



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-05-87-T  
Date: 27 April 2007  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Iain Bonomy, Presiding  
Judge Ali Nawaz Chowhan  
Judge Tsvetana Kamenova  
Judge Janet Nosworthy, Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 27 April 2007

**PROSECUTOR**

v.

**MILAN MILUTINOVIĆ  
NIKOLA ŠAINOVIĆ  
DRAGOLJUB OJDANIĆ  
NEBOJŠA PAVKOVIĆ  
VLADIMIR LAZAREVIĆ  
SRETEN LUKIĆ**

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**DECISION ON CROSS-MOTIONS IN RELATION TO EVIDENCE OF ZORAN LILIĆ**

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**Office of the Prosecutor**

Mr. Thomas Hannis  
Mr. Chester Stamp

**Counsel for the Accused**

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović  
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović  
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić  
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković  
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević  
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

**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”) was seised of a partially confidential “Joint Defence Motion Requesting the Trial Chamber to Declare the Prosecution Case-in-Chief Closed,” filed 23 April 2007 (“Defence Motion”), and the partially confidential “Prosecution Response to Joint Motion Requesting the Trial Chamber to Declare the Prosecution Case-in-Chief Closed and Motion to Postpone Witness Testimony with Annexes A and confidential Annex B,” filed 23 April 2007 (“Prosecution Motion”), and rendered, by majority, its oral ruling thereon during the hearing held on 24 April 2007.

1. The Chamber, by majority, now issues this written decision confirming its oral ruling upon this matter. Judge Iain Bonomy, Presiding, appends hereto his dissenting opinion.

2. The Chamber, in effect, was faced with cross-motions regarding the evidence of Zoran Lilić.<sup>1</sup> In the Defence Motion, the Defence requested the Chamber to declare the Prosecution case-in-chief closed and to proceed directly to hear submissions pursuant to Rule 98 *bis*.<sup>2</sup> The reasons for this request for relief were threefold.

3. First, the Chamber had held in a prior order as follows:

In the event that the appeal fails, the Prosecution shall lead the evidence of Shaun Byrnes and Zoran Lilić on 16 April 2007. If the Prosecution is not in a position to do so, the Chamber will proceed directly to hear submissions from the parties pursuant to Rule 98 *bis*.<sup>3</sup>

The Defence essentially argued that, now that the appeal had failed<sup>4</sup> and the evidence of Shaun Byrnes had been completed, the Prosecution was required by the terms of the order to lead the evidence of Zoran Lilić or close its case; and, if the Prosecution would not close its own case, then the Chamber should do it for the Prosecution.<sup>5</sup>

4. The other two reasons related to averred breaches of disclosure obligations. The Defence argued that the Prosecution should be precluded, pursuant to Rule 68 *bis*, from calling Zoran Lilić

<sup>1</sup> The witness was included in the Prosecution’s Rule 65 *ter* list. Prosecution’s Submission Pursuant to Rule 65 *ter* (E) with Confidential Annex A and Annexes B and C, 10 May 2006.

<sup>2</sup> Joint Defence Motion Requesting the Trial Chamber to Declare the Prosecution Case-in-Chief Closed, filed 23 April 2007 (“Defence Motion”), para. 1, p. 5.

<sup>3</sup> Order on Prosecution Motion to Postpone Close of Case-in-Chief, Pre-Defence Conference, and Commencement of Defence Case, 23 March 2007, para. 9(c).

<sup>4</sup> Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* Witness List, 20 April 2007.

<sup>5</sup> Defence Motion, para. 3.

as a witness due to disclosure violations under Rules 65 *ter* and 68.<sup>6</sup> Mr. Eugene O’Sullivan, Counsel for Mr. Milan Milutinović, who was speaking on behalf of all the Accused, closed his oral argument upon this matter in the following manner, “And I might add, we must say quite frankly to the Trial Chamber that, so far, this has been a high-paced intensive case and well-managed. For the last month, quite frankly, we have been floundering.”<sup>7</sup>

5. The Prosecution, in its Motion responded, in respect of the alleged Rule 65 *ter* disclosure violations, that the material in relation to Mr. Lilić: (a) was part of the witness’s evidence in the *Milošević* trial and attached to his trial transcript from that case, which was disclosed to the Defence long ago; (b) was publicly available; (c) would not be tendered by the Prosecution during the testimony of the witness; or (d) had already been admitted into evidence.<sup>8</sup> In addition, some of the exhibits, as admitted by the Prosecution, were omitted from the Rule 65 *ter* list, but now had been listed on the witness notification, filed 19 April 2007;<sup>9</sup> as such, the Prosecution intended to seek an amendment of the Rule 65 *ter* exhibit list in order to include these late exhibits, a process that the Chamber had granted in the past.<sup>10</sup>

6. In relation to the alleged Rule 68 violations, the Prosecution explained the status of the Rule 68 disclosure in the context of its internal ongoing procedures, determining that the timing of the last disclosure of Rule 68 material in relation to Mr. Lilić was nothing more than the latest in a series of periodic disclosures pursuant to internal searches.<sup>11</sup> The Prosecution took issue with the Defence’s characterisation of the amount of material that needed to be reviewed for preparation of the cross-examination of Mr. Lilić and remarked that much of the material disclosed under Rule 68 was in fact in the public domain and therefore available to the Defence.<sup>12</sup>

7. After having heard oral argumentation from the parties upon their motions,<sup>13</sup> the Chamber adjourned to consider the matter and then returned to issue its oral ruling, by majority, granting the Prosecution Motion and allowing the Prosecution to call Zoran Lilić on 1 May 2007. In doing so, the Chamber also, by majority, decided to refuse the Defence Motion to apply any sanctions against

<sup>6</sup> Defence Motion, paras. 4–11, confidential Annex A. The Chamber does not find it necessary, in the present circumstances, to recount in detail the arguments of the Defence on these points.

<sup>7</sup> T. 12292–12293 (24 April 2007).

<sup>8</sup> Prosecution Response to Joint Motion Requesting the Trial Chamber to Declare the Prosecution Case-in-Chief Closed and Motion to Postpone Witness Testimony with Annexes A and confidential Annex B filed 23 April 2007 (“Prosecution Motion”), paras. 4–6.

<sup>9</sup> Prosecution Witness Notification for Trial Week Commencing 23 April 2007, 19 April 2007.

<sup>10</sup> Prosecution Motion, para. 6.

<sup>11</sup> Prosecution Motion, para. 7.

<sup>12</sup> Prosecution Motion, paras. 8–9.

<sup>13</sup> T. 12275–12294 (24 April 2007).

the Prosecution in relation to its alleged failure to comply with its disclosure obligations.<sup>14</sup> The Chamber also issued a unanimous oral ruling, in principle, that Mr. Lilić's evidence would be led *viva voce*, rather than pursuant to Rule 92 *ter*.<sup>15</sup>

8. In coming to this decision, the Chamber considered the evidence that Mr. Lilić is to give to be potentially quite relevant and of high probative value to these proceedings, especially to the issue of the Accused's individual criminal responsibility for the many charges alleged in the Indictment. The Chamber now moves to its decision to deny the Defence Motion in relation to the alleged disclosure violations.

9. The Chamber, during the oral hearing on this matter, rigorously questioned the Prosecution in relation to the alleged disclosure violations. The Chamber recalls that the jurisprudence of the Tribunal provides that the Prosecution alone is responsible for identifying which information might be exculpatory and for disclosing such under Rule 68; and, if the Defence believes that the Prosecution has not complied with Rule 68, it must establish that the requested information is in the possession of the Prosecution and present a *prima facie* case that would make probable the exculpatory nature of the material sought.<sup>16</sup> If the Defence satisfies the Chamber that there has been a failure by the Prosecution to comply with Rule 68, the Chamber then assesses whether the Defence has been prejudiced by the non-compliance and, if so, whether sanctions pursuant to Rule 68 *bis* are appropriate.<sup>17</sup>

10. The Chamber found, as it had had occasion to in the past, that the Prosecution's behaviour in this regard had been less than ideal.<sup>18</sup> However, the Chamber was persuaded that, on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology and that the Defence did not demonstrate any undue prejudice it had suffered from the manner in which the Prosecution conducted itself in relation to this matter.<sup>19</sup> The postponement mitigates even further any potential prejudice that may have been suffered by the Defence, by affording it more time to review the relevant material in order to prepare for the cross-examination for the

<sup>14</sup> T. 12294 (24 April 2007).

<sup>15</sup> T. 12297 (24 April 2007).

<sup>16</sup> *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to Be Imposed Pursuant to Rule 68 *bis* and Motion for Adjournment While Matters Affecting Justice and a Fair Trial Can be Resolved, 30 October 2002, para. 23.

<sup>17</sup> *Ibid.*

<sup>18</sup> See, e.g., Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2007, para. 21 (finding violation of Rule 65 *ter* disclosure obligation); Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, para. 28 ("The Chamber notes that the way in which the Prosecution has dealt with this matter leaves much to be desired...").

<sup>19</sup> See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, paras. 153, 199–200, 211–215.

witness. Finally, the Chamber's oral ruling that Mr. Lilić's evidence would be led *viva voce*, rather than pursuant to Rule 92 *ter*, further alleviates any potential prejudice that the Defence may have suffered in relation to this matter.<sup>20</sup>

11. Mr. Lilić was subpoenaed, upon motion of the Prosecution, on 15 February 2007 and ordered to appear before the Chamber on 2 March 2007, or on other dates communicated to him, or to show good cause he should not testify.<sup>21</sup> On 10 April 2007, the Prosecution informed the Chamber and parties that Mr. Lilić had confirmed to "Serbian authorities" that he was prepared to accept the subpoena and appear to testify on 25 April 2007.<sup>22</sup> On 19 April 2007, the Prosecution reiterated to the Chamber and the parties that Mr. Lilić would be giving evidence during the week of 23 April 2007.<sup>23</sup> On 23 April 2007, the Prosecution informed the Chamber and parties that Mr. Lilić had received the subpoena in person on that day and had informed the Belgrade District Court that he would be available to give evidence on 1 May 2007.<sup>24</sup> The Prosecution referred to a confidential "Official Note" attached to the Prosecution Motion, which contained the reasons for Mr. Lilić's unavailability until that date.<sup>25</sup>

12. The Chamber was of the view that the reasons of the witness for his attendance almost two months after he was subpoenaed are, on their face, within the realm of reason and that the witness is facing genuine difficulties at the moment which reasonably excuse him from attendance on 25 April 2007. Moreover, the present delay amounts to no more than three court days. Finally, and more importantly, the Defence will suffer no unfair prejudice by Mr. Lilić's attendance on 1 May 2007, rather than 25 April 2007.

13. The Chamber expresses no view, at this point in time, regarding the potential consequences of Mr. Lilić's non-attendance on Tuesday, 1 May 2007.

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<sup>20</sup> T. 12295–12297 (24 April 2007).

<sup>21</sup> Confidential and *ex parte* Subpoena Ad Testificandum, 15 February 2007. The Chamber considers that, although Mr. Lilić was subpoenaed in a confidential and *ex parte* manner, it is appropriate, under the present circumstances, to make this fact public and *inter partes*.

<sup>22</sup> Confidential Report Regarding Witness Zoran Lilić, 10 April 2007.

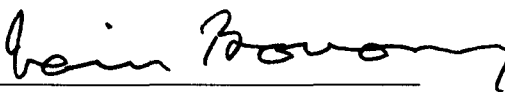
<sup>23</sup> Prosecution Witness Notification for Trial Week Commencing 23 April 2007, 19 April 2007.

<sup>24</sup> Prosecution Motion, paras 10–11.

<sup>25</sup> Prosecution Motion, confidential Annex B.

14. Pursuant to Rules 54, 65 *ter*, and 68 and Articles 20 and 21 of the Statute, the Chamber, by majority, hereby CONFIRMS its oral ruling.
15. Judge Iain Bonomy, Presiding, appends hereto a dissenting opinion.

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

  
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Judge Iain Bonomy  
Presiding

Dated this twenty-seventh day of April 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

**DISSENTING OPINION OF JUDGE IAIN BONOMOY**

1. The Prosecution intimated its intention to call Zoran Lilić as a witness when it filed its Rule 65 *ter* list of witnesses on 10 May 2007.<sup>26</sup> Thereafter, the Prosecution encountered difficulties in arranging for his attendance. These difficulties came to a head in January 2007 when an application was made to the Trial Chamber to subpoena his attendance. An Order to that effect was granted on 15 February 2007.<sup>27</sup>

2. Since then, the Prosecution has failed to take reasonable steps to secure the attendance of the witness timeously at the Tribunal to testify in this case. The history of the efforts to secure his attendance is as follows:

- a. On 12 June 2006, a Prosecution investigator contacted Mr. Lilić by telephone via an interpreter. The investigator stated that Mr. Lilić seemed surprised to hear from the Tribunal and that he said that he did not want to go to The Hague and would not agree to testify in this case. The investigator told Mr. Lilić that he would be in Belgrade between 28 June and 7 July and requested that Mr. Lilić meet him for an interview. Mr. Lilić agreed to meet with the investigator about the Prosecution's request for him to testify but would not commit to a specific date.<sup>28</sup>
- b. On 29 June 2006, the investigator again contacted Mr. Lilić by telephone via an interpreter. Mr. Lilić was upset at being contacted by the Prosecution and told the investigator that he could not talk at that moment and to contact him again on 3 July.<sup>29</sup>
- c. On 3 July 2006, the investigator again contacted Mr. Lilić by telephone via an interpreter. Mr. Lilić was rude and aggressive and refused to meet with anyone from the Tribunal.<sup>30</sup>
- d. On 18 July 2006, another Prosecution investigator contacted Mr. Lilić by telephone and informed him as to the dates that a member of the Prosecution would be in Belgrade. Mr. Lilić indicated that he was unavailable for an interview with the Prosecution.<sup>31</sup>

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<sup>26</sup> Prosecution's Submission Pursuant to Rule 65 *ter* (E) with Confidential Annex A and Annexes B and C, 10 May 2006.

<sup>27</sup> Confidential and *ex parte* Subpoena Ad Testificandum, 15 February 2007 ("Subpoena").

<sup>28</sup> Prosecution's Motion for Issuance of Subpoena with Confidential and *Ex Parte* Annexes, 31 January 2007 ("Subpoena Motion"), confidential and *ex parte* Annex A. It is no longer necessary to maintain the contents of the Prosecution's motion on a confidential and *ex parte* basis.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

- e. On 24 July 2006, the investigator, whilst in Belgrade, again contacted Mr. Lilić to request that he attend an interview that afternoon. Mr. Lilić said he was not available that afternoon and nor was he available the following day. When asked when would be convenient for him to meet with the Prosecution, Mr. Lilić said he did not understand and hung up the telephone.<sup>32</sup>
- f. On 4 August 2006, the Prosecution issued a summons to Mr. Lilić for him to appear for an interview with the instruction to attend the ICTY Liaison Office in Belgrade on 7 September 2006. The Prosecution states that the summons was not served because Mr. Lilić, according to his wife, was out of the country at that time.<sup>33</sup>
- g. On 4 September 2006, the investigator again contacted Mr. Lilić by telephone. He spoke to Mr. Lilić's wife who told him that Mr. Lilić was out of the country and would not be returning until after the date of the witness summons.<sup>34</sup>
- h. On 9 or 10 November 2006, a Prosecution Special Advisor/Political Affairs Officer attempted to contact Mr. Lilić by telephone and was informed by Mr. Lilić's wife that Mr. Lilić was not in the country and that there was no number upon which to call him while he was away. Mr. Lilić's wife told the Special Advisor that Mr. Lilić would not be returning until 21 November 2006.<sup>35</sup>
- i. On 21 or 22 November 2006, the Special Advisor again attempted to contact Mr. Lilić by telephone. The call was answered by somebody claiming to be Mr. Lilić's housekeeper and secretary. She told the Special Advisor that both Mr. Lilić and his wife were out of the country and that they had no contact number while away. The housekeeper/secretary also told the Special Advisor that Mr. Lilić was on continuous medical treatment while away and did not want to be disturbed.<sup>36</sup>
- j. On 16 January 2007, the Special Advisor again attempted to contact Mr. Lilić and spoke to Mr. Lilić's housekeeper/secretary who told him that Mr. Lilić was still away for medical treatment and that it was unclear when the medical treatment would be finalised. The

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Subpoena Motion, confidential and *ex parte* Annex B.



Special Advisor explained that Mr. Lilić might be called by the Tribunal to testify and the housekeeper/secretary stated that Mr. Lilić knew of this possibility.<sup>37</sup>

- k. Mr. Lilić was subpoenaed, upon motion of the Prosecution, on 15 February 2007 and ordered to appear before the Chamber on 2 March 2007, or on other dates as may be communicated to him, or to show good cause as to why he should not testify.<sup>38</sup>
- l. On 16 February 2007, a Prosecution investigator from the Belgrade Liaison Office (“BLO”) attempted to contact Mr. Lilić, with the assistance of a language assistant, to see whether he would be available to receive a copy of the subpoena. The number dialled was answered by Mr. Lilić’s secretary who informed the investigator that Mr. Lilić and his wife were both overseas until mid-April.<sup>39</sup>
- m. On 21 March 2007, authorities of the Republic of Serbia (“Serbia”) reported that they had not been able to serve the subpoena on Mr. Lilić.<sup>40</sup>
- n. On 24 March 2007, a Prosecution investigator went to Mr. Lilić’s residence where he met with Mr. Lilić’s wife. She told the investigator that Mr. Lilić would be returning in seven days.<sup>41</sup>
- o. On 26 March 2007, Mr. Lilić telephoned BLO and was informed of the subpoena. Mr. Lilić indicated that he had been in contact with Mr. Ljajić, the President of the National Council for Cooperation regarding the issuance of the subpoena.<sup>42</sup>
- p. On 28 March 2007, Mr. Mihov, the Head of BLO, had a meeting with Mr. Ljajić in which he confirmed that he had been in contact with Mr. Lilić and that Mr. Lilić had been informed that he was required to testify on 16 April 2007. Mr. Mihov then sent a letter to Mr. Dilparić, Investigating Judge at the War Crimes Chamber of the Belgrade District Court, to be passed to Mr. Lilić, confirming that, even though the date in the subpoena had passed, the subpoena remained valid and that Mr. Lilić was requested to be in The Hague on 16 April 2007.<sup>43</sup>

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<sup>37</sup> *Ibid.*

<sup>38</sup> Confidential and *ex parte* Subpoena Ad Testificandum, 15 February 2007.

<sup>39</sup> Confidential Report Regarding Witness Zoran Lilić, 10 April 2007 (“Lilić Report”), confidential Annex A.

<sup>40</sup> Lilić Report, para. 5.

<sup>41</sup> Lilić Report, confidential Annex A.

<sup>42</sup> Lilić Report, para. 5, confidential Annex A.

<sup>43</sup> Lilić Report, confidential Annex A.

- q. On 2 April 2007, Mr. Mihov was notified that Mr. Lilić would only be available to testify as of 25 April 2007, as he had to accompany his wife for pre-scheduled medical treatment.<sup>44</sup>
- r. On 10 April 2007, the Prosecution informed the Chamber and parties that Mr. Lilić had confirmed to “Serbian authorities” that he was prepared to accept the subpoena and appear to testify on 25 April 2007.<sup>45</sup>
- s. On 19 April 2007, the Prosecution reiterated to the Chamber and the parties that Mr. Lilić would be giving evidence during the week of 23 April 2007.<sup>46</sup>
- t. On 23 April 2007, the Prosecution informed the Chamber and parties that Mr. Lilić had received the subpoena in person on that day and had informed the Belgrade District Court that he would be available to give evidence on 1 May 2007.<sup>47</sup>
3. On 21 March 2007, the Prosecution intimated the closure of its case and stated that it would forego three witnesses, including Mr. Lilić.<sup>48</sup> The Trial Chamber reminded the Prosecution that there remained outstanding its appeal against the Chamber’s refusal to add General Wesley Clark to the witness list and stated that it did not consider it possible for the Prosecution case to be closed while the potential of General Clark being authorised to give evidence remained outstanding.<sup>49</sup> The Prosecution intimated that it had intended to take its chance on being able to introduce General Clark by reopening its case or in rebuttal, in the event that the appeal was successful.<sup>50</sup> On 22 March 2007, the Prosecution invited the Chamber to adjourn the trial until after the outcome of the appeal was known.<sup>51</sup> The Chamber made further Orders contingent upon that outcome as follows:
- a. That part of the Order of 5 March 2007 relating to the date for closure of the Prosecution case is vacated.
  - b. The trial is adjourned until 16 April 2007, upon which date it will resume.
  - c. In the event that the appeal fails, the Prosecution shall lead the evidence of Shaun Byrnes and Zoran Lilić on 16 April 2007. If the Prosecution is not in a position to do so, the Chamber will proceed directly to hear submissions from the parties pursuant to Rule 98 *bis*.

<sup>44</sup> Lilić Report, Confidential Annex A.

<sup>45</sup> Lilić Report, para. 2.

<sup>46</sup> Prosecution Witness Notification for Trial Week Commencing 23 April 2007, 19 April 2007.

<sup>47</sup> Prosecution Motion, paras 10–11.

<sup>48</sup> T. 12095–12098 (21 March 2007); *see also* T. 12099–12102 (22 March 2007).

<sup>49</sup> T. 12096 (21 March 2007).

<sup>50</sup> T. 12096 (21 March 2007); Notification Regarding Closing of Prosecution’s Case, 22 March 2007.

<sup>51</sup> T 12106 (22 March 2007)

- d. In the event that the appeal succeeds, the Prosecution shall, on 16 April 2007, lead the evidence of Shaun Byrnes and Zoran Lilić and shall inform the Chamber and the parties when precisely General Clark would give evidence.
- e. In any event, the evidence of the remaining witnesses must be completed within 30 days from the appeal decision.<sup>52</sup>

4. On 10 April 2007, the Prosecution filed a report on the situation relating to Mr. Lilić. That report indicated that the witness would be at the Tribunal to give evidence on 25 April.<sup>53</sup> In the event, the appeal had not been determined by 16 April 2007; and, on that day, the Prosecution led the evidence of Shaun Byrnes.<sup>54</sup>

5. The Appeals Chamber refused the Prosecution appeal on 20 April 2007.<sup>55</sup> When the Chamber next sat on 24 April, it was advised by the Prosecution that Mr. Lilić would not be available on 25 April, but would be available to give evidence on 1 May, and asked the Chamber to allow it to call him that day.<sup>56</sup> In support of its Motion, the Prosecution relied in particular upon the unique importance of his evidence.<sup>57</sup> The Prosecution also founded upon circumstances set out in confidential Annex B to its report of 10 April 2007, which it claimed gave a full explanation for the witness being unable to attend prior to 1 May.<sup>58</sup>

6. The Defence sought immediate closure of the Prosecution case on broadly three grounds, namely, that the Trial Chamber had already decided that Mr. Lilić should be immediately available following the determination of the appeal, that on 19 April the Prosecution disclosed a substantial quantity of Rule 68 material which could not be reviewed prior to cross-examination of the witness for a variety of reasons, and the failure of the Prosecution to set out in the witness notification for Mr. Lilić under Rule 65 *ter* 27 exhibits which it intended to examine the witness about contrary to the Trial Chamber's Order.<sup>59</sup>

7. Since the decisions facing the Trial Chamber on this occasion were essentially discretionary, it may appear unusual to dissent from the view of the majority of colleagues. However, I have decided upon this course because I am quite unpersuaded by the material

<sup>52</sup> Order on Prosecution Motion to Postpone Close of Case-in-Chief, Pre-Defence Conference, and Commencement of Defence Case, 23 March 2007, para. 9(a)–(e).

<sup>53</sup> Lilić Report, para. 2.

<sup>54</sup> T. 12128–12212 (16 April 2007).

<sup>55</sup> Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* Witness List, 20 April 2007.

<sup>56</sup> T. 12276 (24 May 2007).

<sup>57</sup> T. 12276 (24 May 2007).

<sup>58</sup> Lilić Report, 10 April 2007, confidential Annex B; T. 12276 (24 April 2007).

<sup>59</sup> Partially confidential Joint Defence Motion Requesting the Trial Chamber to Declare the Prosecution Case-in-Chief Closed, 23 April 2007 (“Defence Motion”); T. 12289–12294 (24 April 2007).

presented to the Chamber by the Prosecution that there is any colourable justification for granting the motion to allow further time to bring Mr. Lilić to the court.

8. The history which I have narrated above militates against granting the Motion. Even at the hearing on 24 April 2007, the Prosecution failed to take the basic step of inviting the Trial Chamber to grant a warrant for the arrest of the witness. I find it difficult to see how the Prosecution can be said, as it submitted, to have acted with “due diligence” in the absence of an application at any stage for a warrant to enforce the attendance of the witness. Hard though I have looked, I cannot find any satisfactory explanation for the continued failure of the witness to accept the subpoena and appear at the Tribunal. Various unspecific explanations relating to his need to accompany his wife for medical treatment, about his own condition of health, and about his own need to be absent from Belgrade, have been offered, but are not vouched. In an official note compiled on 23 April 2007 by an investigating judge at Belgrade District Court, the witness is recorded as having explained, when he attended to receive his subpoena, that he had no visa and thus was not able to appear in The Hague.<sup>60</sup> The Prosecution confirmed that the obtaining of a visa is a routine matter that it would have arranged for the witness.<sup>61</sup> He also introduced for the first time unspecified complications about his being accompanied to The Hague and over the provision of security for his family during his absence. In addition, he is recorded as having said, *not* that he will be available to give evidence on 1 May, but that “he will be able to respond to the summons of the court on 29 of this month or 06 May”.

9. In the absence of a reasonable explanation for his absence, and a clear indication that he will attend, I saw no basis for granting the Prosecution application. I would, therefore, have given effect to the Order of 23 March by refusing the Prosecution Motion with the result that the case would be closed and the Trial Chamber would move straight to hearing Defence submissions under Rule 98 *bis*.

10. I also found the situation relating to disclosure of Rule 68 exculpatory material to be unsatisfactory. A total of 127 items comprising 4,392 pages, including a 263-page untranslated document in Albanian only, as well as seven CDs of raw video interview of the witness for a television documentary, were disclosed on 19 April. While many of the Defence concerns about the potential prejudice caused to the Accused by such late disclosure are not particularly significant and the delay in the attendance of the witness until 1 May will resolve others, the Prosecution was unable to explain in a number of instances whether the material was being disclosed for the first

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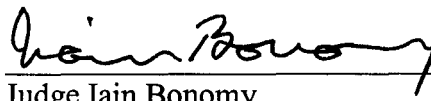
<sup>60</sup> Prosecution Motion, confidential Annex B.

<sup>61</sup> T. 12278 (24 April 2007).

time and how long it had been in the possession of the Prosecution. Failure in disclosure obligations can be met with sanctions. The Prosecution is bound, therefore, to be alert to the need to explain any apparent undue delay to the Court. The Prosecution was largely unable to identify the documents which were being disclosed for the first time or the length of time that they had been in its possession. However, it was able to identify that only 859 of the 4,273 pages disclosed required to be reviewed as potentially exculpatory and explained that much of the material was from open sources, available to the Defence in any event. It also appears that perhaps only one page of the 263-page document in Albanian is of significance. That document was, in any event, published in April 1998 prior to the most important period and events in the Indictment. Had the issue of Rule 68 disclosure been the sole one, I would not have applied the sanction of refusing to hear the witness on that ground alone. However, the apparent failure to disclose a substantial quantity of Rule 68 material timeously does add weight to the principal reason for refusing the Prosecution Motion set out above.

11. The problem posed to the Defence by the failure of the Prosecution to relate—in its Rule 65 *ter* exhibit list dated 10 May 2006—the exhibits proposed to be put to the witness, arose because of the Prosecution decision to depart from its original intention to lead the whole evidence of the witness *viva voce* and instead to present the bulk of his evidence in writing in terms of Rule 92 *ter*. That was possible because of the change in the Rules introducing Rule 92 *ter*. However, that change to the Rules was made on 13 September 2006. The Prosecution has, therefore, been on notice since then of the need to have the Rule 65 *ter* filings amended. The problem thus posed has been resolved by the Trial Chamber deciding, as it did following the granting of the Prosecution motion for more time, that, in principle, the evidence of the witness should be led *viva voce* in view of its importance and the problem of the related exhibits.<sup>62</sup> With that decision I agree. It remains open to the Prosecution at any stage in the course of the evidence of the witness to apply for the admission in writing of specific parts of his evidence.

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

  
 Judge Iain Bonomy  
 Presiding

Dated this twenty-seventh day of April 2007  
 At The Hague  
 The Netherlands

[Seal of the Tribunal]

<sup>62</sup> T. 12297 (24 April 2007).