



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: 7 April 2014
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: 7 April 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S SIXTH MOTION FOR BINDING ORDER
(UNITED STATES OF AMERICA)**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the United States of America

via the Embassy of the United States of America
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 “Sixth Motion for Binding Order: United States of America” filed on 3 March 2014 (“Motion”) and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests, pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), an order compelling the United States of America (“U.S.”) to provide him with four documents he had previously requested and which he believes to be relevant and necessary to his defence case.¹ The documents are:

- (A) A paper prepared by the DCI Interagency Balkan Task Force on or about February 27, 1995 concerning increased air activity over Bosnia. The paper was attached to a memo from Ray Converse of the Task Force to the Deputy Director for intelligence dated February 27, 1995 which was among those released by the United States government and Clinton library.
- (B) A copy of the cable from Brigadier Jones referred to in the memorandum of the deputies committee meeting of 22 February 1993 on p. 2 in which it was attached and allegedly reported that the Muslims were responsible for all UNPROFOR casualties.
- (C) A copy of the detailed documentation of recent helicopter and fixed-wing activity in Bosnia ordered by the Principals committee on 21 February 1995.
- (D) Contents of Intelligence Tab and Serb Objectives Tab to 13 July 1995 memo from Norman Schindler to CIA Director.²

2. On 20 February 2014, the Chamber issued a scheduling order setting a deadline of 3 March 2014 for the Accused to file any evidence-related motions,³ and the Accused submits that he filed the Motion after having failed to obtain the documents before the Chamber’s deadline.⁴

3. The Accused argues the Motion meets the requirements of Rule 54 *bis*.⁵ He submits that he specifically identified each document by date and reference.⁶ He asserts documents (A) and (C) are relevant and necessary as they relate to arms smuggling into Žepa and Srebrenica in 1995, evidence which the Chamber has previously found to be relevant and necessary.⁷ The Accused argues that

¹ Motion, paras. 1, 3.

² Motion, para. 1.

³ Scheduling Order for End of Defence Case, 20 February 2014.

⁴ Motion, para. 4.

⁵ Motion, para. 14.

⁶ Motion, para. 15.

⁷ Motion, paras. 1, 17–18.

document (B) is relevant and necessary as it relates to the Sarajevo component of the case and may corroborate the evidence of witnesses who have testified in his defence case.⁸ Lastly, the Accused argues that document (D) is relevant and necessary because it relates to his knowledge of events in Srebrenica and supports his defence that “he had no knowledge that prisoners in Srebrenica would be executed, and no reason to believe that the events in Srebrenica would lead to genocide”.⁹

4. The Accused asserts he first learned of the documents in September 2013 and requested them from the U.S.¹⁰ On 28 October 2013, after not having received a response, the Accused filed a motion requesting that the Chamber invite the U.S. to respond and to set a deadline for that response.¹¹ Having been thus invited by the Chamber to respond,¹² the U.S. filed its response requesting that the Chamber deny the Accused’s request for setting a deadline and submitting that it was conducting a good-faith review for the Accused’s request for information and that it would respond as quickly as possible.¹³ On 12 December 2013, the Accused sent a letter to the U.S. requesting a substantive response and on 10 January 2014, the U.S. responded to the Accused that it was still working towards providing the documents to him.¹⁴ Therefore, the Accused argues that he has made efforts to obtain the material voluntarily from the U.S. but has failed to do so.¹⁵

5. The Accused then filed his Motion on 3 March 2014, and on the same day the Office of the Prosecutor (“Prosecution”) informed the Chamber *via* e-mail that it would not respond.

6. Having been invited to respond to the Motion,¹⁶ the U.S. requested that the Chamber extend its deadline until 21 March 2014 as counsel for the U.S. would be out of the office and unable to appropriately prepare the U.S. response.¹⁷ The Chamber granted the request and invited the U.S. to respond by 21 March 2014.¹⁸

7. On 21 March 2014, the U.S. filed its “Response of the United States of America to the Trial Chamber’s 5 March 2014 ‘Invitation to the United States of America’” (“Response”), requesting

⁸ Motion, paras. 24–26.

⁹ Motion, paras. 27–29.

¹⁰ Motion, paras. 3, 5–6, Annexes A, B. The Accused sent letters to the U.S. on 23 September 2013 and 8 October 2013.

¹¹ Motion for Invitation to United States of America, 28 October 2013, para. 4.

¹² Invitation to the United States of America, 30 October 2013

¹³ Response of the United States of America to the Trial Chamber’s 30 October 2013 “Invitation to the United States of America”, 21 November 2013, para. 4

¹⁴ Motion, paras. 9–10, Annexes C, D.

¹⁵ Motion, para. 30.

¹⁶ Invitation to the United States of America, 5 March 2014.

¹⁷ Request by the United States of America for Extension Until March 21 of Deadline to Respond to the Trial Chamber’s March 6, 2014 “Invitation to the United States of America”, 10 March 2014, paras. 4, 7.

¹⁸ Decision on Request from the United States of America for Extension of Time, 11 March 2014.

that the Motion be denied.¹⁹ The U.S. asserts that the Motion fails to meet the threshold requirements of a Rule 54 *bis* binding order because the U.S. has worked continuously and co-operatively to respond appropriately to the Accused's requests and has advised the Accused of this on multiple occasions.²⁰

8. The U.S. submits that it is deeply committed to assisting and co-operating with the Tribunal, and notes that over the past several years it has provided the Accused with hundreds of pages of documents and authorised interviews with a number of U.S. Government officials.²¹ The U.S. states that it has responded substantively to some of the Accused's requests, and that it informed the Accused that it was working on responding to the remaining items sought and would inform him and provide any responsive materials when finished.²² The U.S. asserts that it provided one document to the Accused, it was unable to locate another document, and it was continuing to work on the remaining two requests.²³ The U.S. notes that the Accused has acknowledged that it "has continually professed its willingness to provide the requested documents", and while aware of the circumstances regarding the close of evidence in the Accused's case, it argues the Motion lacks an appropriate basis for the issuance of a Rule 54 *bis* binding order.²⁴ The U.S. submits that it is continuing with its good faith review of the Accused's remaining requests and will respond promptly upon completion.²⁵

II. Applicable Law

9. 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".²⁶

10. 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

¹⁹ Response, para. 13.

²⁰ Response, para. 1.

²¹ Response, para. 2.

²² Response, para. 5.

²³ Response, paras. 9–10. The U.S. provided one document to the Accused on the condition that the Chamber issue a Rule 70 order, which the Chamber issued on 19 March 2014. *See* Seventh Motion for Order Pursuant to Rule 70: United States of America, 14 March 2014; Decision on the Accused's Seventh Motion for Order Pursuant to Rule 70 (United States of America), 19 March 2014 ("Seventh Rule 70 Decision").

²⁴ Response, paras. 11–12.

²⁵ Response, para. 12.

²⁶ Article 29(2)(c) of the Statute.

Rule 54 *bis* should identify specific documents and not broad categories of documents;²⁷ (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;²⁸ (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;²⁹ and (iv) the request cannot be unduly onerous upon the state.³⁰

III. Discussion

11. As stated above, binding orders can be issued only after the applicant has made reasonable efforts to persuade the state concerned to provide the requested information voluntarily, and then the state has refused to do so.³¹ The Chamber notes that the U.S. has continuously co-operated with the Accused since his initial request seeking documents in September 2013.³² The Accused even submits that the U.S. has “continuously professed its willingness to provide the requested documents” to him and due to the ending of his defence case, he felt obliged to file the Motion.³³

12. The Chamber notes that so far the U.S. has responded to the Accused’s request for three of the documents by providing him with one document after the Chamber issued an order pursuant to Rule 70,³⁴ advising him that it was unable to locate another document,³⁵ and agreeing that it would disclose to him a third document upon the issuance of a Rule 70 order by the Chamber.³⁶ The U.S. submits it has notified the Accused that it is continuing to work on responding to his requests, and that it will inform the Accused promptly when it completes its work.³⁷ The Chamber is satisfied that the U.S. is voluntarily co-operating with the Accused in searching for and providing documents responsive to his requests. Accordingly, the Chamber finds that the Accused has failed

²⁷ *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 USA 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 Decision*”), 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.

²⁸ Rule 54 *bis*(A)(ii) of the Rules; *Blaškić Review Decision*, paras. 31, 32(ii); *Kordić Decision*, para. 40; *Milutinović USA Decision*, paras. 21, 23, 25, 27.

²⁹ 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.

³⁰ *Blaškić Review Decision*, para. 32 (iii); *Kordić Decision*, para. 41.

³¹ *Milutinović USA Decision*, para. 32.

³² See Motion, paras. 8, 10, Annex D, Response, paras. 4–6, 9–10, Annexes A, B, Eighth Motion for Order Pursuant to Rule 70: United States of America, 1 April 2014 (“*Eighth Rule 70 Motion*”), para.2, Annex A.

³³ Motion, para. 31.

³⁴ Seventh Rule 70 Decision.

³⁵ Response, para. 9.

³⁶ Eighth Rule 70 Motion, Annex A.

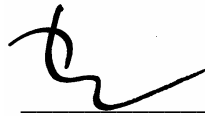
³⁷ Response, paras. 5, 10, 12, Annexes A, B.

to meet one of the requirements of Rule 54 *bis*, and it need not consider the remaining requirements under this rule.

IV. Disposition

13. Accordingly, the Chamber, pursuant to Article 29 of the Statute and Rule 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 seventh day of April 2014
At The Hague
The Netherlands

[Seal of the Tribunal]