



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-02-60-PT  
Date: 10 February 2003  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Wolfgang Schomburg, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Carmel Agius

**Registrar:** Mr. Hans Holthuis

**Decision of:** 10 February 2003

**PROSECUTOR**

v.

**VIDOJE BLAGOJEVIĆ  
DRAGAN OBRENOVIĆ  
DRAGAN JOKIĆ  
MOMIR NIKOLIĆ**

**DECISION ON JOINT DEFENCE MOTIONS FOR CERTIFICATION OF  
DECISION ON JOINT DEFENCE MOTIONS FOR RECONSIDERATION OF  
TRIAL CHAMBER'S DECISION TO REVIEW ALL DISCOVERY MATERIALS  
PROVIDED TO THE ACCUSED BY THE PROSECUTION, AND REQUEST  
FOR STAY OF EXECUTION OF DECISION**

**The Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Mr. Michael Karnavas and Ms. Suzana Tomanović for Vidoje Blagojević  
Mr. David Wilson and Mr. Dušan Slijepčević for Dragan Obrenović  
Mr. Miodrag Stojanović and Ms. Cynthia Sinatra for Dragan Jokić  
Mr. Veselin Londrović and Mr. Stefan Kirsch for Momir Nikolić

**TRIAL CHAMBER II** ("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" or "ICTY"),

**NOTING** the Trial Chamber's "Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review All Discovery Materials Provided to the Accused by the Prosecution," filed on 21 January 2003 ("Decision"), in which the Trial Chamber ordered the Office of the Prosecutor ("Prosecution") to deliver: (1) copies of all witness statements of the witnesses whom the Prosecution intends to call for trial; and (2) copies of all exhibits the Prosecution intends to tender at trial ("Requested Materials"),

**BEING SEISED OF** two motions for certification for leave to appeal the Decision, pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules"), filed on behalf of Accused Vidoje Blagojević<sup>1</sup> and Dragan Jokić,<sup>2</sup> and filed within the seven days of the filing of the Decision, in accordance with Rule 73(C),<sup>3</sup>

**NOTING** the "Accused Nikolić's Motion to Order the Prosecution to File Copies of All Witness Statements Whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial," filed on behalf of Accused Momir Nikolić on 28 January 2003 and discussed in a separate decision delivered today,<sup>4</sup>

**NOTING** that the Accused Dragan Obrenović did not file any motions in relation to the Decision,

**NOTING** the "Prosecution's Consolidated Response to Defence Request for Certification to Appeal Trial Chamber's Decision to Review Trial Materials" filed on 6 February 2003 ("Prosecution Consolidated Response"), in which the Prosecution submits that the Trial Chamber's receipt and review of the Requested Materials will not affect the fair and expeditious conduct of the

<sup>1</sup> Vidoje Blagojević's Request for Certification to Appeal the Trial Chamber's Decision on Joint Defence Motions for Reconsideration of the Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution & Request for a Stay of Execution of the Decision, filed on 28 January 2003 ("Blagojević Request").

<sup>2</sup> Request of Dragan Jokić for Certification for Appeal of Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review All Discovery Materials Provided to the Accused by the Prosecution, and Motion for Immediate Stay of Order for Delivery of Documents to Trial Chamber Pending Judgement of Appeals Chamber, filed on 27 January 2003 ("Jokić Request"). The Trial Chamber notes that the Jokić Request was improperly filed on 27 January 2003, as the person signing on behalf of the Dragan Jokić is a "legal consultant", rather than lead counsel or co-counsel assigned by the Registrar, in violation of Article 16(D) of the Directive on the Assignment of Defence Counsel. On 29 January 2003, the Jokić Defence re-filed the motion with the proper signature. While the Jokić Defence did not seek leave from the Trial Chamber for an extension of time to properly file the motion and did not provide an explanation to the Trial Chamber as to why the initial motion was improperly signed, the Trial Chamber, in this instance, will accept the Jokić Request as validly filed.

<sup>3</sup> For the purposes of the seven days required under Rule 73(C), the Trial Chamber will consider the Jokić Request as having been filed on 27 January 2003.

proceedings or the outcome of the trial, but rather will facilitate and expedite the proceedings, and is “within the sound discretion of the Trial Chamber and is not an appropriate issue for interlocutory appeal”,<sup>5</sup>

**NOTING** that the Jokić Request submits that the effect of the Decision, if executed, would: (1) permit disclosure to the Trial Chamber of materials that is not provided for in the Rules;<sup>6</sup> and (2) place material before the Trial Chamber that may never become evidence, thereby causing bias and unfairly influencing the Trial Chamber,<sup>7</sup>

**NOTING** that the Blagojević Request submits that: (1) the “pre-trial review” of the Requested Materials by the Trial Chamber will “adversely impact upon the fair and expeditious conduct of the proceedings” as such review may lead to the Trial Chamber prejudging issues of admissibility of evidence before hearing the parties;<sup>8</sup> (2) that such review is not “necessary” for a Trial Chamber to fulfil its obligations under the Statute and the Rules;<sup>9</sup> (3) the Rules specifically do not provide for disclosure of the Requested Materials to a Trial Chamber, but only to the defence, thereby seeking to maintain the proper standards and burdens of proof on the Prosecution;<sup>10</sup> (4) that the Trial Chamber places “undue emphasis” on the effective management of the trial, and does not adequately recognise the role of the parties in decisions that the Trial Chamber will need to make on issues related to witnesses and their testimony, and admissibility of documentary evidence;<sup>11</sup> (5) the Decision, through its reference to Rules 54 and 85(B), “implies that it could assume the task of filling in the gaps in the Prosecution case” thereby leading to an abuse of the Trial Chamber’s powers under the Rules and Statute;<sup>12</sup> and (6) the Decision violates the principle of equality of arms central to a fair trial, as the Trial Chamber will have access to Prosecution statements before trial, thereby possibly influencing the Trial Chamber, while the Trial Chamber will not have access to such statements of Defence witnesses due to the Accused’s fundamental right to remain silent,<sup>13</sup>

**NOTING FURTHER** that the Blagojević Request characterises the Requested Materials as “confidential and privileged disclosure material,”<sup>14</sup>

<sup>4</sup> Decision on Accused Nikolić’s Motion to Order the Prosecution to File Copies of All Witness Statements Whom the Prosecution Intends to Call For Trial and Copies of All Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003.

<sup>5</sup> Prosecution Consolidated Response, para. 4.

<sup>6</sup> Jokić Request, para. 3.

<sup>7</sup> Jokić Request, para. 3.

<sup>8</sup> Blagojević Request, paras 10 and 13.

<sup>9</sup> Blagojević Request, para. 9.

<sup>10</sup> Blagojević Request, para. 12.

<sup>11</sup> Blagojević Request, para. 13.

<sup>12</sup> Blagojević Request, para. 14-15.

<sup>13</sup> Blagojević Request, para. 16.

<sup>14</sup> Blagojević Request, para. 9.

**NOTING** that both the Jokić Request and the Blagojević Request submit that while the Decision may reflect the practice of certain Trial Chambers, as it is not provided for in the Rules, the practice of delivery of the Requested Materials to a Trial Chamber should be reviewed by the Appeals Chamber to promote uniformity between the Trial Chambers and predictability in the proceedings, as well as removing any perception of bias or unfairness in this case,<sup>15</sup>

**NOTING FURTHER** that both the Jokić Request and the Blagojević Request submit that once the material is delivered to the Trial Chamber, the harm to the fairness and outcome of the trial is “irreversible”, and therefore the issue needs to be addressed by the Appeals Chamber,<sup>16</sup>

**NOTING** that Rule 73 (B) provides:

Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

**RECALLING** that the Trial Chamber found in the Decision that the Requested Materials are necessary to the Trial Chamber efficiently fulfilling its functions and obligations under the Statute and the Rules, because the materials sought by the Trial Chamber shall promote effective management of the trial as:

- the Requested Materials will further assist the Trial Chamber in ensuring that the trial be “fair and expeditious” pursuant to Article 20(1) of the Statute, and in guaranteeing the right of the Accused “to be tried without undue delay” as enshrined in Article 21(4)(c) of the Statute, and will in no way infringe upon the right of the Accused to be presumed innocent, as enshrined in Article 21(3) of the Statute;
- the Requested Materials shall assist the pre-trial Judge in fulfilling his obligations under Rule 65 *ter*;
- the Requested Materials shall assist the Trial Chamber in fulfilling its obligations under Rule 73 *bis* including, *inter alia* determining the number of witnesses that the Prosecution may call, and determining the time available for the Prosecution to present evidence;
- the Requested Materials shall assist the Trial Chamber in fulfilling its obligation under Rule 71 to order *proprio motu*, in the interests of justice, that a deposition be taken for use at trial in lieu of live testimony;

<sup>15</sup> Jokić Request, para. 5; Blagojević Request, para. 16(E).

<sup>16</sup> Jokić Request, para.4; Blagojević Request, para. 6.

- the Requested Materials shall assist the Trial Chamber in making decisions throughout the course of the proceedings, including decisions on admissibility of evidence or the length of examination-in-chief or cross-examination necessary for a particular witness; and
- the Requested Materials shall assist the Trial Chamber in determining whether it must exercise its powers under Rule 98 to order the production of additional evidence or summon witnesses,

**CONSIDERING** that a Trial Chamber, composed of professional judges, must assess on a case by case basis the extent to which the Requested Materials may be necessary to it efficiently fulfilling its functions and obligations under the Statute and Rules,

**CONSIDERING** that the Trial Chamber maintains that the Requested Material is vital to this Trial Chamber efficiently fulfilling its functions and obligations under the Statute and Rules in this concrete case, due to the large number of proposed witnesses (at present, 123) and proposed exhibits, and decisions that will need to be made in relation to both, including protective measures<sup>17</sup> (at present, 89 witnesses have been designated by the Prosecution as "protected" pending requests for protective measures) and hearing witnesses pursuant to Rule 92bis,

**RECALLING** that similar requests have been made by other Trial Chambers in the past and have been complied with,<sup>18</sup>

**CONSIDERING** that the Trial Chamber further held in the Decision that that the material will never be regarded as evidence by professional judges unless and until submitted and admitted in the course of trial in accordance with the Rules,

**CONSIDERING** that Article 20(1) of the Statute vests a Trial Chamber with the power and the duty to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses,

**CONSIDERING** that this approach is also taken on the issue of disqualification of a judge in Rule 15, which provides in part:

[...]

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<sup>17</sup> The Trial Chamber notes the Trial Chamber order in *Prosecutor v. Dario Kordić and Mario Čerkez*, in which it ordered that the Prosecution provide it with both redacted and unredacted copies of all witness statements that accompanied the amended indictment when confirmation was sought in order to review redactions made for purposes of witness or victim protection "for appropriateness". *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Order for Disclosure of Documents and Extension of Protective Measures, 27 November 1998.

<sup>18</sup> See, e.g., *Prosecutor v. Slavko Dokmanović*, Order, 28 November 1997.

(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber, or as a member of a bench of three Judges appointed pursuant to Rules 65 (D), 72 (B)(ii) or 73 (B), to hear any appeal in that case.

[...]

**CONSIDERING** that when Rule 15(C) was first adopted, it provided for the disqualification of a Judge who reviewed an indictment from sitting as a member of the Trial Chamber for the trial of that accused, and that the rule was subsequently amended to reflect the fact that judges at the Tribunal are professional judges who will base any decisions only on the evidence admitted at trial and not on any supporting material received,<sup>19</sup>

**CONSIDERING** that this approach was only recently reaffirmed by Trial Chamber I in the case *Prosecutor v. Galić*, which stated that “[t]he Judges of this Tribunal are professional Judges with solid experience in handling information in the criminal legal context and notably distinguishing between facts established at trial and facts derived from elsewhere,”<sup>20</sup>

**CONSIDERING** that Trial Chambers have – and must have – discretion in interpreting provisions of the Statute and Rules to best manage the conduct of the trial proceedings, while always ensuring that the rights of the accused are fully respected, and that in relation to the issue of obtaining the statements of proposed Prosecution witnesses and proposed exhibits in advance of the witness testifying or the exhibit being tendered, practices among Trial Chambers have varied in terms of the length of time between the delivery of the materials to a Trial Chamber or even whether the materials are ever delivered to a Trial Chamber,

**NOTING** the flexibility and discretion of a Trial Chamber to request such materials is explicitly provided for in the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (“ICTR”), whereas the Rules of the Tribunal are silent on this matter. Rule 73 *bis* (B) of the ICTR provides in relevant part: “The Trial Chamber or Judge may order the Prosecution to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.” The Trial Chamber notes that the ICTR Rules do not contain an identical Rule to the ICTY Rule 65*ter*, but that the obligations on the Prosecution required under Rule 65 *ter* (E) of the ICTY Rules are reflected in Rule 73 *bis* (B) of the ICTR Rules,

<sup>19</sup> In relation to this change, Rule 15(C) was first amended at the Twentieth Plenary Session, 2 July 1999 (IT/32/Rev.16), at which time the non-disqualification of a judge who confirmed an indictment from sitting as a member of the Appeals Chamber or a bench of three judges was added. At the Twenty-First Plenary Session, 17 November 1999 (IT/32/Rev. 17), in the first sentence of the sub-rule, the words “shall not sit as a member of the Trial Chamber” were replaced with “shall not be disqualified for sitting as a member of the Trial Chamber” for the trial of an accused whose indictment that judge confirmed.

<sup>20</sup> *Prosecutor v. Stanislav Galić*, Case No IT-98-29-T, Decision on the Defence Motion for Withdrawal of Judge Orić, 3 February 2003, para. 8.

**NOTING** that a Trial Chamber may grant certification if the decision involves an issue that would significantly affect “the fair and expeditious conduct of the proceedings” or “the outcome of the trial”, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber “may materially advance the proceedings”,

**CONSIDERING** that the issue that the Trial Chamber must assess for certification is the delivery by the Prosecution to the Trial Chamber of copies of all witness statements of the witnesses whom the Prosecution intends to call for trial and copies of all exhibits the Prosecution intends to tender at trial,

**CONSIDERING** that, in the absence of a clear Rule providing for the delivery of the Requested Material to the Judges sitting in this case [i.e., the permanent Judges of Trial Chamber II and the *ad litem* Judges as from the date of their appointment and assignment (as of 21<sup>st</sup> of April 2003) to the case], and to not run any risk in this complex case by starting with an unsettled question, only a decision by the Appeals Chamber on this issue will provide a sound basis upon which to commence the trial scheduled to begin on the 6<sup>th</sup> of May 2003,

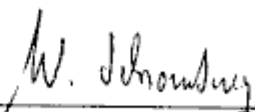
**FINDING THEREFORE** that the issue is one that would significantly affect the expeditious conduct of the proceedings and for which an immediate resolution by the Appeals Chamber may materially advance and safeguard the proceedings,

**FOR THE FOREGOING REASONS,**

**HEREBY GRANTS** the Jokić Request and Blagojević Request for certification pursuant to Rule 73, and **FINDS** that it is for the Appeals Chamber to grant – if deemed necessary – the request to stay the delivery of material not yet delivered to the Trial Chamber.

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

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

  
\_\_\_\_\_  
Judge Wolfgang Schomburg  
Presiding

[Seal of the Tribunal]