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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 the Former Yugoslavia since 1991

Case No: IT-95-14-T

Date: 21 July 1998

Original: ENGLISH
FRENCH

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, presiding**
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registrar: **Mr. Jean-Jacques Heintz, Deputy-Registrar**

Order of: **21 July 1998**

PROSECUTOR

v.

TIHOMIR BLASKIĆ

SEPARATE OPINION OF JUDGE MOHAMED SHAHABUDDEEN

Office of the Prosecutor:
Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel of the Republic of Croatia:
Mr. David B. Rivkin Jr.
Mr. Lee A. Casey

SEPARATE OPINION OF JUDGE MOHAMED SHAHABUDDEEN

Today's order, with which I agree, comes out of extended proceedings held by this Trial Chamber in respect of an order made in this case on 30 January 1998 for disclosure of documents by the Republic of Croatia. In the course of those proceedings, certain arguments were advanced on behalf of the Republic. Some had merit. In my view, however, the major positions assumed by the Republic rested on a misunderstanding of the Statute of the Tribunal which could lead to miscarriage of the mission entrusted to the Tribunal by the Security Council. My particular misgiving is that that consequence could ensue if, as a result of the positions so taken, the competence of a Trial Chamber to order a State to disclose evidence to a party or to the Trial Chamber is too narrowly restricted to the jurisdiction of some national courts to issue a summons requiring a witness to produce documents to a court. The concern arises in the circumstances set out below.

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On 30 January 1998 an order for the disclosure of documents to the Office of the Prosecutor was issued to the Republic of Croatia by Judge Jorda. The order recited that it was made "[p]ursuant to Article 29 of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence", the former requiring cooperation by States, the latter providing that "a Judge or a Trial Chamber may issue such orders ... as may be necessary for the purpose of an investigation or for the preparation or conduct of the trial". Thus, under the latter provision, an order may be made either by a Judge or by a Trial Chamber.

On a review motion by the Republic of Croatia, on 26 February 1998 the Appeals Chamber suspended the order made by Judge Jorda, referred the matter to this Trial Chamber to hear arguments from the Republic and the parties with respect to the order, and directed the Chamber, when receiving those arguments, "to take into consideration the Appeals Chamber's decision of 29 October 1997".

It follows that the Appeals Chamber did not determine that the order made by Judge Jorda was, or was not, in conformity with the positions taken by that Chamber in its decision of 29 October 1997; it left that to be considered by this Chamber. The Republic of Croatia correctly submitted, and the prosecution accepted, that those positions were controlling. But those positions have to be interpreted. I shall consider their interpretation on two points of significance to the work of the Tribunal.

First, what are the applicable standards of identification of the required documents? Second, to the extent that the order made by Judge Jorda on 30 January 1998 may be regarded as requiring the State to say whether it had any of the documents and, if it had any, to disclose them, was the order correctly issued?

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As to the first point, concerning the standards of identification, relying on paragraph 32 of the decision of the Appeals Chamber of 29 October 1997, counsel for the Republic of Croatia contended before this Chamber that an order requiring the Republic to disclose

documents could only be made if the order described the *specific* documents required - if not by reference to title, date, author, or other particulars, in some other appropriate manner relating to the *specific* document. In his words, "the Appellate Chamber's order ... indicated that specific documents had to be requested". (Transcript, 22 April 1998, morning, pp. 4-5). This was restated by counsel in a letter of 2 June 1998 sent by him to the Legal Officer of the Chamber and copied to the prosecution. At page 4 of that letter, counsel contended that a qualification in the decision of the Appeals Chamber "stands for nothing more than that, in extraordinary circumstances, the specific documents sought by the Prosecutor need not be identified by title, date and author, but may be identified in some other appropriate manner". Counsel stressed, "However, *the Prosecutor must still identify specific documents, not categories of documents".* (Original italics).

The practical effect of that interesting stand (if correct) is that a Judge or a Trial Chamber cannot require a State to disclose documents which are only identifiable as members of a class, however clearly defined this may be and however readily the identification of its contents may be made. I am not persuaded that this follows from the decision of the Appeals Chamber of 29 October 1997.

The need for specificity is obvious, and there is much in national jurisprudence that supports it. As the books in some jurisdictions show, the test, which could be put in different ways, is in substance whether the document to be produced has been described with such precision as to enable the witness conveniently to find and bring it. I see nothing in the learning on the subject which requires this Trial Chamber to say that the test is not met where

an order directs the production of documents within a class which itself is defined with sufficient clarity to enable ready identification of the documents as members of the class.

The prohibition by the decision of the Appeals Chamber of 29 October 1997 was not against the use of "categories" as such, but against the use of "broad categories". What is broad is a relative thing. In the situation with which the Tribunal is concerned, account has to be taken of the peculiar size and nature of the cases and of the complex background against which they allegedly occurred. When account is taken of that factor, I do not see that a demand for "hundreds of documents" is mechanically excluded if identification by reference to a clearly defined category is readily possible. What is broad in one set of circumstances is not broad in another.

The Appeals Chamber's statement that "a party cannot request hundreds of documents" was followed by the words "particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial". The Appeals Chamber, as it indicated, was dealing with requests which were "unduly onerous". I view the prohibition of a request for "hundreds of documents" as illustratively related to that kind of situation and not as intended to be mechanically applicable in all cases.

As I understand it, then, the test is whether, in the particular circumstances, the category is broad in the sense that the number of documents sought is oppressive. If, in the particular circumstances, the number of documents sought is not oppressive, it matters little

that hundreds of documents are sought. Depending on what they are, hundreds of documents may well be capable of easy production, particularly in the electronic age; and hundreds of documents may well be needed by a party - either the prosecution or the defence. These cases are not simple; they sprawl over wide areas of law and fact. Thousands upon thousands of documents were required at Nuremberg; the comparative ease with which it was possible to provide them is not at the disposal of this Tribunal.

Provided then that it is not so broad as to be oppressive, it seems to me that a category which is sufficiently clear to enable ready identification of the specific documents which it comprises is admissible; use of categories in such a case is merely an abbreviated way of describing the particular documents. A requirement for specificity is the norm. But I think that the Appeals Chamber recognised that there can be circumstances in which the "Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89(B) and (D), to allow the omission of those details [to which it referred] if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars". (Judgement, 29 October 1997, par. 32(i)). In my view, that leaves open the possibility of identification of specific documents by reference to their membership of a category which is both clearly defined and not so broad as to be oppressive.

In sum, a party may be certain that a State has a class of documents without having any way of knowing what specific documents the class comprises. I am not persuaded that the judgement of the Appeals Chamber can be construed to mean that, unless particulars of each and every document are first given, it is never possible to reach the contents of that class. So

to hold is to shut out the party from the material. Potentially vital evidence thus becomes unavailable to the Trial Chamber. And that would materially diminish the capacity of the Tribunal to do its work and to fulfil its international responsibilities.

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As to the second point, the view is possible that Judge Jorda's order of 30 January 1998 was not inquiring from the State whether it had any documents of a certain kind; it was asserting that the State had *some* documents of a certain kind and was requiring it to disclose them. However, if the order could be regarded as inquiring whether the State had any documents of a certain kind, would that conflict with the positions taken by the Appeals Chamber? The Republic of Croatia submitted that it would.

In determining whether the Republic of Croatia was right, it is useful to have in mind the governing text. Article 29 of the Statute, in relevant part, states:

> "1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
> "2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
> ....
> (b) ... the production of evidence;".

On the basis of this structure, counsel for the Republic of Croatia formulated an argument in the following terms:

> "Although the OTP [Office of the Prosecutor] generally is free to frame non-binding requests for assistance as it likes under Article 29(1) of the International Tribunal's Statute, the 'binding order for document production' under Article 29(2) of the International Tribunal's Statute is an entirely different process. It was not designed as a general investigative tool, but allows the issuance of an order compelling a third-party to produce specific documents needed for trial - documents that the OTP presumably already *knows* to exist and to contain evidence relevant to issues before the

> Chamber". (Letter from counsel for Croatia to the Legal Officer of the Trial Chamber, 2 June 1998, p. 5, copied to the prosecution).

Two propositions are conveyed. First, the reference to "specific documents needed for trial" suggests that the contention is that the only documents to be produced are documents which are to be given in evidence to the Trial Chamber. A second proposition is this: although for purposes of investigation the Prosecutor is free, under Article 29(1) of the Statute, to request a State's cooperation in the disclosure of any documents on a subject even if the Prosecutor does not know whether any particular document exists, that is not permissible under Article 29(2); under this, production may be ordered only of documents which the Prosecutor "presumably already *knows* to exist and to contain evidence relevant to issues before the Chamber".

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As to the first proposition, that the documents to be produced must be limited to documents destined for production to the Trial Chamber, it may be argued that the words "the production of evidence" in Article 29(2)(b) of the Statute suggest such a limitation. But a wider meaning is indicated by the words "but not limited to" appearing in the chapeau of that paragraph, read in the light of the earlier reference therein to "any request for assistance" and of the reference in paragraph 1 to the "investigation" of possible crimes. The fruits of the investigation may be handed over to a party - either the prosecution or the defence - and not necessarily to the Trial Chamber. In this case, the order made by Judge Jorda correctly directed the Republic of Croatia to "disclose" the documents to the Office of the Prosecutor - not to produce them to the Trial Chamber. Other orders have directed disclosure by a State of documents to the defence.

The Tribunal is seated some distance away from the places where the relevant events, allegedly involving armed conflict, occurred. It does not have the facility available to national courts of ascertaining whether documentary material exists through searches conducted by an investigating agency endowed with coercive powers. It is difficult to appreciate how its work is to be done if the power to require production of evidence is not to extend to documents required by either side even if they are not eventually produced to the Trial Chamber.

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As to the second proposition, concerning the relative scope of the documents which may be sought under the two paragraphs of Article 29 of the Statute, the reason given by the Republic of Croatia for the suggested difference is the distinction which the Appeals Chamber drew "between two modes of interaction with the International Tribunal: the cooperative and the mandatory compliance". (Appeal Judgement, 29 October 1997, para. 31). Although, as mentioned below, both modes represent legal obligations, there is obviously a distinction between the specific character of one obligation and that of the other; but it is difficult to see what is there in the distinction which compels the consequence that production may be ordered under the mandatory mode only of documents which the Prosecutor "presumably already *knows* to exist and to contain evidence relevant to issues before the Chamber". The Prosecutor may not know that unless she is in the first instance in a position to acquire the knowledge compulsorily. The distinction between the cooperative and the mandatory modes is interesting, but not determinative of the question whether a State may be required to say if it has documents of a certain kind, and, if it has, to disclose them. The test is whether it is reasonably possible to do what is asked under the mandatory mode. If it is not, that is an

answer. If it is, it has to be done, subject to any valid security considerations; if it is not done, the failure is reportable to the Security Council.

And why should it be otherwise? States being explicitly required under the second paragraph of Article 29 of the Statute to "*comply* without undue delay with any *request* for *assistance*" (italics supplied), it is difficult to appreciate why, in making an order under that provision for the production of evidence, a Trial Chamber cannot simply ask a State to say if it has documents of a certain kind, and, if it has, to disclose them. The investigatory aspect of the power of a Trial Chamber of the International Tribunal to order "production of evidence" suggests that it is not correct to confine that power within the limits applicable to an ordinary summons to produce documents to a national court.

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Connected with the issue last examined is an important question concerning the legal status of the requirement to cooperate. Counsel for the Republic of Croatia suggested that there was a substantial juridical difference between the requirement to cooperate and the requirement to comply with a judicial order for the production of documents. He put it this way:

> "[W]e have to keep in mind that we are dealing here with a separate animal. A request for assistance can, indeed, be broad. It is something that is a matter of cooperation between the Prosecutor's Office and the State. All the State is required to do is basically use its best efforts to try to comply. An order is very, very different. An order, as the Appellate Chamber indicated, could result, if Croatia does not satisfy the order, in a report to the UN Security Council, suggesting that Croatia is in violation of its international obligations, which is a very serious matter". (Transcript, 22 April 1998, afternoon, p. 41).

If that recognises that the requirement to cooperate under Article 29(1) of the Statute is a legal obligation, I agree; if it does not, I disagree. In any event, I am not able to accept the implication that non-compliance with the requirement to cooperate is not reportable to the Security Council.

Article 29(1) of the Statute is neither hortatory nor gesticulatory: it forms part of an instrument which was adopted by the Security Council under Chapter VII of the Charter of the United Nations. Counsel for the Republic of Croatia, in his letter mentioned above, submitted that to "cooperate" is not to "obey". That is right. But the *requirement* to cooperate is an obligation, and that obligation has to be obeyed. A State may have no obligation to do a particular thing; but it certainly can have an obligation to cooperate by making its best efforts to see if the particular thing can be reasonably done. Violation of this obligation is reportable to the Security Council.

The Tribunal's Rules of Procedure and Evidence reflect this appreciation of the legal position. The conjoint effect of Rule 7*bis*(B) and Rule 8 is to make reportable to the Security Council a failure to comply with a request by the Prosecutor for certain information. This is so even though the request would only have been made pursuant to the general requirement to cooperate imposed by Article 29(1) of the Statute and was unsupported by a judicial order made under Article 29(2).

As has often been observed, the Tribunal is not aided by a police force. It is crucial to its capacity to function that the requirement for States to cooperate under Article 29(1) of the Statute is regarded as a legal obligation non-compliance with which is reportable to the Security Council whether or not recourse has also been made to the judicial machinery of paragraph 2 of that Article. This was why, in submitting the draft Statute to the Security Council, the Secretary-General of the United Nations said:

> "[T]he establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an *obligation to cooperate* with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with *requests* for assistance in the *gathering of evidence...*". (Report of the Secretary-General on the Statute, para. 125, with added emphasis).

That the Secretary-General went on to speak of effect having to be given to "orders necessary for the conduct of the trial" does not diminish the import of his wider statement about there being "an obligation to cooperate". The requirement to comply with judicial orders is built on the requirement to cooperate. Both are obligations in law.

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It was because of the foregoing considerations that the Presiding Judge, in one form or another, asked this question - and asked it more than once - during the hearing held by this Trial Chamber pursuant to the referral by the Appeals Chamber: Could the Republic of Croatia say if it had any of the documents included in certain categories? (Transcript, 22 April 1998, pp. 5-8).

If the Republic had none of the documents, that was an answer. Likewise, if the category was not clearly defined or was oppressively broad. To the extent that the Republic argued along these lines, there was some merit in its case. But, for the reasons set out above, there were important respects in which its objections were not correctly conceived.

In the result, I hold that, provided that a category is defined with sufficient clarity to permit of ready identification of its members and that it is not so broad as to be oppressive, a State may be ordered to say whether it has any documents within the category even if particulars of each document are not given, and, if it has, to produce them either to a party or to the Chamber, barring valid considerations of State security.

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

Mohamed Shahabuddeen

Dated this 21st day of July 1998
At The Hague
The Netherlands

[Seal of the Tribunal]