



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: 18 October 2002  
Original: English

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**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. Hans Holthuis

**Decision of:** 18 October 2002

**PROSECUTOR**

**v.**

**DRAGOLJUB OJDANIĆ  
NIKOLA ŠAINOVIĆ**

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**DECISION ON DEFENCE MOTION  
TO REQUIRE FULL COMPLIANCE WITH RULE 66(A)(i)  
AND FOR UNSEALING OF *EX PARTE* MATERIALS**

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**The Office of the Prosecutor**

Ms. Carla Del Ponte  
Mr. Geoffrey Nice  
Mr. Dirk Ryneveld

**Counsel for the Accused**

Mr. Tomislav Višnjić, Mr. Vojislav Selžan and Mr. Peter Robinson, for Dragoljub Ojdanić  
Mr. Toma Fila and Mr. Zoran Jovanović, for Nikola Šainović

**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 (“International Tribunal”),

**BEING SEISED** of “General Ojdanić’s Motion to Require Full Compliance with Rule 66 (A)(i) and for Unsealing of Ex Parte Materials” filed on behalf of the accused Dragojlob Ojdanić on 23 July 2002, together with the “Prosecution’s Response” filed by the Office of the Prosecutor (“Prosecution”) on 6 August 2002 and the unauthorised Reply filed on 13 August 2002 on behalf of the accused Dragojlob Ojdanić (“the Motion”), in which the accused seeks disclosure by the Prosecution of “all supporting materials which accompanied the indictment(s) including (A) pleadings and other documents submitted by the Prosecutor which accompanied the indictment(s) and (B) materials pertaining to all accused, together with an order for disclosure to the public and the accused of *ex parte* filings and transcripts made in connection with the confirmation of the indictment(s) and regulating further *ex parte* filings in this case,

**NOTING** that the accused seeks disclosure of four categories of material, namely:

- (1) “all materials which accompanied the indictment(s) when confirmation was sought”, in particular, documents drafted with the goal of assisting the confirming Judge during the confirmation process, or if the Trial Chamber does not grant disclosure of all material that accompanied the indictment at confirmation, that the Trial Chamber should review the material in camera and order disclosure of all material that does not constitute a brief of argument or statement of facts;
- (2) the supporting material pertaining to each of the co-accused which accompanied the indictment(s) when confirmation was sought;
- (3) all *ex parte* submissions of the Prosecutor, including oral submissions, made to the confirming Judge, to be made public; and
- (4) an order regulating future *ex parte* filings in this case,

**NOTING** the objections raised by the Prosecution in its Response to the relief sought, in particular:

- (1) material other than the material on which the charges are based (the supporting material) may be provided to the confirming Judge and is not subject to disclosure under Rule 66 (A)(i) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”);
- (2) material relating to the other co-accused does not constitute supporting material for the accused himself and that the Prosecution has, in any event, provided the defence with a list

of all such material and has invited them to identify material on that list of which the accused would like a copy;

- (3) there is no basis under the Statute of the International Tribunal or the Rules for disclosure of material other than that mandated by Rule 66 (A)(i); and
- (4) it is more appropriate for the Trial Chamber to evaluate the necessity for *ex parte* filings on a case-by-case basis, rather than by means of a blanket order,

**NOTING ALSO** that the Ojdanić Defence has indicated that it does not intend to file any preliminary motions under Rule 72 until such time as this Motion has been determined and that the defence for the co-accused, Nikola Šainović, has indicated in a “Defence Notice” filed on 8 October 2002 that it considers the preliminary motion filed by it on 2 August 2002 challenging the form of the indictment to be equally applicable to the Indictment as amended,

**CONSIDERING** the provisions of Rule 66 (A)(i) which requires that the Prosecution disclose to the accused, “the supporting material which accompanied the indictment when confirmation was sought”,

**CONSIDERING** and approving of the decision in *Prosecutor v. Kordić & Čerkez*, in which it was held that the phrase “supporting material” in Rule 66 (A)(i) means the material upon which the charges are based and does not include other material that may be submitted to the confirming Judge<sup>1</sup>,

**CONSIDERING** that the case of *Brdanin & Talić*<sup>2</sup> relied upon by the accused is not relevant, since that decision is concerned with the disclosure of information redacted by the Prosecution from witness statements which accompanied the indictment at confirmation, rather than the disclosure of material other than that upon which the charges are based within Rule 66(A)(i),

**CONSIDERING** therefore that there is no obligation upon the Prosecution to disclosure material other than that “upon which the charges are based», which material has been identified by the Prosecution and provided to the accused<sup>3</sup>,

**CONSIDERING** that the language of Rule 66 (A)(i) clearly indicates that all «supporting material which accompanied the indictment» is to be disclosed and therefore, in the case of multiple accused

<sup>1</sup> *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Order on Motion to Compel Compliance by the Prosecutor with Rules 66 (A) and 68, 26 Feb. 1999, p. 3.

<sup>2</sup> *Prosecutor v. Brdanin & Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective measures, 27 Oct. 2000.

charged with the same counts on basis of the same alleged events in one indictment, the Trial Chamber is of the view that the Prosecution is obliged to disclose all such material to each accused, subject to leave to apply to the Trial Chamber for permission not to disclose specific information which it believes should not be so disclosed,

**CONSIDERING** that under the Statute proceedings for the confirmation of an indictment are by their very nature *ex parte*, and their conduct is within the sole control of the confirming Judge who has the power to determine what material should be made public pursuant to Rule 53,

**CONSIDERING** that, contrary to the argument advanced by the Defence, Article 21, paragraph 2, of the Statute does not grant the accused any right to disclosure, and that there is no right of access under the Statute or the Rules to material that is not supporting material,

**CONSIDERING** that the Trial Chamber has already declined to issue a general order relating to *ex parte* filings<sup>4</sup> and the defence has submitted no new grounds for such an order, and

**CONSIDERING** all other arguments of the parties as set out in the pleadings,

**PURSUANT** to Rule 66 of the Rules

**HEREBY DENIES** the relief sought under the first, third and fourth heads of the Motion, **GRANTS** the relief sought in the second head of the Motion and **ORDERS** as follows:

- (1) the Prosecution shall, no later than Friday 1 November 2002, disclose to the defence all of "the supporting material which accompanied the indictment when confirmation was sought", including material relating to the co-accused, or to apply to the Trial Chamber for leave not to disclosure certain material, and giving the reasons therefor;
- (2) the Ojdanić Defence shall have a further period of thirty days from the date of such disclosure in which to file preliminary motions as to the form of the indictment; and

<sup>3</sup> Prosecution's Notice of Compliance with Rule 66(A)(i), Case No. IT-99-37-PT, 8 July 2002.

<sup>4</sup> *Prosecutor v. Milošević et al.*, Case No. IT-99-37, Decision on Defence Motions for Access to Transcripts and Documents and for Disclosure of *Ex Parte* Filing, 14 June 2002.  
Case No. IT-99-37-PT

- (3) the Šainović Defence shall have a further period of thirty days from the date of such disclosure in which to raise additional points as to the form of the indictment arising from the newly-disclosed material.

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



Richard May  
Presiding

Dated this eighteenth day of October 2002  
At The Hague  
The Netherlands

[Seal of the Tribunal]