



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 FOURTH MOTION FOR ORDER
PURSUANT TO RULE 70 (UNITED STATES OF AMERICA)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the United States of America

via the Embassy of the United States of America
to The Netherlands, The Hague

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 “Fourth Motion for Order Pursuant to Rule 70: United States of America”, filed on 28 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 United States of America (“U.S. Government”).¹

2. Currently pending before the Chamber is the Accused’s “Motion for Binding Order: Government of the United States of America”, 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 U.S. Government to produce ten categories of documents.² On 15 September 2009, the Chamber invited the U.S. Government to respond to the Binding Order Motion, by 29 September 2009.³ On that day, the U.S. Government filed a “Response of the United States of America to the Trial Chamber’s 15 September 2009 ‘Invitation to the United States of America’” (“Response”). In the Response, the U.S. Government notes that it was at the time of the filing of the Binding Order Motion, and subsequently, in the midst of co-operative discussions with the Accused.⁴ Indeed, on 10 September, the Accused was informed by the U.S. 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 In addition, on 25 September 2009, representatives of the U.S. Government met with the Accused’s legal adviser where further negotiations were held and the same conditions for disclosure reiterated.⁶ As a result, the Accused filed the present Motion.⁷ The Office of the Prosecutor has indicated that it does not intend to respond to the Motion.

¹ Motion, paras. 1–3.

² Binding Order Motion, para. 1, Annex A.

³ Invitation to the United States of America, 15 September 2009.

⁴ Response, p. 1.

⁵ Motion, Annex A.

⁶ Response, pp. 1–2.

⁷ The Accused notes in the Motion that he is not willing to withdraw his Binding Order Motion as the U.S. Government has not agreed to disclose to him all the documents he requested. Motion, para. 4.

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 basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information’s sources will be protected”.⁸

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”,⁹ a purpose which is served by explicitly affirming the applicability of Rule 70 to confidential material provided to the Defence.¹⁰

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. Upon receipt of the Response from the U.S. Government, and having regard to Annex A of the Motion, the Trial Chamber is satisfied that the U.S. 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 the issues relating to the Binding Order Motion currently pending before the Chamber.¹¹

⁸ *Prosecutor v. Milošević*, Case Nos. IT-02-54-AR108bis & IT-02-54-AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19.

⁹ *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.

¹⁰ *Orić Decision*, paras.6–7.

¹¹ Motion, para. 4.

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:

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 U.S. 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]