



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: 23 September 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: 23 September 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION IN RELATION TO SELECTION OF CASES FOR DNA ANALYSIS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 “Prosecution’s Request for Further Orders Regarding the Accused’s Random Selection of ICMP DNA Case Files” filed on 6 September 2011 (“Request”) by the Office of the Prosecutor (“Prosecution”), and hereby issues this decision thereon.

RECALLING that, on 19 March 2010, this Trial Chamber issued the “Order on Selection of Cases for DNA Analysis” (“Order”) outlining the complex procedural background relating to the Accused’s intention to challenge the conclusions reached by the International Commission on Missing Persons (“ICMP”) and the Prosecution’s proposed expert witness Thomas Parsons as to the DNA identification of Srebrenica victims, for the purpose of which he engaged his own DNA expert to examine these conclusions and conduct his own analysis;¹

RECALLING that the pre-trial Judge concurred that the Accused should be able to run tests similar to those performed by the ICMP on a representative sample of the DNA material held by the ICMP, with a view to checking the accuracy of the ICMP’s identification of Srebrenica victims;²

RECALLING the ICMP’s position that it could not provide to the Accused its entire database of genetic profiles obtained from blood samples taken from family members of Srebrenica-related victims without obtaining the consent of each family member who provided such a sample and that this process would take significant time in view of the number of samples taken;³

RECALLING the then ongoing communications between the Prosecution, the Accused’s legal advisor, the Accused’s expert, and the ICMP, about the selection by the Accused of 300 sample cases from the ICMP’s list of identified Srebrenica victims in relation to which the Accused’s expert could conduct his own analysis;⁴

RECALLING FURTHER that the ICMP eventually agreed to obtain the consent of the 1,200-odd family members who provided samples for the 300 test cases which the Accused had agreed to select, and that, as a result, on 19 March 2010, this Trial Chamber issued the Order,

¹ Order, p. 2.

² Order, p. 2.

³ Order, p. 2.

⁴ Order, p. 2.

instructing the Accused to immediately complete his selection of 300 cases for further DNA analysis and provide the details of his selection to the ICMP, noting that any further delay on the Accused's part may result in him having to conduct his cross-examination of Thomas Parsons without the benefit of the results of his expert;⁵

NOTING that on 21 June 2011, the Prosecution filed the "Notification of the Accused's Non-Compliance with the Trial Chamber's Order on Selection of Cases for DNA Analysis and Request for Further Orders with Public Appendix C and Confidential Appendices A–B and D–F" ("Notification") in which it informed the Chamber that the Accused had failed to comply with the Order in that, despite claiming to have completed the selection of the 300 cases, he had not provided the details of this selection to the ICMP and instead demanded that the ICMP first provide his expert with its complete collection of unique bone DNA profiles and electropherograms of Srebrenica-related victims;⁶

NOTING the Prosecution's submission in the Notification that this condition, while slightly different from the previous request the Accused had made,⁷ is based on the same concerns already expressed by the Accused and discounted by the Chamber, namely concerns about the ICMP's impartiality and suspicion that it would adjust the database to ensure matches in the 300 selected cases;⁸

NOTING that, in order to give the Accused's expert the opportunity to analyse the 300 samples before Parsons gives evidence and to forestall any future delays, the Prosecution requested in the Notification that the Chamber order the Accused to comply with its Order within 14 days or, alternatively, that the Trial Chamber direct the ICMP to randomly select 300 case files and provide them to the Accused and the Prosecution as soon as practicable;⁹

NOTING the Accused's "Response to Prosecution's Request for Further Orders: DNA Testing", filed on 28 June 2011 ("Response to Notification"), in which he conceded that he did

⁵ Order, p. 3.

⁶ Notification, paras. 1–2, 5–9.

⁷ As indicated above, the Accused previously requested that he be provided with the ICMP's entire database of genetic profiles obtained from blood samples taken from family members of missing persons but the ICMP declined to do so, on the basis that it would take too much time and too many resources. *See* Order, p. 2.

⁸ Notification, paras. 12–13. *See also* Order, p. 2.

⁹ Notification, paras. 3, 17.

not comply with the Order because he would “rather not have the testing done at all than engage in a testing process that is unscientific and open to manipulation”;¹⁰

NOTING that on 30 June 2011, the Prosecution filed the “Prosecution’s Reply to the Accused’s ‘Response to Prosecution’s Request for Further Orders: DNA Testing’ (“Reply to Notification”),¹¹ in which it withdrew, in light of the Accused’s submissions above, the relief requested in the Notification, and instead sought a declaratory relief that the Accused breached the Order and that the ICMP is not obliged to provide 300 sample case files to the Accused under any procedure outside the terms of the Order;¹²

NOTING that, on 22 July 2011, the Chamber ordered the Accused to further clarify his position in relation to the manner in which the alleged data could be manipulated by the ICMP;¹³

NOTING that, as a result, on 28 July 2011, the Accused filed his “Supplemental Response to Prosecution’s Request for Further Orders: DNA Testing” (“Supplemental Response”), in which he provided further details as requested;¹⁴

NOTING that, on 15 August 2011, the Prosecution filed the “Prosecution’s Reply to the Accused’s Supplemental Response to Prosecution’s Request for Further Orders: DNA Testing” (“Supplemental Reply”), in which it submitted that the Accused’s concerns were purely hypothetical and could be dealt with through Parsons’ cross-examination or the examination of any ICMP official the Accused may choose to call;¹⁵

NOTING that the Prosecution further submitted that even if such manipulation were to occur, it could be detected immediately if the Accused accepted the ICMP’s offer, made already in 2009, to provide him with a list of all Srebrenica-related bone DNA profiles and associated barcodes, in advance of him providing the list of 300 cases for further analysis;¹⁶

¹⁰ Response to Notification, paras. 2–5.

¹¹ The leave to reply was sought by the Prosecution on 29 June and granted on 30 June. *See* Prosecution Request for Leave to Reply to “Response to Prosecution’s Request for Further Orders: DNA Testing”, 29 June 2011; Hearing, T. 15727 (30 June 2011).

¹² Reply to Notification, para. 2.

¹³ Hearing, T. 17196–17197 (22 July 2011).

¹⁴ Supplemental Response, paras. 7–11.

¹⁵ Supplemental Reply, paras. 1, 10–11.

¹⁶ Supplemental Reply, paras. 2, 12–15. The Prosecution also maintained its request for a declaratory finding outlined above. *See* Supplemental Reply, para. 19.

NOTING that on 18 August 2011, the Accused sent a letter to the ICMP, stating that he was willing to accept the offer to be provided with bone DNA profiles and associated barcodes, which would enable him to detect any potential manipulation and that following this he would provide the ICMP with his selection of 300 sample cases for further analysis;¹⁷

NOTING that, during the hearing on 5 September 2011, the Chamber inquired with the parties as to progress made in this matter and was informed by the Accused's legal advisor that progress had been made and that the Accused was waiting to receive the list of victims' names and bone DNA profiles from the ICMP as agreed, following which he would "begin the random sampling";¹⁸

NOTING that, when asked if the need therefore remained to issue a decision in relation to the Reply to the Notification, the Prosecution informed the Chamber that it would indicate its position as soon as possible;¹⁹

NOTING that, on 6 September 2011, the Prosecution filed the Request, in which it argues that instead of providing the 300 cases for further analysis, the Accused has now entered into negotiations with the ICMP over the sampling method for the 300 cases, which in turn continues to delay the process;²⁰

NOTING that the Prosecution therefore requests that the Chamber: (i) immediately schedule a status conference regarding the completion of the selection process;²¹ (ii) if the Accused does not finalise an agreement with the ICMP as to the method of random sampling, order him to use the method which he had previously agreed upon with the ICMP;²² (iii) order the Accused to provide the ICMP, either immediately following the status conference, or within a specific deadline, with the 300 cases selected for further analysis;²³ and (iv) issue a declaratory finding that the Accused has breached the Order and that, in the absence of any future agreement or

¹⁷ Letter to International Commission on Missing Persons ("ICMP"), 18 August 2011.

¹⁸ Hearing, T. 18338–18339 (5 September 2011).

¹⁹ Hearing, T. 18339–18340 (5 September 2011).

²⁰ Request, paras. 6–10. The issue appears to be how to proceed in cases where family members of the victims whose data is to be re-tested do not consent to disclosure of their genetic profiles to the Accused.

²¹ The Prosecution submits that the representatives of the ICMP are willing to attend such a status conference. *See* Request, para. 12.

²² Request, para. 13.

²³ Request, para. 14.

order by the Chamber, the ICMP is not obliged to provide the 300 sample case files to the Accused;²⁴

NOTING that, on 16 September 2011, the Accused filed his “Response to Prosecution’s Request for Further Orders: ICMP” (“Response”), in which he welcomes “any assistance that the Trial Chamber can provide to move the process with the ICMP forward” and to which he attaches a declaration signed by his legal advisor providing an explanation of his dealings with the ICMP in order to counteract any suggestion of bad faith on his part;²⁵

CONSIDERING that, in light of the Accused’s admission that he did not comply with the Order because he did not want to engage in a process that, according to him, could be manipulated, there is no need for the Chamber to issue a declaratory finding to the effect that the Accused has breached the Order;

CONSIDERING that the Chamber has already found, and continues to be of the view, that the Accused has not established any basis for his concern that the ICMP would manipulate its database to strengthen its own conclusions;

CONSIDERING that, in any case, the Accused has now agreed that the ICMP’s long-standing offer to provide him with bone DNA profiles of the victims together with associated barcodes will prevent such manipulation as much as reasonably possible;

CONSIDERING also that any further concerns the Accused may have can most appropriately be raised during Parsons’ cross-examination or, indeed, during the examination of any other ICMP officials who the Accused calls to give evidence;

CONSIDERING further that, despite the issue of manipulation having been resolved, the Accused has still not provided the ICMP with the 300 sample cases for further analysis but instead continues to negotiate the method of random sampling of those 300 cases, specifically in relation to cases of persons who may not consent to their samples being provided to the Accused;

²⁴ Request, para. 15.

²⁵ Response, paras. 2–3, Declaration of Peter Robinson. The Prosecution made a request for leave to reply to the Response, but the Chamber refused to grant the said leave. *See* Prosecution’s Request for Leave to Reply to the Response to Prosecution’s Request for Further Orders: ICMP, 19 September 2011; Hearing, T. 19149 (19 September 2011), T. 19177 (20 September 2011).

CONSIDERING that, if the Accused's intention is still to test the work of the ICMF, it is imperative for him to proceed with his selection of the 300 cases for further analysis, and to inform the ICMF accordingly as soon as possible;

CONSIDERING that it is up to the Accused to organise his defence case, including the manner in which to challenge the Prosecution's evidence, and that therefore the Chamber will not impose a specific deadline on the Accused to provide the ICMF with the 300 cases nor will it hold a status conference on this issue or instruct the Accused to select a random sample of 300 cases in a certain way;

CONSIDERING, however, that the warning already given to the Accused in the Order, namely that any further delay on his part may result in his expert being unable to perform the necessary analysis before Parsons' testimony thus leaving him without the benefit of his expert's results, continues to apply;

PURSUANT TO Rule 54 of the Tribunal's Rules of Procedure and Evidence,

HEREBY DENIES the Request.

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



Judge O-Gon Kwon, Presiding

Dated this twenty-third day of September 2011
At The Hague
The Netherlands

[Seal of the Tribunal]