



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-97-25/1-PT
Date: 30 June 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Jean-Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision : 30 June 2005

PROSECUTOR

v.

**MITAR RAŠEVIĆ
SAVO TODOVIĆ**

**DECISION ON SAVO TODOVIĆ' S DEFENCE MOTION FOR
ACCESS TO ALL CONFIDENTIAL AND UNDER SEAL
MATERIAL IN THE KRNOJELAC CASE**

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff

Counsel for the Accused Mitar Rašević :

Mr. Vladimir Domazet

Counsel for the Accused Savo Todović :

Mr. Aleksandar Lazarević

TRIAL CHAMBER II (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”);

BEING SEIZED of “Savo Todović’s Defence Motion for Access to All Confidential and Under Seal Material in the *Krnjelac* Case”, filed by Savo Todović’s counsel (“Defence for Mr. Todović”) on 30 May 2005 (“Motion”) to obtain access to four categories of material from *The Prosecutor v. Krnjelac* (“*Krnjelac* case”): a) all confidential material that were produced in support of the indictment, b) all closed and private session transcripts produced in the pre-trial, trial and the appellate proceedings¹, c) all confidential and under seal trial and appeal exhibits, including but not limited to, witness statements, documentary evidence, audio and video compact disks and tapes, photographs, Rule 92bis of the Rules of Procedure and Evidence (“Rules”) material, and other relevant tangible objects admitted as evidence by the Trial Chamber and the Appeals Chamber, and d) all confidential and under seal filings of the parties during pre-trial, trial and appellate proceedings²;

NOTING that the Defence for Mr. Todović also seeks access to any Rule 70 of the Rules material that is encompassed by the four aforementioned categories³;

NOTING that on 31 May 2005 the Office of the Prosecutor (“Prosecution”) filed its “Prosecution’s Response to Defence Motion for Access to All Confidential and Under Seal Material in the *Krnjelac* case” (“Prosecution Response”), in which it does not object to the Motion subject to the continued application of the protective measures imposed, acknowledging that the confidential material and filings discussed in the Motion which have not previously been disclosed by the Prosecution pursuant to its obligation under Rules 66 and 68 of the Rules, may be relevant to the Defence for Mr. Todović⁴;

CONSIDERING that a party is always entitled to seek material from any source to assist in the preparation of his case if the document sought has been identified or described by its general nature, and if a legitimate forensic purpose for such access has been shown⁵;

¹ It is not clear to the Chamber why the reference to “post-trial proceedings” is made in paragraphs 1 and 19 of the Motion.

² See Motion, paras. 1 and 19.

³ See Motion, para. 14.

⁴ See Prosecution Response, para. 2.

⁵ See *The Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 10; *The Prosecutor v. Tihomir Blaškić*, Case No.

CONSIDERING that “the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant’s case and the case from which such material is sought, *i.e.* if the cases stem from events alleged to have occurred in the same geographic area and at the same time”⁶;

CONSIDERING that the Accused Savo Todović was initially indicted with, among others, the Accused Milorad Krnojelac for crimes allegedly committed against Muslims and other non-Serb civilians, from April 1992 to August 1993, at the Foča Kazneno-Popravni, in the municipality of Foča, in Bosnia and Herzegovina;

CONSIDERING, moreover, that the proposed amended indictment against the Accused Savo Todović charges him with individual criminal responsibility for crimes against humanity (persecutions, torture, inhumane acts, murder, imprisonment, enslavement) and for violations of the laws or customs of war (torture, cruel treatment, murder, slavery), and that the Appeals Chamber found the Accused Milorad Krnojelac guilty of crimes against humanity (persecutions, torture, inhumane acts, murder, forced labour, deportation and expulsions) and of violations of the laws or customs of war (torture, cruel treatment, murder);

CONSIDERING, therefore, that, in the case at hand, there is a clear temporal, geographical and material overlap with the *Krnojelac* case;

CONSIDERING, however, that, in the interest of justice, confidential documents and transcripts of the *Krnojelac* case which are subject to Rule 70 must not be disclosed, unless the person or entity which provided them consents to such disclosure,

CONSIDERING, in addition, that, because *ex parte* submissions require the highest degree of confidentiality, they should not be disclosed, unless a legitimate forensic necessity is established,

CONSIDERING for the foregoing reasons that at this stage the Motion shows a legitimate forensic purpose justifying access to the requested confidential and under seal material, except for those subject to Rule 70 and *ex parte* submissions;

IT-95-14-A, “Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleading and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*”, 16 May 2002, para. 14; *The Prosecution v. Blaškić*, Case No. IT-95-14-A, “Decision on Paško Ljubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits”, 4 December 2002, para. 13.

⁶ See *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, “Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleading and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*”, 16 May 2002, para. 15; *The Prosecution v. Blaškić*, Case No. IT-95-14-A, “Decision on Paško Ljubičić’s Motion for Access to Confidential Material, Transcripts and Exhibits”, 4 December 2002, para. 13.

FOR THE FOREGOING REASONS

PURSUANT TO Rules 54, 70 and 75 of the Rules,

HEREBY PARTIALLY GRANTS the Motion, and

ORDERS AS FOLLOWS:

(1) For the purpose of this disposition:

i) the term “Prosecution” shall refer to the Prosecutor of the Tribunal and her staff,

ii) the term “Defence” shall refer to the Accused Savo Todović, his counsel, the staff of his counsel and any other person designated specifically by the Tribunal to defend Savo Todović. Each member of the Defence must be named expressly in a list drawn up by the counsel of Savo Todović. This list shall be filed under seal and *ex parte* within ten days of the date of this decision. Any addition to or withdrawal from this list of any of those persons properly designated to defend Savo Todović shall be indicated to the Chamber in the aforementioned manner within seven days,

iii) the term “third parties” shall refer to all persons, governments, organizations, entities, clients, associations and groups, other than the Judges and Chambers’ staff of the Tribunal, the Registry staff, the Prosecutor and the Defence. “Third parties” also include, without limitation, members of the families and friends of the Defence, agents of the Accused Savo Todović who are not designated to defend him, accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.

(2) The Prosecution shall determine whether any of the confidential material in the four categories listed above is subject to restrictions pursuant to Rule 70, and shall seek the consent of the providers of such material before disclosing such material;

(3) The Registry shall grant the Defence access to the following categories of *inter partes* confidential documents in the *Krnjelac* case only if and when the consent of the providers has been obtained by the Prosecution in accordance with the directions under paragraph (2), and subject to the protective measures defined below under paragraph (4):

(a) all confidential material produced in support of the indictment,

(b) all closed and private session transcripts produced at the pre-trial, trial and appellate proceedings,

(c) all confidential and under seal trial and appeal exhibits, including but not limited to witness statements, documentary evidence, audio and video compact disks and tapes, photographs, material admitted under Rule 92bis of the Rules, and other relevant tangible objects, admitted as evidence by the Trial Chamber and the Appeals Chamber,

(d) all confidential and under seal filings by the parties during pre-trial, trial and appellate proceedings;

Access to *ex parte* material may be granted by the Trial Chamber only upon a showing by the Defence for Mr. Savo Todović of a legitimate forensic purpose;

(4) The Defence shall:

(a) not disclose to any third party the names of witnesses, their whereabouts, copies of witness statements, the contents of the witness statements, transcripts of witness testimonies, the contents thereof, or any information which would identify the witnesses and would breach the confidentiality of the protective measures already in place unless such disclosure is considered essential to the preparation of Savo Todović's case, and only after the Trial Chamber has granted leave to disclose;

(b) not disclose to any third party, any documentary or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; and

(c) not contact any witness without first demonstrating to the Trial Chamber that the witness may materially assist Savo Todović's case in some identifiable way and that such assistance is not otherwise reasonably available to the Defence for Mr. Todović;

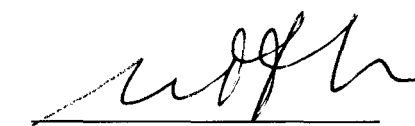
If, for the purpose of preparing Savo Todović's case, confidential material is disclosed to third parties in accordance with conditions set out in paragraph (a), the recipient of such confidential material must be informed that he or she is prohibited from copying, reproducing or publicising, in whole or in part, any non-public information or disclosing it to any other person, and further, that, any person who has been provided with such material must return it to the Defence as soon as the possession of such material is no longer necessary for the preparation of such case;

In addition to the measures set out in this disposition, any previous protective measures applied to documents and testimony shall remain in effect;

(5) The Motion is otherwise denied;

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

Done this 30th day of June 2005,
At The Hague,
The Netherlands



Judge Carmel Agius, Presiding

[Seal of the Tribunal]