IT-02-60-AR73.3
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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 Former Yugoslavia since 1991

Case No. IT-02-60-AR73 IT-02-60-AR73.2, IT-02-60-AR73.3

Date: 8 April 2003

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Claude Jorda
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana

Registrar: **Mr. Hans Holthuis**

Decision of: **8 April 2003**

PROSECUTOR

v.

Vidoje BLAGOJEVIĆ
Dragan JOKIĆ
Momir NIKOLIĆ

DECISION

Counsel for the Prosecutor:

Mr. Peter McCloskey

Counsel for the Appellants:

Mr. Michael Karnavas and Ms Suzana Tomanović, for Vidoje Blagojević
Mr. Miodrag Stojanović and Ms Cynthia Sinatra, for Dragan Jokić
Mr. Veselin Londrović and Mr. Stefan Kirsch, for Momir Nikolić

I. BACKGROUND

1. The present appeals arose from Trial Chamber II'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", dated 21 January 2003 ("Impugned Decision"). The Impugned Decision 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 statements of all witnesses whom the Prosecution intends to call at trial; and 2) copies of all exhibits the Prosecution intends to tender at trial ("Disclosure Materials"). It also requests that the Disclosure Materials be provided on CD-ROM in addition to paper copies, "when possible".

2. On receiving motions for certification from the accused Jokić and Blagojević,[1] and a motion from the accused Nikolić,[2] the Trial Chamber granted Jokić and Blagojević each a certificate to appeal from the Impugned Decision pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") on 10 February 2003.[3] The Trial Chamber treated the Nikolić Motion as a Rule 73 motion and granted, also on 10 February 2003, Nikolić a certificate under Rule 73 (B).[4] On 14 February 2003, Nikolić filed "Defendant Nikolić's Appeal of 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" ("Nikolić's Appeal"). On 17 February, Jokić filed an "Interlocutory Appeal of Dragan Jokić Pursuant to Certification under Rule 73 (B) and (C) against Decision on Joint Defence Motions for Reconsideration of Trial Chamber's Decision to Review all Discovery Materials Provided to the Accused by the Prosecution" ("Jokić's Appeal"). On 18 February, Blagojević filed "Vidoje Blagojević's Interlocutory Appeal of 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, and Request for Stay of Execution of Decision" ("Blagojević's Appeal").

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[1] "Request of Dragan Jokić for Certification forAppeal 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", 27 January 2003; "Vidoje Blagojević's Request for Certification to Appeal 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 and Request for a Stay of Execution of the Decision", 28 January 2003.

[2] "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", 28 January 2003 ("Nikolić Motion").

[3] "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", 10 February 2003.

[4] "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 ("*Nikolić* Decision").

3. By the "Ordonnance du Président portant nomination de juges à la Chambre d'appel" of 27 February 2003, five appellate judges were assigned to deal with the present appeals.

4. The Prosecution filed a consolidated response to all three appeals on 28 February 2003, upon leave granted by the Appeals Chamber ("Response").[5] The Appeals Chamber also stayed the execution of the Impugned Decision on the same date, pending the resolution of the appeals.

5. Jokić filed a reply on 4 March 2003; so did Blagojević on the same date.[6] Nikolić has not filed any reply.

II. NIKOLIĆ'S APPEAL

6. Nikolić takes no position on the question posed by the other two Appellants as to whether the Trial Chamber is entitled to receive the Disclosure Materials.[7] However, Nikolić submits that the Disclosure Materials should be filed in both English and Bosnian/Croatian/Serbian and that these materials be provided on identical CD-ROMs to the Trial Chamber and all four Defendants, in addition to paper copies.[8]

7. The Prosecution does not object to the provision of a CD-ROM of the Disclosure Materials to Nikolić, but does object to the request that paper copies be filed with the Registry, on the ground of the voluminous nature of the materials in question.[9]

8. The Appeals Chamber notes that Nikolić himself has not appealed from the Impugned Decision. Nikolić's Appeal came before the Appeals Chamber pursuant to a Rule 73 certificate, which was granted by the Trial Chamber on the basis that there was a "close link" between the Nikolić Motion and the requests of the other two Appellants considered by the Trial Chamber, and that it might be useful for the Appeals Chamber to be seized of "all aspects of one and the same issue".[10] The Appeals Chamber holds that the way in which the delivery of the Disclosure Materials should be effected, which is the gist of Nikolić's Appeal, is a matter within the discretion of the Trial Chamber. Having said that, this "appeal" should be dismissed on the following two

[5] "Order", Case no. IT-02-60-AR73, IT-02-60-AR73.2, IT-02-60-AR73.3, Appeals Chamber, 28 February 2003; "Prosecution's Response to the Defence's Appeal of Trial Camber's Decision to Review Trial Materials", 28 February 2003.
[6] "Reply of Dragan Jokić to Prosecution's Response to the Defence's Appeal of Trial Camber's Decision to Review Trial Materials", 4 March 2003 ("Jokić's Reply"); "Vidoje Blagojević's Reply to Prosecution's Response to the Defence's Appeal of Trial Camber's Decision to Review Trial Materials", 4 March 2003 ("Blagojević's Reply").
[7] Nikolić's Appeal, par 5.
[8] *Ibid.*, par 9.
[9] Response, par 21, also see pars 22-24.
[10] *Nikolić* Decision, p. 4. The decision contains a typing error on that page in its reference to Rule 73 *bis* as the basis for the decision: it should read "Rule 73 (B)".

grounds. First, Nikolić's Appeal does not need to be now answered, because the Defence for Nikolić has already received paper copies of the Disclosure Materials under Rule 65 *ter* and Rule 66 (A) (ii) and the Prosecution has further agreed, by its Response, to provide a CD-ROM of the Disclosure Materials. Secondly, the argument that the Disclosure Materials should be filed with the Registry before they are delivered to the Trial Chamber is rejected, because the Disclosure Materials are only expected to form part of the trial record to the extent that they are subsequently given in evidence.

9. Nikolić's Appeal is rejected.

III. JOKIĆ'S AND BLAGOJEVIĆ'S APPEALS

10. These overlapping appeals will be dealt with together.

A. The Argument that Neither the Statute nor the Rules allow the Trial Chamber to receive the Disclosure Materials

11. In his first ground of appeal, Jokić claims that the Impugned Decision is in error because neither the Statute nor the Rules of the International Tribunal confer any power on the Trial Chamber to require the pre-trial delivery to it of documents disclosed by the Prosecution to the accused pursuant to Rules 66-68 of the Rules.[11] The fact that the Rules of the International Criminal Tribunal for Rwanda ("ICTR") do have such a provision,[12] is not accidental, and it should be presumed that the provisions of each Tribunal's Rules have been enacted deliberately.[13] If it were a practice at the International Tribunal, a rule would have been written and adopted to that effect.[14]

12. In his second ground of appeal, Blagojević argues that the Rules do not authorize the pre-trial Judge or a Trial Chamber to review the entire Prosecution case in non-testimonial form, months in advance of trial.[15] Rule 65 *ter* (E) (ii) is clear and explicit as to what type of documents a pre-trial Judge may receive: "a summary of the facts on which each witness will testify", not the statements of the witnesses.[16] He notes that the Trial Chamber, in its justification for the request of the materials, primarily relied on an order issued in *Dokmanović*,[17] and to a lesser extent, on an

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[11] Jokić's Appeal, par p.10.
[12] Rule 73 *bis* (B) of the ICTR Rules provides in relevant part that: "The Trial Chamber or the Judge [--pre-trial 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".
[13] Jokić's Appeal, par 15, pp.10-11.
[14] *Ibid.*, par 15, p.11.
[15] Blagojević's Appeal, p.10.
[16] *Ibid.*, par 24.
[17] *Prosecutor v. Dokmanović*, IT-95-13a-PT, Order, 28 Nov. 1997, p.2: " The Trial Chamber will benefit from having access to Witness Statements and other documentary materials which will be relied on by the parties at trial... Perusal

order in *Kordić*,[18] and he underscores that: a) in neither case are there any references to the Statute or the Rules; b) in both cases the parties consented to the disclosure practice; and c) neither one of the cases amounts to a precedent, as recognized by the Tribunal.[19] In his fourth ground of appeal, he also submits that Rule 65 *ter* addresses the concerns raised by the Trial Chamber in this case and is in "full keeping with the letter and spirit of the Statute and Rules",[20] and that the material sought by the Trial Chamber is not necessary for the Trial Chamber to efficiently fulfil its functions and obligations under the Statute and Rules.[21] He also argues that the Trial Chamber places "undue" emphasis on the effective management of the trial, and that decisions on the length of examinations-in-chief and cross-examinations should be made with the guidance of the parties.[22]

13. The Prosecution responds that by reviewing the Disclosure Materials, the Trial Chamber will be better prepared to manage the case under Rule 73 *bis* and will be assisted in performing its functions under Rules 71, 85 (B) and 98.[23] The Prosecution then recalls the *Dokmanović*[24] and *Kupreškić*[25] cases as precedents and submits that the ICTR has echoed this practice and amended its Rules accordingly.[26]

14. Blagojević replies that the fundamental question is whether a Trial Chamber is duty-bound to follow the Rules, or whether it can, on an *ad hoc* basis and as it deems fit, interpret the Rules beyond their plain and ordinary meaning.[27] Jokić replies that in the cases cited by the Prosecution as precedents, there was no proper challenge to the orders, and that, since these orders were made outside the ambit of the Rules, the Appeals Chamber should take the opportunity to overrule them.[28] Blagojević also argues that the Prosecution presents no binding legal authority from the Appeals Chamber in support of its interpretation of the Rules, that it does not present any argument against the interpretation of the Rules as presented by the Defence, and that it does not present an

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of such documents by the Trial Chamber is primarily for the purpose of promoting better comprehension of the issues and more effective management of the trial".

[18] *Prosecutor v. Darko Kordić and Mario Čerkez*, Case No. IT-95-14/2-PT, Order for Disclosure of Documents and Extension of Protective Measures, 27 Nov. 1998.

[19] Blagojević's Appeal, par 26.

[20] Blagojević's Appeal, par 33.

[21] *Ibid.*, p.14.

[22] *Ibid.*, par 35.

[23] Response, par 12.

[24] *Supra* note 17.

[25] *Prosecution v. Kupreškić et al.*, Case No. IT-95-16-PT, Scheduling Order, 21 January 1998, pp.2-3, where the Trial Chamber ordered the Prosecution to submit, no less than 30 days prior to the commencement of trial, "statements of witnesses it intends to call and any other documentary material upon which it intends to rely, it being understood that these statements and material shall not be used as evidence until admitted by the Trial Chamber in the course of trial".

[26] Response, pars 13-14.

[27] Blagojević's Reply, par 5.

[28] Jokić's Reply, par 4.

explanation or justification as to why the Trial Chamber, months in advance of trial, would need to review the Prosecution's entire case-in-chief.[29]

15. The Appeals Chamber observes that the Rules are not exhaustive as to the detailed steps or measures that Chambers may take in fulfilling the mandate of the Tribunal, but they are devised and amended in accordance with certain recognised fundamental principles that govern proceedings before the Tribunal, such as those enshrined in Article 20 (1) of the Statute, which provides that "the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses", and in Article 21 of the Statute, which guarantees the rights of the accused. The judges of the International Tribunal are given the power by Article 15 of the Statute to adopt (which includes the power to amend) the rules of procedure and evidence subject to the fundamental principles of justice set out in the Statute and international law. These principles set the parameters for the interpretation and application of the Rules. On the other hand, as stated by the Appeals Chamber in *Aleksovski*, "the purpose of the Rules is to promote a fair and expeditious trial, and Trial Chambers must have the flexibility to achieve this goal."[30] It is plain from the successive amendments of the Rules that the Rules have been refined over the years through the practice of the Chambers in applying them. New practice, which serves the mandate of the Tribunal and conforms to internationally recognised standards, may eventually be reflected in an amendment to the Rules. To claim that the power to order the delivery of the Disclosure Materials is non-existent because neither the Statute nor the Rules expressly provide for it, is not sufficient to establish that there was an error in the Impugned Decision. An error will prejudice the interests of a party to the case. A decision which is in conformity with the principles of justice, even though not based on a written rule, does not prejudice the interests of the party. In fact, the Impugned Decision was made to benefit the accused, as the Disclosure Materials will "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".[31] The Impugned Decision was aimed at ensuring a fair and expeditious trial, which is a right of the accused as recognised in Article 20 (1) and Article 21 (4) (c) of the Statute. Furthermore, the Disclosure Materials will, in the view of the Trial Chamber, assist 1) the pre-trial Judge in fulfilling his obligations under Rule 65 *ter*, 2) the Trial Chamber in fulfilling its obligations under Rule 73 *bis* (such as shortening the length of examination-in-chief, deciding on

[29] Blagojević's Reply, par 6.
[30] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision of Prosecutor's Appeal on Admissibility of Evidence, 16 Feb. 1999, Appeals Chamber, par 19.

the number of witnesses the Prosecution may call, and determining the amount of time available to the Prosecution to present evidence), 3) the Trial Chamber in fulfilling its obligations under Rule 71 to order depositions, and 4) the Trial Chamber in determining whether to apply Rule 98 in ordering the production of additional evidence by the parties.[32] The Appellants need to show that there is actual prejudice arising from the order of the Trial Chamber for production of the Disclosure Materials which is not pegged to a specific rule.

16. A Trial Chamber may follow another Trial Chamber's decisions as precedents if it finds them to be *persuasive*, even though the decisions are not *binding* on it.[33] The Impugned Decision states that similar requests were made by other Trial Chambers and were complied with.[34] The parties referred to these requests in their pleadings. The Appeals Chamber notes that, contrary to the argument of Jokić that the requests were not properly challenged, all of those requests were made by the Trial Chambers *after* the parties were heard.[35] The parties in those cases had the opportunity to challenge the requests of the Trial Chambers, but they elected not to do so. The Appellants in the present appeals have not, therefore, satisfied this Appeals Chamber that the Impugned Decision erred in finding *support* in previously unchallenged requests made by other Trial Chambers. Further, the Impugned Decision relied primarily on various provisions of the Statute and the Rules, which in fact will not be undermined by the difference between Rule 73 *bis* (B) of the ICTR Rules and the Rules of the International Tribunal, as neither the ICTR nor the International Tribunal is bound by the Rules of the other.

17. Blagojević concedes that Rule 65 *ter* is "unambiguous, concise and explicit".[36] However, the terms of Rule 65 *ter* may be clear but not intended to be exhaustive. Further, the Appellants seem to have overlooked the provision of Rule 65 *ter* (B), which provides that "the pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial". The pre-trial Judge's powers are not confined to what is specified in the rule, as long as his powers are exercised consistently with the provision of Rule 65 *ter* (B). More importantly, the Impugned Decision was not issued pursuant to Rule 65 *ter*, but was issued pursuant to Rules 54, 73 *bis*, 85 (B) and 89 (C), in addition to Articles 20 (1) and 21

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[31] Impugned Decision, p. 4.
[32] *Ibid.*, pp. 4-5.
[33] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, Appeals Chamber, par 114.
[34] Impugned Decision, p.2.
[35] To those orders made in *Dokmanović, Kupreškić* and *Kordić*, may be added the scheduling order made by the Trial Chamber in *Prosecutor v. Milan Kovačević*, Case No. IT-97-24-PT, 5 March 1998.
[36] Blagojević's Appeal, par 24.

(4) (C) of the Statute. There is no question of non-compliance with Rule 65 *ter* or of an interpretation of the rule beyond its plain and ordinary meaning.

18. Whether the Disclosure Materials are "necessary" to the Trial Chamber in fulfilling its function under the Statute and the Rules is a matter within the discretion of the Trial Chamber.

19. The grounds of appeal are dismissed.

B. The Argument that the Trial Chamber improperly assumes the investigative role of the Prosecution

20. Jokić argues in his second ground of appeal that the Trial Chamber improperly assumes an investigative role not assigned to it by the Statute.[37] Jokić is concerned with the Trial Chamber's desire to begin a "search for the truth" in the pre-trial phase.[38] In part of his fourth ground of appeal, Blagojević argues that the Trial Chamber's reference to Rules 54 and 85 (B) "implies that it could assume the task of filling in the gaps in the Prosecution case. Thus, the Trial Chamber would be sharing the burden of proof with the Prosecution".[39] His fifth ground of appeal emphasizes that it is the Prosecution which has the exclusive right to investigate and it is not the role of the Trial Chamber to search for the material truth.[40] The Prosecution responds that there is no suggestion on the part of the Trial Chamber that it intends to usurp the Prosecution's power to investigate. The Defence's argument regarding the Trial Chamber's investigative intentions amounts to no more than speculation.[41] In reply, Blagojević expresses the fear that the Trial Chamber will assume a quasi-investigative role in search for material truth, not assigned to it by the Statute and the Rules.[42] He claims that the Prosecution actually used this argument in objecting to the initial request made by the pre-trial Judge in July 2002.[43] He recognises that Rule 98 allows a Trial Chamber to call witnesses, *proprio motu*, but he insists that "the Statute and Rules do not establish as an integral part of the Tribunal's procedure an obligation on the judiciary to conduct a search for material truth, independent of the obligations of the Prosecution to present the evidence against the accused."[44]

21. The pre-trial Judge stated, during a status conference held in July 2002, that

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[37] Jokić's Appeal, p.13.
[38] Jokić's Appeal, p. 9 and par 24. He refers to the transcript of the Status Conference of 19 July 2002, held in the case of *The Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT: especially at p. 5, lines 9-15.
[39] Blagojević's Appeal, par 36.
[40] *Ibid.*, par 38.
[41] Response, par 20.
[42] Blagojević's Reply, par 7.

> Please understand that general concept of this Tribunal, and here, it is the necessity to come as close as possible to the truth. And this also means that what is usual, for example in your legal system, cannot translate it one to one in our system here, when we are mandated to find the truth, or to the search the truth...But we need some factual basis.[45]

However, nothing in that statement visualised that it was the duty of the Chamber to engage in the prosecutorial investigation of the case. The pre-trial Judge was correctly concerned with the duty of the Chamber to discover the truth but only from the evidence as presented to the Chamber. While conceding that the Trial Chamber has clarified this matter by the Impugned Decision, Blagojević maintains that "the Trial Chamber through its Decision continues to insist (albeit in a more qualified fashion) that it play (though not as overtly) an investigative role in these proceedings."[46] He submits that many of the decisions of the Trial Chamber to be made in the course of review of the Disclosure Materials "go to the core of the Prosecution's independence, and which, axiomatically, directly impact on the fair-trial rights" of the accused.[47] This is speculation. In paragraph 15, above, the reasons given by the Trial Chamber for ordering the delivery of the Disclosure Materials have been set out. None of them suggests that the Trial Chamber was about to take over any part of the investigation work undertaken by the Prosecution. Further, it has not been shown by the Appellants that the Trial Chamber will pursue such investigation further to its receipt of the Disclosure Materials.

22. A Trial Chamber of the International Tribunal is in nature both a trier of fact and an arbiter of questions of law. Authorised by the Statute and the Rules to make factual findings on the basis of evidence presented by the parties, the Trial Chamber relies on the factual findings to determine the guilt or innocence of the accused. In that sense, the factual findings, subject to appeal and review, are parts of the truth proved beyond reasonable doubt.[48] It does not, however, follow that the Trial Chamber, by assessing evidence presented by the parties, will be discharging some of the prosecutorial responsibilities.

23. The Impugned Decision was rendered pursuant to Rules 54, 73 *bis*, 85 (B) and 89 (C). Rules 54 and 85 (B) apply in every case before this Tribunal, and there has been no case where the

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[43] *Ibid.*
[44] *Ibid.*, par 8.
[45] 19 July 2002, T.6.
[46] Blagojević's Appeal, par 39.
[47] *Ibid.*
[48] See Rule 87 (A) and *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, Appeals Chamber, par 459. Both show that the standard of proof at trial is that of proof beyond reasonable doubt. In civil law countries, search for truth in criminal trial is regarded as a basic principle, often known as the principle of instruction: Christine van den Wyngaert et al., *Criminal Procedure Systems in the European Community* (Butterworths, London, 1993), pp. 18 (Belgium), 145 (Germany), 292 (Netherlands) and 324 (Portugal). The related principle of freedom in evaluation of evidence is also common to the criminal justice systems of Continental European countries.

parties challenged the legality of these rules.[49] It is not clear from Blagojević's submission why the reference in the Impugned Decision to Rules 54 and 85 (B) shows that the Trial Chamber would share the burden of proof of the Prosecution. Rule 85 (B), in conjunction with Rule 85 (A), shows clearly that it is the parties who will conduct the three stages of examination of evidence. In addition, Rule 85 (B) allows a judge to put a question to a witness called by either party in the presence of the parties. If Blagojević's argument were that by allowing the judge to ask questions of the witness, the Rules allow the judge to help the Prosecution discharge its burden of proof, it would be plainly wrong. The questions asked by the judge are asked in order to clarify for the court, as opposed to the parties, certain questions of evidence, and the answers may be to the advantage of the accused. In both common and civil law systems, a judge can ask witnesses questions, *proprio motu*.[50]

24. The grounds of appeal are dismissed.

C. The Argument that the Trial Chamber by reviewing the Disclosure Materials improperly considers the merits of the case before trial

25. Jokić by his third ground of appeal submits that the Trial Chamber improperly considered the merits of the case privately and before trial, in violation of the accused's right to a public hearing guaranteed by Article 21 (2) of the Statute and the right to be tried in his presence guaranteed by Article 21 (4) (d) of the Statute.[51] Jokić also argues that the search for truth would be conducted in the privacy of the Chamber and not in a public hearing.[52] Blagojević's third ground of appeal suggests that, under the Statute and Rules, the Trial Chamber must base its decision solely on the evidence submitted on record during the trial.[53] Exposure to material as requested by the Trial Chamber may influence the judges and improperly affect the impartiality of the Trial Chamber.[54] His sixth ground of appeal is that, by reviewing the Disclosure Materials prior to the

[49] Rule 54 provides that "at the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." Rule 85 (B) reads: "Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness."

[50] For instance, Rule 614 (b) of the *Rules of Evidence for United States Courts and Magistrates*, Pub.L.93-595, s 1, January 2, 1975, 88 Stat.1926, Amendments received to January 5, 1998, provides that "The court may interrogate witnesses, whether called by itself or by a party."

[51] Jokić's Appeal, par 29, p.20.

[52] *Ibid.*

[53] Blagojević's Appeal, p.13.

[54] *Ibid.*, par 31.

trial, the Trial Chamber will be fostering a perception of bias against the accused.[55] Therefore, according to the *Furundžija* Appeal Judgement,[56] the Trial Chamber will lack, at a minimum, the perception of impartiality.[57]

26. The Prosecution points out that Rules 92 *bis* and 94 *bis* contemplate a review by the Trial Chamber of certain materials before trial.[58] In stressing the professionalism of the judges of the International Tribunal, the Prosecution rejects the argument of the Appellants that "material not properly admitted into evidence would factor into a final judgement rendered by the Trial Chamber".[59]

27. Acknowledging the Trial Chamber's or pre-trial Judge's rights under Rules 92 *bis* and 94 *bis*, Jokić replies that these rights are not the same as that to order the delivery of the Disclosure Materials.[60] He argues that the judges' professionalism is not in issue, and that what is in issue is that the Trial Chamber made requests outside the ambit of the Rules, thus affecting the rights of the accused.[61] Blagojević does not reply in this respect.

28. There is no basis for suggesting that the Trial Chamber would consider the merits of the case without a public hearing of evidence. The Impugned Decision states clearly that the Disclosure Materials are not evidence unless and until submitted and admitted in the course of trial in accordance with the Rules.[62] Further, Rule 98 *ter* (C) requires a judgement to be accompanied by a reasoned opinion in writing, which will explain the factual findings with reference to admitted evidence. Moreover, the Impugned Decision relies on, among others, Rule 85 (B), which states clearly that "examination-in-chief, cross-examination and re-examination *shall* be allowed in each case" (italics added). A consideration of the merits of the case to the detriment of the accused was simply not on the mind of the judges of the Trial Chamber. As the Disclosure Materials have yet to reach the trial stage, the concern of the Appellants about a public hearing has no substance.

29. Rule 92 *bis* and Rule 94 *bis* materials are not exactly in the same position as the Disclosure Materials. But both sets of materials may raise the same question as to whether the Trial Chamber may, by receiving documents before they are tested in court, form an unfair impression of the accused. This concern has not been made out by the Appellants. Further, in their appeals, Blagojević and Jokić referred to Rule 15 (C), which allows a judge who confirms an indictment to sit in the trial on the indictment as well as in the appeal of that

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[55] *Ibid.*, par 44.
[56] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2002, Appeals Chamber, pars 182, 189-190.
[57] Blagojević's Appeal, pars 46-47.
[58] Response, pars 18-19.
[59] *Ibid.*, par 17.
[60] Jokić's Reply, par 6.
[61] *Ibid.*, par 2.
[62] Impugned Decision, p.4.

case.[63] To confirm the indictment, the judge has to read supporting materials in relation to each count of the indictment, pursuant to Rule 47 (E). The provisions of Rule 15 (C) illustrate the view that there will be no partiality arising from the opportunity which the confirming judge will have to form an impression of the case before the start of the trial. Further, Rule 65 *ter* (D) (ii) (b) provides that the Prosecution be ordered to file "a summary of the facts on which each witness will testify", thus ensuring that the Trial Chamber will be apprised of the facts to which each witness will testify. There is no challenge by the Appellants to that provision in these appeals and Blagojević actually relied on Rule 65 *ter* to define the issues of his appeal. Moreover, to be exposed to materials yet to be presented in evidence does not necessarily lead to pre-judgement or partiality. The professionalism of the judges of the Trial Chamber is a guarantee that the presumption of innocence will be respected. Again, it should be emphasised that the Trial Chamber stated clearly in the Impugned Decision that the Disclosure Materials "will not be regarded as evidence" unless and until they are submitted and admitted in the course of trial in accordance with the Rules.

30. The Appellants have also failed to show that there is an appearance of partiality or that actual partiality exists, in terms of the *Furundžija* test.[64] The Trial Chamber stated in the Impugned Decision that it would not treat the Disclosure Materials as evidence before trial. Also, in ordering the production of the Disclosure Materials, the Trial Chamber referred for support to the right of the accused to have a fair and expeditious trial, as shown by the reference in the Impugned Decision to Article 20 (1) and Article 21 (4) (C) of the Statute.

31. The grounds of appeal are dismissed.

D. The Argument that the Impugned Decision deprives the Accused of certain rights in violation of Article 21(3) and (4) of the Statute

32. Jokić's fourth ground of appeal is that the Impugned Decision would deprive the accused of basic rights guaranteed by Article 21 (3) and (4) of the Statute, namely, the right to be considered innocent until proven guilty,[65] the right to counsel, the right to examine or have examined the witnesses against him, and the right to defend himself, including the right to object to the authenticity, relevance and admissibility of evidence.[66] Blagojević's first ground of appeal contains similar submissions.[67] The Prosecution responds that the timing of the review by the Trial Chamber of the

[63] Blagojević notices this rule and argues that the better rule would be that the confirming judge does not sit on the trial: Blagojević's Appeal, par 42. That argument is beyond the scope of his appeal.
[64] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2002, Appeals Chamber, par 189.
[65] Jokić's Appeal, par 32.
[66] *Ibid.*, pars 34-35.
[67] Blagojević's Appeal, pars 18-21.

Disclosure Materials does not affect the rights of the accused.[68] The review will cause no harm and will promote efficiency and expeditiousness in the conduct of the trial proceedings.[69] The Prosecution does not share the Appellants' concerns about the violation of Article 21 of the Statute by the Impugned Decision, because it has prepared the exhibits and witness lists in good faith and intends to present this evidence at trial, where the Defence will have the opportunity to challenge the evidence.[70] In reply, Jokić submits that the Prosecution did not specifically address his legal arguments based on Article 21 of the Statute and therefore no reply is necessary.[71] Blagojević has not replied.

33. The review of the Disclosure Materials by the Trial Chamber is to be distinguished from the presentation of the materials in evidence at the trial. In fact, the Trial Chamber made it clear that the Disclosure Materials are not evidence until submitted and admitted in the course of trial. It is notable that, at this moment, the Disclosure Materials are not formally filed with the Registry as part of the trial record. Further, it would be incorrect to suggest that the judges will reach a verdict on the basis of those materials without even hearing the witnesses or having the exhibits tested by the parties, and without even hearing the Defence case. The review of the Disclosure Materials, which does not affect either party's case in this case, does not impair the rights conferred on the accused by Article 21 (3) and (4) of the Statute.

34. The grounds of appeal are dismissed.

IV. DISPOSITION

35. For the foregoing reasons, Jokić's, Blagojević's, and Nikolić's Appeals are dismissed.

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

Judge Fausto Pocar
Presiding

Dated this eighth day of April 2003,
At The Hague,
The Netherlands

[Seal of the Tribunal]

[68] Response, par 11.
[69] *Ibid.*
[70] Response, par 16.
[71] Jokić's Reply, par 5.