



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-99-37-PT

Date: 7 June 2002

Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 7 June 2002

PROSECUTOR

v.

DRAGOLJUB OJDANIĆ

**DECISION ON PROSECUTION'S MOTION FOR ORDER OF NON-DISCLOSURE TO
PUBLIC OF SUPPORTING MATERIALS DISCLOSED PURSUANT TO RULE 66 (A) (i)**

The Office of the Prosecutor

Ms. Carla Del Ponte

Counsel for the Accused

**Mr. Tomislav Višnjić
Mr. Vojislav Selžan
Mr. Peter Robinson**

I. BACKGROUND

1. The Office of the Prosecutor (“Prosecution”) filed an “Ex Parte and Confidential Prosecution’s Motion for Order of Non-Disclosure to Public of Supporting Materials Disclosed Pursuant to Rule 66 (A)(i)” on 2 May 2002 (“the Motion”). The Motion seeks orders that all the supporting material disclosed to the accused pursuant to Rule 66 (A)(i) be subject to non-disclosure to the public pursuant to Rule 53 (A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), as well as other orders, and in particular seeks the following:
 - (a) the supporting material disclosed to the accused pursuant to Rule 66 (A)(i) not be disclosed to the public, except to the limited extent such disclosure is directly and specifically necessary for the preparation and presentation of the Defence case;
 - (b) to the extent the witness’ identities or whereabouts are known to the accused, Defence counsel or their representatives, those whereabouts not be disclosed to the public;
 - (c) evidence or other written statement of a witness or potential witness, or the substance, in whole or in part, of any such non-public evidence, statements or prior testimony disclosed to the Defence pursuant to Rule 66 (A)(i), not be disclosed to the public except to the limited extent such disclosure is directly and specifically necessary for the preparation and presentation of the Defence case;
 - (d) where disclosure is made by the Defence to the public to the extent directly and specifically necessary for the preparation and presentation of the Defence case, the Defence require each person to whom disclosure is made to sign a non-disclosure agreement;
 - (e) the Defence keep a record of all the disclosure of protected information, including to whom disclosed, when and for what purpose;
 - (f) if a member of the Defence team withdraws from the case, all material in his or her possession be returned to the lead Defence counsel or Registry;
 - (g) any and all deletions to the initial Defence list be notified to the Trial Chamber;
 - (h) “the Defence” be defined as the accused, his counsel and others specifically assigned by the Tribunal to the accused’s Defence team and identify these persons in a list to be maintained be lead counsel and filed with the Trial Chamber; and
 - (i) The “public” be defined in a particular manner set out in the Motion.

II. THE LAW

1. The Prosecution purports to rely upon Articles 20, 21(2) and 22 of the Statute of the Tribunal ("Statute") and Rules 53, 54, 69, 75 and 79 of the Rules of Procedure and Evidence of the Tribunal ("Rules").
2. In fact, the Motion concerns largely relief sought by the Prosecution under Rule 53 (A) of the Rules for limited non-disclosure by the accused to the public of material received from the Prosecution pursuant to Rule 66 (A)(i). Rule 53 (A) provides that in "exceptional circumstances" and where the interests of justice require, non-disclosure to the public may be ordered with respect to any documents or information.
3. The Trial Chamber notes that it has been its practice, and that of other Trial Chambers, to grant relief under Rule 53 (A) with respect to Rule 66 (A)(i) where such non-disclosure can be justified. In a Decision in the Milosevic proceedings, the Chamber characterised the distinction between non-disclosure to the public under Rule 53 (A) and redacted disclosure to the accused under Rule 69 (A) as follows:

The considerations which attach to such an application are that, whilst an application under Rule 69 (A) goes to the heart of an accused's ability to prepare his defence, applications under Rule 53 (A) do not materially impede the preparation of an accused's defence so long as he is expressly allowed to make public such material for this strict purpose. Furthermore, applications under Rule 53 (A) go directly to concerns regarding the safety of victims and witnesses in proceedings before the Tribunal. It has been noted above that the correct balance must be achieved between the interests of the accused and the protection of victims and witnesses. The Trial Chamber is of the view that whilst the balance dictates clearly in favour of an accused's right to the identity of witnesses which the Prosecution intends to rely upon (subject to protective measures granted), it dictates against making public supporting material where such disclosure might lead to witness identification and therefore endanger such victims or witnesses. The reason for this distinction is primarily because the former goes to the ability of the accused to prepare his defence, whilst the latter does not.¹

The Trial Chamber will apply this reasoning to its determination of the instant Motion.

4. Other orders sought in the Motion concern the general decision-making power of the Trial Chamber under Rule 54.

¹ *Prosecutor v. Milosevic*, "Decision on Prosecution Motion for Provisional Protective Measures" issued on 19 February 2002, para. 32.
Case No. IT-99-37-PT

III. DISCUSSION OF THE APPLICATION AND DECISION

5. The Prosecution sets out a number of factors it argues establishes exceptional circumstances such that an order under Rule 53 (A) would be appropriate. The first justification is the unique circumstances of these proceedings, including the sensitive and public position held by the accused and therefore the extraordinary level of public scrutiny of those involved in it. The second justification is that because of the conflict between chains of command beneath the various accused in this indictment, and the attendant tensions between the Army of Yugoslavia ("VJ") and the Serbian Ministry of Internal Affairs ("MUP"), witnesses may be further subjected to heightened scrutiny and risk of interference or intimidation. These criteria would appear to lend legitimacy to the application made by the Prosecution.
6. The third justification is that disclosure of supporting materials to the public could undermine future cooperation between the FRY and the Tribunal. The fifth and final justification is that because of the possibility that FRY or Serbian authorities may one day return to Kosovo, witnesses may be vulnerable to retaliation for agreeing to testify at the hands of those authorities. Unlike the first three criteria set out by the Prosecution, the Trial Chamber does not consider matters of cooperation between the Tribunal and speculation about possible future political realities to be appropriate indicia upon which to find that exceptional circumstances exist to justify an order under Rule 53 (A).
7. The Trial Chamber is satisfied that exceptional circumstances exist, and that it would be in the interests of justice in this case, to order the non-disclosure to the public of the Rule 66 (A)(i) material.
8. The Prosecution seeks further relief in its Motion which goes beyond non-disclosure under Rule 53 (A). An order is requested that to the extent the witness' identities or whereabouts are known to the accused, Defence counsel or their representatives, those whereabouts not be disclosed to the public. The Chamber takes the view that an order under Rule 53 (A) precluding the disclosure of documents or information in the confirming material includes the information contained in that material, whether or not the accused or his counsel have knowledge of that information from another source. The order of the Chamber will be fashioned in such a way as to make this requirement clear.
9. The Prosecution also seeks an order that where disclosure is made by the Defence to the public to the extent directly and specifically necessary for the preparation and presentation

of the Defence case, the Defence require each person to whom disclosure is made to sign a non-disclosure agreement and to keep a record of the disclosure of all protected material. This Trial Chamber has in the recent past been reluctant to make such orders on the basis that it is not generally speaking useful or appropriate when dealing with such a large volume of material and where protective orders are in place. It has done so with respect to sensitive source witnesses on the basis of the exceptional security risks attaching to such witnesses and the fact that they are very limited in number. Such circumstances do not apply here and the Trial Chamber will decline to make these orders.

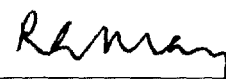
10. The Prosecution also seeks an order to the effect that if a member of the Defence team withdraws from the case, all material in his or her possession be returned to the lead Defence counsel or Registry. Such an order would seem entirely appropriate and the Trial Chamber will make it. On the other hand, further orders are sought with respect to the Defence which are not appropriate. The Prosecution seeks the creation and maintenance of an *ex parte* and confidential list of members of the Defence team of this accused and a definition of “the Defence” which is set out in its Motion. The Trial Chamber does not consider the creation and maintenance of such a list necessary in circumstances where counsel are appointed through the Tribunal Registry and therefore already subject both to the standards of professional conduct and to the formal processes for the addition or withdrawal of members of the Defence team required by the Registry. The creation of a list of members of the Defence team might be a matter considered appropriate in instances where the accused is represented at his own expense and therefore it may not be known who is officially part of that Defence team. That is not the case here. Furthermore, there is a definition of “Defence” under Rule 2 which, coupled with the Registry’s maintenance of Defence-related issues, makes it unnecessary to further define the meaning of this term.

IV. DISPOSITION

11. For the foregoing reasons, the Trial Chamber **ORDERS**, pursuant to Rules 53 (A) and 54 of the Rules as follows:
- (a) The Defence shall not disclose to the public:
 - (i) the supporting material disclosed to the accused pursuant to Rule 66 (A)(i) of the Rules, except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the accused's case;
 - (ii) the knowledge of the accused or his counsel or representatives with regard to the identities and whereabouts of the witnesses mentioned in the supporting material; or
 - (iii) any evidence or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony disclosed to the accused pursuant to Rule 66 (A)(i) of the Rules.
 - (b) If a member of the Defence team withdraws from the case, all Rule 66 (A)(i) material in his or her possession shall immediately be returned to the lead Defence counsel or Registry;
 - (c) For the purposes of these Orders, "the public" means all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), the Prosecutor and her representatives, the accused in this case, the Defence counsel, legal assistants and other members of the Defence team, their agents or representatives. "The public" specifically includes, without limitation, family, friends and associates of the accused, accused in other cases or proceedings before the Tribunal, Defence counsel in other cases or proceedings before the Tribunal and the media and journalists.

- (d) All other orders sought in the Motion are rejected.

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



Richard May
Presiding

Dated this seventh day of June 2002
At The Hague
The Netherlands

[Seal of the Tribunal]