UNITED
NATIONS

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: 1 March 2012

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **1 March 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

PUBLIC REDACTED VERSION OF "DECISION ON ACCUSED'S SIXTY-SEVENTH AND SIXTY-EIGHTH DISCLOSURE VIOLATION MOTIONS" ISSUED ON 1 MARCH 2012

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "67th Motion for Finding of Disclosure Violation and for Remedial Measures (December 2011)", filed publicly with confidential annexes on 10 January 2012 ("Sixty-Seventh Motion"), and the Accused's "68th Motion for Finding of Disclosure Violation and for Remedial Measures (January 2012)", filed publicly with confidential annexes on 30 January 2012 ("Sixty-Eighth Motion") (together, "Motions") and hereby issues its decision thereon.

I. Submissions

1. In the Motions, 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 13 December 2011 and 10 January 2012 of letters it had sent to national authorities seeking benefits for 43 Prosecution witnesses ("Correspondence").[1] He contends that the Correspondence pertains to 17 witnesses who have already testified in this case,[2] 12 witnesses who have yet to testify (together "92 *ter* Witnesses"),[3] and 14 witnesses whose statements and testimony were admitted pursuant to Rule 92 *bis* ("92 *bis* Witnesses"),[4] (together, "Witnesses").

2. The Accused observes that the Chamber, in the Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, filed on 22 November 2011 ("Consolidated Decision"), already held that such material should have been disclosed by the Prosecution pursuant to Rule 68 of the Rules.[5] He requests a specific finding that the Prosecution has violated Rule 68 by failing to disclose the Correspondence as soon as practicable.[6] In addition as a further remedy he seeks the exclusion of the Witnesses' testimony

[1] Sixty-Seventh Motion, paras. 1–2; Sixth-Eighth Motion, paras. 1–2.

[2] Sixty-Seventh Motion, para. 3, referring to KDZ011, KDZ017, KDZ051, KDZ052, KDZ310, KDZ490, KDZ605, Ivo Atlija, Armin Baždar, Isak Gaši, Nenad Krejić, Idriz Merdžanić, Kerim Mešanović, Mirsad Mujadžić, Izet Redžić, and Nusret Sivac; Sixty-Eighth Motion, para. 3, referring to KDZ045.

[3] Sixty-Seventh Motion, para. 5, referring to KDZ015, KDZ045, KDZ047, KDZ067, KDZ068, KDZ084, KDZ114, KDZ122, KDZ296, KDZ610, Midho Alić, and Momir Nikolić.

[4] Sixty-Seventh Motion, para. 4, referring to KDZ010, KDZ023, KDZ054, KDZ070, KDZ092, KDZ407, KDZ611, Jusuf Avdispahić, Dražen Erdemović, Sakib Husrefović, Nermin Karagić, Mirsad Kuralić, and Safet Tači; Sixty-Eighth Motion, para. 3, referring to KDZ072. The Chamber notes that at the date of the Sixty-Seventh Motion, the Chamber had granted the Prosecution's motion that Dražen Erdemović's evidence be presented pursuant to Rule 92 *bis*, *see* Decision on Prosecution's Fifth Motion for Admission of Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Srebrenica Witnesses), 21 December 2009 ("Srebrenica Decision"), para. 67(B)(2). Since that date, however, the Chamber has ruled that Dražen Erdemović be called for cross-examination and that his evidence be therefore presented pursuant to Rule 92 *ter*, *see* Decision to Call Dražen Erdemović for Cross-Examination, 13 February 2012, para. 10.

[5] Sixty-Seventh Motion, para. 6; Sixty-Eighth Motion, para. 4.

[6] Sixty-Seventh Motion, para. 6; Sixty-Eighth Motion, para. 4.

or, in the alternative, that each of the Witnesses be "called or recalled for cross examination so that the promises made to them, and the impact of those promises on their credibility, can be explored".[7]

3. On 12 January 2012, given the number of witnesses addressed in the Sixty-Seventh Motion, the Prosecution requested and was granted an extension of time to respond to the Sixty-Seventh Motion and to exceed the word limit for its response by 17,000 words.[8] On 10 February 2012, the Prosecution filed the "Consolidated Prosecution Response to Karadžić's Sixty-Seventh and Sixty-Eighth Motions for Finding of Disclosure Violation" with confidential annexes A to D ("Response"). Guided by the Consolidated Decision, the Prosecution acknowledges that many of the documents found in the Correspondence fall within the scope of Rule 68 given the similarities with material which the Chamber found may affect the credibility of witnesses.[9] In any event the Prosecution opposes the granting of any relief given the failure by the Accused to show or even assert prejudice with respect to the disclosure of the Correspondence.[10]

4. The Prosecution contends that the material relating to seven of the Witnesses does not fall within Rule 68 as it does "not establish that the witness requested and/or received a benefit, or that the Prosecution was involved in the witness potentially receiving a benefit by virtue of being a Prosecution witness".[11] In addition the Prosecution observes that none of the Correspondence relates to Ibro Osmanović.[12] Given these observations it submits that the Motions with respect to these eight witnesses should be dismissed.[13] The Prosecution also acknowledges that one witness was not named in the Sixty-Seventh Motion but that some of the Correspondence relates to this witness.[14] In addition a number of the documents appended to

[7] Sixty-Seventh Motion, paras. 7–8; Sixty-Eighth Motion, paras. 5–6.

[8] Hearing, T. 22816–22817 (12 January 2012).

[9] Response, paras. 1, 5, 7.

[10] Response, paras. 1, 11.

[11] Response, paras. 2, 9, referring to KDZ407, Armin Baždar, Dražen Erdemović, KDZ122, Momir Nikolić, KDZ610, and KDZ072. The content of these documents is explained in more detail in confidential annex C to the Response. Response, confidential annex C, paras. 103–104, 106, 108, 110, referring to Sixty-Seventh Motion, confidential annex B, ERN 06812426–06812427 (which relates to KDZ407); ERN 06812633 (which relates to Armin Baždar); ERN 06812419–06812425 (which relates to Dražen Erdemović); ERN 06807000–06807001, 06807134–06807135, 06807138, 06812431–06812433, 06812439–06812443, 06812447–06812448, 06812435–06812438, 06812444–06812446 (which relates to KDZ122); 06812449–06812451 (which relates to Momir Nikolić); 06812677 (which relates to KDZ610); Sixty-Eighth Motion, confidential Annex A (which relates to KDZ072).

[12] Response, para. 2. The Chamber notes that contrary to the Prosecution's suggestion, there is no reference to Ibro Osmanović in the Motions and there is no further need to consider the Prosecution's submissions with respect to this witness.

[13] Response, paras. 2, 9.

[14] Response, para. 3, referring to Ahmet Zulić.

the Sixty-Seventh Motion were mistakenly disclosed by the Prosecution pursuant to Rule 68 but do not relate to witnesses in this case.[15]

5. The Prosecution observes that 17 of the documents annexed to the Sixty-Seventh Motion have already been the subject of motions which have been adjudicated by the Chamber and that therefore the Sixty-Seventh Motion should be dismissed or considered moot with respect to these documents ("Adjudicated Documents").[16] The Prosecution further observes that documents of the same nature as the Adjudicated Documents have already been ruled upon by the Chamber in relation to four witnesses and that the Chamber already found that the Accused had not been prejudiced by this late disclosure.[17] The Prosecution submits that the content of these documents is essentially the same as those contained in the Sixty-Seventh Motion and that therefore the Sixty-Seventh Motion should be denied with respect to these witnesses.[18]

6. With respect to the 92 *ter* Witnesses, the Prosecution observes that the Accused did not argue that the Correspondence affected their evidence but that in fact "the witnesses' accounts in their testimony and prior statements have remained consistent irrespective of events described" in the Correspondence.[19] Given this observation, the Prosecution submits that even if the Accused had been able to ask an additional question of each witness, the content of the Correspondence is not of such significance that its late disclosure had a detrimental effect on the Accused's cross-examination of the affected witnesses or that it prejudiced his overall defence strategy or approach.[20] Furthermore, for four of the 92 *ter* Witnesses, the Prosecution submits that documents containing similar subject matter had already been disclosed to the Accused prior to their testimony and he was "thus fully able to address the matter in cross-examination if he so wished".[21] In addition, in relation to 12 of the 92 *ter* Witnesses, the Prosecution observes that none of them had testified when the Correspondence was disclosed to the Accused and therefore "the Accused fails to show any prejudice in their regard. He remains fully able to raise in cross-examination or in written submissions the matters in the relevant documents".[22]

7. With respect to the 92 *bis* Witnesses, the Prosecution argues that despite the Accused's general opposition to Rule 92 *bis* applications, the Chamber decided to admit their evidence

[15] Response, para. 10, confidential annex D.
[16] Response, para. 4, confidential annex A.
[17] Response, para. 15.
[18] Response, para. 15.
[19] Response, para. 12.
[20] Response, para. 12.
[21] Response, paras. 13–14, referring to KDZ011, Ivo Atlija, Idriz Merdžanić and Nenad Krejić.
[22] Response, para. 18.

pursuant to Rule 92 *bis*.[23] It observes that the Chamber found that the evidence of the 92 *bis* Witnesses was cumulative, "crime-base" evidence which, "although relevant to the charges against the Accused, did not pertain to his acts and conduct, did not go to establish that he participated in a JCE or shared with the perpetrators the requisite intent for the crimes charged, and did not describe conduct of others sufficiently proximate to the Accused to require the witnesses to appear for cross-examination".[24] The Prosecution argues that under these circumstances receipt of the Correspondence would not have changed the overall strategy of the Accused and that even if the Chamber had called the 92 *bis* Witnesses for cross-examination, "the impact on his defence as a whole would have been negligible".[25]

8. The Prosecution contends that the exclusion of relevant evidence is at the extreme end of a scale of measures available to the Chamber, and given that in similar factual circumstances the Chamber found that exclusion was not warranted, it should reject the Accused's request that the evidence of the Witnesses be excluded in this case.[26] Similarly, the Prosecution argues that given the Accused suffered no prejudice and also failed to show good cause, the request to recall the Witnesses should also be denied.[27] In support of this submission, the Prosecution observes that "there is no material inconsistency in the witnesses' numerous statements and testimonies" and that any explanation the Witnesses would give about the Correspondence "would add nothing to the documents themselves".[28]

9. In the confidential annexes to the Response, the Prosecution details the nature of the documents disclosed with respect to each of the Witnesses, identifies if and when the witness provided statements prior to the relevant Correspondence and whether they had testified in other cases before the Tribunal.[29] The Prosecution observes that 32 of the Witnesses had provided statements or testified prior to the dates of the relevant Correspondence and that there was no "substantial deviation" in the content of their evidence "across these statements" and that their evidence was consistent with their testimony in other cases.[30]

---

[23] Response, para. 16.

[24] Response, para. 16.

[25] Response, para. 16.

[26] Response, para. 19, citing Decision on Accused's Sixty-Fifth Disclosure Violation Motion, 12 January 2012 ("Sixty-Fifth Decision"), para. 25; Consolidated Decision, paras. 32–36.

[27] Response, para. 20.

[28] Response, para. 21.

[29] Response, confidential annexes A and B.

[30] Response, confidential annex B, paras. 25, 28, referring to Prosecution Response to Sixty-Fifth Motion for Finding of Disclosure Violation, 12 December 2011 ("Sixty-Fifth Response"), confidential annex A, paras. 18–19; paras. 30, 32, referring to Sixty-Fifth Response, confidential annex A, paras. 26–27; para. 34, referring to Sixty-Fifth Response, confidential annex A, para. 33; paras. 36, 38, referring to Sixty-Fifth Response, confidential annex A, para. 36; paras. 39, 40, 42, 44, 46, 48, 50, 52, 54, referring to Sixty-Fifth Response,

10. The Prosecution also identifies whether or not the particular witness requested the Prosecution's assistance or whether the assistance was provided by the Prosecution without any record of such a request.[31] For 14 of the Witnesses, the Prosecution notes that some of the documents which relate to them "have already been adjudicated by the Chamber" and that any newly disclosed documents did not add materially to the information contained in those documents.[32] The Prosecution acknowledges that KDZ010, KDZ092, and Ahmet Zulić only gave statements and testified after the date of the Correspondence relating to them.[33]

11. The Prosecution states that the Chamber should also "consider the fairness to the witnesses concerned of any order to call or recall them", particularly given that the majority of the Witnesses who were granted protective measures involved "objectively grounded risks to their security or welfare or that of their families".[34] Finally the Prosecution contends that the Accused's request for a specific finding that it has violated its disclosure obligations pursuant to Rule 68 should also be denied.[35]

II. Applicable Law

12. Rule 68 of the Rules imposes a continuing obligation on the Prosecution to "disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". 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.[36]

---

confidential annex A, para. 43; para. 59, referring to Sixty-Fifth Response, confidential annex A, para. 20; para. 61, referring to Sixty-Fifth Response, confidential annex A, paras. 28; paras. 63, 67 referring to Sixty-Fifth Response, confidential annex A, para. 37; paras. 68, 71, 73, referring to Sixty-Fifth Response, confidential annex A, para. 40; paras, 74, 75, 77 (statement given at the same time as the Correspondence), 79, 81, referring to Sixty-Fifth Response, confidential annex A, para. 23; paras. 83, 85, 87, 89, 91, 94, 96, 98. The 32 witnesses are KDZ011, KDZ017, KDZ051, KDZ310, KDZ490, KDZ605, Ivo Atlija, Isak Gaši, Nenad Krejić, Idriz Merdžanić, Kerim Mešanović, Mirsad Mujadžić, Izet Redžić, Nusret Sivac, KDZ023, KDZ054, KDZ070, KDZ611, Jusuf Avdisphahić, Sakib Husrefović, Nermin Karagić, Mirsad Kuralić, Safet Tači (whose statement was given at the same time as the Correspondence), KDZ015, KDZ045, KDZ047, KDZ067, KDZ068, KDZ084, KDZ114, KDZ296, and Midho Alić.

[31] Response, confidential annex B, paras. 27, 29, 31, 33, 35, 37, 38, referring to Sixty-Fifth Response, confidential annex A, para. 36; paras. 39, 43, 45, 47, 49, 51, 53, 56, 58, 60, 62, 64, 66, 70, 72, 73, referring to Sixty-Fifth Response, confidential annex A, para. 41; paras. 74, 76, 78, 80, 86, 88, 90, 93, 95, 97, 99.

[32] Response, confidential annex B, paras. 26, 29, 33, 39, 41, 47, 55–56, 58, 60, 62, 66, 68, 74, 82.

[33] Response, confidential annex B, para. 57, referring to Sixty-Fifth Response, confidential annex A, para. 16; para. 65, referring to Sixty-Fifth Response, confidential annex A, paras. 30–31; para. 100.

[34] Response, para. 22.

[35] Response, para. 23.

[36] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 179.

13. The Chamber reiterates that regardless of the Prosecution's internal practices, there is a clear obligation to disclose potentially exculpatory material "as soon as practicable" and that the "ongoing nature of the obligation relates only to the fact that as new material comes into the possession of the Prosecution it should be assessed as to its potentially exculpatory nature and disclosed accordingly".[37]

14. Rule 68 *bis* provides that a Trial Chamber may, *proprio motu* or at the request of either party, decide on sanctions to be imposed on a party which fails to comply with its disclosure obligations under the Rules. In determining the appropriate remedy (if any), the Chamber has to examine whether or not the accused has been prejudiced by the relevant breach.[38]

III. Discussion

15. A number of the documents appended to the Sixty-Seventh Motion were mistakenly disclosed by the Prosecution pursuant to Rule 68 but did not relate to witnesses in this case.[39] The Chamber finds that there was no violation with respect to these documents.

16. The Prosecution itself has acknowledged that "many of the documents annexed to the Motions" fall within Rule 68 of the Rules ("Uncontested Correspondence").[40] Amongst those, the Chamber has already ruled upon the 17 Adjudicated Documents in earlier decisions.[41] In the absence of any new submissions from the Accused with respect to this material, the Chamber dismisses the Sixty-Seventh Motion with respect to the Adjudicated Documents.

17. Considering the Prosecution's acknowledgement that the Uncontested Correspondence falls within the scope of Rule 68, and having conducted its own review, the Chamber considers that the nature of the Uncontested Correspondence indicates involvement of the Prosecution in securing a benefit for the Witnesses. Under these circumstances, the Chamber considers that the Uncontested Correspondence may affect the credibility of the Witnesses. Accordingly, the Chamber finds that the Prosecution violated its obligation under Rule 68 of the Rules by failing to disclose the Uncontested Correspondence as soon as practicable, given that it dates back as far as 1998 but was only disclosed to the Accused on 13 December 2011 and 10 January 2012. The assessment of whether the Accused has been prejudiced by this violation is addressed below on the basis of whether the material pertains to 92 *bis* Witnesses or 92 *ter* Witnesses.

[37] Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision, 10 December 2010, para. 11.

[38] *Kordić and Čerkez* Appeal Judgement, para. 179; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 268.

[39] Response, para. 10, confidential annex D.

18. The Prosecution challenges whether the material disclosed with respect to seven of the Witnesses fall within the purview of Rule 68 ("Contested Material"). These witnesses are KDZ407, Armin Baždar, Dražen Erdemović, KDZ122, Momir Nikolić, KDZ610, and KDZ072.

19. The document disclosed with respect to KDZ407 is [REDACTED].[42] The document disclosed with respect to Armin Baždar is [REDACTED].[43] The material disclosed with respect to Momir Nikolić consists of [REDACTED].[44] In these materials, the Prosecution merely transmits information about the witnesses' security concerns and the need to ensure their protection as a result thereof.

20. [REDACTED] cannot be construed as involvement in the witnesses potentially receiving a benefit by virtue of their status as Prosecution witnesses. There is thus nothing to suggest that such material could affect the credibility of KDZ407, Baždar, or Nikolić. The Chamber therefore finds that the Prosecution did not violate its disclosure obligations with respect to KDZ407, Baždar, and Nikolić.

21. The first document disclosed with respect to Erdemović [REDACTED].[45] [REDACTED].[46] These documents fall into the category of documents discussed in the paragraph above and cannot be construed as involvement by the Prosecution in Erdemović receiving a benefit by virtue of his status as a Prosecution witness. The Chamber finds that these documents cannot affect Erdemović's credibility and that therefore there was no violation in the disclosure of these four documents by the Prosecution.

22. In contrast, one of the documents disclosed with respect to Erdemović is a letter from the Prosecution specifically addressed to a national authority [REDACTED] ("Erdemović Document").[47] In this correspondence, the Prosecution underlines the fact that Erdemović will be required as a witness in subsequent cases at the Tribunal.[48] The Chamber finds that this

---

[40] Response, paras. 1, 5.

[41] *See* Response, confidential annex A.

[42] Response, confidential annex C, paras. 103–104; Sixty-Seventh Motion, confidential annex B, ERN 06812426–06812427.

[43] Response, confidential annex C, paras. 105–106; Sixty-Seventh Motion, confidential annex B, ERN 06812633.

[44] Response, confidential annex C, para. 111; Sixty-Seventh Motion, confidential Annex B, ERN 06812449–068124451.

[45] Response, confidential annex C, paras. 107–108; Sixty-Seventh Motion, confidential annex B, ERN 06812419–06812420.

[46] Response, confidential annex C, paras. 107–108; Sixty-Seventh Motion confidential annex B, ERN 06812423, 06812424–06812425.

[47] Response, confidential annex C, paras. 107–108; Sixty-Seventh Motion, confidential annex B, ERN 0612421–06812422.

[48] Response, confidential annex C, paras. 107–108; Sixty-Seventh Motion, confidential annex B, ERN 0612421–06812422.

document is more akin to the letters written by the Prosecution to national authorities supporting or requesting exemption from repatriation by virtue of a person's status as a Prosecution witness and should have been disclosed pursuant to Rule 68 as it may affect Erdemović's credibility. The Chamber therefore finds that the Prosecution violated its disclosure obligations by failing to disclose this document as soon as practicable.

23. The documents disclosed with respect to KDZ122 include [REDACTED] ("KDZ122 Documents").[49] The Chamber finds that this correspondence indicates involvement of the Prosecution in securing a benefit for KDZ122 and could potentially affect his credibility and that the Prosecution violated its disclosure obligation by failing to disclose this material as soon as practicable. There is a similar letter from the President of the Tribunal to the witness's lawyer [REDACTED].[50] This letter does not indicate involvement by the Prosecution in the witness receiving a benefit and therefore there was no disclosure violation with respect to its disclosure.

24. The remaining material disclosed with respect to KDZ122 consists of [REDACTED].[51] It also includes a response to an inquiry from a national authority for information regarding KDZ122.[52] [REDACTED].[53] [REDACTED].[54] The Chamber finds that this material does not indicate involvement by the Prosecution in KDZ122 receiving a benefit by virtue of his status as a Prosecution witness and therefore there was no disclosure violation with respect to the disclosure of this material.

25. The document relating to KDZ610 is simply confirmation by the Prosecution to the national authorities that he was not required as a witness at the date of the correspondence.[55] Similarly the document relating to KDZ072 is a Prosecution response to national authorities and notes the personal circumstances of the witness.[56] The Chamber finds that there is nothing to suggest that such material could affect the credibility of KDZ610 or KDZ072. The Chamber therefore finds that the Prosecution did not violate its disclosure obligations with respect to the disclosure of the material pertaining to KDZ610 and KDZ072.

[49] Response, confidential annex C, paras. 109–110; Sixty-Seventh Motion, confidential annex B, ERN 06807000–06807001, 6807134–06807135, 06807138.

[50] Response, confidential annex C, para.110; Sixty-Seventh Motion, confidential annex B, ERN 06812443.

[51] Response, confidential annex C, para. 110, Sixty-Seventh Motion confidential annex B, ERN 06812431–06812433, 0681239–06812442.

[52] Response, confidential annex C, para. 110; Sixty-Seventh Motion, confidential annex B, ERN 06812447–06812448.

[53] Response, confidential annex C, para. 110; Sixty-Seventh Motion, confidential annex B, ERN 06812435–06812438.

[54] Response, confidential annex C, para. 110; Sixty-Seventh Motion, confidential annex B, ERN 06812444–06812446.

[55] Response, confidential annex C, para. 112; Sixty-Seventh Motion, confidential annex B, ERN 06812677

[56] Response, confidential annex C, para. 113; Sixty-Seventh Motion, confidential annex B, ERN 06815958.

26. In summary, the Chamber finds that with the exception of the Erdemović Document and the KDZ122 Documents, the Prosecution did not violate its disclosure obligations with respect to the Contested Material. With respect to the Erdemović Document and the KDZ122 Documents, while there was a violation of Rule 68 by the Prosecution, the Chamber finds that the documents were not of such significance that the Accused was prejudiced by their late disclosure. In reaching that conclusion the Chamber observes that KDZ122 has yet to testify and that since the date of the Sixty-Seventh Motion, the Chamber has ordered that Erdemović be called for cross-examination. This gave the Accused a full opportunity to cross-examine the witnesses on the KDZ122 Documents and the Erdemović Document if he chose to do so.

27. Turning now to the relief sought by the Accused, the Chamber will treat the Accused's request that the 92 *bis* Witnesses be called for cross-examination as a request for reconsideration of its original decision that their evidence be admitted pursuant to Rule 92 *bis* without the need for cross-examination. The Chamber recalls that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".[57] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[58]

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

29. The Chamber found that the evidence of the 92 *bis* Witnesses could be admitted pursuant to Rule 92 *bis* on the basis that the proposed evidence was relevant to a number of charges against the Accused and had probative value, that their testimony consisted largely of crime-base evidence, and that their evidence was cumulative of the evidence of a number of

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

[58] KDZ595 Decision, para. 7, citing *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prosecutor v. Prlić et al*., Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009, pp. 2–3.

witnesses.[59] The Chamber in reaching that conclusion found that the 92 *bis* Witnesses' evidence did not pertain to the acts and conduct of the Accused as charged in the Third Amendment Indictment ("Indictment") and that it did not "go to establish that the Accused participated in a joint criminal enterprise" as charged in the Indictment, or that he had the requisite intent for those crimes.[60] The Chamber also found that there were no other factors that would weigh against the admission of their prior testimony pursuant to Rule 92 *bis* or which would require them to appear for cross-examination.[61]

30. Given the Chamber's original assessment that the 92 *bis* Witnesses were not required for cross-examination, the Chamber finds that the Accused has failed to show that the Uncontested Correspondence in and of itself, is of such significance to assessing their evidence that it is necessary to reconsider this decision to prevent an injustice. Furthermore, for six of the 92 *bis* Witnesses, the Chamber has recently ruled that there was a disclosure violation with respect to the disclosure of similar material but that the Accused had failed to demonstrate that the content of this material was of such significance to assessing their evidence that its late disclosure would justify reconsideration of its original decision that they not be called for cross-examination.[62] Given the similarity between the content of the documents disclosed and the Uncontested Correspondence and the failure by the Accused to provide any additional submissions, there is nothing which would warrant a different conclusion by the Chamber with respect to these witnesses.

31. The Chamber also observes that according to the Prosecution, 12 of the 92 *bis* Witnesses had provided statements prior to the dates of the relevant Uncontested Correspondence and that there was no "substantial deviation" in the content of their evidence "across these statements" and that the statements were consistent with their testimony in other cases.[63] The Chamber is not in a position to assess the consistency of statements made prior to and after the dates of the

[59] Decision on Prosecution's First Motion for Admission of Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Eleven Municipalities), 10 November 2009 ("Municipalities Decision"), paras. 21, 23, 27; Further Decision on Prosecution's First Rule 92 *bis* Motion (Witnesses for Eleven Municipalities), 9 February 2010 ("Further Municipalities Decision"), paras. 13, 17, 44; Decision on Prosecution's Second Motion for Admission of Statements and Transcripts in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses ARK Municipalities), 18 March 2010 ("ARK Decision"), paras. 28, 33–35; Srebrenica Decision, paras. 34–37, 67.

[60] Municipalities Decision, paras. 23, 25–26; Further Municipalities Decision, paras. 18, 20; ARK Decision, para. 31; Srebrenica Decision, paras. 34, 40, 43–44.

[61] Municipalities Decision, paras. 28, 32–33, 35; Further Municipalities Decision, paras. 24–25; ARK Decision, paras. 40–42, 49; Srebrenica Decision, paras. 35, 38.

[62] [REDACTED].

[63] Response, confidential annex B, paras. 59 (referring to KDZ023), 61 (referring to KDZ054), 63 (referring to KDZ070), 67–68 (referring to KDZ611), 69 (referring to Jusuf Avdispahić), 71 (referring to Sakib Husrefović), 73–74 (referring to Nermin Karagić), 75 (referring to Mirsad Kuralić), 77 (referring to Safet Tači); confidential annex C, paras. 102 (referring to KDZ407), 107 (referring to Dražen Erdemović), 113 (referring to KDZ072).

Uncontested Correspondence. However, in the absence of submissions which point to any such inconsistency, the Chamber is not convinced that the Accused has demonstrated that the content of the Uncontested Correspondence is of such significance to assessing the evidence of the 92 *bis* Witnesses that its late disclosure justifies reconsideration of its original decision that they not be called for cross-examination. Reconsideration of that decision in light of the new circumstance relating to the disclosure of the Uncontested Correspondence is not necessary in order to prevent an injustice.

32. As such, the Chamber finds that the Accused has not been prejudiced by the late disclosure of the Uncontested Correspondence and therefore shall not exclude the evidence of the 92 *bis* Witnesses. In reaching that conclusion the Chamber observes that the majority of the Uncontested Correspondence includes generic letters from the Prosecution to relevant national authorities requesting exemption from repatriation by simply informing the authorities that the witness in question is required to testify in ongoing or upcoming trials.

33. With respect to the 92 *ter* Witnesses, the Chamber finds that the Prosecution violated its disclosure obligations under Rule 68 of the Rules by the late disclosure of the Uncontested Correspondence. However, the Chamber finds that the Accused has suffered no prejudice as a result of this violation. In reaching that conclusion, the Chamber observed that according to the Prosecution, with the exception of Ahmet Zulić, all of the 92 *ter* Witnesses had provided statements or testified prior to the dates of the relevant Uncontested Correspondence, that there was no "substantial deviation" in the content of their evidence "across these statements", and that the statements were consistent with their testimony in other cases.[64] As discussed above, while the Chamber is not in a position to assess the consistency of statements made prior to and after the Uncontested Correspondence, in the absence of submissions which point to any such inconsistency, the Chamber is not convinced that the content of the Uncontested Correspondence is of such significance to assessing the evidence of the 92 *ter* Witnesses that the Accused has been prejudiced by its late disclosure.

34. With respect to Ahmet Zulić, the Chamber observes that his statements and testimony post-date the Correspondence which relates to him. However, the Accused has not pointed to any inconsistencies in his prior evidence or any other factor which would suggest that the single document which relates to Zulić is of such significance to assessing the credibility of his evidence that he has been prejudiced by its late disclosure or that it would warrant him being recalled for cross-examination on this one document.

[64] Response, confidential annex B, paras. 25, 28, 30, 32, 34, 36, 38–39, 40, 42, 44, 46, 48, 50, 52, 54, 79, 81, 83, 85, 87, 89, 91, 94, 96, 98.

35. In addition, for six of the 92 *ter* Witnesses, the Chamber recently ruled that the Prosecution had violated its disclosure obligations with respect to the disclosure of similar material but that the Accused suffered no prejudice as a result of the violation.[65] Given the similarity between the content of the documents disclosed and the Uncontested Correspondence and the failure by the Accused to provide any additional submissions, there is nothing which would warrant a different conclusion by the Chamber with respect to these witnesses. The Chamber also notes that at the date of the Motions, 12 of the Witnesses had yet to testify, and the Accused thus had the opportunity to cross-examine these witnesses on the issues raised in the Uncontested Correspondence if he so wished. In addition, with respect to Momir Nikolić and Dražen Erdemović, who testified after the Sixty-Seventh Motion was filed, the Chamber observes that the Accused failed to put a single question relating to the correspondence disclosed with respect to these witnesses. This is a further indication that the content of the Uncontested Correspondence is not of such significance to assessing the credibility of the Witnesses and that the Accused was not prejudiced with respect to its late disclosure.

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

[65] Sixty-Fifth Decision, paras. 16, 23, referring to KDZ017, KDZ052, KDZ310, KDZ605, Nusret Sivac, and KDZ045.

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 dissenting,[66] the Motions, in part, and finds that the Prosecution has violated Rule 68 of the Rules with respect to the late disclosure of the Uncontested Correspondence, the Erdemović Document, and the KDZ122 Documents; and

b) **DENIES** the Motions in all other respects.

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

Judge O-Gon Kwon
Presiding

Dated this first day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[66] 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.