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 2010

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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 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S BINDING ORDER MOTION (THE FRENCH REPUBLIC)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of France

via the Embassy of France 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: Government of France", filed on 24 August 2009 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. The Accused has filed a number of motions asking the Trial Chamber to issue binding orders to various states, pursuant to Article 29 of the Statute of the Tribunal ("Statute") and Rule 54 *bis* of the Rules of Procedure and Evidence ("Rules"), requesting them to disclose to him documents he claims to be relevant to and necessary for his case. In the present Motion, the Accused requests the Chamber to order the French Republic ("France") to produce the following categories of documents:

(i) All reports or memoranda concerning the suspected delivery of arms at Tuzla, Bosnia in February 1995 and the efforts to conceal those deliveries, including reports made by French personnel serving in Bosnia.

(ii) Reports from General De Lapresle to UN Special Representative Akashi dated 14 February 1995 (UNPROFOR Z-0257 entitled "Unidentified fix winged aircraft flight to Tuzla") and 15 February 1995 (UNPROFOR Z-0268) concerning shipments of arms at Tuzla.

(iii) All correspondence or notes or memoranda of communications between the government of France and the United Nations or any of its bodies concerning shipments of arms to Tuzla in February 1995.

(iv) All correspondence or notes or memoranda of communications between the government of France and the United States concerning shipments of arms to Tuzla in February 1995.

(v) All reports, minutes, or notes of the meetings of Ministers of Defence of UK, France, and Germany and US Secretary of Defence at Key West, Florida on 3-5 March 1995 concerning arms supplies to Bosnia.

(vi) All reports, memoranda or correspondence indicating the presence of French military or intelligence agency personnel in Bosnia between April 1992 and August 1995 including the placement of any such individuals in UNPROFOR, UNMO, UNHCR, or other UN

organisations or NGOs, when such personnel were in fact reporting to the French government, including the Direction du Renseignment Militaire (DRM).

(vii) All reports, memoranda, or correspondence concerning the use of UNPROFOR, UNMO, UNHCR, or NGO personnel in Bosnia between April 1992 and August 1995 to provide arms, ammunition, or military equipment to the Bosnian Muslims.

(viii) All reports, memoranda, or correspondence concerning the use of UNPROFOR, UNMO, UNHCR, or NGO personnel in Bosnia between April 1992 and August 1995 to perform acts of a military or intelligence nature for their own governments or for NATO.

(ix) All reports of intelligence or security services or UNPROFOR members from France concerning the explosions at the Markale market in Sarajevo on 5 February 1994 and 28 August 1995.

(x) All reports of the Gendarmerie special intervention team or other French agencies or departments which tend to indicate that Bosnian Muslims in Sarajevo killed their own people between April 1992 and December 1995.

(xi) All reports, transcripts, or notes of statements made by Radovan Karadžić between 9 July and 4 August 1995 about the Srebrenica events including information from signals and human intelligence.[1]

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 the French authorities before filing the Motion.[2] With regard to the relevance of the requested documents, the Accused explains that they go to a number of issues relevant to his case. First, the documents concerning shelling and sniping incidents in Sarajevo are relevant and necessary "to directly rebut the allegations" in the Third Amended Indictment ("Indictment") that the Accused and the Bosnian Serb Army ("VRS") were responsible for these incidents.[3] Second, the statements by the Accused concerning the events in Srebrenica "will rebut the allegation in the [I]ndictment that [the Accused] was involved in a criminal enterprise to eliminate the Bosnian Muslims in Srebrenica."[4] Furthermore, the documents related to the smuggling of arms to the Army of Bosnia and Herzegovina ("ABiH"), which were then shipped to Srebrenica, will also rebut this allegation, as they will support the Accused's case that "there was a legitimate military objective to commence operations in March 1995 directed at the

[1] Motion, para. 1.
[2] Motion, paras. 21–34.
[3] Motion, para. 27.
[4] Motion, para. 28.

enclaves".[5] Third, the provision of arms to ABiH, in violation of the United Nations ("UN") arms embargo, by personnel who gained access to Bosnia and Herzegovina ("BiH") by virtue of their participation in UN missions is, according to the Accused, relevant to the 1995 detention of UN personnel as alleged in Count 11 of the Indictment.[6] Finally, the Accused argues that documents showing "the direct involvement of French and other international personnel in the Bosnian war on the ABiH side, including violations of the arms embargo, are relevant to the credibility and bias of international witnesses to be called by the prosecution."[7]

3. The Accused submits that France is in possession of these documents and bases his claim on various sources, such as newspaper articles, books (including 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), a report by the United States' House of Representatives on the smuggling of Iranian arms into BiH, and an interview of a French official. Using those sources, the Accused outlines how the arms were allegedly smuggled into BiH with the discrete acquiescence of the United States ("US"), using, *inter alia*, UN personnel. He also refers to specific deliveries of weapons to Tuzla in February 1995, made with a Hercules C-130 transport plane and observed by UN personnel stationed in Tuzla, and notes that these weapons were then transported to Srebrenica. Furthermore, according to the Accused, French and the Norwegian UN personnel reported on these deliveries to their superiors in the UN.[8] The Accused also states that "the use of intelligence services of UN missions … was 'normal' and widespread during the Bosnian war" and "many NGOs were involved in arms smuggling."[9] With respect to the events in Sarajevo, the Accused submits, relying on the sources outlined above, that ABiH forces in Sarajevo "committed several deliberate attacks against Muslim civilians to obtain intervention on their behalf by the international community" and that French UN personnel were involved in investigating most of these attacks, including the two Markale shelling incidents and a number of sniping attacks.[10] Finally, the Accused alleges that the French intelligence services, including DRM, were active in collecting intelligence throughout the war in BiH and that one target of their intelligence-gathering was the Accused himself.[11]

[5] Motion, para. 29.
[6] Motion, para. 30.
[7] Motion, para. 31.
[8] Motion, paras. 2–11.
[9] Motion, paras. 12–13.
[10] Motion, paras. 14–18.
[11] Motion, para. 19.

4. The Accused further explains that, before filing the Motion, he served a letter on the French government requesting the documents outlined above. Upon receiving no response, he sent another letter, but to no avail.[12]

5. Having been invited to respond to the Motion,[13] France filed, on 10 September 2009, a letter addressed to the Registrar, informing him and the Chamber that it was ready to co-operate with the Tribunal and search for the categories of documents requested, but indicating that it might seek protective measures as provided in Rule 54 *bis* of the Rules. France also noted that it would endeavour to inform the Tribunal of the results of its search for documents requested in categories (i), (iii), (iv), (v), partially (x), and (xi), within a reasonable deadline. As for categories (vi), (ix), and in part (x), France explains that it cannot respond to those as it has a "fixed rule" preventing it from responding to requests regarding the possible presence or identity of French security and intelligence agents, or disclosing documents coming from the French intelligence and security services. Finally, France notes that the Accused's requests in categories (ii), (vii), and (viii) are "inappropriately addressed as they concern issues relevant to other authorities and organisations."[14]

6. On 14 September 2009, the Accused filed a "Motion for Leave to Reply and Reply: Motion for Binding Order to Government of France", seeking leave to reply to France's letter and attaching the relevant reply ("Reply").[15] He submits that (a) he has no objection, in principle, to protective measures being afforded to information provided by France; (b) reasonable time may be granted to France to complete its search; (c) national security interests provide no excuse for refusal to produce information under Rule 54 *bis*; and (d) he seeks only information in the possession of France - if France is in possession of material that originates from other sources, it should either request permission from those sources to disclose it or notify the Accused of who the sources are so that he can pursue them directly.[16]

7. Having not heard from France for some time, the Chamber, on 13 October 2009, decided to invite France to either complete its search or submit a detailed report on the progress of that search, by 27 October 2009.[17] Having not heard from France on 27 October, nor by 30 November 2009, the Chamber requested France to, complete its search for the requested documents and, if any are found, deliver them to the Accused, or submit a detailed report to the

[12] Motion, paras. 21, 34.
[13] *See* Invitation to the French Republic, 25 August 2010.
[14] *See* Letter from France, filed on 10 September 2009.
[15] The leave to reply was granted on 13 October 2009. *See* Second Invitation to the French Republic, 13 October 2009.
[16] Reply, paras. 1–5.

Chamber on the progress of the search by its authorities, by no later than 7 December 2009.[18] As a result, on 16 December 2009, France filed a confidential letter addressed to the Registrar in which it apologised for the delay and informed the Chamber that its search had produced a document going to category (v) of the requested documents, which it attached to the letter. France requested that, due to its sensitive nature, this document be subject to Rule 70 conditions.[19]

8. On 8 January 2010, the Accused filed his "Memorandum of Status of Requests to States and International Organisations" (Accused's Memorandum") in which he acknowledges that he received one document from France but notes that he has not been provided with all the documents he requested and has not been advised that no other requested documents exist.[20] The Accused also informed the Chamber that, on 7 January 2010, he had sent a letter to the French Embassy in The Hague, indicating his readiness to comply with any Rule 70 conditions for the document produced, but noting that he continues to await the production of other documents. The Accused attached to this letter an article from the *New York Times* which, according to him, would assist the French authorities in their search for the documents requested in category (x).[21]

9. At the Status Conference held on 28 January 2010, the Trial Chamber announced that a hearing pursuant to Rule 54 *bis* would be held on 15 February 2010 ("Hearing"), during which the status of the Motion, as well as the other binding order motions filed by the Accused, would be discussed.[22] Accordingly, in its "Order Scheduling a Hearing Pursuant to Rule 54 *bis*", the Chamber invited, *inter alia*, representatives of France to attend the Hearing.[23] On 12 February 2010, France informed the Chamber that it would send four representatives to the Hearing.[24]

10. During the Hearing, the Accused confirmed that there had been no developments and no further delivery of documents from France since December 2009 and stated that "France was a very important player in [BiH] crisis" and that its Generals, serving in BiH with the UN, were well-informed about the situation there.[25] In response, the representatives of France noted that France has been co-operating with the Tribunal and will continue to do so. The French

[17] *See* Second Invitation to the French Republic, 13 October 2009.
[18] Order to the French Republic, 30 November 2009.
[19] Confidential Letter from France, filed on 16 December 2009.
[20] Accused's Memorandum, para. 6.
[21] Accused's Memorandum, footnote 10, Annex G.
[22] Status Conference, T. 710 (28 January 2010).
[23] Order Scheduling a Hearing Pursuant to Rule 54 *bis*, 29 January 2010.
[24] Correspondence from France, 12 February 2010.
[25] Hearing, T. 770–771 (15 February 2010).

representatives then reiterated that the French authorities had conducted a search for the documents requested in categories (i), (iii),[26] (iv), (v), part of (x), and (xi), which resulted in the production of one document, and that France had "nothing else to offer at this stage."[27] As for categories (ii), (vii), and (viii) of the documents requested, the French representatives submitted that it was not for the French authorities to produce documents that belong to the UN or third parties, and also appeared to imply that France was not aware of their existence and thus not in possession of the same.[28] Finally, with respect to the remaining categories of documents, which relate to the French intelligence services, the French representatives submitted that their disclosure would "reveal the nature and scope of France's ability in the field of intelligence services as well as in which place and in what manner these services operate" and that this would jeopardise France's national security interests. Thus, according to the French representatives, if these documents even exist, France is not obliged to disclose them to the Accused.[29]

11. During the Hearing, the Prosecution submitted that some of the documents requested by the Accused in the Motion had already been disclosed to him by the Prosecution itself.[30] Accordingly, the Trial Chamber ordered the Prosecution to file a submission indicating which of the disclosed documents fell into the categories of documents requested by him from various states, including France.[31] Thus, on 24 February 2010, the Prosecution filed the "Prosecution Submission Pursuant to Trial Chamber's Request During Rule 54 *bis* Hearing" ("Prosecution's Submission"), indicating that it had produced to the Accused the two documents referred to in category (ii);[32] some of the documents related to category (v);[33] hundreds of documents dealing with events in Sarajevo, including the lists of people killed and UN reports on the shelling and sniping, which are broadly related to categories (ix) and (x);[34] and, in relation to category (xi), a number of intercepted conversations in which the Accused participated in the relevant period.[35]

[26] The French representatives do not appear to have mentioned category (iii) explicitly at this point in the Hearing. However, the Chamber considers that, in light of France's earlier correspondence, the documents described in category (iii) should be encompassed by this submission.

[27] Hearing, T. 772, 774 (15 February 2010).

[28] Hearing, T. 772–773, 775–776 (15 February 2010). The Chamber notes that the French representatives appear to have also mentioned category (ix) in the context of this submission. However, given France's earlier correspondence, the Chamber considers that documents requested in category (ix) relate to France's submissions concerning its national security interests.

[29] Hearing, T. 773, 775 (15 February 2010).

[30] Hearing, T. 776–777 (15 February 2010).

[31] Hearing, T. 777–778 (15 February 2010).

[32] Prosecution's Submission, Appendix A, p.21.

[33] Prosecution's Submission, Appendix A, p.22.

[34] Prosecution's Submission, Appendix A, pp. 24–26.

[35] Prosecution's Submission, Appendix A, p. 27.

12. Following an order issued by the Chamber to respond to the Prosecution's Submission,[36] the Accused filed his "Submission on Request to Government of France" on 11 March 2010 ("Accused's Submission") confirming that he had been given documents referred to in categories (ii) and (v) and withdrawing them from the Motion as a result.[37] With respect to the remaining categories, the Accused claims that France is "likely to have a wealth of information" relating to categories (i), (iii), (iv), (vi), (vii), (viii), and (xi). The Accused submits that the documents requested in categories (ix) and (x) are "certainly in the possession of the government of France and should be ordered to be produced."[38] He notes that the Prosecution has disclosed to him one report of French UN officers, dated 12 February 1994, relating to the first Markale shelling (and thus going to category (ix)) but that he has received no other documents falling within categories (ix) and (x).[39] The Accused then outlines the information he has collected so far which, according to him, shows that France received information on several occasions to the effect that the Bosnian Muslims were shelling and sniping their own citizens in Sarajevo.[40]

II. Applicable Law

13. 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."[41]

14. In addition, Rule 54 *bis* enables a party to 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;[42] (ii) the requested documents must be

[36] Order for Response, 3 March 2010.
[37] Accused's Submission, paras. 2–4.
[38] Accused's Submission, para. 5.
[39] Accused's Submission, para. 6.
[40] Accused's Submission, paras. 7–12.
[41] Article 29(2)(c) of the Statute.
[42] *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

"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;[43] (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;[44] and (iv) the request cannot be unduly onerous upon the state.[45]

15. 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".[46] If the requesting party is unable to specify the title, date, and author of the requested documents, but provides an explanation and is able to identify the requested documents in some 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".[47]

16. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.[48] 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,[49] or whether they relate to the "defence of the accused".[50] 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 make a reasonable effort before the Trial Chamber to demonstrate their existence.[51] 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

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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.

[43] 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.

[44] 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.

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

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

[47] *Blaškić* Review, para. 32.

[48] *Kordić* Decision, para. 40.

[49] *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.

[50] *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).

[51] *Milutinović* US Decision, para. 23.

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."[52]

17. 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 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.[53] 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*.[54]

18. 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".[55]

III. Discussion

19. The Chamber recalls its earlier finding, in its decision on the Accused's binding order motion relating to the Federal Republic of Germany, that the issue of the alleged smuggling of arms to Srebrenica, as well as the alleged involvement of UN personnel in arms smuggling is relevant to the Accused's case, and that any documents that may go to these issues are necessary for a fair determination of this case.[56] The Chamber also repeats its finding that, while it may be possible to argue that the relevance of certain documents is established because they are necessary for challenges to the credibility of witnesses brought by the Prosecution and preparation of cross-examination, in the Chamber's view this can be done only if the applicant provides information regarding the specific witnesses to which the requested information will relate, the issues that these witnesses will be cross-examined on, and an explanation of how this cross-examination will affect the applicant's case.[57] However, the Accused has made no attempt

[52] *Milutinović* US Decision, para. 25.
[53] *Sreten Lukić* Decision, para.7.
[54] *Milutinović* US Decision, para. 32.
[55] *Kordić* Decision, para. 38; *Blaškić* Review, para. 26.
[56] *See* Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010 ("Germany Decision"), paras. 20–27. Judge Kwon attached a partial dissent from the majority on these issues.
[57] Germany Decision, para. 28.

to identify any of these matters. Accordingly, the Chamber is not satisfied that the Accused has adequately satisfied the requirement of relevance with respect to this issue.

20. As for the requested documents which relate to events in Sarajevo, the Accused claims that they are relevant and necessary "to directly rebut the allegations" in the Indictment that he and the VRS were responsible for these incidents.[58] The Chamber recalls that the Accused has been charged with participating in a joint criminal enterprise to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, and thus has been charged with a number of sniping and shelling incidents, including the two Markale shelling incidents.[59] Accordingly, any documents that may go to the issue of the identity of the perpetrators of these and other incidents charged in the Indictment are undoubtedly relevant to and necessary for the fair determination of these charges.

21. Based on these general findings, the Chamber will now consider whether each individual category of documents requested relates to any of those issues found to be relevant to this case and otherwise satisfies the requirements of Rule 54 *bis*.

22. The Chamber recalls, as described above in the background and submissions section, that prior to the filing of the Motion, the Accused contacted France privately but that the latter did not respond to his requests. Once the Motion was filed on 24 August 2009 and the Chamber became involved, France produced one document. In addition, as part of its disclosure obligations, the Prosecution produced two documents sought in the Motion, as well as a number of documents it says are related to the Motion. As a result, the Accused withdrew his request for documents described in categories (ii) and (v) but still maintains his request for documents in other categories described above. The Chamber is, therefore, satisfied that the Accused has made a reasonable effort to persuade the state to provide the requested documents voluntarily.

23. With respect to the documents requested in categories (i), (iii), (iv), and (xi), the Chamber recalls France's submission that it has searched for them but that the search has produced no results. In response, the Accused, other than submitting that France is "likely to have a wealth of information" relating to those categories, has not provided any further information on the basis of which the Chamber could conclude this to be the case. Furthermore, the Motion connects France to the alleged arms deliveries to Tuzla only through the two documents referred to in category (ii) of the Motion, which have now been provided to the

[58] *See above*, para. 2.
[59] Indictment, paras. 15–19, 76–82. *See also* Schedules F and G of the Indictment.

Accused by the Prosecution.[60] Thus, considering the lack of persuasive argument from the Accused that France in fact has the documents requested in those categories in its possession, especially bearing in mind the submissions made by France that its authorities conducted a search and were unable to find any, the Chamber is not satisfied that the Accused has made a reasonable effort to demonstrate the existence of the documents requested in those categories. As a result, the Chamber shall not order France to conduct yet another search for them, without any additional specification from the Accused pointing to particular information in France's possession. Accordingly, the Chamber also does not need to make any findings in relation to their relevance, necessity, and specificity.

24. With respect to documents requested in categories (vi) and (viii), the Chamber cannot see how they are connected to any of the issues deemed relevant to this case. They do not appear to be connected to the alleged smuggling of arms to Srebrenica or to UN involvement in arms smuggling, nor do they go to the shelling and sniping incidents in Sarajevo. Indeed, the Accused argues that they go to the credibility of international witnesses.[61] However, as stated above in paragraph 19, the Chamber is not satisfied that the Accused has adequately satisfied the requirement of relevance in relation to the issue of credibility of international witnesses. Accordingly, the Chamber is of the view that the Accused has failed to meet the requirements of Rule 54 *bis* with respect to categories (vi) and (viii) of documents sought.

25. With respect to documents requested in category (vii), the Chamber is of the view that they go to the issue of UN involvement in arms smuggling in BiH, which has been deemed, by majority, Judge Kwon dissenting, relevant to and necessary for a fair determination of the Accused's case in relation to the allegations of hostage-taking made in Count 11 of the Indictment. However, the Chamber is not satisfied that this category is specific enough. First, the Chamber recalls that the Accused has been accused of participating in a joint criminal enterprise to take UN personnel hostage during May and June 1995. While documents from the period prior to this joint criminal enterprise allegedly coming into existence may be relevant to rebut the allegations in Count 11, the Chamber is concerned that this particular category covers an expansive period of time, namely some three and a half years. Second, on top of that broad time period, the Accused also does not specify whose documents he is seeking. In this respect, the Chamber does not find persuasive the argument of the French representatives that this particular request should be addressed to the UN merely because it is concerned with UN

[60] *See* Motion, paras. 2–11. With respect to category (xi), which deals with the Accused's statements surrounding Srebrenica events, the Chamber notes that the Prosecution has provided the Accused with a number of his intercepted conversations from that period.

[61] *See* Motion, para. 31. *See also* Hearing, T. 778–780.

documents.[62] Indeed, it is perfectly possible that French authorities are aware of, and are in possession of, documents originating from the UN. However, the Accused's request is not limited merely to UN documents in French possession, and the documents sought might originate from other organisations or states. Thus, the Chamber is of the view that the lack of specificity as to the origins of documents requested together with the expansive time period covered by this category, would make the search for these documents unduly onerous for France, despite the fact that their subject matter is sufficiently defined and relevant to this particular case. Accordingly, the Chamber shall not order France to search for these documents at this stage.

26. With respect to the documents requested in categories (ix) and (x), the Chamber notes that they go to two specific shelling incidents charged in the Indictment (both relating to Markale) and to the issue of the physical perpetrators of sniping and shelling in Sarajevo, respectively. As found above, both of those are matters relevant to and necessary for a fair determination of the Accused's case. The Chamber is also of the view that these documents are defined with sufficient specificity as they are limited temporally, their subject-matter is clearly defined, and the creators of the documents in question are specifically named. With respect to category (x), specifically, while, like category (vii), it covers a broad period of time, the fact that it points to originator of the documents in question is enough, in the Chamber's view, to narrow it down so that the search for these documents is not unduly onerous for France. Finally, the Chamber also considers that the Accused has made a reasonable effort to demonstrate the existence of these documents and that he has exercised due diligence in attempting to obtain them from the Prosecution or from other states, but has been unable to do so. Accordingly, the Chamber considers that the Accused has satisfied all the requirements of Rule 54 *bis* in relation to documents requested in categories (ix) and (x).

27. The Chamber notes the submission of the French representatives to the effect that, if these documents exist, France is not obliged to disclose them as they relate to its national security interests.[63] However, the jurisprudence of this Tribunal holds that a state does not have a blanket right to withhold the production of documents on the basis of its national security concerns. As held by the Appeals Chamber, if states were able to "unilaterally assert national security claims and refuse to surrender those documents," this could jeopardise "the very

[62] Hearing, T. 773, 775–776 (15 February 2010).

[63] *See above* paras. 5, 10. The Chamber acknowledges France's submission that its authorities have searched for some of the documents related to category (x), namely those that do not raise the issues of national security, but that this search failed to produce results. Thus, the Chamber's ruling above in relation to category (x) of the documents, is concerned only with the documents for which no search has been conducted on the basis that they raise national security issues.

function of the International Tribunal, and 'defeat its essential object and purpose.'"[64] Accordingly, France cannot refuse to search for documents on the basis of a blanket assertion of national security interests. However, the Rules provide France with an alternative because its concerns may be addressed by recourse to Rule 54 *bis* (F) to (I), which provides for various protective measures for the documents at issue, should they be requested.

28. It appears to the Chamber that France's arguments in relation to its national security interests reveal that no search for these documents was ever conducted on the basis of the assumption that they might raise national security issues, rather than specific knowledge of which particular document, if any, would be so affected. Given that France now knows which categories of documents it should search for and produce to the Accused, if the search is successful, it should provide the Chamber with specific arguments relating to its national security interests, with a reference to the specific documents affected, if any. Bearing in mind that states cannot simply refuse to produce documents on the basis of national security interests, France's objection should also contain an indication of whether it requests any protective measures for particular documents.

IV. Disposition

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

(a) **GRANTS** the Accused's Motion **IN PART**, and **ORDERS** as follows:

(i) France shall search for documents requested by the Accused in categories (ix) and (x) of the Motion and shall deliver them to the Accused by 28 July 2010;

(ii) France shall indicate to the Chamber, by 20 July 2010, if any of the documents ordered to be produced are affected by national security concerns, or require that certain protective measures be applied to them; and

[64] *Blaškić* Review, para. 65.

(iii) the provisions of Rule 70 of the Rules shall apply *mutatis mutandis* to the document already provided by France to the Accused.

(b) **DENIES** the Motion in all other respects.

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

Judge O-Gon Kwon
Presiding

Dated this thirtieth day of June 2010
At The Hague
The Netherlands

[Seal of the Tribunal]