits of its Motion,<sup>62</sup> which seeks reconsideration of a reprimand authorized by Rule 68bis.<sup>63</sup> Further, he submits that the Prosecutor does not dispute that a public reprimand is a sanction available to the Chamber under Rule 68bis.<sup>64</sup>

### 3. Definition of a party in Rule 2

21. Balaj contends that Rule 2 places no limitations on a Chamber’s authority under Rule 68bis to issue a personal reprimand to an individual prosecutor.<sup>65</sup> Noting the absence of any equivalent defence entity that could be sanctioned as a whole for the conduct of individual defence counsel,<sup>66</sup> Balaj submits that if an individual defence counsel was found to have breached his or her disclosure

<sup>55</sup> Brahimaj Response, para. 32.

<sup>56</sup> Brahimaj Response, para. 33. See also Balaj Response, para. 32.

<sup>57</sup> Haradinaj Response, para. 9; Balaj Response, para. 27, referring to Motion, para. 10, citing *Karemera* Decision of 19 October 2006; Brahimaj Response, paras 30, 31.

<sup>58</sup> Brahimaj Response, para. 31.

<sup>59</sup> Brahimaj Response, para. 31.

<sup>60</sup> Brahimaj Response, para. 28, referring to Rule 68bis; *Prosecutor v. Stakić*, Case No. IT-97-24, Trial Judgement, 22 March 2006, para. 190.

<sup>61</sup> Brahimaj Response, para. 28, referring to Motion, para. 16; Brahimaj Response, para. 29.

<sup>62</sup> Balaj Response, para. 38, referring to Motion, para. 18.

<sup>63</sup> Balaj Response, para. 38.

<sup>64</sup> Balaj Response, para. 2, referring to Motion, para. 8.

<sup>65</sup> Balaj Response, para. 26.

<sup>66</sup> Balaj Response, para. 26.



obligations, he or she would be held personally accountable and could be personally reprimanded.<sup>67</sup> Brahimaj submit that giving Prosecution counsel individual immunity from sanction under Rule 68bis violates the principle of ‘equality of arms’.<sup>68</sup>

22. Brahimaj avers that, although the responsibility for disclosing information under Rule 68 lies, technically, with the Prosecutor, it is those designated by him as “Senior Trial Attorneys” who exercise these functions.<sup>69</sup> Brahimaj submits that the Chamber must be in a position to hold accountable the party who appears before it and who exercises these functions.<sup>70</sup> Brahimaj argues that to find otherwise would deprive the Chamber of any effective power to prevent disclosure violations by the Prosecution<sup>71</sup> by permitting “the OTP as an organ to absorb all blame for Mr. Rogers’ serious and repeated breaches of Rule 68 and eliminate all personal accountability within the OTP”.<sup>72</sup> Brahimaj submits that this would be inconsistent with the spirit of the Statute and contrary to the interests of justice.<sup>73</sup>

23. Brahimaj argues, in the alternative, that if the Chamber were to accept that, pursuant to Rule 2, the “party” referred to in Rule 68bis is the Prosecutor, then he himself must be reprimanded for Mr. Rogers’ breaches of Rule 68. Brahimaj avers that the Prosecutor may not escape accountability by allowing the OTP simply to absorb blame for improper conduct by its individual members.<sup>74</sup>

#### 4. Accountability of individual prosecuting counsel before the Tribunal

24. Haradinaj contends that prevention of further breaches was a major concern of the Chamber in rendering the Impugned Decision,<sup>75</sup> and argues that, irrespective of whether the object of the reprimand is Mr. Rogers as prosecuting counsel or the Prosecutor as a party, it is Mr. Rogers who has been found in breach of his disclosure obligations, and it is he who must implement the measures decided on by the Trial Chamber, and who is responsible for compliance with the Prosecution’s disclosure obligations in the rest of the case.<sup>76</sup>

<sup>67</sup> Balaj Response, para. 26.

<sup>68</sup> Brahimaj Response, para. 26-27.

<sup>69</sup> Brahimaj Response, para. 20.

<sup>70</sup> Brahimaj Response, para. 20.

<sup>71</sup> Brahimaj Response, paras 2, 22.

<sup>72</sup> Brahimaj Response, paras 2, 22-23. Brahimaj also contends that reprimanding the Prosecutor is “analogous to reprimanding the Association of Defence Counsel of the ICTY for an impropriety perpetrated by an individual Defence Counsel” (Brahimaj Response, para. 24). Brahimaj notes that, in England and Wales, if a counsel acting in the name of the Attorney-General were to violate an order of the court, any reprimand issued by the court would be directed at the counsel conducting the prosecution – not the Attorney-General (Brahimaj Response, para. 21).

<sup>73</sup> Brahimaj Response, para. 2.

<sup>74</sup> Brahimaj Response, para. 25.

<sup>75</sup> Haradinaj Response, para. 8, referring to Impugned Decision, para. 57.

<sup>76</sup> Haradinaj Response, para. 8

25. Haradinaj submits that individual counsel responsible for the conduct of particular cases should be held to account for their actions, including in relation to the conduct of the proceedings that they oversee in each case.<sup>77</sup> Haradinaj refers to the Standards of Professional Conduct for Prosecution Counsel, which state that sanctions may be imposed, under the Statute and Rules, against “prosecution counsel”.<sup>78</sup> Haradinaj notes also that the Code of Conduct of the Bar of England and Wales (“Code of Conduct”) requires that “Prosecuting counsel [...] bear in mind at all times whilst he is instructed [...] that he is responsible for the presentation and general conduct of the case”<sup>79</sup> and that as a practising barrister from England, Mr. Rogers is bound also by this Code of Conduct.<sup>80</sup> Haradinaj submits that the Code of Conduct holds individual counsel accountable for their actions in the cases they conduct and provides for personal reprimands as potential sanctions.<sup>81</sup>

26. Haradinaj also notes that, in the Motion, the Prosecutor does not state whether he intends to take any action against Mr. Rogers.<sup>82</sup> Haradinaj submits that the Prosecution Standards of Professional Conduct envisage that disciplinary action may be taken, and asserts that case law has recognised that the Prosecutor may be regarded as a disciplinary body of individual prosecution counsel.<sup>83</sup>

27. Haradinaj, Balaj, and Brahimaj argue that it was appropriate, in the circumstances, to reprimand Mr. Rogers.<sup>84</sup> Haradinaj argues that the reprimand was appropriate because of the importance of ensuring that no further breaches of Rule 68 occur with respect to the remaining witnesses in the retrial, in relation to whom Mr. Rogers is responsible for providing all disclosure.<sup>85</sup> He submits that this concern was especially pressing in light of the circumstances at the time that the Impugned Decision was issued, referring in particular to Witness 81.<sup>86</sup> Brahimaj submits that

<sup>77</sup> Haradinaj Response, paras 12.

<sup>78</sup> Haradinaj Response, paras 12, 14. Haradinaj refers, in this regard to the “Standards of Professional Conduct for Prosecution Counsel, Prosecutor’s Regulation No. 2 (1999)” (“Prosecution Standards of Professional Conduct”), which were issued by the Prosecutor. Haradinaj argues that Prosecution Standards of Professional Conduct apply to counsel who are prosecuting before the ICTY on behalf of the Prosecutor, such as Mr. Rogers (Haradinaj Response, para. 12, referring to Prosecution Standards of Professional Conduct, para. 4).

<sup>79</sup> Haradinaj Response, para. 15, referring to Code of Conduct of the Bar of England and Wales, Section 3: Written standards for the conduct of professional work, para. 10.2.

<sup>80</sup> Haradinaj Response, para. 12.

<sup>81</sup> Haradinaj Response, paras 15, 16, referring to Code of Conduct of the Bar of England and Wales, Section 3: Written standards for the conduct of professional work, Section 2, Annexes to the Code, Annex K, The Disciplinary Tribunal Regulations 2009, 19(2)(j) (The regulations annexed to the Code provide for personal reprimands as potential sanctions.)

<sup>82</sup> Haradinaj Response, para. 13.

<sup>83</sup> Haradinaj Response, para. 13, referring to *Karemera* Decision of 19 October 2006, para. 17.

<sup>84</sup> Haradinaj Response, para. 17; Balaj Response, paras 23, 24; Brahimaj Response, para. 33.

<sup>85</sup> Haradinaj Response, para. 17.

<sup>86</sup> Haradinaj Response, para. 17. See also Brahimaj Response, para. 33.

the Prosecution continues to withhold Rule 68 material, regarding which Haradinaj and Brahimaj have filed submissions.<sup>87</sup>

28. Balaj argues that it is clear, on the face of the Impugned Decision, that the personal reprimand of Mr. Rogers was the result of several factors which were specific to the approach taken by the individual prosecutor, including his “unduly narrow interpretation of Rule 68” which “may result in additional prejudice to the Defence insofar as it leads the Prosecution to withhold analogous Rule 68 material related to other witnesses”,<sup>88</sup> his refusal to “readily [concede] the obvious relevance of the evidence,”<sup>89</sup> his repeated and unconvincing insistence that the materials were irrelevant to Witness 75’s credibility,<sup>90</sup> and his “unwillingness to recognize his violations of the rule”.<sup>91</sup> Balaj contends that the Chamber was authorized to address such issues by imposing a personal reprimand on the individual prosecutor in question.<sup>92</sup>

### III. APPLICABLE LAW

#### A. Request for reconsideration

29. The Chamber has set out the law applicable to requests for reconsiderations in its “Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65ter Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie” issued on 27 February 2012 (“Decision of 27 February 2012”).<sup>93</sup> It recalls that a Chamber may reconsider its decision where it has been persuaded that its previous decision was erroneous or that it has caused an injustice<sup>94</sup> and, further, that the principle of finality requires that the power to reconsider previous decisions should be exercised sparingly.<sup>95</sup>

<sup>87</sup> Brahimaj Response, para. 15, referring to Brahimaj Extension of Time Response; Haradinaj Extension of Time Response; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Request for Leave to Reply and Reply to Prosecution Response to Defence Motion on Behalf of Ramush Haradinaj for Urgent Disclosure of Exculpatory Materials in Respect of Witness 81, 26 October 2011. See also Brahimaj Response, para. 33.

<sup>88</sup> Balaj Response, para. 23, referring to Impugned Decision, paras 57, 59.

<sup>89</sup> Balaj Response, para. 23, referring to Impugned Decision, para. 63.

<sup>90</sup> Balaj Response, para. 23, referring to Impugned Decision, para. 63.

<sup>91</sup> Balaj Response, para. 23, referring to Impugned Decision, para. 64.

<sup>92</sup> Balaj Response, para. 24.

<sup>93</sup> Decision of 27 February 2012, paras 11-12.

<sup>94</sup> *Prosecutor v. Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13; *Prosecutor v. Mucić et al.*, Case No. IT-96-21A-Bis, Judgement on Sentence Appeal, 8 April 2003 (“*Mucić Sentencing Appeal Judgement*”), para. 49.

<sup>95</sup> Decision of 27 February 2012, para. 12 citing *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002, para. 8.

## **B. Relief for violations of disclosure obligations**

30. As held by the Appeals Chamber, violations by the Prosecution of its disclosure obligations under the Rules are to be addressed by Rule 46 and Rule 68bis.<sup>96</sup>

31. Rule 68bis provides:

The pre-trial Judge or 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.

The Appeals Chamber has held that Rule 68bis is specific to disclosure obligations, and provides the Tribunal with a broad discretionary power to impose sanctions on a defaulting party, *proprio motu* if necessary.<sup>97</sup>

32. Rule 46 of the Rules provides, in relevant parts:

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission [...]

33. Rule 46 is intended to cover offensive or abusive conduct, obstruction of the proper conduct of the proceedings, negligence or any other failure to meet the standard of professional competence and ethics.

## **IV. DISCUSSION**

34. On a preliminary note, the Chamber notes that in the Defence Rule 68 Motion, when addressing the question of sanctions, the Defence referred to authority based upon Rule 68, and specifically requested that the Chamber *reprimand Mr. Rogers*. The Chamber considers that this put the Prosecution on notice of the need to deal with the issue of possible imposition of a

<sup>96</sup> *Krstić Appeals Judgement*, paras 188, 200, 211.

reprimand, addressed to Mr. Rogers, under Rule 68bis. The Prosecution now recognizes<sup>98</sup> that it did not address that issue in its response to the Defence Rule 68 Motion. The Chamber finds, therefore, that the Prosecution's failure to address the issue of possible imposition on Mr. Rogers of sanctions pursuant to Rule 68bis at an earlier stage is the result of its own error.

35. The Prosecutor seeks to rely on Rule 46(B) and submits that making a public reprimand to a named individual effectively communicates misconduct to their professional body without the President's approval.<sup>99</sup> The Chamber rejects this argument. Accepting the argument advanced by the Prosecution would imply that a decision pursuant to Rule 46, imposing a sanction, is by definition a confidential one and that, in order to file a public decision the approval of the President is required. This view is not supported by the jurisprudence.<sup>100</sup> In the view of the Chamber, the communication of misconduct to the domestic professional body is an additional measure that can be imposed in a public as well as in a confidential decision.

36. The Chamber notes that no Rule should be interpreted in such a way as to frustrate the object and purpose of any other of the Rules.<sup>101</sup> The purpose of both Rule 68bis and Rule 46 is to provide for possible responses, by the Chamber, to conduct which adversely affects the proper administration of justice. The Chamber by Majority, Judge Hall dissenting, considers, however, that within the context of disclosure violations, Rule 46 is *lex specialis* as to responses to such conduct by an individual counsel, whereas Rule 68bis is *lex generalis* on sanctions for disclosure violations, and that by addressing, on the basis of Rule 68bis, an issue which is within the purview of Rule 46, the object and purpose of Rule 46 is frustrated. This finding is based on the following reasons.

37. The jurisprudence indicates that, while an individual counsel can be found, on the basis of his/her part in a violation of Rule 68, to have conducted him/herself such as to render Rule 46 applicable, this occurs only where there are "sufficient grounds in the circumstances to question the propriety" of the counsel concerned.<sup>102</sup> If it were permissible to reprimand an individual counsel on the basis of Rule 68bis, a sanction could be imposed which is materially identical to a measure under Rule 46 without the requirement of Rule 46 that the Chamber be satisfied that the conduct of

<sup>97</sup> *Krstić Appeals Judgement*, para. 212.

<sup>98</sup> Motion, para. 6.

<sup>99</sup> Motion, para. 18.

<sup>100</sup> See, for example, *Prosecutor v Prlić et al.*, Case No. IT-04-74-T, Order Issuing a Warning to Mr. Karnavas, issued publicly on 15 June 2009; *Prosecutor v Gotovina et al.*, Case No. IT-06-90-PT, Decision on Finding of Misconduct of Attorney Miroslav Šeparović, issued publicly on 6 May 2007.

<sup>101</sup> See article 31(1), Vienna Convention on the Law of Treaties.

<sup>102</sup> See *Krstić Appeals Judgement*, paras 173, 174. For an example of imposition of a sanction, pursuant to Rule 46, against an individual counsel, for his part in a violation of Rule 68, see *Prosecutor v. Karemera et al.*, Case No. ICTR-

counsel is offensive, abusive, obstructive, negligent or otherwise fails to meet the standard of professional competence and ethics, having been met, thus rendering Rule 46 redundant.

38. While Rule 68bis prescribes no particular procedure, Rule 46 requires that any sanction may be imposed only “after giving counsel due warning”.

39. Further, Rule 46 concerns “the conduct of a counsel”,<sup>103</sup> whereas Rule 68bis covers disclosure violations, *inter alia*, violations of Rule 68. Rule 68 provides for specific obligations for the Prosecutor, which extend beyond the individual prosecutors acting on a specific case.

40. The Majority finds, therefore, that although reprimands can be imposed on individual counsel as a consequence of egregious disclosure violations, any request for sanctions of this kind must be made on the basis of Rule 46. In order to be successful, such requests must demonstrate that the material requirements of Rule 46 are fulfilled – *i.e.*, (i) that the counsel’s conduct was offensive, abusive or otherwise obstructed the proper conduct of the proceedings, or otherwise failed to meet the standard of professional competence and ethics; (ii) that there are sufficient grounds in the circumstances to question the propriety of the counsel concerned; and (iii) that the Chamber has *already* given counsel due warning.

41. This approach is consistent with decisions of Trial Chambers and the Appeals Chamber of this Tribunal and the ICTR, which, generally, have adopted sanctions under Rule 68bis as a mechanism to regulate the proceedings<sup>104</sup> and have relied on Rule 46 to impose a warning or a reprimand as a disciplinary measure in cases of serious disclosure violations.<sup>105</sup> While the latter set

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98-44-T, Decision on Prosecutor’s Rule 68(D) Application and Joseph Nzirorera’s 12<sup>th</sup> Notice of Rule 68 Violation, 26 March 2009, para. 27.

<sup>103</sup> Rule 46(A) (emphasis added).

<sup>104</sup> *Prosecutor v. Orić*, Case No. IT-03-68-T, Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance with Rule 68, 27 October 2005, p. 3, finding that “in the practice of this Tribunal the possible violation of Rule 68(i) is governed less by a system of ‘sanctions’ than by the judges’ definitive evaluation of the evidence presented by either of the parties, and the possibility which the opposing party will have had to contest it”; *Prosecutor v. Lukić & Lukić*, Case No. IT-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, para. 18, allowing the defence to recall prosecution witnesses for further cross-examination; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-A, Decision on Prosecution Failure to Comply with Rule 66(A)(ii) Disclosure Obligations, 5 November 2008, pp 4-5, ordering that the testimony of a particular witness be excluded and the witness be removed from the witness list; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, directing the Prosecution to provide a “comprehensive explanation for the failings in its approach to its disclosure obligations” and to “satisfy the Chamber that everything has been done to ensure that the smooth conduct of these proceedings will not be affected by continuing issues surrounding disclosure.” See also *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić’s Motion for Remedies arising out of Disclosure Violations by the Prosecution, 12 May 2011, para. 22, finding that Rule 115 may be used to remedy any prejudice suffered by the accused as a result of a breach of Rule 68; *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 64, allowing the defence the opportunity to further cross-examine selected prosecution witness and call additional witnesses if necessary.

<sup>105</sup> *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Defence Motion for Disclosure of RPF Material and for Sanctions against the Prosecution, 19 October 2006, para. 17; p. 8, imposing a sanction, pursuant to Rule 46(A),

of sanctions, in the specific circumstances of a case, may be a useful mechanism to ensure the fairness of the proceedings, the Majority finds that when such sanctions are imposed on individual counsel, the requirements of Rule 46 must be fulfilled.

42. The Chamber by Majority, Judge Hall dissenting, finds that an individual reprimand could only have been administered to Mr. Rogers pursuant to Rule 46 and with the procedural safeguards provided therein. Therefore, there is a clear error of reasoning in the Impugned Decision, that warrants reconsideration and the vacation of the reprimand.

43. In the Defence Rule 68 Motion there was no application from the Defence to sanction Mr. Rogers under Rule 46 and the Chamber is not inclined to do so *proprio motu*.

44. Similarly, there was no application from the Defence in the Defence Rule 68 Motion to sanction the Prosecution under Rule 68bis and the Chamber is not inclined to do so *proprio motu*.

## V. DISPOSITION

For the foregoing reasons, the Chamber by Majority, Judge Hall dissenting, hereby **GRANTS** the Motion, and

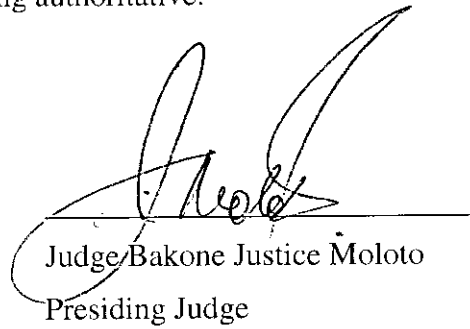
- i. **VACATES** the reprimand against Mr. Paul Rogers, in the Impugned Decision, rendered on 12 October 2011;
- ii. pursuant to Article 20(1) of the Statute and Rule 68 of the Rules, **ORDERS** the Prosecutor, through appropriate means, to ensure that the erroneous understanding of Rule 68, which has been applied by the Prosecution in the *Haradinaj et al.* retrial, is corrected, and that any future prejudice to the Defence, arising from disclosure practice, is avoided.

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against the Prosecution “by formally drawing the attention of the Prosecutor himself, as the disciplinary body, to this misconduct”; *Prosecutor v. Ndindiliyimana*, Case No. ICTR-00-56-T, Decision on Bizminugu’s Motion for Reparation Following the Prosecution’s Failure to Disclose Documents Affecting the Credibility of Prosecution Witness AOE, 18 February 2009, para. 9, p. 4, issuing a warning pursuant to Rule 46(A) in response to the Prosecution’s defiance of Rule 68 and actions which amounted to “an obstruction of proceedings”; *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Prosecutor’s Rule 68(D) Application and Joseph Nzirorera’s 12<sup>th</sup> Notice of a Rule 68 Violation, 26 March 2009, para. 27, p. 11, issuing a personal warning to the Senior Trial Attorney of the Prosecutor’s Special Investigative Unit pursuant to Rule 46; *Prosecutor v. Ntawukilyayo*, Case No. ICTR-05-82-T, Oral Order Warning prosecution, 6 May 2009, issuing an oral warning against the Prosecution pursuant to Rule 46(A). The Chamber notes that the ICTR Rules of Procedure and Evidence do not contain a provision analogous to Rule 68bis of the Rules of the ICTY, therefore, the only Rule under which Trial Chambers at the ICTR may impose sanctions on the Prosecution for Rule 68 disclosure violations is Rule 46.

Judge Hall appends a partially dissenting opinion.

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



Judge Bakone Justice Moloto  
Presiding Judge

Dated this twenty-seventh day of March 2012  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**



## I. PARTIALLY DISSENTING OPINION BY JUDGE HALL

1. While I join with the Majority in the decision to vacate the reprimand against Mr. Rogers because the Impugned Decision, by choice of the word “reprimand”, may have had the effect of visiting upon Mr. Rogers the penalties of Rule 46 without having afforded him the safeguards afforded by that Rule, I, nevertheless, based on my appreciation of the intendment of Rule 68*bis*, respectfully disagree with the conclusion reached by my brothers that there was a “clear error of reasoning”<sup>1</sup> in the Impugned Decision.

2. Under Rule 46, a Chamber may, “after . . . due warning”, penalise an individual counsel by refusing him audience or by reporting him to his bar authorities. These are very serious sanctions that should be reserved for the gravest kinds of misconduct. I am of the opinion that, reading the Rules as a whole, Rule 46 cannot reasonably be construed as the only option to sanction misconduct committed by an individual prosecuting attorney.

3. Rule 68*bis* states that “[t]he pre-trial Judge or 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” and this Rule is not devoid of safeguards. If a Trial Chamber were inclined to exercise its authority *proprio motu*, the rules of natural justice would require that the party in question be invited to show cause why sanctions should not be imposed. In the instant case, the Defence moved for a reprimand against Mr. Rogers who responded orally and in writing that there was, not only no basis to reprimand him, but that there were no violations of Rule 68 in the first place except with regard to a single item.<sup>2</sup> In other words, Mr. Rogers was heard and had ample opportunity to defend himself.

4. Imposing an individual “sanction” (to use the *ipsisima verba* of Rule 68*bis*) under Rule 68*bis* is appropriate for disclosure violations that are serious but do not rise to the level at which any Rule 46 penalty may be contemplated. Rule 68*bis* explicitly grants a Chamber the power to impose “sanctions” for disclosure violations. The power to reprimand an individual attorney under Rule 68*bis* is a necessary option to hold attorneys accountable for grave disclosure violations and to deter them from future violations. Depriving a Chamber of this option would hinder its ability to manage court proceedings, respond to attorney misconduct, and ensure compliance with Rule 68. Further, it may foster a climate of impunity by sending attorneys the message that they cannot be held accountable for misconduct unless a Chamber takes the extraordinary step of applying Rule 46.

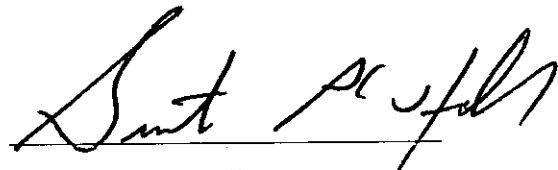
<sup>1</sup> See *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-A, Decision on Defence Request for Reconsideration, 16 July 2004 (*Galic* Decision), p. 2.

<sup>2</sup> Impugned Decision, paras 49-51.

The Appeals Chamber has underlined that the duty to disclose potentially exculpatory evidence is key to ensuring a fair trial<sup>3</sup> and that it “will not tolerate anything short of strict compliance with disclosure obligations”.<sup>4</sup> Rule 68bis should not be interpreted so narrowly as to hinder this goal. Indeed, if any and every action which attracts the attention of a Trial Chamber under Rule 68bis were to trigger Rule 46, it would have said so by inclusion of “pursuant to Rule 46” or similar language.

5. The fact that no individual sanction has been imposed pursuant to Rule 68 bis in the past does not determine that it is impossible to do so under the Rule. It may be that past violations of Rule 68 bis have not been sufficiently serious to warrant a personal sanction on a prosecuting attorney or that other remedies were readily available, such as disallowing the use by the Prosecution of the non-disclosed material, a remedy which is not available here. The Chamber’s decision to sanction Mr. Rogers aimed to serve the interests of justice and ensure the fairness of the proceedings.

6. The Prosecution has not shown that reconsideration is necessary to remedy either a “clear error of reasoning” or an “injustice” caused by the Chamber’s original decision.<sup>5</sup> An individual sanction pursuant to Rule 68bis is, in my view, not intended to and ought not to have an impact on Mr. Rogers’s ability to practice before the Tribunal.



Judge Burton Hall

<sup>3</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić* Appeals Judgement”), para. 180.

<sup>4</sup> *Ibid*, para. 215. *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. 23.

<sup>5</sup> *See Galić* Decision, p. 2.