

UNITED
NATIONS

IT-02-60-PT
D 8081 - D 8077
21 January 2003

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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: 21 January 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: 21 January 2003

PROSECUTOR

v.

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

**DECISION ON JOINT DEFENCE MOTIONS FOR
RECONSIDERATION OF TRIAL CHAMBER'S DECISION TO
REVIEW ALL DISCOVERY MATERIALS PROVIDED TO THE
ACCUSED BY THE PROSECUTION**

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"),

BEING SEISED OF the four motions of Dragan Obrenović,¹ Vidoje Blagojević,² Dragan Jokić³ and Momir Nikolić⁴ (collectively, "Motions") which object to the Trial Chamber's request to be provided with the same materials that were provided by the Prosecution to the Defence through disclosure,

NOTING the "Consolidated Prosecution Response to ("Joint") Defence Motion for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution," filed on 10 January 2003 ("Response"), following the Trial Chamber's Decision of 7 January 2003⁵ granting the Prosecution's request to file a consolidated response and an extension of time,

RECALLING the request made by this Trial Chamber at two Status Conferences that this Chamber receive the "same materials" disclosed by the Prosecution to the Defence during pre-trial discovery ("Request") in order to be prepared to make decisions that effect preparations for the trial and decisions during trial including those on admissibility of evidence,⁶

CLARIFYING that the Trial Chamber did not intend that materials falling under Rule 66(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") were to be considered included in the Request,

NOTING that such similar requests have been made by other Trial Chambers in the past and have been complied with,⁷

NOTING that the Motions characterise the Request as seeking "all" material disclosed by the Prosecution to the Defence through discovery,⁸

¹ Accused Obrenović's Motion for Reconsideration of Trial Chambers Decision to Review all Discovery Materials Provided the Accused by the Prosecution, filed 13 December 2002 ("Obrenović Motion").

² Accused Blagojević's Motion for Reconsideration of the Trial Chamber's Order to the Prosecution to Produce to the Trial Chamber all of the Disclosure Material Provided to the Defense Pursuant to the Prosecution's Disclosure Obligations & Request for Stay of Execution of the Trial Chamber's Order; Request for Leave to Accept Motion in Excess of Page Limitation, dated and filed 12 December 2002 ("Blagojević Motion").

³ Motion of Dragan Jokić for Order that Trial Chamber Not Be Supplied with Materials Disclosed to Defence, dated 12 September 2002 and 12 December 2002 ("Jokić Motion").

⁴ Accused Nikolić's Motion for Reconsideration of the Trial Chamber's Request to Have Access to all the Disclosure Material Provided to the Defence, dated and filed 13 December 2002 ("Nikolić Motion").

⁵ Decision in Prosecution Request to Filed Consolidated Response to Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials on 10 January 2003, 7 January 2003.

⁶ Status Conference, 27 November 2002, T. 76-77; Status Conference, 19 July 2002, T. 5-6.

⁷ See, e.g., *Prosecutor v. Slavko Dokmanović*, Order, 28 November 1997.

NOTING that the Motions object to the Request on the grounds that, *inter alia*: (i) the Request does not fall within the Rules;⁹ (ii) the Request impinges on the Prosecution's discretion to select which materials to put into evidence;¹⁰ (iii) the Request "confuses" the judicial and prosecutorial functions, including the function to investigate;¹¹ (iv) the Request places materials before the Trial Chamber which the Defence will not be provided an opportunity to object to or comment upon;¹² (v) the Request places before the Trial Chamber material which may be irrelevant to the factual allegations in the Indictment, and material which would not be admissible under the Rules and may be highly prejudicial;¹³ and (vi) the Request violates the basic rights of the Accused including, *inter alia*, the right to be presumed innocent and the right of cross-examination,¹⁴

NOTING FURTHER that at least two of the Defence motions object to the Trial Chamber's Request as clarified, namely to receive witness statements of proposed Prosecution witnesses and to receive all exhibits proposed on the exhibit list,¹⁵

NOTING that in the Response, the Prosecution submits that it does not object to the disclosure to the Trial Chamber copies of materials that it has identified for use at trial including, witness statements for proposed Prosecution witnesses and copies of exhibits on the Rule 65 *ter* (E)(iii) exhibit list,¹⁶ recognising that the Defence will have a right to object to the admissibility of any proposed exhibits at trial,¹⁷

NOTING FURTHER that the Response objects to the disclosure to the Trial Chamber of "all" materials disclosed to the Defence, meaning all materials disclosed to the Defence including that pursuant to Rule 66(B) other than the materials that will be used at trial, on four grounds: (i) the Request risks interference with the rights of the Accused;¹⁸ (ii) the Request may create an

⁸ See, e.g., Nikolić Motion, para. 1.

⁹ See, e.g., Obrenović Motion, paras 4-7; Blagojević Motion, paras 12-22. See also, Blagojević Motion, paras 45-46, which submit that by acting outside the Rules, it would violate the right of all accused to be equal, pursuant to Article 21(1) of the Statute. The Trial Chamber notes that the Nikolić Motion adopts the arguments put forward on behalf of the other three Accused, with no exceptions cited. Nikolić Motion, para. 5.

¹⁰ See, e.g., Obrenović Motion, para. 9. See also, Blagojević Motion, paras 39-40 (arguing that the Trial Chamber would only be receiving a selection portion of the Prosecution's file).

¹¹ See, e.g., Jokić Motion, paras 6-7.

¹² See, e.g., Obrenović Motion, para. 12; Jokić Motion, para. 17; Blagojević Motion, paras 23-25.

¹³ See, e.g., Jokić Motion, para. 11; Blagojević Motion, paras 26-30.

¹⁴ See, e.g., Jokić Motion, paras 12-16; Blagojević Motion, paras 7-11, 28-31, 34-38. See also, Blagojević Motion, paras 47-52 (an accused has a right to an impartial bench).

¹⁵ See, e.g., Obrenović Motion, paras 10-11 (submitting that the Prosecution may decide not to offer all evidence currently proposed and that the Trial Chamber may rule against the admission of some of the proposed evidence); Blagojević Motion.

¹⁶ Response, paras 5, 7-11.

¹⁷ Response, para. 8.

¹⁸ Response, paras 13-15 (the Defence would not be in a position to know which material the Trial Chamber may have reviewed and therefore know which material it must challenge).

appearance of bias;¹⁹ (iii) the Request is not contemplated by the ICTY Rules or established practice;²⁰ and (iv) the Request would lead to inconsistency in Tribunal proceedings,²¹

RECALLING that the Rules of the Tribunal are neither a mere reflection of the “common-law” accusatorial system or the “civil-law” inquisitorial system, nor are their origins predominantly in only one system; rather, the Rules are a hybrid of the two systems, having as their primary purpose “to promote a fair and expeditious trial”,²²

CONSIDERING that the materials sought by the Trial Chamber are necessary for the Trial Chamber to more efficiently fulfil its functions and obligations under the Statute of the Tribunal and the Rules of Procedure and Evidence,

CONSIDERING that materials sought by the Trial Chamber shall promote more effective management of the trial, in assisting the Trial Chamber to make decisions in the course of the proceedings including *inter alia* on admissibility of evidence or the length of examination-in-chief or cross-examination necessary for a particular witness,

CONSIDERING FURTHER that the Trial Chamber’s Request 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,

CONSIDERING that the requested materials will not be regarded as evidence by the Trial Chamber unless and until submitted and admitted in the course of trial in accordance with the Rules,

CONSIDERING that the materials sought by the Trial Chamber shall assist the pre-trial Judge in fulfilling his obligations under Rule 65 *ter*,

CONSIDERING that the materials sought by the Trial Chamber shall assist the Trial Chamber in fulfilling its obligations under Rule 73 *bis* including, *inter alia* determining whether the estimate length of the examination-in-chief for some witnesses should be shortened, determining the number

¹⁹ Response, paras 16-17 (unlike a dossier in civil law systems, the Prosecution file does not necessarily contain both inculpatory and exculpatory information).

²⁰ Response, paras 18-20.

²¹ Response, paras 21-22.

²² *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999, para. 19.

of witnesses that the Prosecution may call, and determining the time available for the Prosecution to present evidence,

CONSIDERING that the materials sought by the Trial Chamber 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,

CONSIDERING FURTHER that the materials sought 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,

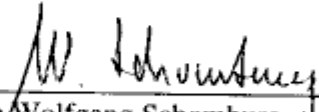
PURSUANT TO Article 20(1) and 21(4)(c) of the Statute, and Rule 54, Rule 73 *bis*, 85(B) and Rule 89(C) of the Rules,

HEREBY ORDERS that the Prosecution deliver to the Trial Chamber the following materials as soon as practicable, but not later than 3 February 2003:

1. Copies of all witness statements whom the Prosecution intends to call for trial; and
2. Copies of all exhibits the Prosecution intends to tender at trial, and

REQUESTS that the materials be provided on CD-ROM in addition to paper-copy, when possible.

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



Judge/Wolfgang Schomburg
Presiding

Dated this twenty-first day of January 2003,
At The Hague,
The Netherlands

[Seal of the Tribunal]