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UNITED
NATIONS

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: IT-99-37-I

Date: 8 November 2002

Original: English

BEFORE A JUDGE OF THE TRIBUNAL

Before: Judge David Hunt, Confirming Judge

Registrar: Mr Hans Holthuis

Decision of: 8 November 2002

PROSECUTOR

v

Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ & Dragoljub OJDANIĆ

DECISION ON APPLICATION BY DRAGOLJUB OJDANIĆ FOR DISCLOSURE OF *EX PARTE* SUBMISSIONS

Counsel for the Prosecutor:

Ms Carla del Ponte
Mr Geoffrey Nice

Counsel for the Defence:

Mr Tomislav Višnjić, Mr Vojislav Seležan & Mr Peter Robinson for Dragoljub Ojdanić

1. In May 1999, and pursuant to Rule 28(A) of the Rules of Procedure and Evidence ("Rules"), I was designated by the President of the Tribunal as a duty judge to determine an application by the Prosecutor to review an indictment brought against Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vlajko Stojiljković.[1] My decision confirming the indictment was given on 24 May 1999.[2] In June 2001, as the case had not at that stage been assigned to a Trial Chamber, I determined an application by the Prosecutor for leave to amend that indictment and to confirm the indictment as amended.[3] My decision was given on 29 June 2001.[4] On that day, Slobodan Milošević was transferred into the custody of the Tribunal, and the President thereafter assigned the case to Trial Chamber III.[5]

2. Dragoljub Ojdanić ("applicant") was transferred into the custody of the Tribunal on 25 April 2002. He has now sought an order from me as the confirming judge "disclosing all *ex parte* submissions, written and oral, made by the Prosecutor in connection with confirmation of the indictment(s) in his case".[6] He requests that this material be made public.[7] It is true that only the prosecution was represented before me during the two confirmation hearings. This was necessarily the case, because the first hearing (in May 1999) was in advance of the commencement of the proceedings by the filing of an indictment, and the second hearing (in June 2001) was in advance of any accused being transferred into the custody of the Tribunal. In that sense only could those hearings be described as *ex parte* in nature. They were not *ex parte* in the usual sense that a party was *excluded* from the hearing.

3. The first application was, however, heard *in camera*, because the Prosecutor was seeking an order pursuant to Rule 53 that there be no public disclosure of the indictment, the accompanying material or the confirmation and orders made for a period of about seventy-two

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1 Trial Chamber III, to which this case is now assigned, has granted leave to the prosecution to amend the indictment, by deleting from it both the charges against Slobodan Milošević (as those charges are now part of a new indictment [IT-02-54] upon which he is presently standing trial) and the charges against Vlajko Stojiljković (who is now deceased): (Substituted) Decision on Motion to Amend Indictment, 5 Sept 2002, pp 2-3.

2 Decision on Review of Indictment and Application for Consequential Orders, 24 May 1999 ("First Decision").

3 This was pursuant to Rule 50(A)(ii).

4 Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, 29 June 2001 ("Second Decision").

5 Ordonnance du Président Relative à l'Attribution d'une Affaire à une Chambre de Première Instance, 29 June 2001, p 2.

6 General Ojdanić's Application for Disclosure of *Ex Parte* Submissions, 31 Oct 2002 ("Motion"), par 1.

7 *Ibid*, par 4.

hours. This was to enable steps to be taken to protect persons who were then within the territories of the former Federal Republic of Yugoslavia and of the Republic of Serbia – staff members of the Office of the Prosecutor, members of a United Nations fact-finding mission and staffs of other United Nations and Governmental agencies and of humanitarian agencies – against whom there was a serious risk of reprisals and intimidation if the indictment were to be disclosed immediately.[8] The second application was also heard *in camera*, as the Prosecutor was seeking an order that the supporting material which accompanied both indictments should not be made public until the arrest of all of the accused.

4. It is recognised by the Rules that a hearing may take place *in camera*.[9] A hearing *in camera* was originally one conducted in the judge's private room, which is often called the judge's Chambers (latin, *camera*), rather than in a courtroom. It now means no more than a hearing in the absence of the public, as provided in Rule 79 ("Closed Sessions"). It does not necessarily mean an *ex parte* hearing, and closed sessions are frequently conducted *inter partes* during the course of trials in order to protect confidential information from becoming public.

5. At the first hearing, an order was made by me that, with a stated exception, there was to be no disclosure of the indictment, the review and confirmation of the indictment, the arrest warrants or "the Prosecutor's application dated 22 May 1999" during the period ending at 12 noon (The Hague time) on Thursday, 27 May 1999, unless otherwise ordered, and that there was to be no disclosure of the supporting material forwarded by the Prosecutor with the indictment until the arrest of all of the accused.[10] The only orders made in relation to disclosure at the second hearing were that the last of those orders made previously (that the supporting material forwarded by the Prosecutor with the indictment was not to be disclosed until the arrest of all of the accused) was to be continued, and that it was to apply also to the additional supporting material forwarded in relation to the amended indictment.[11] The disclosure referred to in each of those orders meant *public* disclosure.[12] An accused who has appeared before the

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[8] First Decision, pars 30-33.

[9] See, for example, Rule 66(C).

[10] First Decision, p 12. The reference to "the Prosecutor's application dated 22 May 1999" would appear to a wrongly dated reference to the originating document, the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders", which is dated 23 May 1999. That was the first document filed.

[11] Second Decision, par 9(iii).

[12] The order at the second hearing expressly refers to all orders as being concerned with "public disclosure".

Tribunal is entitled to have all of the supporting material disclosed to him within thirty days of that appearance.[13]

6. As is usual, there was no transcript taken of either of the *in camera* hearings, both of which took place in my private room in the Tribunal building. A document entitled "Minute of Review of the Indictment", dated and filed 24 May 1999, contains a note of submissions made by the Prosecutor on 24 May 1999. It has been endorsed "Under Seal" – no doubt in order to protect it from disclosure during that seventy-two hour period of non-disclosure to the public. To that document I will return. No such Minute was prepared in relation to the second hearing. The only record I have in relation to the submissions made by counsel appearing for the Prosecutor on 29 June 2001 related to the agreement on her behalf, as a term of the confirmation, to include, in the description of the individual responsibility of each of the accused, a passage along these lines:

> By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally.

The contemporaneous (public) record appears in another decision, to which the agreement was relevant.[14] The phrase appeared in the amended indictment filed thereafter.[15]

7. The applicant relies upon a statement made by Mr Nice, Principal Trial Counsel for the prosecution at the trial, that:

> When confirmation of the original indictment, the amended indictment and the second amended indictment was sought in May 1999, June 2001 and October 2001, respectively, there were no "explanatory" filings (annotated indictment, memorandum or other) made to the confirming Judge(s). However, certain documents drafted with the goal of assisting the Confirming Judge(s) during the confirmation process were filed *ex parte*. These documents were intended to be guides for the Judge(s) at the confirmation stage, and were not intended to be part of the supporting material for the Indictment(s).[16]

A document was provided to me by the Prosecutor at the first hearing, in May 1999, which identified the particular statements upon which the Prosecutor relied for specific allegations in

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[13] Rule 66(A)(i).

[14] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision Varying Decision on Form of Further Amended Indictment, 2 July 2001, par 2; Leave to appeal refused: Decision on Application for Leave to Appeal Against the Decision of 2 July 2001, 31 July 2001.

[15] Amended Indictment, 29 June 2001, par 16.

[16] Letter to counsel for the applicant, 11 July 2002, Annex C to General Ojdanić's Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 23 July 2002 ("Motion to Trial Chamber"), p 3.

the indictment. A copy of the amended indictment was provided to me by counsel appearing for the Prosecutor at the second hearing, in June 2001, which identified in red the amendments which had been made to the original indictment, and which also identified by a series of numbers the particular statements upon which the Prosecutor relied for specific allegations in the additional material in the amended indictment.[17] This document was filed on a "confidential" basis, which means only that it may not be disclosed to the public without an order. On each occasion, there was an originating process filed: the "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" dated 23 May 1999, and the "Motion for Leave to File an Amended Indictment and Confirmation of the Amended Indictment" dated 26 June 2001.[18]

8. The applicant argues that, as the circumstances in which those hearings were conducted *in camera* no longer exist, disclosure of the submissions made by or on behalf of the Prosecutor during those hearings "will promote transparency in the work of the Tribunal",[19] and "will promote accountability of the Prosecutor and act as a deterrent to misleading or irresponsible statements to the confirming judge".[20] I do not believe that I am being unduly cynical when I express doubt that these are the true reasons for this application. If the true (but unstated) reason is to use the information sought in order to challenge the validity of the proceedings,[21] the applicant should note that both indictments which I confirmed have now been replaced by the Second Amended Indictment. In any event, I did not regard myself as being in any way limited by the documents provided to me by the Prosecutor for my assistance. The confirmation in each case was based solely upon the supporting material supplied.

9. The applicant has also referred, darkly, to the particular need for transparency in the present case because "the timing of the indictment during NATO's bombardment of the Federal

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[17] It is perhaps unnecessary for me to determine whether this was indeed, contrary to Mr Nice's assertion, an "annotated" indictment.

[18] The application for the confirmation of the second amended indictment, which took place in October 2001, was determined by Trial Chamber III. It was not determined by me, and any application in relation to the submissions made by the prosecution in that confirmation hearing should be made to Trial Chamber III.

[19] Motion, par 10.

[20] *Ibid*, par 11.

[21] Compare the lack of success in such endeavours in *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory appeal dismissed as improperly filed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999; *Prosecutor v Brđanin*, IT-99-36-PT, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 8 Dec 1999; Leave to appeal refused: Decision on Application for Leave to Appeal, 23 Dec 1999.

Republic of Yugoslavia raised questions about the politicalisation [*sic*] of the Tribunal".[22] I draw his attention to what I said on this issue in the First Decision.[23] What I said was intended to make it clear that the timing of the presentation of indictments is a matter for the Prosecutor and not the Tribunal, and that the Tribunal was *not* acting on a political basis. I do not propose to debate the veiled, but unfounded, suggestion to the contrary now made by the applicant.

10. The Prosecutor's first response is that, as the confirming judge, I am *functus officio* as the Trial Chamber is "seized of all matters in the case".[24] Secondly, the Prosecutor submits that the Motion before me is an abuse of process, in that the applicant "seeks a review of the Trial Chamber's Decision by remitting the matter to the Confirming Judge".[25] Thirdly, the Prosecutor says that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment (and which is dealt with by Rule 66(A)(i)).[26]

11. The applicant recently sought from Trial Chamber III orders to the Prosecutor:

> [...] to fully comply with Rule 66(A)(i) by disclosing to General Ojdanić 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 each co-accused [...] [and] for disclosure of *ex parte* submissions made in connection with the confirmation of the indictment(s) and regulating future *ex parte* submissions.[27]

The Trial Chamber ordered the Prosecutor to disclose to the applicant all of the supporting material which accompanied the indictment when confirmation was sought, including material

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[22] Motion, par 10.

[23] Paragraph 35 reads: "No submission has been made that the impact of such disclosure on the current attempts to resolve the armed conflict in the Kosovo Province is a relevant matter to be considered in determining whether it is in the interests of justice to order non-disclosure. The safety of those personnel involved in the attempts to resolve that armed conflict is a legitimate consideration in relation to the interests of justice, but the possible political and diplomatic consequences of the indictment are not the same thing. There is a clear and substantial distinction to be drawn between what may be relevant to the well known and accepted discretion of prosecuting authorities as to whether an indictment should be presented and what may be relevant to this Tribunal's discretion as to whether an order should be made for the non-disclosure of that indictment once it has been presented and confirmed. In view of the opinion which I have already expressed, that a non-disclosure order for a short period is justified to enable security measures to be taken in relation to those at risk of intimidation or reprisals, it is unnecessary for me to determine whether the impact of the public disclosure of the indictment upon the peace process itself is also a consideration which is relevant to the exercise of my discretion to make a non-disclosure order pursuant to Rule 53. It is sufficient for me to say that such impact is not a matter which I have considered in determining the application made for non-disclosure in this case."

[24] Prosecution's Response to "General Ojdanić's Application for Disclosure of *Ex Parte* Submissions", 6 Nov 2002 ("Response"), pars 5-8.

[25] *Ibid*, par 6.

[26] *Ibid*, par 9.

[27] Motion to Trial Chamber, par 31.

relating to the co-accused, or to apply to the Trial Chamber for leave not to disclose certain material.[28] It refused all the other relief sought. In relation to the material before me when confirming the first and second indictments other than the supporting material, however, the Trial Chamber did not refuse relief on the merits. It ruled that, as the proceedings for the confirmation of an indictment are by their very nature *ex parte*, it was within the sole control of the confirming judge to determine what material should be made public pursuant to Rule 53.[29]

12. In its context of ordering the Prosecutor to comply with Rule 66, that particular ruling concerning the material remaining within the sole control of the confirming judge must be interpreted as being limited to any material used in the review process other than the supporting material. Clearly, once the case has been assigned to a Trial Chamber, further orders in relation to the supporting material forwarded with the indictment for review fall within the jurisdiction of that Trial Chamber,[30] and the confirming judge has no further responsibility in relation to the disclosure of that material. The applicant has not sought to have me deal with the supporting material in any way. The Prosecutor's submission that the applicant is seeking to have me review the Trial Chamber's decision is therefore misconceived. I reject the Prosecutor's second submission.

13. It is anything but clear just how far the confirming judge retains control of any material used in the review process other than the supporting material once the case has been assigned to a Trial Chamber, after which time the confirming judge has no further contact with the case. Prior to the amendment of Rule 50 in July 2000 to permit the Trial Chamber itself to grant leave to amend an indictment which was already before it, the confirming judge did retain some contact with the case up until the presentation of evidence in the trial commenced. That is no longer the situation. In my respectful opinion, the Trial Chamber to which the case has been assigned does have power to deal with this issue itself, just as it clearly has power at that stage to vary any orders made by the confirming judge (other than the confirming order itself).[31] This must be so, as the confirming judge may no longer be a judge of the Tribunal by the time the

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[28] Decision on Defence Motion to Require Full Compliance with Rule 66(A)(i) and for Unsealing of *Ex Parte* Materials, 18 Oct 2002 ("Trial Chamber Decision"), p 4.

[29] *Ibid*, p 4. Rule 53(A) provides that a judge or a Trial Chamber may, in exceptional circumstances and in the interests of justice, order the non-disclosure to the public of any documents or information until further notice. Rule 53(B) permits the judge confirming the indictment to order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

[30] Rule 66(A).

[31] *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct 2001.

accused is transferred into the custody of the Tribunal and the case is assigned to a Trial Chamber.

14. I am nevertheless satisfied that I also retain power to deal with matters which were before me where they do not deal with Rule 66 material. And, whether for reasons of deference or comity or anything else, the fact is that the Trial Chamber has invited the applicant to apply to me as the confirming judge to deal with the issue. It would be ludicrous to accede to the Prosecutor's submission that I have no power to deal with it, thus forcing the applicant to appeal against the Trial Chamber's decision that only I have the power to do so. The Rules of Procedure and Evidence were intended to be the servants and not the masters of the Tribunal's procedures,[32] and an acceptance of the Prosecutor's submission would produce such a bizarre situation as to destroy public confidence in the administration of justice. Accordingly, I reject the Prosecutor's first submission.

15. The Prosecutor claims that her third submission – namely, that there is no basis under the Tribunal's Statute or Rules for the disclosure to the accused of any material before the confirming judge other than the supporting material which accompanied the indictment – has already been upheld by the Trial Chamber.[33] The issue here, of course, is *not* whether there is a specific provision in either the Statute or the Rules which permits the disclosure of the material before me as the confirming judge other than the supporting material which accompanied the indictment. The Tribunal's powers are not limited to those which are specifically provided in the Statute and the Rules. The Tribunal also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[34] In any event, the Prosecutor's claim that her submission has already been upheld by the Trial Chamber is not supported by a proper reading of the Trial Chamber's Decision.

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[32] *Kendall v Hamilton* (1879) 4 App Cas 504 at 525, 530-531. In *The Matter of an Arbitration Between Coles and Ravenshear* [1907] 1 KB 1, Sir Richard Henn Collins, the Master of the Rolls, said in the Court of Appeal (at 4): "Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

[33] Response, par 9.

[34] *Prosecutor v Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 13, following *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaškić Subpoena Decision*), footnote 27 (par 25), and *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment"), par 322.

16. The application for disclosure of the submissions made by the Prosecutor before the confirming judge was put upon two bases before the Trial Chamber: first, that such submissions constituted part of the supporting material which accompanied the indictment in the confirmation process and thus fell within Rule 66(A)(i);[35] and, secondly, that the applicant was entitled to them as part of his right to a fair and public hearing under Article 21 of the Tribunal's Statute.[36] The Trial Chamber rejected both arguments,[37] in my respectful opinion correctly so. The Trial Chamber did, however, expressly state that the confirming judge retained control of the confirmation process,[38] thereby inviting the applicant to apply to me as the confirming judge for the relief sought. It is against that background that other statements made by the Trial Chamber in its decision must be interpreted.

17. There appear to be two relevant passages in the Trial Chamber's Decision. The first is in these terms:[39]

> **CONSIDERING** therefore that there is no obligation upon the Prosecution to disclosure [*sic*] material other than that 'upon which the charges are based', which material has been identified by the prosecution and provided to the accused [...].

That statement is clearly directed only to the obligations of disclosure under Rule 66(A). The second passage is in these terms:[40]

> **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 [...].

Insofar as that statement is limited to the absence of any specific provision in either the Statute or the Rules giving such a right of disclosure, it is literally correct. But the Prosecutor seeks to find in it support for her submission that the applicant is not entitled to relief because there is no such specific provision in the Statute or the Rules permitting such access. That is not what the Trial Chamber was saying. The Trial Chamber was concerned only with the arguments which the applicant had placed before it. It was not being asked to order access to material pursuant to a power which the Tribunal possesses as part of its inherent jurisdiction, and that statement should not be interpreted as going beyond the issues which the Trial Chamber had to determine. If it

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[35] Motion to the Trial Chamber, pars 6, 10.
[36] *Ibid*, par 19.
[37] Trial Chamber Decision, pp 3, 4.
[38] *Ibid*, p 4.
[39] Trial Chamber Decision, p 3.
[40] *Ibid*, p 4.

were to be taken literally, as the Prosecutor seems to be submitting, the statement would be clearly wrong.

18. Trial Chambers and the Appeals Chamber have for some years now regularly ordered access to be given to accused persons to material in the possession of the prosecution or confidential material tendered in other cases where a legitimate forensic purpose has been demonstrated for such access. Although such applications involve an application pursuant to Rule 75(D) for the variation of protective measures ordered in relation to confidential material, the access is granted despite the absence of any specific provision in either the Statute or the Rules which permit it. In a recent decision, the Appeals Chamber said:[41]

> Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case. A party is always entitled to seek material from *any* source to assist in the preparation of his case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.

I do not interpret the second quoted statement of the Trial Chamber as denying access by an accused to material beyond that referred to in Rule 66(A). If I am wrong in my interpretation of that statement, then I would, with the greatest of respect to the Trial Chamber, entirely disagree with it.

19. Before considering whether the Prosecutor's third submission should nevertheless be upheld even though the Trial Chamber has not supported it, it is necessary to point out that, other than the Minute still under seal, there is no order presently in effect which prevents the disclosure to the applicant of anything which happened during either of the *in camera* hearings before me, although there may be references in what happened to the source of Rule 70 material (which cannot be subject to disclosure unless the provider agrees). What the Prosecutor is saying, therefore, is that an accused person who, as of necessity, is not present at the time the indictment against him is being confirmed, but who has not been *excluded* from being present (as in the usual *ex parte* situation), *cannot* be given access to the material presented during the confirmation process – in relation to which no order has been made that it is *not* to be disclosed to him – unless it falls within the terms of Rule 66(A)(i). Such a proposition has only to be stated to demonstrate its illogicality.

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[41] *Prosecutor v Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v Blaškić, 16 May 2002, par 14.

20. Had the confirmation proceedings taken place at a time when the applicant was available to attend the hearing (for example, if he had been in custody in relation to another indictment), it need not, in my view, have been necessary for those proceedings to have been conducted *ex parte*, although it would still be appropriate for them to be conducted *in camera* where an order is sought for the non-disclosure to the public of the supporting material. There is nothing inherent in the characteristics of a confirmation hearing which requires the accused to be actively *excluded* from it. That is recognised by the provisions of Rule 50(A), prior to its amendment in July 2000, which expressly gave the accused the opportunity to be heard during the confirmation of an indictment which had been amended after the presentation of evidence had commenced.[42] The Prosecutor's third submission is accordingly rejected.

21. The issue then arises as to whether the Prosecutor would have been entitled to a order expressly *excluding* the applicant from the confirmation hearings if he had been available to attend at that time. There are many occasions where *ex parte* applications (in the sense of a hearing in which a party has been *excluded* from the hearing) *are* appropriate, but they are warranted only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[43]

22. Such applications are to some extent justified by Article 20.1 of the Tribunal's Statute, which requires that a trial is to be fair and to be conducted with due regard for the protection of victims and witnesses.[44] Sight should not, however, be lost of the accompanying requirement that the trial also be conducted with full respect for the rights of the accused. The Tribunal's

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[42] Prior to that amendment, and once the presentation of evidence had commenced, Rule 50(A) permitted the Prosecutor to amend the indictment only with the leave of the Trial Chamber and after having heard the parties. If a confirmation was necessary, this was to be performed by the Trial Chamber, and this was done in the presence of the accused. Prior to the amendment to Rule 50(A) in November 1999, a further confirmation by the Trial Chamber was always required. The present Rule 50(A) provides that an indictment amended after the assignment of the case to a Trial Chamber need no longer be confirmed – which is a recognition that an application to amend an indictment by pleading additional charges or material facts involves the same process as a confirmation.

[43] *Prosecutor v Simić et al*, IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000 ("*Simić* Case"), par 39; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("*Brđanin & Talić* Case") par 11.

[44] See also Article 22 ("Protection of victims and witnesses").

Rules refer expressly or by necessary implication to various circumstances in which *ex parte* proceedings are appropriate. Rule 47 requires the prosecution to submit an indictment to a confirming judge for review before an arrest warrant may be issued. As I have already said, this is ordinarily an *ex parte* application as a matter of necessity. Rule 50 requires the prosecution to return to the confirming judge in order to obtain leave to amend the indictment whenever leave to amend is sought (and if further confirmation is required) at any time before the case is assigned to a Trial Chamber. This is also ordinarily an *ex parte* procedure, for the same reason.[45] Rule 54*bis* enshrines the procedure first discussed in the *Blaškić Subpoena Decision*[46] for hearing a State *in camera* and *ex parte* to enable submissions to be made in relation to national security interests concerning the issue of a subpoena. Rule 66(C) permits the prosecution to provide the Trial Chamber (and only the Trial Chamber) with information which should otherwise be disclosed to the defence but which is sought to be kept confidential. Rule 69 permits the Trial Chamber to consult with the Tribunal's Victims and Witnesses Section before determining the nature of the protective measures to be provided for a witness. This is clearly intended to be on an *ex parte* basis. As a matter of practice, and in accordance with common sense, applications by either party for protective orders are determined on the basis of some material provided to the Trial Chamber *ex parte* where the persons to be protected would otherwise be identified.[47] Rule 77 permits any party to bring to the notice of a Trial Chamber the conduct of a person which may be in contempt of the Tribunal, with a view to an investigation of that conduct and/or prosecution. Such a procedure recognises that the notification to the Trial Chamber will ordinarily be *ex parte*. Rule 108*bis* has been amended to remove the previous entitlement of the party in the proceedings who was not a party to an application pursuant to Rule 54*bis* to be heard in a State Request for Review of the decision made in that application.

23. But those provisions of the Rules do not exhaust the circumstances in which it may be appropriate to communicate with a judge or a Chamber *ex parte,* or for the judge or the Chamber to deal with a matter *ex parte*. It is neither possible nor appropriate to define the circumstances

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[45] *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 20 May 1999, par 11; *Prosecutor v Talić*, Case IT-99-36-PT, Decision on Motion for Release, 10 Dec 1999, par 9.

[46] *Prosecutor v Blaškić*, Case IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, at par 68.

[47] The respondent to an application for protective measures is nevertheless entitled to have the arguments advanced to justify the protective measures sought set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought: *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000, par 14.

in which such motions are appropriate by any limiting definition. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.[48]

24. The fact that applications had been made for the indictments to be confirmed has already been made public, in the Decisions which I gave and which were made public at the time. The Prosecutor has not sought to argue that disclosure *to the accused* of the information conveyed during the confirmation process would be prejudicial to her or to any person – the sources of Rule 70 material of course excepted. Whatever the true reason may be for this application, nothing which has been put forward by the Prosecutor persuades me that it would be inappropriate to permit the disclosure *to the applicant* of the material which I have described, other than references to Rule 70 material which identify its source. Indeed, the document accompanying the original indictment, entitled "Presentation of an Indictment for Review and Application for Warrants of Arrest and for Related Orders" and dated 23 May 1999, is available on the ICTY Intranet, so that it is already available to the applicant. The other material should similarly be made available to the applicant and to his co-accused who has appeared before the Tribunal (Nikola Šainović).

25. That does not mean that the material is to be made public. Because the material presented to me identifies the supporting material which accompanied the indictments and which remains the subject of orders that it not be made public until the arrest of all the accused, and because there is one accused who has not yet appeared before the Tribunal (Milan Milutinović), it would not be appropriate for that material to be made public. It will remain confidential, in that disclosure will be limited to the parties. As the purpose for which the Minute prepared in relation to the first hearing was endorsed "Under Seal" no longer applies, that document is to be unsealed, but disclosure of that document, too, will be limited to the parties and thus remain confidential, for the same reason.

[48] See, generally, *Simić* Case, pars 38-43; *Brđanin & Talić* Case, pars 8-11.

Disposition

26. The following orders are made:

(1) The Registrar is directed to disclose to both accused who have appeared before the Tribunal (Nikola Šainović and Dragoljub Ojdanić), on a confidential basis, all material placed before me by the Prosecutor during the confirmation hearings in relation to the original indictment (in May 1999) and the amended indictment (in June 2001), other than the supporting material accompanying the indictments.

(2) Such material consists of the documents which I have described in par 7 of this Decision.

(3) If any of this material has not been filed, the Prosecutor is directed to file that material on a confidential basis so that these orders may be complied with.

(4) The Registrar is directed also to unseal the Minute of Review of Indictment, filed on 24 May 1999 "Under Seal", and to disclose it to both accused who have appeared before the Tribunal, on a confidential basis.

(5) Prior to the Registrar executing those directions, the Prosecutor is entitled to redact from such material anything which identifies the source of Rule 70 material.

(6) The Prosecutor must carry out that redaction within seven days of this Decision, and the Registrar is to execute those directions within seven days thereafter.

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

Dated this 8th day of November 2002
At The Hague
The Netherlands

David Hunt

Judge David Hunt

[Seal of the Tribunal]