



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: 24 September 2010

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IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 24 September 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S ELEVENTH TO FIFTEENTH MOTIONS FOR FINDING OF
DISCLOSURE VIOLATION AND FOR REMEDIAL MEASURES**

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 “Eleventh Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 24 August 2010 (“Eleventh Motion”), the Accused’s “Twelfth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 30 August 2010 (“Twelfth Motion”), the Accused’s “Thirteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annexes on 2 September 2010 (“Thirteenth Motion”), the Accused’s “Fourteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annex on 3 September 2010 (“Fourteenth Motion”), the Accused’s “Fifteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annex on 6 September 2010 (“Fifteenth Motion”), and the Accused’s “Supplement to Fifteenth Motion for Finding of Disclosure Violation and for Remedial Measures”, filed publicly with confidential Annex on 7 September 2010 (“Supplement to Fifteenth Motion”) (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. In the Motions, the Accused argues that there have been 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 to him. Specifically, the Accused alleges violations of Rules 66(A)(ii) and 68 of the Rules in connection with the late disclosure of a total of 72 documents by the Prosecution.
2. On 3 September 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Eleventh and Twelfth Motions for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Eleventh and Twelfth Motions”).
3. On 7 September 2010, the Prosecution filed the “Prosecution’s Response to Karadžić’s Fourteenth Motion for Finding of Disclosure Violation and for Remedial Measures with Confidential Appendix A” (“Response to the Fourteenth Motion”).
4. On 13 September 2010, the Prosecution filed the “Prosecution’s Consolidated Response to Karadžić’s Thirteenth and Fifteenth Motions for Finding of Disclosure Violation and for Remedial Measures” (“Response to the Thirteenth and Fifteenth Motions”).

A. Eleventh Motion

5. In the Eleventh Motion, the Accused makes reference to the disclosure by the Prosecution, on 20 August 2010, of ten witness statements relating to eight witnesses, after the 7 May 2009 deadline for disclosure of all Rule 66(A)(ii) material that was set by the pre-trial Judge.¹ The Accused requests that the Trial Chamber make a specific finding that the Prosecution has violated its obligations under Rule 66(A)(ii) of the Rules in relation to disclosure of these statements, and that it grant him an appropriate remedy.² The Accused does not identify whether (or how) he has been prejudiced by this late disclosure but suggests that the Trial Chamber exclude the testimony of any witness in relation “to whom a disclosure violation is found after 31 October 2010,” and postpone the testimony of Mirza Sabljica (KDZ180) until 2011.³

6. In the “Response to the Eleventh and Twelfth Motions”, the Prosecution acknowledges that nine of the ten documents referred to in the Eleventh Motion should have been disclosed earlier but had not been due to oversight on its part.⁴ The Prosecution reiterates that these documents were identified by it as a result of the additional measures it has implemented following the Trial Chamber’s Decision on the Second Disclosure Violation Motion, which required that it undertake further searches for Rule 66(A)(ii) material to ensure that all such material had been properly disclosed to the Accused.⁵

7. The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the disclosure of the documents in question, and his failure to do so precludes the granting of a remedy by the Chamber.⁶ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider these additional materials given that the

¹ Eleventh Motion, paras. 1-2. Copies of these documents were attached in Confidential Annex A to the Eleventh Motion. These documents include supplemental information sheets, OTP memoranda, investigator information reports, records of interview, statements and interview notes. These documents relate to witnesses KDZ051, Mirza Sabljica (KDZ180), Miroslav Deronjić, KDZ304, Rupert Smith, Petar Janković, Dušan Kovačević, and Zdravko Marčeta.

² Eleventh Motion, para. 12.

³ Eleventh Motion, para. 12. The Chamber notes that the Accused’s suggestion of 31 October 2010 as the cut-off date after which the Chamber should begin excluding witness testimony appears to have been based on the Prosecution’s original estimate that it would have completed the additional measures implemented to ensure no further violations of Rule 66(A)(ii) by that date.

⁴ Response to the Eleventh and Twelfth Motions, paras. 2-3. The Prosecution notes that one of the statements pertains to a person (Deronjić) who is no longer a witness in the case and therefore its disclosure cannot amount to a disclosure violation.

⁵ Response to the Eleventh and Twelfth Motions, para. 3.

⁶ Response to the Eleventh and Twelfth Motions, para. 5.

documents in question are not lengthy and the affected witnesses are scheduled to be approximately 150th, 22nd, 44th, 54th, 95th, 60th and 190th in the present witness calling order.⁷

8. The Prosecution argues more specifically that the Accused has failed to substantiate how the disclosure of a one-page document warrants postponement of the testimony of Mirza Sabljica (KDZ180), and that the suggested exclusion of testimony should be dismissed as premature.⁸ It notes that even though the transcript of an audio-taped interview with KDZ192 is attached in Appendix A to the Eleventh Motion, the motion itself does not make an argument with respect to the disclosure of this material.⁹ While it acknowledges that this material should have been disclosed earlier, it submits that there is no prejudice to the Accused given that the affected witness is approximately 85th in the present witness calling order.¹⁰

C. Twelfth Motion

9. In the Twelfth Motion, the Accused makes reference to the disclosure by the Prosecution, on 23 August 2010, of a note of an interview conducted by the Royal Netherlands Army with the witness Roger Patelski in 1995.¹¹ The Accused requests that the Trial Chamber make a specific finding of violation of Rule 66(A)(ii) in relation to this document and that it impose an appropriate remedy.¹² He suggests that the Trial Chamber should exclude the testimony of any witness in relation “to whom a disclosure violation is found after 1 October 2010”.¹³

10. In the “Response to the Eleventh and Twelfth Motions”, the Prosecution acknowledges that this interview note should have been disclosed to the Accused earlier but had not been due to oversight on its part.¹⁴ The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to its late disclosure, and his failure to do so precludes the granting of a remedy by the Chamber.¹⁵ In support of this submission, the Prosecution argues that the

⁷ Response to the Eleventh and Twelfth Motions, para. 5. The Prosecution also submits that the information contained in KDZ304’s record of informal interview “is largely contained in his record of formal interview, which was disclosed on 24 March 2009”.

⁸ Response to the Eleventh and Twelfth Motions, paras. 6 and 8.

⁹ Response to the Eleventh and Twelfth Motions, para. 7. The Prosecution notes that the transcript of this interview (but not the audio-tape) was disclosed pursuant to Rule 68 on 17 February 2009.

¹⁰ Response to the Eleventh and Twelfth Motions, para. 7.

¹¹ Twelfth Motion, paras. 1-2. A copy of the two-page statement is attached in confidential Annex A to the Twelfth Motion.

¹² Twelfth Motion, para. 14.

¹³ Twelfth Motion, para. 14. By the time of filing of the Twelfth Motion, the Chamber had ordered the Prosecution to have completed the additional measures implemented to ensure no further violations of Rule 66(A)(ii) by 1 October 2010.

¹⁴ Response to the Eleventh and Twelfth Motions, para. 9.

¹⁵ Response to the Eleventh and Twelfth Motions, para. 5.

Accused will have sufficient time to consider this document given that it is less than two pages in length and that the affected witness is scheduled to be approximately 270th in the present witness calling order.¹⁶

D. Thirteenth Motion

11. In the Thirteenth Motion, the Accused makes reference to the disclosure by the Prosecution, on 27 August 2010, of an additional 30 statements pertaining to the testimony of 25 witnesses.¹⁷ He argues that there has been a violation by the Prosecution of Rule 66(A)(ii) in relation to the disclosure of all these statements and, in addition, a violation of Rule 68 with respect to the disclosure of two of them.¹⁸

12. The Accused requests that the Trial Chamber make a specific finding of violation of Rule 66(A)(ii) and Rule 68 and then impose an appropriate remedy.¹⁹ He repeats his request that the Prosecution trial attorney responsible for each witness certify that disclosure is complete and that the Trial Chamber exclude the testimony of any witness in relation “to whom a disclosure violation is found after 1 October 2010”.²⁰ In addition the Accused requests that the testimony of witnesses John Hamill and Alen Gičević be postponed until 2011 as a result of the alleged disclosure violations.²¹

13. In the “Response to the Thirteenth and Fifteenth Motions”, the Prosecution acknowledges that 28 of the statements concerned should have been disclosed earlier, under Rule 66(A)(ii), but had not been due to administrative error or oversight on its part.²² It states yet again that these documents were identified by it as a result of the additional measures it has implemented following the Trial Chamber’s Decision on the Second Disclosure Violation Motion.²³ It argues there has been no disclosure violation with respect to the two remaining

¹⁶ Response to the Eleventh and Twelfth Motions, para. 9.

¹⁷ Thirteenth Motion, para. 1. Copies of these 30 documents are attached in confidential Annex A to the Thirteenth Motion. These documents relate to witnesses Jose Cutileiro, Elvir Jahić, Christian Nielsen, KDZ163, Paul Groenewegen, Charles Kirđua, John Hamill, KDZ239, Miodrag Simović, Mehmed Musić, Cedric Thornberry, Emir Turkušić, KDZ340, Alen Gičević, KDZ391, Jose Baraybar, Dragan Majkić, Hajrudin Karić, Muhamed Hećo, Helge Brunborg, KDZ480, Branko Đerić, Milan Trbojević, Vitomir Zepenić, KDZ554.

¹⁸ Thirteenth Motion, para. 1. The Accused submits that the 1995 statement of John Hamill “contradicts prosecution evidence concerning the number of casualties at the Markale I shelling and raises doubts about the conduct of the Muslim authorities in charge of the scene”. The Accused fails to particularise why disclosure of the statement of KDZ554 also constituted a violation of Rule 68.

¹⁹ Thirteenth Motion, para. 17.

²⁰ Thirteenth Motion, paras. 17-18.

²¹ Thirteenth Motion, para. 19.

²² Response to the Thirteenth and Fifteenth Motions, para. 3.

²³ Response to the Thirteenth and Fifteenth Motions, para. 3.

documents referred to in the Thirteenth Motion as they had been previously disclosed pursuant to Rule 66(A)(ii) on 16 March and 7 May 2009.²⁴

14. The Prosecution repeats its submission that the Accused has not demonstrated any prejudice with respect to the late disclosure of the 28 documents in question, and his failure to do so precludes the granting of a remedy by the Chamber.²⁵ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider the material given that all of the “materials have been provided well in advance of the witnesses’ testimony and are not lengthy”.²⁶

15. It also submits that the Accused has failed to substantiate “the basis for his request to postpone the testimony of witnesses Gičević and Hamill until after the New Year”.²⁷ In support of this submission, the Prosecution notes that there had been no disclosure violation with respect to Gičević and that the additional document pertaining to Hamill is only one-page in length.²⁸ In any event, the Prosecution submits that the Accused’s request for certification should be dismissed as unworkable and that his request for exclusion of testimony be dismissed as premature.²⁹

16. With regard to the alleged breaches of Rule 68, the Prosecution argues that the Accused has failed to substantiate how the disclosure of the statement of KDZ554 constitutes a Rule 68 violation and that, “this material had been provided well in advance of the witness’s testimony”.³⁰ The Prosecution does not address whether the disclosure on 27 August 2010 of a record of a conversation between the Prosecution and John Hamill violated Rule 68 as suggested by the Accused, but repeats its submission that it had been provided “well in advance of the witness’s testimony”.³¹

²⁴ Response to the Thirteenth and Fifteenth Motions, para. 3, The documents in question relate to witnesses Alen Gičević and John Hamill.

²⁵ Response to the Thirteenth and Fifteenth Motions, para. 5.

²⁶ Response to the Thirteenth and Fifteenth Motions, para. 5. The Prosecution provides a list of when the affected witnesses are expected to be called in the present witness calling order and the respective length of the additional statements. The Prosecution notes that most of the statements in question are 1-3 pages in length.

²⁷ Response to the Thirteenth and Fifteenth Motions, para. 7.

²⁸ Response to the Thirteenth and Fifteenth Motions, para. 7.

²⁹ Response to the Thirteenth and Fifteenth Motions, para. 8.

E. Fourteenth Motion

17. In the Fourteenth Motion, the Accused makes reference to the disclosure by the Prosecution, on 31 August 2010, of two additional statements of witness Bakir Nakaš.³² The Accused requests that the Trial Chamber make a specific finding of violation of Rule 66(A)(ii) and Rule 68 and then impose an appropriate remedy.³³ He again repeats his request that the Prosecution trial attorney responsible for each witness certify that disclosure is complete and suggests that the Trial Chamber exclude the testimony of any witness in relation “to whom a disclosure violation is found after 1 October 2010”.³⁴ In addition, the Accused requests that the testimony of Bakir Nakaš be postponed until 2011 as a result of the alleged disclosure violations.³⁵

18. In the Response to the Fourteenth Motion, the Prosecution acknowledges that these two documents should have been disclosed to the Accused at an earlier date but had not been due to administrative error on its part.³⁶ It repeats its submission that these documents were identified by it as a result of the additional measures it has implemented following the Trial Chamber’s Decision on the Second Disclosure Violation Motion.³⁷ The Prosecution also submits that the Accused has not demonstrated any prejudice with respect to the late disclosure of the documents in question, and his failure to do so precludes the granting of a remedy by the Chamber.³⁸ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider these short documents, which contain information also in previously disclosed material, and that the documents do not contain “information which may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.³⁹

19. The Prosecution argues, once again, that the Accused’s request for certification should be dismissed as unworkable and that his request for exclusion of testimony be dismissed as premature.⁴⁰ In addition, the Prosecution submits that the Accused has failed to substantiate how the late disclosure of the two documents warranted postponement of the testimony of Bakir

³⁰ Response to the Thirteenth and Fifteenth Motions, para. 6.

³¹ Response to the Thirteenth and Fifteenth Motions, para. 6.

³² Fourteenth Motion, para. 1. A copy of these two-page statements are attached in confidential Annex B to the Fourteenth Motion.

³³ Fourteenth Motion, para. 14.

³⁴ Fourteenth Motion, paras. 14-15.

³⁵ Fourteenth Motion, para. 16.

³⁶ Fourteenth Motion, para. 2.

³⁷ Response to the Fourteenth Motion, para. 2.

³⁸ Response to the Fourteenth Motion, para. 1.

³⁹ Response to the Fourteenth Motion, paras. 5-7.

⁴⁰ Response to the Fourteenth Motion, para. 8.

Nakaš.⁴¹ It argues that, given the limited volume of the material, and that “some of the information is referenced in prior disclosure and testimony”, there was no basis for postponement.⁴²

F. Fifteenth Motion

20. In the Fifteenth Motion, the Accused makes reference to the disclosure by the Prosecution, on 3 September 2010, of an additional 29 statements from 21 witnesses.⁴³ He requests that the Trial Chamber make a specific finding of violation of Rule 66(A)(ii), repeats his request that the Prosecution trial attorney responsible for each witness certify that disclosure is complete, and again suggests that the Trial Chamber exclude the testimony of any witness in relation “to whom a disclosure violation is found after 1 October 2010”.⁴⁴ In addition, the Accused requests that the testimony of witnesses Mirza Sabljica (KDZ180) and Bogdan Vidović (KDZ438) be postponed until 2011 as a result of the alleged disclosure violations.⁴⁵

21. In the “Response to the Thirteenth and Fifteenth Motions”, the Prosecution acknowledges that 27 of the statements should have been disclosed earlier but had not been due to administrative error or oversight on its part.⁴⁶ It reiterates that these documents were identified by it as a result of the additional measures it has implemented following the Trial Chamber’s Decision on the Second Disclosure Violation Motion.⁴⁷ It repeats its submission that the Accused has not demonstrated any prejudice with respect to the late disclosure of the documents in question, and his failure to do so precludes the granting of a remedy by the Chamber.⁴⁸ In support of this submission, the Prosecution argues that the Accused will have sufficient time to consider the material given that they had been provided well in advance of the witnesses’ testimony and are not lengthy.⁴⁹

⁴¹ Response to the Fourteenth Motion, para. 7.

⁴² Response to the Fourteenth Motion, para. 7.

⁴³ Fifteenth Motion, para. 1. Copies of these 29 documents are attached in confidential Annex A to the Fifteenth Motion and confidential Annex A to the Supplement to the Fifteenth Motion. These documents relate to witnesses KDZ015, KDZ026, KDZ029, KDZ033, KDZ083, KDZ126, Mirza Sabljica (KDZ180), Enis Šabanović, Marinko Kovačević, Atif Džafić, Manojlo Milovanović, Ibro Osmanović, Asim Džambasović, Grgo Stojić, Milijana Rašević, Azem Omerović, Milorad Davidović, Bogdan Vidović (KDZ438), Dorothea Hanson, Aleksandar Vasiljević, Melika Malešević.

⁴⁴ Fifteenth Motion, paras. 15-16.

⁴⁵ Fifteenth Motion, para. 16.

⁴⁶ Response to the Thirteenth and Fifteenth Motions, para. 10.

⁴⁷ Response to the Thirteenth and Fifteenth Motions, para. 10.

⁴⁸ Response to the Thirteenth and Fifteenth Motions, para. 11.

⁴⁹ Response to the Thirteenth and Fifteenth Motions, para. 11. The Prosecution provides a list of when the affected witnesses are expected to be called in the present witness calling order and the respective length of the additional statements. It also notes that three of the witnesses are reserve witnesses who may not be called.

22. The Prosecution argues there has been no disclosure violation with respect to the remaining two documents referred to in the Fifteenth Motion, as they had been previously disclosed pursuant to Rule 66(A)(ii) on 7 May 2009.⁵⁰ The Prosecution also submits that the Accused has failed to substantiate “the basis for his request to postpone the testimony of witnesses KDZ180 and KDZ438 until after the New Year”.⁵¹ In support of this submission it asserts that there had been no disclosure violation with respect to one of the documents pertaining to Mirza Sabljica (KDZ180), that the remaining document is two pages in length, and that the item pertaining to Bogdan Vidović (KDZ438) is only one page in length.⁵² The Prosecution repeats its submission that the Accused’s request for certification and exclusion of testimony should be dismissed.⁵³

II. Applicable Law

23. Rule 66(A)(ii) of the Rules 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*”.

24. Rule 68 imposes a continuing obligation on 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”.⁵⁴ To satisfy the Chamber that the Prosecution has failed to comply with this obligation the Defence must “present a *prima facie* case making out the probable exculpatory or mitigating nature” of the materials in question.⁵⁵

25. 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.

⁵⁰ Response to the Thirteenth and Fifteenth Motions, para. 10. The documents in question relate to witness Mirza Sabljica (KDZ180).

⁵¹ Response to the Thirteenth and Fifteenth Motions, para. 13.

⁵² Response to the Thirteenth and Fifteenth Motions, para. 13.

⁵³ Response to the Thirteenth and Fifteenth Motions, para. 14.

⁵⁴ 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.

⁵⁵ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004, para. 179.

III. Discussion

26. The Chamber will now consider whether the Accused has established disclosure violations by the Prosecution as argued in the Motions, before discussing whether any of the specific remedies sought by him are merited.

A. Eleventh Motion

27. The Trial Chamber notes that the third document referred to in the Eleventh Motion is an investigator information report that pertains to Miroslav Deronjić, who is no longer a witness in this case. While this is relevant to an assessment of whether the Accused suffered prejudice, it does not determine whether or not the Prosecution violated its pre-trial disclosure obligations. It was only on 23 March 2010 that the Trial Chamber denied the Prosecution's motion, filed on 10 June 2009, for the admission of Deronjić's evidence pursuant to Rule 92 *quater*.⁵⁶ Given that the document in question is dated 6 February 2004, it should have been disclosed in accordance with the deadline set by the pre-trial Judge for the disclosure of Rule 66(A)(ii) material given that Deronjić was a potential witness until 23 March 2010. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of this statement but that the Accused has not suffered any prejudice given that he is no longer a witness in this case.

28. Having reviewed the remaining nine documents referred to in the Eleventh Motion, the Trial Chamber considers that these documents are statements which fall within the scope of Rule 66(A)(ii).⁵⁷ It follows that they should have been disclosed in accordance with the 7 May 2009 deadline set by the pre-trial Judge.⁵⁸ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these nine documents.

29. However, having considered the number, length and subject matter of these documents, and the time available to the Accused to consider them before the relevant witnesses will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure. While Mirza Sabljica (KDZ180) is scheduled to testify as the 26th witness in the present witness calling order, his testimony currently being expected in the week beginning 27 September 2010, the Trial Chamber is not satisfied that the late

⁵⁶ Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjić) Pursuant to Rule 92 *Quater*, 23 March 2010, para. 41.

⁵⁷ See *Prosecutor v. 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 for the definition of "witness statement".

⁵⁸ Order Following Status Conference and Appended Work Plan, 6 April 2009, para. 7.

disclosure of a one-page statement made by him would warrant postponement of his testimony until 2011.

B. Twelfth Motion

30. Having reviewed the document referred to in the Twelfth Motion, the Trial Chamber is of the view that it is a statement which falls within the scope of Rule 66(A)(ii) and should have been disclosed in accordance with the deadline set by the pre-trial Judge.⁵⁹ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) in relation to the late disclosure of the one document referred to in the Twelfth Motion.

31. However, taking into consideration the length and subject matter of the statement, and the time available to the Accused to consider it before the relevant witness will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by its late disclosure.

C. Thirteenth Motion

32. The Trial Chamber notes that two of the documents referred to in the Thirteenth Motion had already been disclosed to the Accused pursuant to Rule 66(A)(ii) on 16 March and 7 May 2009. It follows that there has been no disclosure violation with respect to the disclosure of these two documents pertaining to witnesses Alen Gičević and John Hamill.⁶⁰

33. Having reviewed the remaining 28 documents referred to in the Thirteenth Motion, the Trial Chamber is of the view that they are statements which fall within the scope of Rule 66(A)(ii).⁶¹ The Chamber notes that 23 of these documents were in existence and in the possession of the Prosecution in May 2009, and should therefore have been disclosed in accordance with the deadline set by the pre-trial Judge. While seven of the documents post-date the 7 May 2009 deadline, they should have been disclosed as soon as possible after they came into the Prosecution's possession, and certainly well before 27 August 2010. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these 28 documents.

34. The Trial Chamber notes that the record of a conversation by the Prosecution with John Hamill in August 1995 suggests that he did not believe the number of casualties associated with

⁵⁹ See *supra*, fn. 57 for references to the definition of "witness statement".

⁶⁰ The documents in question are an official note of interview with the witness Gičević dated 18 September 2001, and a supplemental information sheet for the witness Hamill, dated 16 March 2009.

⁶¹ See *supra*, fn. 57 for references to the definition of "witness statement".

one of the Markale Market attacks and doubted the accuracy of the analysis of the craters performed by French UN officers.⁶² The Trial Chamber is satisfied that this statement could potentially affect the credibility of Prosecution evidence relating to this incident and therefore should have been disclosed to the Accused “as soon as practicable” pursuant to Rule 68. Clearly, this statement has been in the possession of the Prosecution since it was recorded, and while there is no set deadline for the disclosure of Rule 68 material, it should have been disclosed to the Accused pursuant to this Rule well before it actually was. Therefore, the Chamber finds that there was a violation of Rule 68 with respect to the late disclosure of this statement.

35. The Accused fails to specify why the disclosure of a statement from KDZ554 on 27 August 2010 also constituted a violation of Rule 68, or to establish a *prima facie* case for the exculpatory or mitigating nature of the information contained in this statement. Having reviewed the statement, the Chamber is not convinced that it suggests the innocence or would mitigate the guilt of the Accused. However, the Trial Chamber is satisfied that some of the material contained in the statement may affect the credibility of Prosecution evidence from KDZ554 and it should, therefore, have been disclosed to the Accused “as soon as practicable” pursuant to Rule 68.⁶³

36. While the Chamber recognises that Rule 68 imposes a continuing obligation, it will assess whether this Rule 68 material was disclosed “as soon as practicable” by considering the date when the statement was created or came into the Prosecution’s possession, and the date of its disclosure to the Accused, in addition to any other surrounding circumstances. The Chamber notes that the Prosecution has not identified when this statement from KDZ554 came into its possession. However, given that it is dated 12 August 2008, and the Prosecution acknowledgement that this document was “missed due to administrative error or to oversight”, the Chamber is convinced that it was not disclosed as soon as practicable.⁶⁴ Therefore, the Chamber finds that the Prosecution breached Rule 68 by disclosing the statement of KDZ554 over two years after it was made by the witness.

37. However, having considered the number, length and subject matter of the 28 documents disclosed late to the Accused, and the time available to him to consider them before the relevant witnesses will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure.

⁶² Thirteenth Motion, Appendix A, pg. 13.

⁶³ Thirteenth Motion, Appendix A, pp. 148-155.

⁶⁴ Response to the Thirteenth and Fifteenth Motions, para. 3.

38. The Trial Chamber notes that, given that there has been no disclosure violation with respect to the witness Gičević, there is no basis to postpone his testimony. Similarly, the Chamber is not satisfied that the disclosure of an additional one-page statement pertaining to the witness Hamill would warrant postponement of his testimony until 2011.

D. Fourteenth Motion

39. Having reviewed the two documents referred to in the Fourteenth Motion, the Trial Chamber is of the view that these are statements which fall within the scope of Rule 66(A)(ii) and should have been disclosed in accordance with the deadline set by the pre-trial Judge.⁶⁵ Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) in relation to the late disclosure of the two documents referred to in the Fourteenth Motion.

40. However, having considered the length and subject matter of the statements, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure. The Trial Chamber has already noted, in an oral ruling on 7 September 2010, that it was “not satisfied that the disclosure of two, two-page statements would warrant postponement of [Nakaš’] testimony until 2011”.⁶⁶

41. The Accused fails to specify why the disclosure of these two additional statements of witness Bakir Nakaš also constituted a violation of Rule 68, or to establish a *prima facie* case for the exculpatory or mitigating nature of the information contained in these statements. Having reviewed the English version of one of the statements, and the Prosecution’s submissions concerning the content of the other, which is in B/C/S, the Chamber is not convinced that these statements suggest the innocence or would mitigate the guilt of the Accused, or affect the credibility of Prosecution evidence.⁶⁷ Therefore, the Chamber finds that there has been no violation of Rule 68 with respect to the disclosure of these documents.

E. Fifteenth Motion

42. The Trial Chamber notes that two of the documents referred to in the Fifteenth Motion had already been disclosed to the Accused pursuant to Rule 66(A)(ii) on 7 May 2009. It follows that there was no disclosure violation with respect to the disclosure of these two documents pertaining to witness Mirza Sabljica (KDZ180).⁶⁸ However, the Chamber notes that it is

⁶⁵ See *supra*, fn. 57 for references to the definition of “witness statement”.

⁶⁶ T. 6251, 7 September 2010.

⁶⁷ Fourteenth Motion, Confidential Annex B and Response to Fourteenth Motion, para. 6.

⁶⁸ The documents in question are information reports pertaining to witness Mirza Sabljica (KDZ180) dated 20 June 2001 and 26 June 2001.

unhelpful for the Prosecution to disclose for a second time material that has already been disclosed, as it requires a duplication of work and review by the Accused and can result in confusion.

43. Having reviewed the remaining 27 documents referred to in the Fifteenth Motion, the Trial Chamber is of the view that these are statements which fall within the scope of Rule 66(A)(ii).⁶⁹ The Chamber notes that 23 of these documents were in existence and in the possession of the Prosecution in May 2009, and should have been disclosed in accordance with the deadline set by the pre-trial Judge. While the remaining four documents post-date the 7 May 2009 deadline, they should have been disclosed as soon as possible after they came into the Prosecution's possession, and certainly well before 3 September 2010. Therefore, the Chamber finds that the Prosecution has violated Rule 66(A)(ii) by its late disclosure of these 27 documents.

44. However, having considered the length and subject matter of the statements and the time available to the Accused to consider them before the relevant witness will be called to testify, the Trial Chamber is not satisfied that the Accused has demonstrated that he has been prejudiced by their late disclosure.⁷⁰

F. Requests for Exclusion of Testimony and Certification

45. In the Motions, the Accused suggests that the Trial Chamber exclude the testimony of any witness in relation "to whom a disclosure violation is found" after 1 October 2010.⁷¹ The Trial Chamber notes that it is for it to determine, on a case-by-case basis, how it will address any future violations of the Rules pertaining to disclosure by the Prosecution which occur after this date, having regard to any demonstrable prejudice to the Accused. It is therefore premature to consider the exclusion of testimony as suggested by the Accused in the Motions.

46. In the Thirteenth, Fourteenth and Fifteenth Motions, the Accused requests an order from the Chamber requiring the Prosecution trial attorney responsible for each witness to certify that disclosure is complete. The Trial Chamber repeats its observation that an order requiring the

⁶⁹ See *supra*, fn. 57 for references to the definition of "witness statement".

⁷⁰ While the number of disclosed pages referred to in the fifteenth motion exceeds 800, the majority of the statements are only a few pages long and the bulk of the pages are composed of lengthy court transcripts in previous cases.

⁷¹ The Eleventh Motion suggests exclusion of the testimony of witnesses in relation to whom disclosure violations are found after 31 October 2010.

Prosecution to certify compliance with its Rule 66(A)(ii) disclosure obligations for all remaining witnesses is not an effective and practical remedy.⁷²

G. General Remarks

47. The Trial Chamber has recently recognised the likelihood that a limited number of documents (including the documents referred to in the Motions) would be identified and disclosed to the Accused as a consequence of the additional measures and searches which the Prosecution was instructed to implement to ensure compliance with its disclosure obligations.⁷³ The deadline for the completion of that process is 1 October 2010. However, the Chamber has also emphasised its concern about the fact that such disclosure violations continue to come to light, and its expectation that there will be no further disclosure violations following the 1 October 2010 deadline.⁷⁴ That discussion will not be repeated here.

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), 68 and 68 *bis* of the Rules, the Trial Chamber hereby **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fourth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷² Decision on Accused's Seventh and Eighth Motions for Finding of Disclosure Violations and for Remedial Measures, 18 August 2010, para. 18.

⁷³ Decision on Accused's Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010, para. 19.

⁷⁴ Decision on Accused's Ninth and Tenth Motions for Finding of Disclosure Violations and for Remedial Measures, 26 August 2010, para. 23.