



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: 20 July 2010

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:** 20 July 2010

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON ACCUSED'S THIRD, FOURTH, FIFTH, AND SIXTH MOTIONS FOR  
FINDING OF DISCLOSURE VIOLATIONS AND FOR REMEDIAL MEASURES**

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**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 “Third Motion for Finding of Disclosure Violations and for Remedial Measures” made orally through his Legal Adviser on 21 June 2010 (“Third Motion”),<sup>1</sup> the Accused’s “Submission in Support of Third Motion for Finding Disclosure Violations and for Remedial Measures”, filed publicly on 22 June 2010 (“Submission in Support”), the Accused’s “Fourth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 23 June 2010 (“Fourth Motion”), the Accused’s “Fifth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with a confidential Annex on 28 June 2010 (“Fifth Motion”), and the Accused’s “Sixth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly on 9 July 2010 (“Sixth Motion”) (together “Motions”), and hereby issues its decision thereon.

### I. Submissions

1. The Motions filed by the Accused argue multiple violations of the Tribunal’s Rules of Procedure and Evidence (“Rules”) by the Office of the Prosecutor (“Prosecution”) in relation to the late disclosure of material by the Prosecution. Specifically, the Accused alleges violations of Rule 66(A)(ii), Rule 66(B), and Rule 68 in connection with the late disclosure of a total of ten documents by the Prosecution. The Accused acknowledges the challenge faced in providing full disclosure, and the good faith shown by the Prosecution, but suggests that the alleged violations demonstrate a systemic problem in the Prosecution’s disclosure practices which demands remedial action.<sup>2</sup>

2. On 6 July 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Third, Fourth and Fifth Motions for Finding Disclosure Violations and for Remedial Measures, with Confidential Appendix” (“Consolidated Response”). Subsequently, on 12 July 2010, it filed the “Prosecution’s Response to Karadžić’s Sixth Motion for Finding of Disclosure Violation and for Remedial Measures” (“Response to Sixth Motion”). In the Consolidated Response, the Prosecution argues that there was no violation of Rules 68 and 66(B) “with respect to Rule 70 documents for which the Prosecution was obligated under the Rules to seek clearance from the providers prior to disclosure”.<sup>3</sup> However, it fails to expressly address whether the late disclosure of documents not subject to Rule 70 clearance obligations

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<sup>1</sup> Hearing, T. 3905–3906 and T. 3938–3939 (21 June 2010).

<sup>2</sup> Submission in Support, paras. 18–20.

<sup>3</sup> Consolidated Response, para. 3.

amount to disclosure violations, but nevertheless stresses that it has implemented additional mechanisms to “avoid future disclosure violations and to identify remaining undisclosed items”.<sup>4</sup>

#### A. Third Motion

3. In the Third Motion and the Submission in Support, the Accused requests the Trial Chamber to make an express finding that there has been a violation of Rule 68 of the Rules by the Prosecution for its late disclosure of two documents, and of Rule 66(A)(ii) of the Rules for the late disclosure of one other document pertaining to the testimony of John Wilson.<sup>5</sup>

4. The Accused argues that two of the documents authored by Wilson contain exculpatory material, and the delayed disclosure of these documents by the Prosecution violated its obligation under Rule 68 to disclose such material “as soon as practicable”.<sup>6</sup> In addition, the Accused argues that the third document, a Prosecution investigator’s report of an interview with Wilson (dated 11 October 2008), should have been disclosed by the deadline of 7 May 2009 set by the pre-trial Judge, and thus its disclosure on 18 June 2010 amounted to a violation of Rule 66(A)(ii).<sup>7</sup>

5. The Accused also argues that the further disclosure, on 18 June 2010, of 12 memoranda authored by Wilson, while not strictly a violation of Rule 66(B) because the Accused had never submitted a request for them, was in any event “highly prejudicial to the defence” given the relevance of the documents, and the proximity of disclosure to the testimony of the witness.<sup>8</sup> The Accused also makes reference to a supplementary report disclosed on the morning of Wilson’s testimony on 21 June 2010, which contains information provided by Wilson during his proofing session with the Prosecution.<sup>9</sup>

6. The Accused submits that the combined effect of the late disclosure of these documents warrants Wilson being required “to return for further cross examination once the defence has

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<sup>4</sup> Consolidated Response, para. 4.

<sup>5</sup> Submission in Support, para. 19. The documents in question are a UNPROFOR Fax from Brig. Wilson to Stoltenberg dated 4 August 1993 – re Deployment to Bjeslanica, ERN 0171-73111-0171-73111 (a copy of this 1 page document was attached as Annex D of the Submission in Support); an ICFY Memorandum from John Wilson / Graham Messervy-Whiting (signed by Wilson) dated 22 January 1993 – re Military Situation in Bosnia and Herzegovina, ERN 0170-6498-0170-6502 (a copy of this five page document was attached as Annex C of the Submission in Support); and an OTP Investigator Information Report, dated 11/10/2008, ERN 0642-9017-0642-9019 (a copy of this three page document was attached as Annex E of the Submission in Support).

<sup>6</sup> Submission in Support, para. 9.

<sup>7</sup> Submission in Support, para. 10-13.

<sup>8</sup> Submission in Support, paras. 14–16, and Annex F. The Chamber has only been provided with a description and indicative length of these documents. The documents include operational updates, incident reports, and associated memoranda and correspondence.

had the opportunity to review, digest and investigate these materials”.<sup>10</sup> In addition, the Accused seeks a general order that the Prosecution Trial Attorney leading each witness be required to certify “one week in advance of the testimony of all remaining witnesses, that it has made a diligent search for all Rule 66 and 68 material for that witness and that all such material has been disclosed”.<sup>11</sup>

7. The Prosecution submits that the Third Motion should be summarily dismissed because it is an attempt to re-litigate issues that had already been considered by the Trial Chamber.<sup>12</sup> In addition, the Prosecution argues that there was no violation of Rule 68 as the two documents in question required the Prosecution to seek the consent of the relevant Rule 70 provider for their disclosure to the Accused.<sup>13</sup> It stresses that once these documents were identified following its internal procedures, it expeditiously sought clearance from that provider for such disclosure. It made that request on 31 May 2010, Rule 70 clearance was granted on 14 June 2010, and the documents in question were disclosed on 17 June 2010, pursuant to Rule 68.<sup>14</sup> However, the Prosecution does not explain why its Information Support Unit (“ISU”) had failed to identify and request Rule 70 clearance for these documents before 31 May 2010.

8. The Prosecution also fails to expressly address whether the late disclosure of the investigator’s report of an interview with Wilson (dated 11 October 2008) amounted to a violation of Rule 66(A)(ii). Rather, it merely outlines the steps taken by it to locate these materials and identifies four additional mechanisms it has implemented following the late identification of this report to locate any remaining Rule 66(A)(ii) materials.<sup>15</sup>

9. In relation to the 12 memoranda disclosed on 18 June 2010, the Prosecution submits that given the Accused did not claim a Rule 66(B) or Rule 68 violation, a remedy cannot be granted by the Trial Chamber.<sup>16</sup> Nevertheless, the Prosecution notes that the memoranda all required Rule 70 clearance and that they were “disclosed immediately upon receiving clearance” from the provider.<sup>17</sup> It corrects the Accused’s submission by pointing out that only nine of the 12 memoranda were authored by Wilson. It submits that, given the limited subject matter, limited time frame and limited volume of these materials, and the fact that additional time was granted

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<sup>9</sup> Submission in Support, para. 17.

<sup>10</sup> Submission in Support, paras. 16–17.

<sup>11</sup> Submission in Support, para. 19.

<sup>12</sup> Consolidated Response, para. 7.

<sup>13</sup> Consolidated Response, paras. 8–9.

<sup>14</sup> Consolidated Response, Confidential Appendix A.

<sup>15</sup> Consolidated Response, paras. 14–15.

<sup>16</sup> Consolidated Response, para. 16.

<sup>17</sup> An urgent request for Rule 70 clearance was made by the Prosecution on 8 June 2010, Rule 70 clearance was granted and disclosure was made on 18 June 2010. Consolidated Response, Confidential Appendix A.

to the Accused on 22 June 2010 to prepare the remainder of his cross-examination of Wilson, their disclosure did not warrant “recalling the witness for further cross-examination”.<sup>18</sup>

10. In addition, the Prosecution argues that the failure by the Accused to show actual prejudice in connection with the alleged disclosure violations in the Third Motion precludes the granting of any remedy by the Trial Chamber.<sup>19</sup>

#### **B. Fourth Motion**

11. In the Fourth Motion, the Accused makes reference to the disclosure by the Prosecution on 17 June 2010 of a memorandum relating to the subject matter of the testimony of Herbert Okun (“Memorandum”), who testified in this case from 22 to 28 April 2010.<sup>20</sup> The Memorandum is authored by David Owen and includes a summary of a meeting held on 10 September 1992, attended by, *inter alia*, Okun, Owen and the Accused. During his testimony in these proceedings, Okun provided evidence about this meeting. The Accused argues that this document falls within the scope of a request to the Prosecution made by him under Rule 66(B) of the Rules on 6 April 2010, and also contains exculpatory material which would warrant disclosure as soon as practicable under Rule 68.<sup>21</sup> In the 6 April request, the Accused sought “copies of all memorandums or transcripts of the meetings at which Prosecution Witness Herbert Okun and [the Accused] attended”.<sup>22</sup>

12. The Accused seeks an explicit finding that the Prosecution violated Rule 66(B) and Rule 68 of the Rules due to its late disclosure of the Memorandum, and requests that it be admitted as a Defence exhibit. He also repeats his request that the Prosecution Trial Attorney leading each witness be required to certify one week ahead of the testimony of that witness that all relevant Rule 66 and 68 material has been disclosed.<sup>23</sup>

13. In response, the Prosecution submits that the Memorandum was disclosed, pursuant to Rule 66(B) of the Rules, after receipt of clearance from the relevant Rule 70 provider. This Rule 70 clearance was sought on 10 May 2010, following the Accused’s Rule 66(B) requests of 6 and 23 April 2010.<sup>24</sup> Rule 70 clearance was granted on 10 June 2010, and the Memorandum

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<sup>18</sup> Consolidated Response, para. 16.

<sup>19</sup> Consolidated Response, paras. 12–13.

<sup>20</sup> Fourth Motion, Annex B. The Memorandum is a five page report by David Owen regarding the visit by the co-chairmen of the Steering Committee to Zagreb, Sarajevo and Belgrade from 9 to 12 September 1992.

<sup>21</sup> Fourth Motion, para. 7.

<sup>22</sup> Fourth Motion, Annex A.

<sup>23</sup> Fourth Motion, para. 12.

<sup>24</sup> Consolidated Response, Confidential Appendix A.

in question was disclosed on 17 June 2010.<sup>25</sup> The Prosecution notes that the Memorandum was only identified as a result of searches conducted in response to the Accused's Rule 66(B) request of 23 April 2010. It states that this request itself was untimely,<sup>26</sup> and also outlines the reasons why the Memorandum had not been identified in its previous ISU searches.<sup>27</sup>

14. In addition, the Prosecution argues that the Memorandum does not contain Rule 68 material with respect to Okun's evidence,<sup>28</sup> and that in any event it can be put to David Owen when he is brought to testify and "sought to be tendered as an exhibit at that time".<sup>29</sup> The Prosecution again asserts that the failure by the Accused to show actual prejudice in connection with the alleged disclosure violations in the Fourth Motion precludes the granting of any remedy by the Trial Chamber.<sup>30</sup>

### C. Fifth Motion

15. In the Fifth Motion, the Accused identifies three "information reports" and one witness statement disclosed to him by the Prosecution on 23 June 2010,<sup>31</sup> and seeks a specific finding that the Prosecution has violated Rule 66(A)(ii) of the Rules in relation to them, in addition to a remedy "which would serve to deter such violations in the future".<sup>32</sup> At the date of disclosure, the most recent statement had been in existence for nine months and the other statements had all been in existence as at 7 May 2009, when all Rule 66(A)(ii) material was due to be disclosed.<sup>33</sup> Unlike the situation with regard to the Third and Fourth Motions, the witnesses affected by the Fifth Motion have yet to testify in these proceedings. Remedies suggested by the Accused include the "exclusion of the testimony of some or all of the affected witnesses, or an order requiring the lead prosecutors to personally certify that they have verified that Rule 66(A)(ii) has now been complied with as to all remaining witnesses".<sup>34</sup>

<sup>25</sup> Consolidated Response, Confidential Appendix A.

<sup>26</sup> Consolidated Response, para. 24.

<sup>27</sup> Consolidated Response, Confidential Appendix A. The Consolidated Response notes that the Memorandum does not contain the word "Okun".

<sup>28</sup> Consolidated Response, para. 21.

<sup>29</sup> Consolidated Response, para. 23 and Confidential Appendix A.

<sup>30</sup> Consolidated Response, para. 25.

<sup>31</sup> OTP Investigator's Notes Information Report on meeting with witness KDZ105 dated 11 November 2002, Witness Statement of KDZ145 dated 28 April 2009, OTP Investigator's Information Report for witness KDZ226 dated 7 September 2009, and OTP Investigator's Information Report for witness KDZ245 dated 5 February 2007. The Chamber has only been provided with a description and indicative length of these documents in the Confidential Annex to the Fourth Motion.

<sup>32</sup> Fifth Motion, para. 9.

<sup>33</sup> See Order Following Status Conference and Appended Work Plan, 6 April 2009 ("Status Conference Order"), para. 7.

<sup>34</sup> Fifth Motion, para. 9.

16. The Prosecution argues that the Fifth Motion should also be dismissed. While it expresses regret for the “oversight” in the disclosure of witness-related materials, it fails to specifically address whether the late disclosure of the documents referred to in the Fifth Motion amounts to a violation of its disclosure obligations under Rule 66(A)(ii).<sup>35</sup> The Prosecution instead focuses on arguing that there has been no prejudice to the Accused because the documents “had been provided well in advance of the witnesses’ testimony”,<sup>36</sup> and submitting that, in any event, the relief sought by the Accused is unnecessary and disproportionate.<sup>37</sup>

#### **D. Sixth Motion**

17. In the Sixth Motion, the Accused identifies two witness statements (in the form of proofing notes of witness Momčilo Mandić) disclosed to him by the Prosecution on 7 July 2010, after the commencement of his cross-examination of Mandić, and seeks a finding from the Chamber that the Prosecution has violated Rule 66(A)(ii) in relation thereto.<sup>38</sup> The Accused therefore seeks additional time for his cross-examination of Mandić, and re-iterates his request that the Prosecution trial attorneys “personally certify that they have verified that Rule 66(A)(ii) has now been complied with as to all remaining witnesses”.<sup>39</sup>

18. In response, the Prosecution argues that the proofing notes do not contain any new material, and notes the failure of the Accused to demonstrate any prejudice caused by their late disclosure or any justification for additional time to cross-examine Mandić.<sup>40</sup> While the Prosecution identifies additional measures “to address further the error at issue,”<sup>41</sup> it fails to specifically state whether the late disclosure of the documents referred to in the Sixth Motion amounts to a violation of its disclosure obligations under Rule 66(A)(ii).

## **II. Applicable Law**

19. Rule 66(A)(ii) requires the Prosecution (within a time-limit prescribed by the Trial Chamber or pre-trial judge) to make available to the Defence “copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*”.

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<sup>35</sup> Consolidated Response, para. 29 and Confidential Appendix B.

<sup>36</sup> Consolidated Response, para. 9.

<sup>37</sup> Consolidated Response, paras. 30–31.

<sup>38</sup> Sixth Motion, paras. 1–2.

<sup>39</sup> Sixth Motion, para. 10.

<sup>40</sup> Response to the Sixth Motion, para. 4.

<sup>41</sup> Response to Sixth Motion, para. 6.

20. Rule 68 requires the Prosecution (as soon as practicable) 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”. This continuing obligation<sup>42</sup> to disclose exculpatory material is subject to the provisions of Rule 70, and in particular of Rule 70(B) which requires the Prosecution to obtain the consent of the relevant provider before disclosure of information which has been provided to it “on a confidential basis”.

21. Rule 68 *bis* provides that the 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. Even if the Chamber is satisfied that there has been a failure by the Prosecution to comply with its disclosure obligations, the appropriateness of a remedy will depend on whether there has been actual prejudice to the Accused.<sup>43</sup>

22. Previous decisions of the Trial Chamber set out in more detail how these disclosure-related provisions are to be applied, and this discussion will not be repeated here.<sup>44</sup> Similarly, the Chamber has previously emphasised the importance of timely compliance with those obligations to the trial process and specifically to the Accused’s preparation for trial.<sup>45</sup>

### III. Discussion

#### A. Preliminary matters

23. The Trial Chamber notes that the Prosecution requests leave to exceed the word limit of its Consolidated Response by 2,092 words.<sup>46</sup> Given that the Consolidated Response addresses a number of issues raised in multiple motions filed by the Accused, the Chamber is satisfied that the requested extension of the word limit is justified.

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<sup>42</sup> Decision on the Accused’s Motion to Set Deadlines for Disclosure, 1 October 2009 (“Decision on Deadlines for Disclosure”), para 19, citing *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 267.

<sup>43</sup> Decision on Accused’s Second Motion for Finding Disclosure Violation and For Remedial Measures, 17 June 2010 (“Decision on the Second Disclosure Violation Motion”), para. 16 citing, *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and For Disclosure of Mitigating Material, 30 August 2006, para. 31 (citing *Prosecutor v. Jevénal Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 262; *Prosecutor v. Radislac Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, para. 153).

<sup>44</sup> See Decision on the Second Disclosure Violation Motion, paras. 7–8; Decision on Deadlines for Disclosure, paras. 7–20.

<sup>45</sup> Decision on the Second Disclosure Violation Motion, paras. 7–8, citing *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution’s Motion to Amend Rule 65 *ter* Witness List and on Related Submissions, 22 April 2008, para. 16.

<sup>46</sup> Consolidated Response, para. 6.

24. The Trial Chamber reiterates that “it is an essential element of Rule 66(A)(ii) that the disclosure of material falling under this Rule must occur within a specific time limit.”<sup>47</sup> In this case, the Prosecution was required to disclose all Rule 66(A)(ii) material to the Accused no later than 7 May 2009.<sup>48</sup> The Trial Chamber has consistently expressed its concern about the volume of Rule 66(A)(ii) material which has been disclosed after the 7 May 2009 deadline, and that such disclosure was exceptional and should only occur for reasons identified by the Chamber.<sup>49</sup>

25. With regard to the disclosure of Rule 68 material, the Trial Chamber recognises that the obligation on the Prosecution is an ongoing one, such that if new material falling within the Rule comes to light, it should provide such material immediately to the Defence. However, the Prosecution has been on notice for a considerable time that it should “disclose, as soon as possible, all the Rule 68 material currently in its possession,” and has been directed by the Chamber to expedite its search for additional exculpatory material which may be contained in its various collections of evidence.<sup>50</sup> The Chamber is of the view that this process should now have been completed, and that all Rule 68 material currently in the possession of the Prosecution should have been disclosed to the Accused.

26. With these general considerations in mind, the Chamber will examine each of the Motions in turn.

#### **A. Third Motion**

27. The Chamber notes that two of the documents identified in the Third Motion, which pertain to witness John Wilson, required Rule 70 clearance prior to disclosure to the Accused. Given that the Prosecution sought the relevant clearance on 31 May 2010, which was granted on 14 June 2010, and that the documents in question were disclosed on 17 June 2010, the Trial Chamber is satisfied that these items were disclosed by the Prosecution without undue delay following the granting of the required clearance by the Rule 70 provider.

28. However, what is not apparent is the reason why the Prosecution did not seek clearance to disclose these items to the Accused at a much earlier date. While the Prosecution’s continuing obligation under Rule 68 is subject to Rule 70, the Trial Chamber has already clearly instructed it to “to obtain the consent of the relevant Rule 70 providers for disclosure of any such exculpatory material”,<sup>51</sup> and to disclose “as soon as possible, all the Rule 68 material

<sup>47</sup> Decision on Deadlines for Disclosure, para. 13.

<sup>48</sup> Status Conference Order, para. 7(1).

<sup>49</sup> Decision on the Second Disclosure Violation Motion, paras. 2–3; Decision on Deadlines for Disclosure, para. 14.

<sup>50</sup> Decision on Deadlines for Disclosure, para. 20.

<sup>51</sup> Decision on Deadlines for Disclosure, para. 19.

currently in its possession”.<sup>52</sup> The necessary delay in obtaining Rule 70 clearance does not excuse the delay in originally identifying the relevant documents and requesting that clearance. Therefore the Trial Chamber finds that the Prosecution has violated Rule 68 with respect to the disclosure of the first two documents identified in the Third Motion.<sup>53</sup>

29. The third document referred to in the Third Motion is an Investigator Information Report of an interview with John Wilson, dated 11 October 2008, which was disclosed by the Prosecution to the Accused on 17 June 2010. The Prosecution cites “oversight” as the reason for the delay in its disclosure but fails to address whether it amounts to a violation of Rule 66(A)(ii). Having reviewed the document, the Trial Chamber is of the view that it is a statement which does fall within the scope of Rule 66(A)(ii) and should have been disclosed earlier to the Accused in accordance with the deadline set by the pre-trial Judge.<sup>54</sup> Therefore the Chamber finds that the Prosecution has violated Rule 66(A)(ii) in relation to the delayed disclosure of the third document referred to in the Third Motion.

30. The Trial Chamber does not accept the Prosecution’s argument that the Third Motion is an attempt to re-litigate identical issues. While the Chamber did consider the oral submissions relating to the late disclosure of these three documents, the ruling delivered by the Trial Chamber on 22 June 2010 was limited to whether this late disclosure warranted postponement of cross-examination by the Accused.<sup>55</sup>

31. Having considered the length and subject matter of the documents referred to in the Third Motion,<sup>56</sup> the fact that one of the documents was admitted into evidence,<sup>57</sup> and the additional time granted by the Chamber to the Accused for the preparation of the remainder of his cross-examination for John Wilson, the Trial Chamber is of the view that the Accused has failed to demonstrate that he has been prejudiced by the late disclosure of these documents.

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<sup>52</sup> Decision on Deadlines for Disclosure, paras. 19–20.

<sup>53</sup> See *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Decision on Joint Defence Motion and Supplementary Motion to Strike the Testimony of Witness PW-168, 18 January 2008, para. 13 citing the two step approach to evaluating alleged Rule 68 violations in *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179.

<sup>54</sup> For the definition of “witness statement” see *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Milan Lukic’s Motion to Suppress Testimony for Failure of Timely Disclosure with Confidential Annexes A and B, 3 November 2008, para 12 and *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, para. 14 citing the Appeals Chamber in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and additional filings, 26 September 2000, para. 15.

<sup>55</sup> Hearing, T. 3941 (21 June 2010); Hearing, T. 4022–4023 (22 June 2010).

<sup>56</sup> The Chamber has also considered the further disclosure, on 18 June 2010, of 12 memoranda authored by or related to the testimony of John Wilson.

<sup>57</sup> See Exhibit D336.

32. The Trial Chamber reiterates its Decision on the Second Disclosure Violation Motion that ordering the Prosecution to certify compliance with its Rule 66(A)(ii) disclosure obligations for all remaining witnesses in this case is not an effective and practical remedy given the legitimate circumstances which would justify disclosure of Rule 66(A)(ii) material at a later stage in proceedings.<sup>58</sup>

#### **B. Fourth Motion**

33. The Chamber notes that the Memorandum referred to in the Fourth Motion was disclosed to the Accused on 17 June 2010, and relates to the subject matter of the testimony of witness Herbert Okun, who testified in this case from 22 to 28 April 2010.<sup>59</sup> The Accused argues that this document falls within the scope of a request to the Prosecution made by him under Rule 66(B) of the Rules on 6 April 2010, and also contains exculpatory material falling within the terms of Rule 68.<sup>60</sup>

34. The Memorandum is authored by David Owen, who is listed as a witness still to testify in this case, and includes a summary of a meeting held on 10 September 1992, attended by, *inter alia*, Okun, Owen, and the Accused. During his testimony in these proceedings, Okun provided evidence about this meeting. Therefore, the Trial Chamber is satisfied that the Memorandum falls within the scope of the Accused's Rule 66(B) request for "copies of all memorandums or transcripts of the meetings at which Prosecution Witness Herbert Okun and [the Accused] attended".<sup>61</sup>

35. While the Memorandum falls within the scope of the Rule 66(B) request, the document required Rule 70 clearance prior to disclosure. The Prosecution made a request for such clearance on 10 May 2010, it was granted on 10 June 2010, and the Memorandum was disclosed on 17 June 2010.<sup>62</sup> The Trial Chamber is satisfied that the Memorandum was disclosed expeditiously following receipt of the required clearance under Rule 70. Thus, having considered the timing and breadth of the Accused's Rule 66(B) requests on 6 April and 23 April 2010, and the steps taken by the Prosecution to identify and seek clearance for disclosure of the Memorandum, the Chamber is of the view that there was no violation of Rule 66(B) with respect to the disclosure of the Memorandum referred to in the Fourth Motion.

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<sup>58</sup> Decision on the Second Disclosure Violation Motion, para. 18.

<sup>59</sup> Fourth Motion, Annex B.

<sup>60</sup> Fourth Motion, para. 7.

<sup>61</sup> Fourth Motion, Annex A.

<sup>62</sup> Consolidated Response, Confidential Appendix A.

36. In addition, the Accused argues that the Memorandum contains information contrary to parts of Okun's testimony, and therefore constitutes Rule 68 material.<sup>63</sup> The main basis of this assertion is the absence of a reference in the Memorandum to any acknowledgement by the Accused of ethnic cleansing, whereas Okun testified that he "frequently acknowledged that ethnic cleansing occurred".<sup>64</sup> The Prosecution stresses that Okun's testimony "regarding Karadžić's acknowledgement of ethnic cleansing was given in general terms, and not in relation to this specific meeting",<sup>65</sup> and that there is no contradiction between the Memorandum and that testimony. Having considered the Memorandum and the submissions of the parties, the Trial Chamber is not convinced that it contradicts or affects the credibility of Okun's testimony. On this basis, the Chamber is of the view that there was no violation of Rule 68 with respect to the disclosure of the Memorandum referred to in the Fourth Motion.

37. While the Trial Chamber is not satisfied that there has been a technical violation of Rule 66(B) or Rule 68, given that the Memorandum in question dates back to September 1992, and it appears to be relevant to the testimony of Okun and other witnesses to be brought by the Prosecution, the Trial Chamber observes, nonetheless, that the Prosecution should have identified this document and sought clearance for its disclosure to the Accused well before 10 May 2010. However, having considered the length and subject matter of the Memorandum and the opportunity to put the document to David Owen during his testimony, the Trial Chamber is not satisfied that the Accused has demonstrated that he had been prejudiced by its disclosure in June 2010. It follows that the additional remedies sought by the Accused are not warranted at this stage.

### **C. Fifth Motion**

38. The three "information reports" and one witness statement identified in the Fifth Motion, pertaining to witnesses KDZ105, KDZ145, KDZ226, and KDZ245 were disclosed by the Prosecution to the Accused on 23 June 2010.<sup>66</sup> At the date of disclosure the most recent statement had been in existence for nine months, and the other statements had all been in existence as at 7 May 2009, when all Rule 66(A)(ii) material was due to be disclosed.

39. While the Prosecution expresses regret for the "oversight" in the disclosure of these witness-related materials, it fails to specifically address whether the late disclosure of the

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<sup>63</sup> Fourth Motion, para. 9-10.

<sup>64</sup> Fourth Motion, para. 9.

<sup>65</sup> Consolidated Response, para. 21.

<sup>66</sup> OTP Investigator's Notes Information Report on meeting with witness KDZ105 dated 11 November 2002, Witness Statement of KDZ145 dated 28 April 2009, OTP Investigator's Information Report for witness KDZ226 dated 7 September 2009, and OTP Investigator's Information Report for witness KDZ245 dated 5 February 2007.

documents referred to in the Fifth Motion amounts to a violation of its disclosure obligations under Rule 66(A)(ii).<sup>67</sup>

40. The Trial Chamber is of the view that these statements do fall within the scope of Rule 66(A)(ii).<sup>68</sup> The three statements which were in existence should have been disclosed by the 7 May 2009 deadline. The fourth statement, dated 7 September 2009, should have been disclosed as soon as possible thereafter, and certainly well before 23 June 2010. Therefore, it finds that the Prosecution has violated Rule 66(A)(ii) in relation to the four statements referred to in the Fifth Motion.

41. However, having considered the length and nature of the documents and the time available to the Accused to consider them before the relevant witnesses will be called to testify<sup>69</sup>, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure. The Chamber reiterates that it “should exclude evidence only if its probative value is *substantially* outweighed by its prejudicial impact”.<sup>70</sup> It follows that the additional remedies sought by the Accused, including the exclusion of the testimony of the affected witnesses, are not warranted at this stage.

#### **D. Sixth Motion**

42. The two witness statements (in the form of proofing notes for Momčilo Mandić) referred to in the Sixth Motion were disclosed by the Prosecution on 7 July 2010, after the commencement of the Accused’s cross-examination of Mandić. As noted above, the Prosecution fails to address whether the late disclosure of these documents amounts to a violation of its disclosure obligations under Rule 66(A)(ii). The Trial Chamber is of the view that these statements do fall within the scope of Rule 66(A)(ii).<sup>71</sup> Given that they are dated 22-23 March 2010 and 3 May 2010, respectively, they clearly should have been provided to the Accused, in anticipation of Mandić’s testimony in these proceedings, well before 7 July 2010. Therefore, the Trial Chamber finds that the Prosecution has violated Rule 66(A)(ii) in relation to the disclosure of the two proofing notes referred to in the Sixth Motion.

43. However, having considered the length and subject matter of the documents and the absence of new material in them, the Trial Chamber is not satisfied that the Accused has

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<sup>67</sup> Consolidated Response, para. 29 and Confidential Appendix B.

<sup>68</sup> See para. 29 above for the definition of a Rule 66(A)(ii) “witness statement”.

<sup>69</sup> According to the Consolidated Response, Confidential Appendix A, Witness KDZ105 is a reserve witness who may not be called, KDZ245 is approximately 240<sup>th</sup> in the present witness calling order, KDZ226 is approximately 76<sup>th</sup> in the present witness calling order, and KDZ145 is approximately 220<sup>th</sup> in the present witness calling order.

<sup>70</sup> Decision on the Second Disclosure Violation Motion, para. 41, citing Rule 89 of the Rules.

demonstrated that he had been prejudiced by their late disclosure. It follows that the additional remedies sought by the Accused, including the request for additional time for his cross-examination of Mandić are not warranted at this stage.

#### **F. General Observations**

44. The Trial Chamber notes that the Prosecution has recognised that the reason for the delay in disclosure of a number of the documents identified in the Motions was oversight on its part.<sup>72</sup> It is imperative that the Prosecution maintains an organised, efficient, and thorough system for the review of documentary evidence to ensure that all material falling within the various disclosure-related Rules is provided to the Accused in a prompt manner, in accordance with those Rules.

45. In light of the Chamber's Decision on the Second Disclosure Violation Motion, the Consolidated Response emphasises that it "has implemented additional mechanisms to avoid future disclosure violations and to identify remaining undisclosed items",<sup>73</sup> and provides an outline of the technical procedures undertaken by the Prosecution in reviewing documentary evidence. The Response to the Sixth Motion also outlines the assignment of a "person to supplement the existing inter-case communication regarding witness disclosure".<sup>74</sup>

46. The Chamber considers that a reasonable time has not elapsed to form a view as to whether the additional mechanisms implemented by the Prosecution following the Decision on the Second Disclosure Violation Motion have succeeded in addressing the continuing concerns of the Trial Chamber and the Accused about the Prosecution's disclosure regime. If, however, the Prosecution continues to disclose further Rule 66(A)(ii) material each month, and there is a real issue of prejudice to the Accused, the Trial Chamber will consider ordering the more serious remedial action envisaged in the Decision on the Second Disclosure Violation Motion.<sup>75</sup>

47. In addition, in order to satisfy itself that the Prosecution is diligently taking concrete measures to ensure compliance with its disclosure obligations, and to avoid any future disclosure violations, the Trial Chamber will be assisted by a detailed report by the Prosecution about the progress made towards completion of the necessary searches and review as set out in paragraph 15 of the Consolidated Response. This report should be provided to the Chamber by 20 August 2010.

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<sup>71</sup> See para. 29 above for the definition of a Rule 66(A)(ii) "witness statement".

<sup>72</sup> Consolidated Response, Confidential Appendix A.

<sup>73</sup> Consolidated Response, para. 4.

<sup>74</sup> Response to the Sixth Motion, para. 6.

**IV. Disposition**

48. For the foregoing reasons, the Trial Chamber notes the disclosure violations identified above, but given the absence of demonstrated prejudice to the Accused, and pursuant to Rules 54, 66A(ii), 66B, 68, and 68 *bis* of the Rules, the Trial Chamber hereby **DENIES** the Motions.

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



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Judge O-Gon Kwon  
Presiding

Dated this twentieth day of July 2010  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>75</sup> Decision on the Second Disclosure Violation Motion, paras 16–19.