



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-T

Date: 6 May 2011

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 6 May 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S THIRD MOTION FOR BINDING ORDER
(BOSNIA AND HERZEGOVINA)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Bosnia and Herzegovina

via the Embassy of Bosnia and Herzegovina to
The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 “Third Motion for Binding Order: Government of Bosnia”, filed on 5 April 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a binding order to the Government of Bosnia and Herzegovina (“BiH”), pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of its Rules of Procedure and Evidence (“Rules”), requiring it to provide him with the transcripts or recordings of the testimony of witnesses Eset Muračević and Mehmed Musić (“Witnesses”) in certain cases before the BiH War Crimes Chamber and the Cantonal Court of Sarajevo (“Documents”).¹

2. The Accused submits that the Motion meets the requirements of Rule 54 *bis* because “[h]is request is specific, calls for relevant and necessary documents, and he has taken steps to obtain the State’s assistance before filing the motion”.² With regard to the specificity of the Documents, the Accused submits that he has identified the specific dates and the courts in which the Witnesses testified “making the retrieval of the requested material simple”.³

3. The Accused contends that the Motion also meets the relevance and necessity requirements for the issuance of a binding order. He submits that the Witnesses testified in cases before the BiH War Crimes Chamber and Cantonal Court of Sarajevo concerning the events which were also the subject of their testimony in his trial.⁴ He also argues that the prior statements and testimony of a witness are important tools in determining their credibility.⁵

4. The Accused also sets out the efforts he has made to obtain these Documents voluntarily. On 8 March 2011, he sent a letter to BiH in which he requested the Documents.⁶ On 29 March 2011, BiH filed correspondence (“First Correspondence”) stating that “the authorities of Bosnia and Herzegovina can comply with the request of the accused after the Trial Chamber

¹ Motion, para. 1.

² Motion, para. 6.

³ Motion, para. 8.

⁴ Motion, paras. 10, 13.

⁵ Motion, para. 11.

⁶ Motion, para. 4.

issues an order or decision about the necessity to obtain the requested evidence”.⁷ The Accused then filed the Motion.

5. The Chamber invited BiH to respond to the Motion, specifying that it encourages voluntary co-operation between BiH and the Accused in this matter, and inviting BiH to provide reasons why it is unable to so co-operate, should that be the case.⁸ On 21 April 2011, BiH filed correspondence (“Second Correspondence”) stating that it is of the opinion that “the Trial Chamber will assess the need to obtain the aforementioned evidence and will issue an order only if it is justified, based on which order the Court of Bosnia and Herzegovina and the Sarajevo Cantonal Court will take action”.⁹

II. Applicable Law

6. 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 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”.¹⁰

7. 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;¹¹ (ii) the requested documents must be “relevant to any matter in issue” and “necessary for a fair determination of that matter” before a Chamber can issue an order for their production;¹² (iii) the applicant must show that he has made a reasonable effort to persuade the state to provide the requested information voluntarily;¹³ and (iv) the request cannot be unduly onerous upon the state.¹⁴

⁷ Correspondence, p. 1.

⁸ See Invitation to Bosnia and Herzegovina, 11 April 2011, pp. 3–4.

⁹ Second Correspondence, p. 2.

¹⁰ Article 29(2)(c) of the Statute.

¹¹ *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* US 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 1997 (“*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.

¹² Rule 54 *bis* (A) (ii) of the Rules; *Blaškić* Review, paras. 31, 32(ii); *Kordić* Decision, para. 40; *Milutinović* US Decision, paras. 21, 23, 25, 27.

¹³ Rule 54 *bis* (A) (iii) of the Rules; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić Amended Rule 54 *bis* Application, 29 September 2006, para.7.

¹⁴ *Blaškić* Review, para. 32 (iii); *Kordić* Decision, para. 41.

III. Discussion

8. In the Motion, the Accused identifies the specific cases in which the Witnesses testified in the BiH War Crimes Chamber and the Cantonal Court of Sarajevo and the Documents requested pertain to those specific cases.¹⁵ The Chamber is satisfied that the Documents requested by the Accused are identified with sufficient precision and do not constitute a broad category.

9. With respect to the relevance and necessity requirement for the issuance of a binding order, the Accused submits that the Witnesses' testimony in the BiH War Crimes Chamber and the Cantonal Court of Sarajevo concerned the events which were also the subject of their testimony in the present case.¹⁶ The Chamber is satisfied that the previous testimony of a witness in this case, pertaining to the same events as those for which the Accused is charged with responsibility, is relevant to the present proceedings insofar as it may go to the credibility of that witness and/or provide information pertaining to those events which is favourable to the Accused. Indeed, had that testimony been given in prior proceedings before this Tribunal, the Office of the Prosecutor would have been obliged to provide it to the Accused. The Chamber is similarly satisfied that it is necessary for a fair determination of the issue of the credibility of the Witnesses that their prior testimony before the BiH War Crimes Chamber and the Cantonal Court of Sarajevo be made available to the Accused.

10. Furthermore, given the limited number of cases in which the Witnesses testified, the request for the Documents is not unduly onerous on BiH. The Chamber is also satisfied that the Accused has made reasonable efforts to obtain the Documents voluntarily from BiH but has been unable to do so.

11. The Chamber further notes that in both the First and the Second Correspondence, BiH specifically requests the Chamber to issue a decision on the Motion. It is highly regrettable that BiH has not voluntarily co-operated with the Accused. The Chamber reiterates, once again, the importance of BiH's duty to co-operate with the Tribunal, which includes the Accused and his defence team, and that the Chamber should only be involved as a method of last resort.

¹⁵ Motion, para. 1.

¹⁶ Motion, para. 10.

IV. Disposition

12. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute and Rules 54 and 54 *bis* of the Rules, hereby,

(a) **GRANTS** the Motion, and

(b) **ORDERS** BiH to provide to the Accused the Documents identified in the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this sixth day of May 2011
At The Hague
The Netherlands

[Seal of the Tribunal]