



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

Case: IT-95-9-PT
Date: 28 February 2000
Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Lipton Robinson, Presiding
Judge David Hunt
Judge Mohamed Bennouna
Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh
Decision of: 28 February 2000

PROSECUTOR

v

Blagoje SIMIĆ, Milan SIMIĆ, Miroslav TADIĆ,
Stevan TODOROVIĆ and Simo ZARIĆ

DECISION ON (1) APPLICATION BY STEVAN TODOROVIĆ TO RE-OPEN
THE DECISION OF 27 JULY 1999, (2) MOTION BY ICRC TO RE-OPEN
SCHEDULING ORDER OF 18 NOVEMBER 1999, AND
(3) CONDITIONS FOR ACCESS TO MATERIAL

The Office of the Prosecutor:

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Mr Christopher Greenwood QC and Mr Gabor Rona

I Introduction

1. The accused Stevan Todorović (“Todorović”) is one of five persons charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war alleged to have been committed in the municipalities of Bosanski Šamac and Odžak in Bosnia and Herzegovina.

2. Todorović is alleged in the indictment to have been the Chief of Police for the Bosanski Šamac Municipality, and a member of the Serbian Municipality of Bosanski Šamac Crisis Staff which is alleged to have assumed and maintained control of the civilian government of both municipalities. Relevant to some of the charges against him is the nature of the treatment afforded to non-Serbian civilians under detention in those municipalities.

3. Todorović filed a motion seeking an order requesting the assistance of the International Committee of the Red Cross (“ICRC”) by –

- (a) supplying reports made to it by individuals associated with or employed by it as to the conditions in which certain persons were detained in these municipalities alleged to have been under his control, and
- (b) identifying the individuals who inspected those detention facilities and interviewed the detainees.¹

The motion asserts the existence of such inspections, interviews and reports merely “[u]pon information and belief”.² (This motion will be referred to as the “First Motion”).

4. The ICRC informed Todorović that such information and reports are confidential and privileged, and it declined to give the assistance sought by him.³ In a formal response to the

¹ Accused Stevan Todorović’s Motion for an Order Requesting Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, 22 Sep 1999 (“First Motion”), Statement in Support, pars 2-5.

² Compare the requirements for making such an application, laid down by the Appeals Chamber in *Prosecutor v Delalić*, Decision on Motion by Esad Landžo to Preserve and Provide Evidence, 22 Apr 1999, p 4; and, in more detail, Separate Opinion, pars 4, 7.

³ First Motion, at par 6.

First Motion, the ICRC sought leave to be heard as *amicus curiae* to oppose the relief sought,⁴ and such leave has already been granted.⁵ The prosecution responded that, provided Todorović can bring this request in what is described as “a manner consistent with the jurisprudence of the Tribunal”, it takes no position in the matter.⁶

5. This somewhat elliptical reference to “the jurisprudence of the Tribunal” was to a decision of this Trial Chamber given in the present prosecution on 27 July 1999 (“ICRC Decision”), but at that time on an *ex parte* and confidential basis, in which it was held (by majority) that the ICRC has a right to non-disclosure in judicial proceedings of information in the possession of its employees relating to its activities, a right which does not call for any qualifications.⁷ The decision related to a witness who was a former employee of the ICRC, whom the prosecution had intended to call, and who was prepared voluntarily to give evidence as to, *inter alia*, the conditions in which persons were detained in one of the places of detention apparently relevant to this prosecution.⁸ The specific ruling made by the Trial Chamber was that “the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given”.⁹ The confidentiality of that decision was lifted by an order of the Trial Chamber on 1 October, following the agreement of the parties reached after the decision had been delivered.¹⁰

6. On 5 October, Todorović filed a further motion seeking (a) to re-open the ICRC Decision, (b) to be heard when it was re-opened, (c) access to the submissions and evidence of the parties (which were not released with the decision), (d) that the ICRC Decision be set aside,

⁴ Response of the International Committee of the Red Cross to the Defence Motion Requesting Assistance in Securing Documents from the International Committee of the Red Cross, 18 Oct 1999 (“First ICRC Response”), p 2.

⁵ Scheduling Order, 18 Nov 1999 (“Scheduling Order”), Order (1).

⁶ Prosecution’s Response to Motion for Order Requesting Assistance in Securing Witnesses and Documents from the International Committee of the Red Cross, 4 Oct 1999, p 2.

⁷ Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 (“ICRC Decision”), at pars 73-74, 76. The decision makes it clear that such ruling relates only to information obtained by such employees in the course of performing their official functions (at par 36).

⁸ Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning The Testimony of a Witness, 27 July 1999, par 40.

⁹ ICRC Decision, p 20; Separate Opinion, pars 42-43.

¹⁰ Order Releasing Ex Parte Confidential Decision of the Trial Chamber, 1 Oct 1999. The delay in lifting the confidentiality order resulted partly from the Tribunal’s Summer Vacation in August and partly from both the need for the ICRC to consult its two witnesses who had been named in the ICRC Decision and the prosecution’s inability to contact the witness in question before agreement could be reached.

(e) a definition of the scope of and guidelines for the use of *ex parte* motions, and (f) disclosure of any other *ex parte* motions made by the prosecution and not already disclosed to the accused ("Second Motion").¹¹ An order granting Todorović confidential access to the submissions and evidence of the parties was made on 18 November,¹² although the conditions under which that confidential access will take place remained an issue for further consideration. The ICRC has now sought to have the order granting access re-opened.¹³ The remainder of the Second Motion is the subject of the present decision. It is appropriate to deal first with the status of the ICRC Decision and separately with the remaining matters raised in that motion.

II The application by Todorović to have the ICRC Decision re-opened

7. The basis upon which Todorović seeks to have the ICRC Decision re-opened is that the law which it states (as set out in par 5 above) is said to have become *res judicata* and that, if followed, it would preclude the relief which he seeks in his First Motion. He also objects to the decision having been made "without the participation of the one most affected, the [a]ccused".¹⁴ It was, it is said, a breach of the fundamental principles of due process for a ruling to be made in the absence of a party and in the absence of an opportunity for that party to be heard.¹⁵

8. The prosecution filed a response to the Second Motion submitting that no case had been shown for the ICRC Decision to be re-opened, as Todorović is still able to proceed with his First Motion, and as he is not prevented from arguing that the law stated in the ICRC Decision either was wrong or is distinguishable, and from seeking leave to appeal if unsuccessful in doing so.¹⁶

¹¹ Accused Stevan Todorović's Motion for an Order Seeking to Re-Open the Confidential *Ex Parte* Motion under Rule 73 Concerning the Testimony of a Witness Formerly Associated With the International Committee of the Red Cross, and Upon Such Re-Opening, Opportunity to be Heard & Associated Relief, 5 Oct 1999 ("Second Motion").

¹² Scheduling Order, Orders (2) and (3).

¹³ Motion of the ICRC for Order to Re-open the Trial Chamber's Scheduling Order of 18 November 1999, 3 Dec 1999 ("ICRC Motion"). This motion is considered in Section IV of this decision.

¹⁴ Second Motion, pars 3, 5-6.

¹⁵ *Ibid*, par 6.

¹⁶ Prosecutor's Response to Motion for Order Seeking to Re-Open the Confidential *Ex-Parte* Motion and Decision Concerning the Testimony of a Witness Formerly Associated with the International Committee of the Red Cross, 18 Oct 1999 ("Prosecution Response"), pars 5-6.

The ICRC submitted that the Second Motion should be denied.¹⁷ Todorović replied, but added nothing in relation to this matter beyond what had already been said.¹⁸

9. The application to re-open the ICRC Decision is misconceived. There were only two parties to the motion which led to that decision – the prosecution and the ICRC.¹⁹ It was open to the prosecution to seek leave to appeal from that decision, but it did not do so. The ICRC Decision thus stands and is binding upon the parties to it insofar as the Trial Chamber has ruled that the evidence of the former employee of the ICRC sought to be presented by the Prosecutor should not be given. The principle of *res judicata* would prevent the prosecution from raising that specific issue again in any interlocutory proceedings between it and the ICRC unless the Trial Chamber itself were prepared to reconsider its decision.

10. But the statement of law identified by the majority as the basis for that decision – that the ICRC has a right to non-disclosure in judicial proceedings of information in the possession of its employees relating to its activities, a right which does not call for any qualifications²⁰ – is not *res judicata* so far as anyone else is concerned. That statement of law has the status of a precedent and, as such, it has the same effect in relation to other motions filed in the present prosecution as other statements of law made by this Trial Chamber (or by any other Trial Chamber) in a different prosecution.

11. For these reasons, it remains open to Todorović to proceed with his First Motion and to seek to persuade the Trial Chamber that that statement of law either is wrong or can be

¹⁷ First ICRC Response, p 2.

¹⁸ The Todorović Defense Reply to Prosecutor's Response and Reply to ICRC's Response on Motion for an Order Seeking to Re-Open the Confidential *Ex Parte* Motion under Rule 73 Concerning the Testimony of a Witness Formerly Associated with the International Committee of the Red Cross, and Upon Such Re-Opening, Opportunity to be Heard & for Associated Relief, 20 Oct 1999.

¹⁹ In both its application to be permitted to appear as *amicus curiae* and in its Submissions made in that capacity, the ICRC emphasised that, as it was a directly affected party on the subject matter of those proceedings, it should be given a limited form of standing as a party in order to present its case on the matter before the Trial Chamber fully: *Ex parte and Confidential* Application for Leave to Appear as *Amicus Curiae* Under Rule 74 on Behalf of the International Committee of the Red Cross, 10 Feb 1999 ("ICRC Application"), par 7; Submission by the International Committee of the Red Cross Concerning the Proposal to Call a Former Employee of the International Committee of the Red Cross as a Prosecution Witness, 13 Apr 1999, par 2.

²⁰ See par 5, *supra*.

distinguished in relation to the circumstances of that motion, and to seek leave to appeal if he fails to do so.

12. The complaint by Todorović that he was denied due process – when he was not given the opportunity to be heard upon the motion which led to the ICRC Decision – is similarly misconceived. He was not a party to that motion. If he had by that stage filed his own motion to obtain the assistance of the ICRC (that is, what is now his First Motion), the two motions would no doubt have been heard together and he would have been given that opportunity. For the reasons already given, however, he has not been in any way disadvantaged by not being heard at that time.

13. The application to re-open the ICRC Decision is refused, as are the applications to be heard when it is re-opened and for that decision to be set aside.

III The application for access

14. Todorović also sought by his Second Motion to have access to the submissions and evidence of the parties to the motion which led to the ICRC Decision (“ICRC Decision Filings”), and (as already stated) confidential access has been granted, subject to further consideration as to the conditions of that access and subject now also to the determination of the ICRC Motion.²¹

15. The Scheduling Order by which that access was granted stated that the Trial Chamber considered –

[...] that the accused, Stevan Todorović, should be entitled to have the same access as the Prosecution, on a confidential basis, to the material filed in connection with the ICRC Decision, other than to any material which is capable of identifying the proposed witness.

The Trial Chamber here refers briefly, but in more detail, to its reasons for granting that access.

16. Todorović had submitted that it was necessary for the confidentiality which still attaches to the ICRC Decision Filings to be lifted so that he can properly argue in support of his First

²¹ There was no oral hearing of that motion. The only material available is that filed by the two parties to the motion.

Motion that the statement of law in the ICRC Decision is wrong.²² The prosecution in its response accepted that Todorović should have access to these materials, subject to it being permitted to redact any details which may tend to identify the proposed witness.²³

17. The ICRC in its response stated that the issue raised by the First Motion has already been determined by the ICRC Decision,²⁴ and that its “archives” are confidential for the reasons given by the ICRC Decision.²⁵ The Trial Chamber interpreted this statement as a blanket objection to such access being granted, upon the basis that the ICRC Decision determined that the ICRC has a right to non-disclosure in judicial proceedings of information in the possession of its employees relating to its activities, a right which does not call for any qualifications.²⁶ The Trial Chamber’s interpretation of what the ICRC said in its response has since been confirmed by the ICRC Motion.

18. However, in its initial response to a related, but not identical, application by three co-accused of Todorović for access to the ICRC Decision Filings,²⁷ the ICRC sought time to consider its position so that, instead of responding with “a blanket opposition”, it could formulate:

[...] a position that enables the Court to consider release of as much of the subject materials as is possible, without opposition from the ICRC.²⁸

In its eventual response to the Related Motion, the ICRC noted that the materials which it had filed had been submitted to the Trial Chamber on the basis that the proceedings were *ex parte* and *in camera*, and it submitted that it would be wrong to release, without ICRC approval, materials submitted in reliance of assurances of confidentiality, which “it could not have

²² Second Motion, par 11.

²³ Prosecution Response, pars 10-11.

²⁴ First ICRC Response, p 2.

²⁵ *Ibid*, p 1.

²⁶ See par 5, *supra*.

²⁷ Motion Requesting Disclosure of Written Pleadings and Transcripts of Hearings in Relation to the *Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness* Issued on July 27, 1999, 21 Oct 1999 (“Related Motion”).

²⁸ Motion of the International Committee of the Red Cross for Enlargement of Time to November 15, 1999, to Respond to the Defence Motion Requesting Disclosure of Written Pleadings and Transcripts of Hearings in Relation to the *Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness* Issued on July 27, 1999, 8 Nov 1999, par 1.

submitted had the original proceedings not been *ex parte* and *in camera*".²⁹ The source of the "assurances of confidentiality" are not identified, but no such assurances were given by the Tribunal.

19. Nevertheless, the ICRC went on to say that it did not seek to restrict the disclosure of the ICRC Decision Filings –

[...] except where such disclosure would, itself be contrary either to the principles laid down in the [ICRC Decision], or to the reasonable expectations of confidentiality held by the contributors to the materials in question, due to representations made to them and upon which they relied.³⁰

The ICRC then stated:

Accordingly, the ICRC has no objection to the disclosure of its non-confidential legal submissions in connection with [the ICRC Decision], and of those parts of the record, be they submissions, other pleadings, transcripts, or other material, that do not concern confidential aspects of the ICRC's work, and/or that do not adversely affect ICRC activities undertaken in accordance with its mandates under international humanitarian law and the Statutes of the International Red Cross and Red Crescent Movement.

[...] As to material that does concern confidential aspects of the ICRC's work, and/or that might, if disclosed, adversely affect ICRC activities undertaken in accordance with its mandates, and which material was made available to the Court subject to assurances of confidentiality, the ICRC wishes to oppose the instant Defence Motion.³¹

The ICRC submitted in its Response to Related Motion that the disclosure of "such information" (that is, the material referred to in the last paragraph quoted) to the three co-accused of Todorović would be in direct conflict with the ICRC Decision.³²

20. In the same response, the ICRC also directly addressed the Second Motion by Todorović (to re-open the ICRC Decision) pointing out that, whereas the motion by the prosecution which led to the ICRC Decision related to the proposed testimony of a particular witness, Todorović's motion sought to compel the ICRC to provide access to its archives and, potentially, to produce documents from those archives to be tendered in evidence by him; the different nature of the

²⁹ Response of the International Committee of the Red Cross to the Defence Motion Requesting Disclosure of Written Pleadings and Transcripts of Hearings in Relation to the *Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness* Issued on July 27, 1999, 12 Nov 1999 ("Response to Related Motion"), par 2.

³⁰ *Ibid*, par 3. The punctuation is as it appears in the original.

³¹ *Ibid*, pars 4-5. This was subsequently described as a "partial opposition" to the Related Motion: ICRC Motion, par 8.

³² Response to Related Motion, par 6.

relief sought by Todorović, it was said, rendered irrelevant the principle of equality of arms because the ICRC Decision Filings have nothing to do with the issue of his guilt or innocence.³³

21. In its response to the First Motion (requesting assistance from the ICRC), the ICRC sought leave to be heard as *amicus curiae* in relation to both that motion and the Second Motion.³⁴ The Trial Chamber was satisfied that such leave should be granted to the ICRC with retrospective operation, so that both responses already filed by the ICRC could be considered as submissions made in accordance with Rule 74 of the Rules of Procedure and Evidence (“Rules”). Such leave was granted.³⁵

22. The Trial Chamber nevertheless considered that, if things had stood as they were before the order granting access was made, when Todorović comes to argue in support of his First Motion that the law stated in the ICRC Decision is wrong, the Trial Chamber, the prosecution and the ICRC would all have access to that material, but Todorović would not. The different nature of the relief sought by Todorović did not alter the fact that he is seeking to argue that the law stated in the ICRC Decision and based upon that material was wrong. It was clear to the Trial Chamber that not only equality of arms but also common fairness demanded that he should have such access for that purpose, and that the confidentiality presently accorded to the whole of that material should be lifted so far as he is concerned, just as the prosecution had access to the whole of it for the purposes of the motion which led to that decision, subject to redaction to protect the identity of the witness. The Trial Chamber believed that it could not reasonably be argued to the contrary.

23. The Trial Chamber was not insensitive to the concerns of the ICRC that the material should not be disclosed further than it already had been, and its decision was made in the full realisation that the ICRC was opposed to disclosure to Todorović in the circumstances of this case, notwithstanding the partially inconsistent attitude which it had expressed in relation to the Related Motion by his three co-accused. The Trial Chamber nevertheless believed that the dictates of justice to which reference was made in the preceding paragraph required the disclosure to be made, albeit under restrictions as to confidentiality.

³³ *Ibid*, pars 7-8.

³⁴ First ICRC Response, p 2.

³⁵ Scheduling Order, Order (1).

24. In making that decision, the Trial Chamber also took into account another circumstance. In response to the motion by the prosecution which led to the ICRC Decision itself, the ICRC had wanted the Trial Chamber to have the material which was filed in order to persuade it that the prosecution's motion should be unsuccessful. The ICRC could not have provided the Trial Chamber with that material without also providing it to the moving party, the prosecution. The Trial Chamber here is being asked to consider an application by someone who was not a party to that application for the disclosure to him of information relating to the activities of the ICRC in the possession of its employees. That other person is not bound by the ICRC Decision. If this application had been made to another Trial Chamber (which similarly is not bound by the ICRC Decision, and which would have been obliged to consider the merits of the application for itself), the ICRC would inevitably (and understandably) have wanted that Trial Chamber to have the material in question, in order to persuade that Trial Chamber similarly that the application should be unsuccessful. The ICRC similarly could not have provided that Trial Chamber with the material without also providing it to the moving party.

25. The Trial Chamber concluded that there was no justifiable basis for distinguishing such an application from the present one by Todorović. Moreover, a substantial part of the material has already been described in great detail in the ICRC Decision itself, and a redacted version of the material is in any event to be made public.³⁶

IV The application by the ICRC to have the order granting Todorović access re-opened

26. It is convenient at this stage, and before disposing of the remainder of the matters raised by Todorović in his Second Motion, to deal with the application by the ICRC to re-open the Scheduling Order by which Todorović was granted access to the ICRC Decision Filings. This application is opposed by Todorović,³⁷ and by the prosecution.³⁸

³⁶ Scheduling Order, Orders (4) and (5).

³⁷ Stevan Todorović's Defense Response to ICRC's Motion for Order to Re-Open the Trial Chamber's Scheduling Order of November 18, 1999, 13 Dec 1999 ("Todorović Response to ICRC Motion"), par 7.

³⁸ Prosecutor's Submission Regarding ICRC's Requests to (1) Re-open the Trial Chamber's Scheduling Order of 18 November 1999 and (2) for an Extension of Time to 21 January 2000, 17 Dec 1999, par 13.

27. In its application, the ICRC has contended that the Trial Chamber had by the grant of access to Todorović “effectively declined to permit [it ...] to present its case for redaction of its confidential materials in anticipation of release to [Todorović]”.³⁹ It claims to have requested such an opportunity in an earlier document, but this was a request added to its response to the Related Motion by three of Todorović’s co-accused,⁴⁰ not in its response to the Second Motion by Todorović. The ICRC had consistently argued that there should be *no* disclosure to Todorović (notwithstanding its partially inconsistent attitude to the similar, but not identical, application by his three co-accused); it is therefore difficult to understand how the Trial Chamber’s decision to grant access to Todorović on a confidential basis could reasonably be so interpreted. However, the Trial Chamber has always made it clear that the conditions of confidentiality under which Todorović was to have access to the ICRC Decision Filings were yet to be determined. That is an issue which is dealt with in Section V of this decision.

28. From a substantive point of view, the ICRC has contended that many of the affidavits and witness statements “relating to the work of the ICRC” in the material which it had submitted to the Tribunal had been provided by “high government officials and international officials outside the ICRC”, and that they had been furnished to the ICRC with permission to submit them to the Tribunal on the basis that the proceedings were being held *ex parte* and *in camera*. This meant, the ICRC says, that the documents would be seen only by the Tribunal and by “staff in the Office of the Prosecutor, itself an official institution of the Tribunal under Article 16 of the Statute”. Had the proceedings not possessed this character, it is said, the ICRC would not have been able to submit all of these materials.⁴¹ The same is true, the ICRC says, of materials relating to its own operational activities which are of considerable sensitivity and had been submitted only on the basis that the hearings were *ex parte*.⁴² The ICRC says that the disclosure of these materials to Todorović, even on a confidential basis, would entail a risk of harm to the integrity of ICRC operations, and that they should not be disclosed.⁴³

³⁹ ICRC motion, par 10.

⁴⁰ Response to Related Motion, Request 2, fifth unnumbered page.

⁴¹ ICRC Motion, par 11.

⁴² *Ibid*, par 12.

⁴³ *Ibid*, par 13-14.

29. The only matter now put forward by the ICRC which had not been put forward in one or the other of its different approaches to the Second Motion by Todorović and to the Related Motion by his three co-accused is its reference to the Office of the Prosecutor as “an official institution of the Tribunal”. The ICRC appears to assume that the prosecution is placed in some special position as a party in proceedings before the Tribunal. Article 16 of the Tribunal’s Statute, to which the ICRC has referred, describes the Prosecutor as “a separate organ” of the Tribunal but also one which acts “independently” of it. And such an assumption overlooks Article 21.1, which provides that all persons shall be equal before the Tribunal. That includes the prosecution. It should be clearly understood that, as a party before the Tribunal, the prosecution is not treated in any special way. Nor, it is hoped, would the prosecution claim such a special position.⁴⁴ For the reasons given in Section III of this decision, it remains quite unacceptable for the prosecution but not Todorović to have access to the ICRC Decision Filings when he seeks to argue that the law stated in the ICRC Decision is wrong. The Trial Chamber has already pointed out (also in Section III) that the difference between the nature of the relief sought by Todorović in his First Motion and that sought by the prosecution in the proceedings which led to the ICRC Decision does not alter his need to have the same access as the prosecution to the material upon which that decision was based.

30. An alternative approach by the ICRC is that, even if the Trial Chamber were to balance the harm to the ICRC by permitting disclosure of the ICRC Decision Filings against the value of those filings to Todorović, the ICRC says that “the risk of irreparable harm resulting from unauthorised release of confidential materials exceeds any countervailing risk of harm to the right of the Defence to due process of law”.⁴⁵ This assertion, however, proceeds upon the assumption that Todorović seeks access to the ICRC Decision Filings in order to see whether they contain material relevant to his guilt or innocence and upon the further assertion by the ICRC that the material which it filed is not relevant to that issue. That assumption is misconceived, as Todorović has made clear. He seeks access in order to be placed upon the same footing as the prosecution in relation to the issue which is raised by the prosecution in

⁴⁴ Where issues of witness protection arise, the party seeking the protection will often have access to material to which the other party does not, but this is whether the party seeking protection is the prosecution or the accused. The prosecution, although usually being the party seeking the protection, is not in any special position.

⁴⁵ ICRC Motion, pars 15-16. This appears to be a reference to the approach taken in the Separate Opinion of Judge David Hunt in the ICRC Decision.

answer to his First Motion – namely, whether the law stated in the ICRC Decision is correct. Moreover, as the prosecution has pointed out,⁴⁶ it is not for the ICRC as *amicus curiae* to assert what is or is not relevant to the issue of guilt or innocence, if only because it is in no position to know what issues are to be raised by Todorović in the trial.

31. The Trial Chamber remains satisfied that access under the conditions of confidentiality to be imposed by this decision will not entail any realistic risk of harm to the integrity of ICRC operations. To those conditions, the Trial Chamber now turns. The application by the ICRC to re-open the Scheduling Order by which Todorović was granted access to the ICRC Decision Filings on a confidential basis is refused.

V Conditions of access

32. The prosecution has sought only the redaction of any details in the ICRC Decision Filings which may tend to identify the proposed witness.⁴⁷ Todorović has accepted such a redaction as proper.⁴⁸

33. In the event that the order granting access were not re-opened, the ICRC has requested that:

- (i) the release to Todorović of the ICRC Decision Filings be subject to effectively the same restrictions and procedures as the Trial Chamber may apply in relation to their disclosure to the public;⁴⁹ or
- (ii) in the alternative, access by Todorović to the ICRC Decision Filings be restricted to an *in camera* review of those documents on the premises of the Trial Chamber, without permission to make copies.⁵⁰

In his response to the ICRC Motion, Todorović has submitted that, apart from redactions relating to the identity of the proposed witness, all of the materials in the ICRC Decision Filings should

⁴⁶ Prosecutor's Submission Regarding ICRC's Request for Continued Leave to be Heard as *Amicus Curiae*, 19 Nov 1999, par 8.

⁴⁷ Prosecution Response, par 10.

⁴⁸ Todorović Response to ICRC Motion, par 11.

⁴⁹ ICRC Motion, par 15.

⁵⁰ *Ibid*, par 17.

be made available to him so that he may object to or otherwise attack all of the material submitted on behalf of the ICRC.⁵¹ He does not object to “protective orders” being imposed,⁵² but he says that, if the ICRC wishes to insist upon the restrictions proposed in its alternative request, it should be ordered to pay the fees of his counsel at counsel’s normal hourly rate of (US)\$350 per hour, including the time taken for travel and attending the Tribunal, together with appropriate travel and other expenses, upon the basis that the fee schedule established by the Tribunal’s Registrar is “niggardly at best” and takes no account of travel time, whilst reimbursements for other expenses are “spartan”.⁵³

34. As to the material filed by the prosecution, the Trial Chamber is satisfied that Todorović should be given unrestricted access to it, subject only to the redactions sought by the prosecution and to which Todorović has already agreed, by the provision to him of a redacted copy of that material.

35. As to the material filed by the ICRC, the Trial Chamber does not accept the ICRC request that such material be subject to effectively the same restrictions and procedures as may be applied to their public disclosure, for the reasons which have already been sufficiently identified in Sections III and IV of this decision. However, the Trial Chamber does accept that the material filed by the ICRC is of such a nature as to warrant the imposition of the following restrictions upon the access granted to Todorović by the Scheduling Order to those materials redacted to protect the identity of the proposed witness:

- (a) access is to be exercised only by counsel for Todorović after he has given a written undertaking that he will not –
 - (i) reveal the contents of that material except in submissions made to the Trial Chamber in connection with the First Motion, or
 - (ii) make any copy of that material unless permitted to do so by an order of the Trial Chamber; and
- (b) access is given to such counsel only in a room of the Tribunal provided by the Registry.

⁵¹ Todorović Response to ICRC Motion, par 11.

⁵² *Ibid*, p 6.

⁵³ *Ibid*, par 15.

36. The reason for leaving open an order that material be copied is to allow for the possibility that counsel for Todorović will be able to prepare answers to certain material only if he can have such a copy. That issue can be determined only by reference to particular documents. In the event that any such material is located, Todorović may make a confidential application for leave to copy the particular material, such application naming the ICRC as a respondent.

37. As the Trial Chamber is satisfied that such restrictions are reasonable, there is no reason why any special arrangements should be made to compensate counsel for Todorović for performing his duties as counsel assigned to appear in this matter.

VI Ex parte applications

38. The final matters raised by Todorović in his Second Motion which have not been resolved relate to the use of *ex parte* applications by the parties to this prosecution. He seeks a definition of the scope of and guidelines for the use of *ex parte* applications, and a disclosure of any other *ex parte* applications made by the prosecution and not already disclosed to the accused. Todorović contends that the ICRC Decision would not have been made public had he not filed his First Motion, and that for that reason he should be told (a) whether any other such applications have been made, and (b) what orders have been made in relation to them.⁵⁴ The contention upon which this relief is sought is completely baseless. The circumstances in which the decision was made public have already been referred to.⁵⁵ Nor is there any warrant for ordering the disclosure sought in any event.

39. *Ex parte* applications are appropriately made in many different circumstances. They are warranted only where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application. Such applications are to some extent justified by Article 20.1 of the Tribunal's Statute, which requires Trial Chambers to ensure that a trial is fair and is

⁵⁴ Second Motion, Par 13.

⁵⁵ Paragraph 5 and footnote 10.

conducted with due regard for the protection of victims and witnesses.⁵⁶ Sight should not, however, be lost of the accompanying requirement that the trial also be conducted with full respect for the rights of the accused.

40. The Tribunal's Rules refer expressly or by necessary implication to various circumstances in which *ex parte* proceedings are appropriate. Rule 47 requires the prosecution to submit an indictment to a confirming judge for review before an arrest warrant may be issued. This is necessarily an *ex parte* application. Rule 50 requires the prosecution to return to the confirming judge in order to obtain leave to amend the indictment whenever leave to amend is sought (and if further confirmation is required) at any time before evidence is presented in the trial. This is an *ex parte* procedure.⁵⁷ The new Rule 54bis enshrines the procedure first discussed in the *Blaškić Subpoena Decision*⁵⁸ for hearing a State in camera and *ex parte* to enable submissions to be made in relation to national security interests concerning the issue of a subpoena. Rule 66(C) permits the prosecution to provide the Trial Chamber (and only the Trial Chamber) with information which should otherwise be disclosed to the defence but which is sought to be kept confidential. Rule 69 permits the Trial Chamber to consult with the Tribunal's Victims and Witnesses Section before determining the nature of the protective measures to be provided for a witness. This is clearly intended to be on an *ex parte* basis. As a matter of practice, and in accordance with common sense, applications by either party for protective orders are determined on an *ex parte* basis where the persons to be protected would otherwise be identified. Rule 77 permits any party to bring to the notice of a Trial Chamber the conduct of a person which may be in contempt of the Tribunal, but that person is called upon by the Trial Chamber in relation to that conduct only if the Trial Chamber has reason to believe that that person may thereby be in contempt. Such a procedure necessarily recognises that the notification to the Trial Chamber will be *ex parte*. Rule 108bis was recently amended to remove the entitlement of the party in the proceedings who was not a party to an application pursuant to Rule 54bis to be heard in a State Request for Review of the decision made in that application.

⁵⁶ See also Article 22 ("Protection of victims and witnesses").

⁵⁷ *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 20 May 1999, par 11; *Prosecutor v Talić*, Case IT-99-36-PT, Decision on Motion for Release, 10 Dec 1999, par 9.

⁵⁸ *Prosecutor v Blaškić*, Case IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997, at par 68.

41. But those provisions of the Rules do not exhaust the circumstances in which it may be appropriate to communicate with a Trial Chamber *ex parte*, or for the Trial Chamber to deal with a matter *ex parte*. Notwithstanding the request by Todorović for the scope of and guidelines for the use of *ex parte* motions to be defined, the Trial Chamber does not believe that it is either possible or appropriate to define the circumstances in which such motions are appropriate by any limiting definition. The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.

42. That is all that needs to be said, except to point out that a Trial Chamber must necessarily rely to a very large extent upon the assurances of counsel before entertaining an *ex parte* application. Experience suggests that counsel are sometimes over enthusiastic in their assurances that it is appropriate for a particular application to be heard *ex parte*. In the present case, the Trial Chamber was informed by the prosecution that the motion was made *ex parte* “since it seeks a ruling on a sensitive issue of whether an employee of the International Committee of the Red Cross (ICRC) may be called as a witness”,⁵⁹ and “out of an abundance of caution, [...] in order to avoid rendering hollow any subsequent decision of the Trial Chamber that may favour the ICRC”.⁶⁰ When the ICRC sought leave to appear as *amicus curiae*, it did not attempt to disillusion the Trial Chamber as to the basis which had been put forward by the prosecution for an *ex parte* and confidential hearing. It was on the basis put forward by the prosecution that the Trial Chamber made the order that it would be in the interests of justice for the hearing to be *ex parte* and in closed session.⁶¹ Subsequently, in support of an application for an oral hearing, counsel for the ICRC expressly recognised the prejudice to the defence where an *ex parte* hearing is held, but nevertheless submitted that, in the present case, the risk of such

⁵⁹ Prosecution’s Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 10 Feb 1999 (“Prosecution Motion”), par 1.

⁶⁰ *Ibid*, par 4. An *ex post facto* explanation given by the prosecution was that confidential *ex parte* proceedings had been sought “on behalf of the ICRC because the ICRC had emphatically argued that publicity arising merely from an application to the Tribunal would suffice to put at risk their activities in war effected regions”: Prosecution Response, par 8.

⁶¹ Scheduling Order and Order for Closed Session, 8 Mar 1999, p 2.

prejudice was slight “whereas the potential threat to ICRC operations is very great”.⁶² On its face, that submission appears to support the need for the decision to be given on a confidential basis.

43. Nothing further was said by the parties concerning the *ex parte* and confidential nature of the proceedings until the discussions leading to the release of the decision. The prosecution has suggested that the ICRC, by agreeing to the ICRC Decision being made public, seems to have reversed its insistence upon the confidentiality of the decision because of its success in that decision,⁶³ a suggestion denied by the ICRC.⁶⁴ It is unnecessary for the Trial Chamber to determine whether that suggestion is correct, but this *apparent* change of attitude by the ICRC does give rise to some concern that the Trial Chamber had mistakenly been led into the decision to proceed upon an *ex parte* and confidential basis.

44. That concern has now been overcome by the decisions to lift first the confidentiality attaching to the ICRC Decision and then the confidentiality attaching to the material filed in relation to the motion which led to that decision (subject to appropriate redactions). But the fact that the Trial Chamber may have been mistakenly led into its decision in this matter underlines the need both for counsel seeking to have an application heard upon an *ex parte* and confidential basis to exercise greater care in giving their assurances and for Trial Chambers to do so in accepting those assurances.

45. The Trial Chamber has already disclosed to the accused the existence of one other *ex parte* application by the prosecution.⁶⁵ However, notwithstanding the circumstances surrounding the confidentiality of the ICRC Decision already referred to, the Trial Chamber sees no reason to order the disclosure of the existence of any other *ex parte* motions made by the prosecution which have not already been disclosed to the accused.

⁶² *Ex parte and Confidential Request* by the International Committee of the Red Cross for an Oral Hearing Concerning the Proposal to Call a Former Employee of the International Committee of the Red Cross as a Prosecution Witness, 28 Apr 1999, par 5.

⁶³ Prosecutor’s Response to Motion Requesting Disclosure of Written Pleadings and Transcripts, 4 Nov 1999, par 5.

⁶⁴ Second ICRC Response, par 3 and footnote 1.

⁶⁵ *Ex Parte Request for Hearing on Defence Bribery, Intimidation of Witness, and Suborning Perjury of Witness*, 25 May 1999.

VII Disposition

46. For the reasons given –
- (1) in relation to the Motion filed by Stevan Todorović dated 5 October 1999, the Trial Chamber orders that his applications (a) to re-open the decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999, (b) to be heard when it is re-opened, (c) for the said Decision to be set aside, (d) for a definition of the scope of and guidelines for the use of *ex parte* motions, and (e) for a disclosure of any other *ex parte* motions made by the prosecution and not already disclosed to the accused are refused;
 - (2) in relation to the Motion filed by the International Committee of the Red Cross on 3 December 1999, the Trial Chamber orders that its application to re-open the Scheduling Order of 18 November 1999 is refused; and
 - (3) the Trial Chamber varies the Scheduling Order of 18 November 1999 by –
 - (a) directing that Stevan Todorović be provided with a copy of the materials filed by the prosecution in support of its Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness redacted to protect the identity of the proposed witness; and
 - (b) imposing the following restrictions upon the access granted by Order (1) of that Scheduling Order concerning the materials filed by the International Committee of the Red Cross in opposition to that Motion also redacted to protect the identity of the proposed witness:
 - (i) access to is to be exercised only by counsel for Stevan Todorović after he has given a written undertaking that he will not –
 - (A) reveal the contents of that material except in submissions made to the Trial Chamber in connection with the First Motion, or
 - (B) make any copy of that material unless permitted to do so by an order of the Trial Chamber; and
 - (ii) access is to be given to such counsel only in a room of the Tribunal provided by the Registry.

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

Dated this 28th day of February 2000,
At The Hague,
The Netherlands.



Judge Patrick Robinson
Presiding Judge

[Seal of the Tribunal]