



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: 12 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

Decision of: 12 October 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S APPLICATION FOR BINDING
ORDER PURSUANT TO RULE 54 *BIS*
(UNITED STATES OF AMERICA)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The United States of America

via 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 “Motion for Binding Order: Government of the United States of America”, filed on 11 September 2009 (“Motion”), and hereby issues this decision thereon.

I. Background and Submissions

1. On 11 September 2009, the Accused filed his Motion requesting that the Trial Chamber issue, pursuant to Article 29 of the Statute of the International Tribunal (“Statute”) and Rule 54*bis* of the Rules of Procedure and Evidence (“Rules”), a binding order to the Government of the United States of America (“U.S. Government”) for the production of ten categories of documents.¹ The materials sought relate to several issues, namely (i) alleged arms smuggling by various states and the delivery of arms to the Bosnian Army (“ABiH”) through the United Nations Protection Force (“UNPROFOR”) troops; (ii) the shelling of civilians in Sarajevo; (iii) the presence and activities of foreign Muslims fighters in Bosnia; and (iv) signal intelligence monitoring in Srebrenica.² The Accused submits that the U.S. Government is in possession of relevant materials and bases his claims on a book titled “Intelligence and the War in Bosnia 1992–1995”, which was written by Cees Wiebes as part of a larger report on the events in Srebrenica commissioned by the Dutch Government and published by the Netherlands Institute for War Documentation in 2002.

2. Prior to the filing of the Motion, the Accused sent a letter to the U.S. Government on 2 June 2009 in which he requested copies of a number of items. Following this letter, “a series of correspondence took place between the [U.S. Government] and [the Accused]” in which the former indicated that it was preparing a response.³ However, on 11 September 2009, the Accused filed the Motion, stating that, in light of the imminent start of his trial, he “[could] no longer afford to wait”.⁴

3. Following an invitation issued on 15 September 2009 by this Trial Chamber to the U.S. Government to assist the Chamber in providing a response to the Motion,⁵ the U.S. Government filed, on 29 September 2009, the “Response of the United States of America to the Trial Chamber’s 15 September 2009 ‘Invitation to the United States of America’” (“Response”), noting that “the

¹ Motion, para. 1, Annex A.

² Motion, para. 2-15

³ Motion, para. 16.

⁴ Motion, paras. 16–18, 33–34.

⁵ Invitation to the United States of America, 15 September 2009.

threshold requirement for filing a Rule 54*bis* motion” is absent, as it is still co-operating with the Accused.⁶ The U.S. Government further submits that:

Not only has the United States not declined to lend the requested support, we have affirmatively offered to provide some documents in response to the request, and are prepared to continue searching for more. We are also prepared to engage with Mr. Karadžić and his legal team in an effort to discuss and resolve any and all outstanding questions and concerns. For these [reasons], we respectfully request that the Trial Chamber dismiss the pending Motion.⁷

4. It is further explained in the Response that, on 25 September 2009, representatives of the U.S. Government met with the Accused’s legal adviser. Further negotiations were held and the U.S. Government informed the Accused that it was willing to disclose some documents to him, on the condition that he files an application to the Chamber requesting that Rule 70 conditions attach to them.⁸

5. On 2 October 2009, the Accused filed his “Motion for Leave to Reply and Reply: Motion for Binding Order to United States of America” (“Reply”), seeking leave to reply and submitting that he needs the documents before the trial commences so as to be able to use them in his opening statement and to prepare for cross examination of Prosecution witnesses.⁹ The Accused then reiterates his request that the Trial Chamber grant his Motion and set a deadline for the U.S. Government “to produce all requested documents it is willing to voluntary [*sic*] produce, and to file objections to all requests for which it declines to produce material”.¹⁰

6. On 5 October 2009, the Trial Chamber, seized of an application from the Accused for a Rule 70 order, issued its “Decision on the Accused’s Fourth Motion for Order Pursuant to Rule 70 (United States of America)” (“Rule 70 Decision”) ordering that the provisions of Rule 70 should apply to any information voluntarily provided by the U.S. Government to the Accused.¹¹

II. Applicable Law

7. Article 29 of the Statute obliges states to “co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian

⁶ Response, p. 2.

⁷ Response, p. 3.

⁸ Response, pp. 1–2.

⁹ Reply, para. 4.

¹⁰ Reply, para. 8.

¹¹ Rule 70 Decision, para. 9.

law.” This obligation includes the specific duty to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] ... the service of documents.”¹²

8. Rule 54 of the Tribunal’s Rules provides that “[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.

9. Under Rule 54 *bis*, a party can request a Chamber to issue an order to a state for the production of documents or information. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely, (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents;¹³ (ii) the requested documents must be relevant and necessary before a Chamber can issue an order for their production;¹⁴ (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;¹⁵ and (iv) the request cannot be unduly onerous upon the state.¹⁶

10. With respect to (iii) above, it has been held that a party cannot request an order for the production of documents without having first approached the state possessing the documents. The Rule requires the requesting party to explain the steps that have been taken to secure the state’s co-operation.¹⁷ The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily.¹⁸ Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.¹⁹

¹² Article 29(2)(c).

¹³ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006 (“*Milutinović Decision*”), paras. 14–15. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1995, (“*Blaškić Review*”), para. 32; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108bis, 9 September 1999, (“*Kordić Decision*”), paras. 38–39.

¹⁴ Rule 54 *bis* (A)(ii); *Blaškić Review*, paras. 31, 32(ii); *Kordić Decision*, para. 40; *Milutinović Decision*, paras. 21, 23, 25, 27.

¹⁵ Rule 54 *bis* (A)(iii); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić Amended Rule 54 *bis* Application, 29 September 2006 (“*Sreten Lukić Decision*”), para.7.

¹⁶ *Blaškić Review*, para. 32(iii); *Kordić Decision*, para. 41.

¹⁷ Rule 54 *bis* (A)(iii).

¹⁸ *Sreten Lukić Decision*, para.7.

¹⁹ *Milutinović Decision*, para. 32.

III. Discussion

11. As can be seen from the Response by the U.S. Government, the main issue here is one of voluntary co-operation by a state. As stated above, binding orders can be issued only after the applicant has made a reasonable effort to persuade the state to provide the requested information voluntarily, and then following the state's refusal to do so.²⁰ In light of the U.S. Government's willingness to locate and produce the requested documents, as demonstrated by the Rule 70 Decision, the Chamber considers that the Accused has in fact managed to secure the U.S. Government's voluntary assistance. The fact that he is not yet in possession of any documents is more a reflection of the large amount of material which he requested for the first time on 2 June 2009, some two months before the filing of his Motion, than an illustration of the U.S. Government's failure to respond to his requests in a timely manner. Furthermore, it is highly likely that, following the recent issuance of the Rule 70 Decision, some of the documents requested will be produced to the Accused before his trial commences. Accordingly, given that the U.S. Government is co-operating with the Accused, the Chamber is of the view that the Accused's Motion must fail on this ground alone. Issuing a binding order in these circumstances is premature as the U.S. Government is still in the process of searching for the requested documents. Furthermore, the Chamber considers that it is in the interests of all parties involved that requests for documents are, if possible, dealt with on a voluntary basis, rather than entering into potentially lengthy Rule 54 *bis* litigation.

12. The Chamber notes the Accused's assertion that he needs to have the relevant documents before the trial commences so that he can make his opening statement and cross-examine Prosecution witnesses. The Accused cites to no authority which provides that all Rule 54 *bis* litigation has to be completed before the start of the substantive trial in order to enable defence counsel or a self-represented accused to cross-examine witnesses or make an opening statement. This would be impossible, as the Accused is well aware, since Rule 54 *bis* litigation is often a time-consuming and arduous process that may last for a number of years and will often take place simultaneously with the substantive trial.²¹ Indeed, it is for that reason that states should be contacted with requests for documents as early as possible in a particular case. The Chamber notes,

²⁰ *Milutinović* Decision, para. 32.

²¹ In the *Slobodan Milošević* case, the Rule 54 *bis* litigation between the Prosecution and the Federal Republic of Yugoslavia (as it was then) started in 2002 and was still ongoing at the time of the termination of the case in 2006. See *Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-T, Prosecution's Application for an Order Pursuant to Rule 54 *bis* Directing the Federal Republic of Yugoslavia to Comply With Outstanding Requests for Assistance, 13 December 2002, paras. 1-4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Terminating the Proceedings, 14 March 2006. In the *Milutinović* case, the Rule 54 *bis* litigation lasted some four years, culminating with the *Milutinović* Decision. See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, General Ojdanić's Application for Orders to NATO and States for Production of Information, 13 November 2002.

however, that the Accused's first request to the U.S. Government for a large number of documents was made almost a year after his arrest and some two months before the Motion was filed. Accordingly, he cannot now make an argument that, because the U.S. Government has not yet produced the documents requested, the Trial Chamber should issue a binding order and/or set a deadline for the U.S. Government to do so. In any event, even if unable to obtain all or any requested documents prior to the start of the trial, the Accused will have an opportunity to use those provided to him at any time during the trial, so long as they satisfy the requirements of Rule 89 of the Rules.

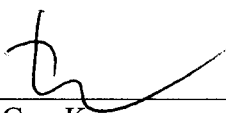
13. Having said that, the Chamber notes that the Accused's trial is due to start on 21 October 2009.²² The Chamber also recalls that the completion of the work of the Tribunal within a reasonable time is a matter of great importance which requires that all Governments should take urgent steps to comply with their duty to co-operate with the Tribunal in its work, including with the defence and self-represented accused who are investigating issues relevant to their cases. For that reason, the Chamber encourages the U.S. Government to do its best to complete its search and inform the Accused of the results as soon as possible.

IV. Disposition

14. For the reasons above, the Trial Chamber, pursuant to Article 29 of the Statute, and Rule 54 *bis* of the Rules, hereby:

- (a) **GRANTS** leave to the Accused to reply to the Response from the Government of United States of America, and accepts the already submitted reply;
- (b) **DENIES** the Motion, without prejudice.

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



 Judge O-Gon Kwon
 Presiding

Dated this twelfth day October 2009
 At The Hague
 The Netherlands

[Seal of the Tribunal]

²² Pre-Trial Conference, T. 465 (6 October 2009).