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-95-5/18-PT

Date: 5 October 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Order of: **5 October 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR ORDER PURSUANT TO RULE 70 (THE NETHERLANDS)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the Netherlands

via Ministry of Foreign Affairs
Ambassador for International Organisations

The Accused

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "Motion for Order Pursuant to Rule 70: The Netherlands", filed on 30 September 2009 ("Motion"), and hereby renders its decision thereon.

I. Submissions

1. In his Motion, the Accused requests the Trial Chamber to issue an order pursuant to Rules 54 and 70 of the Rules of Procedure and Evidence of the Tribunal ("Rules") to the effect that the provisions of Rule 70 should apply to a number of documents which have been requested by the Accused from the Government of the Netherlands ("Dutch Government").[1]

2. Currently pending before the Chamber is the Accused's "Motion for Binding Order: Government of the Netherlands", filed publicly on 11 September 2009 ("Binding Order Motion"), where he requests the Trial Chamber to issue a binding order pursuant to Rule 54 *bis* of the Rules requiring the Dutch Government to produce a number of documents.[2] On 15 September 2009, the Chamber invited the Dutch Government to respond to the Binding Order Motion, by 29 September 2009.[3] On that day, the Dutch Government filed a response in which it noted that it was willing to provide some of the requested documents to the Accused.[4] Indeed, on 29 September, the Accused was informed by the Dutch Government that it was willing to disclose some documents to him, on the condition that he file a Rule 70 motion, requesting that Rule 70 conditions attach to them.[5] As a result, the Accused filed the present Motion.[6] The Office of the Prosecutor has indicated that it does not intend to respond to the Motion.

II. Applicable Law

3. Rule 70 of the Rules creates an incentive for co-operation by States, organisations, and individuals, by allowing them to share sensitive information with the Tribunal "on a confidential

[1] Motion, paras. 1–3.
[2] Binding Order Motion, para. 1.
[3] Invitation to the United States of America, 15 September 2009.
[4] Letter from the Government of the Kingdom of the Netherlands to the Tribunal, 29 September 2009.
[5] Motion, Annex A.
[6] The Accused notes in the Motion that he is not willing to withdraw his Binding Order Motion as the Dutch Government has not agreed to disclose to him all the documents he requested. Motion, para. 4.

basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected".[7]

4. Paragraphs (B) through (E) of Rule 70 relate to material in the possession of the Office of the Prosecutor, and paragraph (F) provides for the Trial Chamber to order that the same provisions apply *mutatis mutandis* to specific information in the possession of the Defence.

5. The Appeals Chamber has interpreted Rule 70(F) as "enabling the Defence to request a Trial Chamber that it be permitted to give the same undertaking as the Prosecution to a prospective provider of confidential material that that material will be protected if disclosed to the Defence", and has held that the purpose of the Rule is "to encourage third parties to provide confidential information to the defence in the same way that Rule 70(B) encourages parties to do the same for the Prosecution",[8] a purpose which is served by explicitly affirming the applicability of Rule 70 to confidential material provided to the Defence.[9]

III. Discussion

6. The Trial Chamber considers that it must be in a position to assess whether the provider has consented to produce the information requested by the Accused. Having regard to Annex A of the Motion, the Trial Chamber is satisfied that the Dutch Government has consented to provide certain information responsive to the Accused's request, so long as there is an order from the Chamber that applies Rule 70 to that information.

7. In addition, as pointed out by the Accused, the documents that are to be produced under these conditions may, in turn, serve to narrow or eliminate the issues relating to the Binding Order Motion currently pending before the Chamber.[10]

8. The Trial Chamber recalls that by granting the Motion and making an order under Rule 70(F) it does not make a determination as to the relevancy of the information in the present case.

IV. Disposition

9. Accordingly, the Trial Chamber, pursuant to Rules 54 and 70 of the Rules, hereby:

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[7] *Prosecutor v. Milošević*, Case Nos. IT-02-54-AR108*bis* & IT-02-54-AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19.

[8] *Prosecutor v. Orić*, Case No. IT-03-68-AR73, Public Redacted Version of the Decision on Interlocutory Appeal Concerning Rule 70, 26 March 2004 ("*Orić* Decision"), para. 6.

[9] *Orić* Decision, paras.6–7.

[10] Motion, para. 4.

a. **GRANTS** the Motion; and

b. **ORDERS** that the provisions of Rule 70 of the Rules shall apply *mutatis mutandis* to any information voluntarily provided by the Dutch Government to the Accused.

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

Judge O-Gon Kwon, ~~Presiding~~

Dated this fifth day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]