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-T

Date: 30 June 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: **30 June 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR BINDING ORDER (THE KINGDOM OF SAUDI ARABIA)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the Kingdom of Saudi Arabia

via the Embassy of The Kingdom of Saudi Arabia 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 "Motion for Binding Order: Saudi Arabia", filed on 18 January 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion the Accused requests the Trial Chamber to issue a binding order to the Kingdom of Saudi Arabia ("Saudi Arabia"), 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 numerous categories of documents.[1] The documents fall into two broad categories: first, documents that pertain to certain financial transactions between July 1992 and August 1995 ("Financial Documents")[2] and second, documents that pertain to either meetings and/or discussions between members of the Saudi Arabian government or members of the royal family and United States ("U.S.") and Bosnian officials between October 1992 and September 1995, or documents in the possession of the Saudi Arabian Military Intelligence Service or Secret Service ("Other Documents").[3] The Accused claims that both these categories are related to the issue of arms delivery into Bosnia and Herzegovina ("BiH").[4]

2. The Accused submits that the Motion meets the requirements of Rule 54 *bis* because his request is specific, calls for relevant and necessary documents, and he took steps to obtain the assistance of Saudi Arabia before filing the Motion.[5]

3. With regard to the specificity of the requested documents, the Accused explains that he has limited his request to "identified transactions which include the dates, amounts, and individual providing the funds".[6] The Accused submits that the Motion also meets the relevance and necessity requirements for the issuance of a binding order. With regard to the former, he explains that the information requested from Saudi Arabia goes directly to the issue of arms smuggling into Srebrenica and in particular the involvement of UN personnel in arms smuggling.[7] He hopes to show that the "purpose of these large financial transactions was to purchase and smuggle arms for the Bosnian Muslims" and that UN member states, such as Saudi

[1] Motion, para. 1.
[2] Motion, para. 1(A)–(G).
[3] Motion, para. 1(H)–(K).
[4] Motion, paras. 4–8, 17.
[5] Motion, para. 12.
[6] Motion, para. 14.
[7] Motion, para. 17.

Arabia, were significantly participating in the arms smuggling.[8] The Accused does not specify separate reasons as to the necessity of the requested documents. In addition, the Accused submits that he has requested the material from Saudi Arabia and has received no response.[9]

4. Having been invited to respond to the Motion,[10] Saudi Arabia filed confidential correspondence on 1 February 2011 ("First Request") requesting an extension of time until 31 July 2011 to respond to the Motion.[11] The Chamber granted an extension until 31 May 2011.[12]

5. On 31 May 2011, Saudi Arabia filed another correspondence ("Second Request") in which it requested an extension of the deadline to respond to the Motion "for a period of not less than a month".[13] On 6 June 2011, Saudi Arabia filed the "Response of the Kingdom of Saudi Arabia to the Trial Chamber's 25 January 2011 'Invitation to the Kingdom of Saudi Arabia'" ("Response") requesting the Chamber to deny the Motion on the basis that it does not meet the requirements of Rule 54 *bis*.[14] In particular, and relying on this Trial Chamber's previous decisions on other binding order motions filed by the Accused, Saudi Arabia submits that the request is not sufficiently specific, and that the documents sought are neither relevant nor necessary for a fair determination of any matter at issue in this case.[15] Further, Saudi Arabia submits that the requests made in the Motion are unduly onerous.[16]

6. Given that the filing of the Response renders the Second Request moot, the Chamber will not issue a decision in relation thereto and will instead proceed to dispose of the Motion.

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 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".[17]

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[8] Motion, para. 17.
[9] Motion, para. 20.
[10] *See* Invitation to the Kingdom of Saudi Arabia, 25 January 2011.
[11] First Request, p. 1.
[12] *See* Decision on Request from the Government of the Kingdom of Saudi Arabia, 17 February 2011.
[13] Second Request, p. 1.
[14] Correspondence, p. 1.
[15] Correspondence, p. 1.
[16] Correspondence, p. 1.
[17] Article 29(2)(c) of the Statute.

8. 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;[18] (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;[19] (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;[20] and (iv) the request cannot be unduly onerous upon the state.[21]

9. With respect to (i) above, the Appeals Chamber has held that "a category of documents may be requested as long as it is defined with sufficient clarity to enable ready identification by a state of the documents falling within that category".[22] If the requesting party is unable to specify the title, date, and author of the requested documents, but is able to identify the requested documents in an appropriate manner, a Trial Chamber may, in consideration of the need to ensure a fair trial, allow the omission of those details if "it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing those particulars".[23]

10. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.[24] In determining whether the documents sought by an applicant are relevant, Chambers have considered criteria such as whether they relate to the "most important" or "live" issues in the case,[25] or whether they relate to the "defence of the accused".[26] As for the necessity requirement, it obliges the applicant to show that the requested materials are necessary for a fair determination of a matter at trial. The applicant need not make an additional showing of the actual existence of the requested materials, but is only required to

[18] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.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-AR108*bis*, 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-AR108*bis*, 9 September 1999 ("*Kordić* Decision"), paras. 38–39.

[19] 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.

[20] 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 ("*Sreten Lukić* Decision"), para.7.

[21] *Blaškić* Review, para. 32 (iii); *Kordić* Decision, para. 41.

[22] *Milutinović* US Decision, para. 15; *Blaškić* Review, para. 32; *Kordić* Decision, para. 39.

[23] *Blaškić* Review, para. 32.

[24] *Kordić* Decision, para. 40.

[25] *See e.g., Prosecutor v. Milutinović et al*, Case No. IT-05-87-PT, Decision on Second Application of General Ojdanić for Binding Orders pursuant to Rule 54*bis*, 17 November 2005 ("Second *Ojdanić* Decision"), paras. 21, 25; *Prosecutor v. Milutinović et al*., Separate and concurring opinion of Judge Iain Bonomy in the Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 23 March 2005.

[26] *See e.g., Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Requests by the Accused for Trial Chamber II to issue Subpoena Orders, 3 June 2005, p. 4; *Sreten Lukić* Decision, para. 13 (*see* footnote 45).

make a reasonable effort before the Trial Chamber to demonstrate their existence.[27] Furthermore, the applicant is not required to make a showing that all other possible avenues have been exhausted but simply needs to demonstrate "either that: [he or she] has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or that the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54 *bis* order".[28]

11. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A) (iii) requires the applicant to explain the steps that have been taken to secure the state's co-operation. The 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.[29] 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*.[30]

12. Finally, with regard to (iv) above, the Appeals Chamber has held that "the crucial question is not whether the obligation falling upon States to assist the Tribunal in the evidence collecting process is onerous, but whether it is unduly onerous, taking into account mainly whether the difficulty of producing the evidence is not disproportionate to the extent that process is strictly justified by the exigencies of the trial".[31]

III. Discussion

13. The Chamber recalls its 19 May 2010 decision on the Accused's binding order motion relating to the Federal Republic of Germany ("Germany Decision"), where it found, by majority, Judge Kwon dissenting, that "documents related to the smuggling of arms to Srebrenica are necessary for the determination of the Accused's state of mind in July 1995, as well as to the Chamber's determination of the general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with responsibility".[32] The Accused relies on this Decision to argue that the documents he now seeks in the Motion go "directly" to those issues.[33]

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[27] *Milutinović* US Decision, para. 23.
[28] *Milutinović* US Decision, para. 25.
[29] *Sreten Lukić* Decision, para.7.
[30] *Milutinović* US Decision, para. 32.
[31] *Kordić* Decision, para. 38; *Blaškić* Review, para. 26.
[32] Germany Decision, para. 22.
[33] Motion, para. 17.

i. *Financial Documents*

14. The Accused submits that the records of financial transactions from Saudi Arabia will show that this money was used to purchase and smuggle arms to the Bosnian Muslims.[34] The Financial Documents requested pertain to financial transactions made by certain people or organisations in Saudi Arabia to the bank account of a non-governmental organisation, the Third World Relief Agency ("TWRA"), in Vienna, Austria, between 1992 until 1995.[35] None of the financial transactions provide any geographical link to the territory of BiH and more specifically to the issue of whether arms were smuggled into Srebrenica in 1995. Further, many of these financial transactions are records of financial donations to the TWRA in 1992 and 1993, and therefore are temporally removed from the issues deemed relevant to this case by the majority.[36] Other than stating that the money was most likely used to buy weapons for Bosnian Muslims, the Accused makes no further connection between the TWRA and the specific issue of alleged arms smuggling into Srebrenica in early-1995. Furthermore, despite saying that the Financial Documents also go "directly" to the issue of UN personnel's involvement in arms smuggling, the Accused makes no connection between the TWRA and UN personnel. The Chamber, therefore, finds that the Financial Documents are not relevant to the issue of the alleged arms smuggling into Srebrenica in 1995 and thus not necessary for a fair determination of this trial.

15. The Chamber notes that the Accused has previously been reminded to limit his request for documents to those which are geographically and temporally linked to relevant issues in his case.[37] In particular, the Chamber recalls its 10 May 2011 decision on the Accused's second binding order motion relating to the Islamic Republic of Iran ("Iran Decision"), where the Accused requested similar documents pertaining to a contract for the alleged sale of ammunition from Iran and the eventual delivery of this ammunition into Croatia.[38] The Chamber found that these documents do not pertain to the alleged arms smuggling into Srebrenica in early 1995 and thus are not relevant to the issue of whether Srebrenica was militarised or not in 1995 or the Accused's state of mind at that time.[39]

16. The Accused further submits that he hopes to "show the scope of arms smuggling and the significant participation in arms smuggling by UN member states such as Saudi Arabia".[40] The Chamber has also previously stated that the issue of whether various states were involved

[34] Motion, para. 17.
[35] Motion, para. 1.
[36] Motion, paras. 2, 5.
[37] *See* Iran Decision, para. 14.
[38] Iran Decision, para. 1.
[39] Iran Decision, para. 14

in, or aware of, arms smuggling is not something that is relevant to this case, or necessary for its fair determination.[41] Again, the Chamber reminds the Accused to focus his defence strategy on the specific issues that are relevant to his case, and in particular to focus his request for documents related to those relevant issues.

17. Given that the Accused has not satisfied the relevance requirement of Rule 54 *bis* with respect to the Financial Documents, the Chamber need not consider the remaining requirements of Rule 54 *bis* and the Accused's arguments related thereto.

ii. *Other Documents*

18. In addition to the Financial Documents, the Accused also seeks several categories of Other Documents. Again, his request in relation to these documents does not, in the Chamber's view, meet the relevance requirement of Rule 54 *bis* of the Rules. First, the documents pertaining to meetings in 1992 involving the founder of the TWRA and Saudi Arabian government officials or members of the royal family[42] are too far removed temporally to be relevant to Srebrenica, nor do they appear to have any connection to UN personnel's involvement in arms smuggling. The same is the case with respect to the documents pertaining to the "International Conference for the Protection of Human Rights"[43] which took place in October 1992. The Chamber therefore finds that these documents are not relevant to any issues in this case and are not necessary for the fair determination of this trial.

19. As for the documents pertaining to meetings between the Saudi Arabian Government or royal family and representatives of the U.S. government,[44] the Chamber finds that they are of questionable relevance as they appear to relate to discussions relating generally to alleged arms smuggling into BiH between January 1993 and September 1995 and fail to make any connection with the specific issue of arms smuggling into Srebrenica or UN personnel's involvement in the same. In addition to the questionable relevance, this request is too broad as it relates to multiple categories of documents, "all information, memorandum or correspondence", that pertain to arms smuggling into BiH over a three-year period, ending in September 1995, that is after the events in Srebrenica. This overly broad request is therefore unduly onerous on Saudi Arabia.

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[40] Motion, para. 17.
[41] Decision on Accused's Motion for Binding Order (The Islamic Republic of Iran), 6 June 2010, para. 20.
[42] Motion, para. 1(H).
[43] Motion, para. 1(I).
[44] Motion, paras. 1(K).

20. Finally, the request for "all information" in the possession of the "Saudi Arabian Government Military Intelligence Service or Government Secret Service"[45] that pertains to the alleged smuggling of arms into BiH between January 1993 and September 1995 also lacks specificity and is of questionable relevance. The documents sought here relate only very generally to arms smuggling into BiH but do not specifically address the issue of arms going into Srebrenica in early 1995 or the UN personnel's involvement in this arms smuggling.[46] In addition, the request covers a period of three years and the Accused seeks "all information" in relation thereto. This lack of specificity makes the request overly broad and renders it unduly onerous on Saudi Arabia.

IV. Disposition

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

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

Judge O-Gon Kwon
Presiding

Dated this thirtieth day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[45] Motion, para. 1(J).

[46] In his dissenting opinion in the Germany Decision, Judge Kwon found that documents relating to the issue of arms smuggling into Tuzla and onward to Srebrenica in early 1995 did not meet the requirements of relevance and necessity as to warrant a binding order to Germany. Partially Dissenting Opinion of Judge Kwon, para. 8.