



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: 10 February 2003  
Original: English

**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. Hans Holthuis

**Decision of:** 10 February 2003

**PROSECUTOR**

v.

**MILAN MILUTINOVIĆ  
DRAGOLJUB OJDANIĆ  
NIKOLA ŠAINOVIĆ**

**DECISION ON DEFENCE MOTION TO REQUIRE DISCLOSURE OF RULE 68  
MATERIAL OBTAINED PURSUANT TO RULE 70**

**The Office of the Prosecutor**

**Ms. Carla Del Ponte  
Mr. Geoffrey Nice**

**Counsel for the Accused**

**Mr. John Livingston, for Milan Milutinović  
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 a “Motion to Require Disclosure of Rule 68 Material obtained pursuant to Rule 70” filed on behalf of the accused Dragojlob Ojdanić (“Defence”) on 30 October 2002 (“Motion”),

**NOTING** the “Prosecution’s Response to General Ojdanić Motion to Require Disclosure of Rule 68 Material obtained pursuant to Rule 70” filed by the Office of the Prosecutor (“Prosecution”) on 14 November 2002 (“Response”); and the “Reply Brief: General Ojdanić Motion to Require Disclosure of Rule 68 Material obtained pursuant to Rule 70” filed by the Defence on 20 November 2002 (“Reply Brief”), without leave being granted pursuant to Rule 126*bis* of the Rules of Procedure and Evidence of the International Tribunal (“Rules”),

**NOTING** the relief sought by the Defence that the Prosecution be ordered to disclose all Rule 68 material in its possession, “regardless of whether it was provided pursuant to Rule 70(B)”, that the Defence submits, *inter alia*, that:

- (1) such a disclosure is mandatory under the Rules and consonant with the rights of the accused under Article 21 of the Statute of the International Tribunal; and
- (2) in *Brdjanin & Talić*<sup>1</sup>, it was held that the exception to disclose found in paragraphs 70(B) to (E) of the Rules “[...] does not relieve the Prosecution of [its] obligation pursuant to Rule 68”<sup>2</sup> and, any event, “does not encompass material subject to Rule 68”<sup>3</sup>,

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

- (1) the motion is premature, the Prosecution has been progressing diligently with its obligations under Rule 68 of the Rules, its searches for Rule 68 material include materials the Prosecution received pursuant to Rule 70(B);

<sup>1</sup> *Prosecution v Brdjanin & Talić*, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, Case No. IT-99-36-T, 23 May 2002 (“*Brdjanin & Talić* Decision, 23 May 2002”).

<sup>2</sup> *Ibid*, para. 19.

<sup>3</sup> *Ibid*, para. 20.

- (2) the Prosecution undertakes to seek consent under Rule 70(C) from the provider of any such material that is identified as falling within Rule 68, in the absence of which the Prosecution will still have several options consistent with its obligations under both Rule 68 and Rule 70(B) including a stipulation of facts, disclosure in a different form, the withdrawal of the evidence materially contradicted or, *in extremis*, an application to withdraw specific allegations or counts;
- (3) in contrast to the circumstances that led to the *Brdjanin & Talić* decision,<sup>4</sup> the Defence request is not sufficiently specific and a ruling *in abstracto* will be inconsistent with the purpose of Rule 70(B) of the Rules;
- (4) the Trial Chamber should follow the interpretation of Rule 70 made by Trial Chamber I in *Blaškić* in which it was held that materials provided pursuant to Rule 70(B) were exempt from disclosure under Rules 66, 67 and 68<sup>5</sup>; and
- (5) the determination of the interplay between Rule 68 and Rule 70(B) can only be made on the basis of specific facts and in specific circumstances that the accused has failed to establish,

**NOTING** the arguments of the Defence set out in the Reply Brief, in particular:

- (1) the Prosecution's proposal to subject the disclosure of Rule 70(B) to the consent of the information provider under Rule 70(C) will result in undue delay and violation of its obligation to disclose exculpatory material "as soon as practicable";
- (2) no guarantee of confidentiality is needed for information providers, and that "governments in their own national judicial systems all operate under the premise that confidential information may have to be disclosed to an accused where it is exculpatory";
- (3) the Defence is not "required to wait until it can prove a violation of Rule 68 in order to be entitled to an order for disclosure", the jurisprudence of the Tribunal has established that "a

<sup>4</sup> In that case, the Defence contended that among the documents provided to the Prosecution by a [redacted] Organisation pursuant to Rule 70 were documents containing exculpatory information and information which directly contradicted the testimony of witnesses that had already given evidence in that case, which were required to be disclosed under Rule 68. Six examples of such documents were included in [redacted] Annex A". *Brdjanin & Talić* Decision, 23 May 2002, para. 19.

<sup>5</sup> *Prosecutor v. Blaškić*, Decision of Trial Chamber I on the Prosecution Motion for Video Deposition and Protective Measures, Case No. IT-95-14-T, 13 Nov. 1997, para. 10.  
Case No. IT-99-37-PT

request based upon Rule 68 is not required to be so specific as to precisely identify which documents shall be disclosed”,<sup>6</sup> requests for categories of material are permissible;<sup>7</sup> and

(4) in the *Brđjanin* case, the Trial Chamber rejected a proposition that Rule 68 disclosure can be satisfied through summaries or offers to stipulate,<sup>8</sup>

**CONSIDERING** the important functions performed by Rule 68 and Rule 70, and the various interests which they seek to promote and protect with regard to the rights and obligations of the parties in respect of disclosure,

**PURSUANT** to Rules 68 and 70 of the Rules

**HEREBY ORDERS** as follows:

- (1) The Prosecution shall disclose Rule 68 material identified for which permission has been granted by the Rule 70(B) provider;
- (2) For any Rule 68 material which was provided under Rule 70(B), permission should be sought for the disclosure of this material within three months of the date of this decision, and
- (3) The Prosecution is to notify the Trial Chamber within one month (after the three months period) of any material falling under Rule 68 and Rule 70(B) for which permission has not been granted by the information provider.

---

<sup>6</sup> *Prosecutor v. Blaškić*, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, 26 Sept. 2000, para. 40.

<sup>7</sup> *Prosecutor v. Kordić & Čerkez*, Decision on the Request by the Republic of Croatia for Review of a Binding Order, 9 September 1999, Case No. IT-95-14/1, para. 39.

<sup>8</sup> *Prosecution v Brđjanin & Talić*, Decision on “Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved”, Case No. IT-99-36-T, 30 Oct. 2002 (“*Brđjanin & Talić* Decision, 30 Oct. 2002”) paras. 26-27.

The Trial Chamber remains seised of the matter.

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



Richard May  
Presiding

Dated this tenth day of February 2003  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**