

UNITED
NATIONS

IT-02-60-PT
D 7818 - D 7807
12 December 2002

7818
BQ



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: 12 December 2002
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: 12 December 2002

PROSECUTOR

v.

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

**JOINT DECISION ON MOTIONS RELATED TO
PRODUCTION OF EVIDENCE**

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") is seised of various motions related to the production of evidence filed by three of the four accused in this case.¹ The Office of the Prosecutor ("Prosecution") has filed two responses to these motions.² Having heard the parties, including counsel for the Accused Nikolić who had not filed any written motions, on the current status of disclosure in this case at a Status Conference held on 27 November 2002 ("Status Conference"), and considering the submissions of each party, the Trial Chamber hereby issues its joint decision.

I. INTRODUCTION

1. The Trial Chamber recalls that the obligation for production of evidence falls under Section 4 of the Rules of Procedure and Evidence of the Tribunal ("Rules"). In this Section, the specific materials that must be disclosed by the Prosecution to the defence are identified, together with time-limits for disclosure, where applicable.³ Additionally, the Rules specify materials which are not subject to disclosure or for which the Prosecution may be relieved of its obligation for disclosure,⁴ as well as information which may temporarily be subject to a non-disclosure order, including the identity of particular victims or witnesses.⁵ The Trial Chamber notes that the obligation for disclosure has been discussed extensively by the Appeals Chamber and various Trial Chambers of the Tribunal.⁶

¹ Accused Blagojević's Request for Production of Witness Statements from the Ongoing Srebrenica Investigation pursuant to Rule 66(B) and the Prosecution's Numerous Representations that Said Statements would be Disclosed, & Request for Oral Argument, 8 April 2002 ("*Blagojević* Motion"); Corrected Emergency Request for Leave Seeking Authorization to Accept Reply in Excess of Page Limitations & Accused Blagojević's Reply to the Prosecution's Consolidated Response to Defence Motions for Production of Evidence, 15 October 2002 (originally filed 28 May 2002) ("*Blagojević* Reply"); Supplemental Brief to Accused Blagojević's Reply, 16 Oct 2002 ("*Blagojević* Supplemental Reply"); Dragan Jokić's Request for Disclosure of Evidence pursuant to Rule 66, Rule 67 and Rule 68, 15 April 2002 ("*Jokić* 15 April 2002 Motion"); Dragan Jokić's Request for Disclosure of Evidence pursuant to Rule 66, Rule 67 and Rule 68, 16 September 2002 ("*Jokić* 16 September 2002 Motion"); Motion for Disclosure of Original Portions of Exculpatory Material, 25 November 2002 ("*Jokić* 25 November 2002 Motion"); Accused Obrenović's Motion for Production of Witness Statements from the Ongoing Srebrenica Investigation pursuant to Rule 66(B) and to the Prosecution's Numerous Representations that Said Statements Would be Disclosed, 26 April 2002 ("*Obrenović* Motion").

² Prosecution Consolidated Response to Defence Motions for Production of Evidence, 2 May 2002 ("Prosecution Consolidated Response"); Prosecution Response to Dragan Jokić's Motion for Disclosure, 20 September 2002 ("Prosecution Response to *Jokić* Motion").

³ See Rule 66(A) and (B), and Rule 68.

⁴ See Rule 66(C) and Rule 70.

⁵ See Rule 69.

⁶ See, e.g., *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motion for the Production of Material. Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000 ("*Blaškić* Appeal Decision"); *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 *bis* and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can Be Resolved", 30 October 2002 ("*Brdanin* Decision"); *Prosecutor*

2. Disclosure in this case has been ongoing. The parties have confirmed that a significant amount of material has been disclosed to the defence for all Accused in this case ("Defence"), including nearly all trial materials from *Prosecutor v. Radislav Krstić* (Case No. IT-98-33). Additionally, pursuant to Rule 65 *ter* (E)(ii), the Prosecution filed a list of witnesses it intends to call at trial, with a summary of the facts to which each witness will testify, on 1 November 2002. The Trial Chamber observes that issues related to the particular circumstances of the Tribunal, including translation and the timely delivery of materials to counsel residing in different countries and continents, often make it difficult to ensure – and verify immediately – that disclosure has taken place according to schedule.

3. While the Trial Chamber generally believes that matters related to disclosure can be best resolved between the parties and without intervention from the Trial Chamber, the Trial Chamber being the last resort for solving problems emanating from the Rules on disclosure, it recognises that the involvement of the Trial Chamber may be necessary at times to ensure compliance with the Rules. The Trial Chamber observes with satisfaction that despite the huge amount of material to be disclosed, the procedure is apparently progressing in a good spirit of co-operation and with mutual trust. With this in mind, the Trial Chamber considers the motions filed by the Defence within the framework of the Rules of the Tribunal.

II. DISCUSSION

4. The Trial Chamber shall discuss each Rule and sub-rule related to the production of evidence individually, presenting the arguments of the parties and its findings.

(a) Rule 66

5. Rule 66 provides:

Disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*; copies of the

v. Zejnil Delalić et al ("Čelebići"), Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996.

statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(i) Rule 66(A)

6. The Trial Chamber observes that at the Status Conference, the pre-trial Judge confirmed with the parties that all obligations under Rule 66(A)(i) had been fulfilled.⁷ Accordingly, those portions of related motions by the Accused Jokić which may be regarded as relating to the obligations under Rule 66(A)(i) are moot.⁸

7. At the Status Conference, the parties were asked to address any issues in relation to Rule 66(A)(ii). The Trial Chamber notes that counsel for Accused Blagojević and Obrenović did not raise any issues in relation to this sub-rule. Counsel for Accused Jokić stated that, with regard to Rule 66 generally, "our main concern is Rule 66(B)."⁹ The Trial Chamber finds no specific complaint raised by counsel for Accused Jokić in relation to Rule 66(A)(ii) at the Status Conference. Accordingly, those portions of related motions by the Accused Jokić which may be regarded as relating to the obligations under Rule 66(A)(ii) are moot.¹⁰

8. Counsel for Accused Nikolić raised a complaint related to disclosure under Rule 66(A)(ii) at the Status Conference, namely that not all witness statements for witnesses the Prosecution intends to call at trial have been disclosed.¹¹ The Prosecution responded that it was unaware that certain statements had not been provided to counsel for Nikolić, stating its understanding that all – or almost all – witness statements had been provided in English and BCS.¹² The Prosecution undertook to provide any missing statements of witnesses its intends to call at trial to counsel for the Accused Nikolić as soon as possible.¹³ Pending the delivery of the outstanding witness

⁷ Status Conference, 27 November 2002, transcript page ("T.") 58.

⁸ The motions filed by the Accused Jokić are not always clear in identifying the specific information sought or the applicable rule pursuant to which the Accused is entitled to such material. On Rule 66(A)(i) material, see generally, *Jokić* 16 September 2002 Motion, para. 12.

⁹ Status Conference, 27 November 2002, T. 65.

¹⁰ See generally, *Jokić* 16 September 2002 Motion, para. 12; *Jokić* 25 November 2002 Motion, para. 3.

¹¹ Status Conference, 27 November 2002, T. 66-67.

¹² Status Conference, 27 November 2002, T. 68.

¹³ Status Conference, 27 November 2002, T. 68.

statements, the Trial Chamber does not find any outstanding motions or issues in relation to Rule 66(A)(ii).

9. The Trial Chamber observes that one category of witness statements that may fall within 65 *ter* (E) (ii), 65 *ter* (E)(iii) or 66(A)(ii) remains open, namely statements taken by the Prosecution with the four Accused that may be required to be disclosed to all co-Accused. In this regard, the Trial Chamber notes that Accused Jokić has specifically requested this material in relation to co-Accused Obrenović and Blagojević in one motion.¹⁴ The Trial Chamber further notes that at the Rule 65 *ter* (D)(v) Conference held on 26 November 2002 with the Senior Legal Officer, the Prosecution stated that the statements of the Accused had not been provided to the Registry or Trial Chamber as of yet. The Prosecution stated that the reason for withholding the statements was “to give Defence counsel a chance to anticipate that they might be trying to exclude those statements.” The Prosecution indicated that if the Defence did not seek to exclude the statements, it would offer the statements as exhibits.¹⁵ The defence for at least one Accused, Jokić, indicated that it would be seeking to suppress such statements.¹⁶ Until the Trial Chamber has concrete motions on this issue pending before it, it takes no position on the disclosure of such statements.

(ii) Rule 66(B)

10. The Trial Chamber is seized of written motions from three of the Accused related to Rule 66(B),¹⁷ to which the Prosecution has filed responses.¹⁸ Additionally, disclosure under this sub-rule has been the source of significant discussion at the last two status conferences held in this case.¹⁹ Defence for Nikolić joined in this motion at the Status Conference.²⁰

11. The Defence seek disclosure of statements of “all” “witnesses or suspects interviewed in connection with the events in Srebrenica”.²¹ The Defence assert that they are entitled to disclosure of such material, including statements of persons the Prosecution does not seek to call at trial, pursuant to Rule 66(B). The Defence argue that such witness statements are “material to the preparation of the defence”, that the term “documents” includes “witness statements”,²² and therefore fall within the scope of Rule 66(B).²³ The Defence recognise that certain statements may

¹⁴ Jokić 16 September 2002 Motion, para. 12(C).

¹⁵ Rule 65 *ter* Conference, 26 November 2002, T. 51.

¹⁶ Rule 65 *ter* Conference, 26 November 2002, T. 52-53.

¹⁷ Blagojević Motion; Obrenović Motion; Jokić 16 September 2002 Motion, paras 1 and 14-15.

¹⁸ Prosecution Consolidated Response; Prosecution Response to Jokić Motion.

¹⁹ Status Conference, 27 November 2002, T. 60-68; 77-88. Status Conference, 19 July 2002, 4-5; 9 – 11.

²⁰ Status Conference, 27 November 2002, T. 66-67.

²¹ Blagojević Motion, para. 7. See also, Status Conference, 27 November 2002, T.80-83.

²² Blagojević Motion, paras 19-25. Obrenović Motion, paras 16-19.

²³ See, e.g., Blagojević Reply, paras 14-16 and 24-25. Status Conference, 27 November 2002, T.60-67, and T.82-84.

be exempt from disclosure pursuant to Rule 66(C).²⁴ The Defence for Obrenović specifically argue that “[i]f the accuseds [*sic*] are to have any meaningful chance of defending themselves against these charges, they must have an opportunity to inspect and understand the evidence against them.”²⁵

12. The Trial Chamber observes that, while maintaining its position that the term “documents” in Rule 66(B) is not intended to include “witness statements”, the Prosecution in this case has stated on numerous occasions that it intends to permit the Defence to inspect all witness statements “which are material to the preparation of the defence case”,²⁶ save those statements which the Prosecution believes may be protected pursuant to Rule 66(C).²⁷ The Prosecution has stated that these statements “are being provided under the personal discretion of the undersigned counsel as Senior Trial Attorney and in order to honour our original agreement, and not pursuant to Rule 66(B).”²⁸

13. The Trial Chamber takes note of the oral decision rendered by the Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) on 4 July 2002 in the case *Prosecutor v. Georges Rutaganda* Case No. ICTR-96-3-A, which stated that:

written statements by the witnesses should be considered as being included within the scope of documents to be disclosed by the Prosecutor to the Defence as provided for under Rule 66(B) of the Rules.²⁹

In the *Rutaganda* case, the Prosecution was withholding access to the witness statements pending a ruling by the Appeals Chamber. In this case, however, the Prosecution is disclosing all statements to the Defence for inspection *de facto* pursuant to Rule 66(B) (or, in the case of exculpatory material, pursuant to Rule 68), with the exception of those statements which it is submitting to the Trial Chamber for review under Rule 66(C), without making any difference in terms of classification (i.e., “document” or “statement”). As the Defence has access to the very statements that they are seeking access to, save those statements which the Prosecution has a right to withhold pursuant to Rule 66(C), the Trial Chamber does not see a legal or factual issue before it.

14. Accordingly, the Trial Chamber declares as moot those portions of the motions raised by the Accused which relate to the question of whether witness statements are included within the term “documents” under Rule 66(B).

²⁴ *Blagojević* Motion, para. 18; *Obrenović* Motion, para. 19; Status Conference, 27 November 2002, T.82.

²⁵ *Obrenović* Motion, para. 22.

²⁶ Status Conference, 19 July 2002, T. 4; Prosecution Consolidated Response, paras 4 and 13; Prosecution Response to *Jokić* Motion, para. 9.

²⁷ Status Conference, 27 November 2002, T. 78-80. See also, Prosecution Consolidated Response, para. 4; Prosecution Response to *Jokić* Motion, paras 7-8.

15. Additionally, in relation to Rule 66(B), in two of his three motions, Accused Jokić has sought disclosure of all materials seized from the military offices of the Zvornik Brigade and “documents seized from the Accused” by the Prosecution.³⁰ The Trial Chamber recalls that Rule 66(B) permits the Defence “to inspect” materials that “were obtained from or belonged to the accused” or “are intended for use by the Prosecutor as evidence at trial” as well as those items, meaning “books, documents, photographs and tangible objects” that are “material to the preparation of the defence.” To the extent that the seized materials fall into one of these three categories, the Defence must be permitted, on request, to inspect such materials pursuant to Rule 66(B).

(iii) Rule 66(C)

16. At the Status Conference, the Prosecution indicated that it would seek to exclude certain materials, namely statements with persons interviewed by the Prosecution, pursuant to Rule 66(C).³¹ On 3 December 2002, the Senior Legal Officer, at the request of the pre-trial Judge, informed the parties that an *ex parte* hearing with the Prosecution would be held to review a certain number of statements to determine whether such statements fall under Rule 66(C). The hearing was held on 6 December 2002, and the Trial Chamber took a decision to relieve the Prosecution of its obligation to disclose most of the material; the Trial Chamber sought additional clarification on the need for confidentiality of a small portion of the material not yet available during this procedure, ordering the Prosecution to present additional facts as soon as practicable.

(b) Rule 67

17. Rule 67 provides:

Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

²⁸ Prosecution Consolidated Response, para. 13.

²⁹ *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, Appeals Hearing, 4 July 2002, T. 17-18.

³⁰ Jokić 16 September 2002 Motion, paras 13 and 21; Jokić 25 November 2002 Motion, para. 12.

³¹ Status Conference, 27 November 2002, T. 79; T. 99-100.

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(C) If the defence makes a request pursuant to Rule 66 (B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects which are within the custody or control of the defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

18. The Trial Chamber observes that all parties in this case have invoked reciprocal disclosure pursuant to Rule 67. While the *Jokić* motions include Rule 67 in their title, the Trial Chamber finds that no concrete alleged violations or comments have been put forward in those motions in relation to Rule 67, nor were any complaints submitted by any party at the Status Conference. The Trial Chamber therefore finds that there are no issues on which it must pronounce in relation to Rule 67.

(c) Rule 68

19. Rule 68 provides:

Disclosure of Exculpatory Material

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

20. At the Status Conference, the parties were asked to address any issues related to Rule 68. Counsel for Blagojević, Obrenović and Nikolić stated that there were no problems with compliance with Rule 68 at the present time.³²

21. Counsel for Jokić referred to its motion of 25 November 2002 in which it stated that it received summaries of statements rather than the full witness summaries to which it was entitled.³³ The Jokić Defence relied on a recent decision taken by another section of Trial Chamber II in support of its position.³⁴ Counsel for Jokić also expressed the opinion that the defence is in the best

³² Status Conference, 27 November 2002, T. 88-89.

³³ Status Conference, 27 November 2002, T. 88-89, *Jokić* 25 November 2002 Motion, paras 5 and 10-11.

³⁴ Status Conference, 27 November 2002, T. 89, citing *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can Be Resolved", 30 October 2002 ("*Brdanin* Decision").

position to determine what is exculpatory, and that it is not for the Prosecution to make this determination as it cannot know the theory of the defence case.³⁵

22. The Prosecution stated its agreement that the Defence is in the best position to determine its case, and that is why it “has taken the discretion to provide almost all of [its] file”.³⁶ In response to the specific complaint regarding the disclosure of summaries rather than full statements, the Prosecution stated that for certain witnesses it only receives summaries from third-parties who conducted the interview.³⁷ For other witnesses, the Prosecution stated that in cases of protected witnesses or information from a “Rule 70 source”,³⁸ it provides a summary so as not to reveal the identity of the witness.

23. The Trial Chamber first notes that, in relation to the Prosecution’s reference to “protected witnesses”, it has not received any applications for a non-disclosure order pursuant to Rule 69, nor has it received any applications for protective measures pursuant to Rule 75 from any party. While the Trial Chamber is aware that the parties have entered into confidentiality agreements, it reminds the Prosecution that it must apply to the Trial Chamber pursuant to Rule 69 in order to withhold disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal, and cannot itself declare witnesses as “protected”, thereby avoiding or evading their disclosure obligations.

³⁵ Status Conference, 27 November 2002, T. 89. The Trial Chamber notes that Counsel for Blagojević made the same argument during discussions related to Rule 66(B).

³⁶ Status Conference, 27 November 2002, T. 90.

³⁷ Status Conference, 27 November 2002, T. 90.

³⁸ Rule 70 (Matters not Subject to Disclosure) provides:

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
- (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
- (D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
- (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in Sub-rules (C) and (D).
- (F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.
- (G) Nothing in Sub-rule (C) or (D) above shall affect a Trial Chamber’s power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

24. In relation to the specific request by counsel for Jokić that it receive full statements rather than summaries, the Trial Chamber recalls the oral instruction of the pre-trial Judge during the Status Conference that this matter be resolved on a bilateral basis.³⁹ In resolving this matter, the parties shall be guided by the jurisprudence of this Tribunal, and particularly the instructions that exculpatory material be disclosed in its original form, and not in summary form;⁴⁰ and that any redacted versions or extracted forms of exculpatory material must be “sufficiently cohesive, understandable and usable” and not taken out of context.⁴¹

25. The Jokić Defence also seeks a copy of the Netherlands Institute for War Documentation on Srebrenica from the Registrar⁴² or from the Prosecution.⁴³ The Trial Chamber observes that this report was neither produced nor presented by the Registrar of the Tribunal and therefore does not find any grounds for requesting that the Registrar obtain and distribute copies of a report produced by an outside source. Additionally, the Trial Chamber observes that this report is available on the Internet⁴⁴ and therefore accessible to the Defence. The Jokić Defence also seeks a particular interview with a non-Accused that was publicly broadcast on Dutch television.⁴⁵

26. As the Appeals Chamber has previously held, if “exculpatory evidence is known and the evidence is accessible”, the Prosecution may be relieved of its obligation to disclose the material under Rule 68.⁴⁶ Rule 68 is not intended to serve as means through which the Prosecution is forced to replace the Defence in conducting investigations or gathering material that may assist the Defence. Rule 68 also does not translate into a right for the Defence to “receive all of the Prosecution’s evidence that could be *useful* in the defence against charges in the Amended Indictment.”⁴⁷ When labelling disclosure material as exculpatory, this characterisation is of course not binding upon the Defence. The primary responsibility for investigating the charges against an accused, including seeking and gathering information related to those charges, lies with his or her defence counsel.

27. The primary purpose of Rule 68 is to ensure that the trial is fair, including due consideration to the concept of equality of arms.⁴⁸ The final aim of such a rule is also to enable the Trial

³⁹ Status Conference, 27 November 2002, T.91.

⁴⁰ *Brdanin* Decision, para. 26.

⁴¹ *Prosecutor v. Tihimor Blaškić*, Case No. IT-95-14-T, Decision on the Defence Motion for “Sanctions for Prosecutor’s Repeated Violations of Rule 68 of the Rules of Procedure and Evidence”, 29 April 1998, para. 19.

⁴² *Jokić* 15 April 2002 Motion, paras 10 –13.

⁴³ *Jokić* 15 April 2002 Motion, page 10; *Jokić* 16 September 2002 Motion, paras 22-23.

⁴⁴ See, <http://www.riod.nl/engels/english.html>.

⁴⁵ *Jokić* 15 April 2002 Motion, para. 14; *Jokić* 16 September 2002 Motion, para. 24.

⁴⁶ *Blaškić* Appeal Decision, para. 38.

⁴⁷ *Jokić* 16 September 2002 Motion, para. 12. Emphasis added.

⁴⁸ *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T, Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002, paras 19-22.

Chamber to come to factual findings that are as close as possible to the truth, taking into account Rules 66 and 68 in light of the Tribunal's mandate under Chapter VII of the Charter of the United Nations. Rule 68 requires the Prosecution to disclose material which may suggest the innocence or mitigate the guilty of an accused, or material that may affect the credibility of the Prosecution evidence; it is not, however, for the Prosecution to step into the shoes of the Defence and research publicly accessible material.

28. The Trial Chamber therefore dismisses that part of the *Jokić* motions related to the disclosure of materials available in the public domain.

29. The Trial Chamber observes that Rule 68 is a continuing obligation for the Prosecution.⁴⁹ The terms "continuing obligation" should be understood to mean that the Prosecution must, on a continuous basis, search all "material known to the Prosecutor", including all its files, in whatever form and in relation to all accused,⁵⁰ for the existence of material which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence, and disclose the existence of such material completely to the Defence. While there were no further complaints raised by the Accused in relation to this Rule at the present time, the Trial Chamber impresses upon the Prosecution that it must, as soon as practicable – meaning as soon as the Prosecution becomes aware of the existence of such material or has the possibility to become aware by regularly checking, *inter alia*, its own databases – disclose the existence of such material to the Defence.

⁴⁹ See, *Blaškić* Appeal Decision, para. 31. See also, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999, page 5; *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 8.

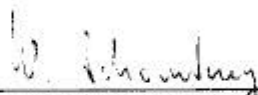
⁵⁰ See, *Prosecutor v. Tihimor Blaškić*, Case No. IT-95-14-T, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Sub-Rule 66 (A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused, 15 July 1998.

III. DISPOSITION

30. Pursuant to Rules 66, 67 and 68 of the Rules, and in accordance with Article 21 of the Statute, the Trial Chamber hereby:

1. Declares MOOT motions pending in relation to Rule 66(A);
2. DISMISSES motions pending in relation to Rule 67 and Rule 68; and
3. Declares MOOT those parts of the motions related to Rule 66(B), with the exception of the materials sought by the Accused Jokić referred to in paragraph 15 for which the motion is GRANTED.

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



Judge Wolfgang Schomburg
Presiding

Dated this twelfth day of December 2002,
At The Hague
The Netherlands

[Seal of the Tribunal]