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UNITED
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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: 15 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: **15 October 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S APPLICATION FOR BINDING ORDER PURSUANT TO RULE 54 *BIS* (AUSTRIA)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Republic of Austria

via Embassy of Austria
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 Austria", filed on 3 August 2009 ("Motion"), and hereby issues this decision thereon.

1. On 3 August 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 Austria ("Austria") for the production of the following documents:

> All reports of the September 1995 search of offices to Third World Relief Agency (TWRA) in Vienna, as well as copies of documents found during this search which tend to show violations of the arms embargo by Malaysian and Turkish UNPROFOR troops smuggling arms into Bosnia.[1]

2. In the Motion, the Accused submits that the Vienna offices of the Third World Relief Agency, an Islamic humanitarian organisation which had financial and organisational ties to high-ranking members of the Bosnian Government, were searched in September 1995 as part of an investigation by the German authorities into arms smuggling.[2] According to the Accused, large quantities of documentation were seized, including some concerning deliveries of military equipment signed by the then Bosnian President, Alija Izetbegović, and Foreign Minister, Haris Silajdžić.[3] The Accused bases these claims on a book titled "Intelligence and the War in Bosnia 1992–1995", which was written by Cees Wiebes as part of the larger report on the events in Srebrenica commissioned by the Dutch Government and published by the Netherlands Institute for War Documentation in 2002.

3. Prior to the filing of the Motion, the Accused sent, on 2 June and 30 June 2009 respectively, two letters to Austria in which he requested copies of these documents.[4] On 1 July 2009, Austria responded that "should such documents or information exist ... they could only be put at the disposal of the Defence in the event that the International Criminal Tribunal for the former Yugoslavia issues an official request for legal assistance to the Government of Austria".[5] The Accused consequently filed the Motion on 3 August 2009.

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[1] Motion, para. 1.
[2] Motion, para. 3.
[3] Motion, para. 4.
[4] Motion, para. 13.
[5] Motion, para. 14, Annex C.

4. Following an invitation issued on 26 August 2009 by this Trial Chamber to Austria to assist the Chamber in providing a response to the Motion,[6] Austria filed, on 2 September, its response, making no submissions relating to the requirements of Rule 54 *bis*, but noting that:

> For legal reasons ... documents can be put at the disposal of the Tribunal and Dr. Karadžić, respectively, only on the basis of a formal binding order issued by the Tribunal.[7]

5. 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."[8]

6. 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."

7. 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;[9] (ii) the requested documents must be relevant and necessary before a Chamber can issue an order for their production;[10] (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;[11] and (iv) the request cannot be unduly onerous upon the state.[12]

8. The Chamber notes Austria's position that it "continues to be fully prepared to comprehensively co-operate with the Tribunal" but that "for legal reasons" it can only put the

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[6] Invitation to the Republic of Austria, 26 August 2009.

[7] Correspondence from the Government of Austria, 2 September 2009, para. 2.

[8] Article 29(2)(c).

[9] *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* 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 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-AR108*bis*, 9 September 1999, ("*Kordić* Decision"), paras. 38–39.

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

[11] 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, para.7.

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

documents at the disposal of the Accused once an order is issued by the Chamber. Further, as noted above, in its response, Austria made no submissions regarding the requirements of Rule 54 *bis*. The Trial Chamber has considered Austria's response and is of the view that it can only be interpreted to mean that Austria does not object to providing the Accused with the requested documents, but that it requires an order from the Chamber before it can institute the necessary procedures at the state level to give those documents to the Accused. In other words, it would appear that both Austria and the Accused are of the view that an order requiring production of documents should be issued by the Chamber. This situation is somewhat different from other Rule 54 *bis* cases where the party seeking the order and the state in question are essentially in dispute over whether the documents should be handed over or not, or even over the existence of such documents. Nevertheless, in order to facilitate the production of the requested documents to the Accused, as well as to encourage a relationship between the Accused and Austria that is based on voluntary co-operation, the Chamber will issue an order as requested by both the Accused and Austria.

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

A. **ORDERS** the Government of Austria to produce the requested documents to the Accused by no later than 29 October 2009;

B. **REQUESTS** the Registry to provide this Decision to the Government of Austria.

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

Judge O-Gon Kwon
Presiding

Dated this fifteenth day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]