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: 11 February 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: **11 February 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR BINDING ORDER (UNITED NATIONS AND NATO)

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

United Nations

Office of Legal Affairs

The North Atlantic Treaty Organisation

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: United Nations and NATO", filed on 29 November 2010 ("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 both the United Nations ("UN") and the North Atlantic Treaty Organisation ("NATO"), pursuant to Article 29 of the Statute of the Tribunal ("Statute") and Rule 54 *bis* of its Rules of Procedure and Evidence ("Rules"), requiring them to provide him with the following documents:

> All memoranda or correspondence in the possession of the UN Office of Legal Affairs, UN Department of Peacekeeping Operations, UN Office of the Secretary General, or the North Atlantic Treaty Organization, written during the period 1 January 1994 through 1 October 1995 in which the issue of when UN peacekeepers might be considered "combatants" or "persons taking a direct part in hostilities" as a result of NATO or UN use of force in Bosnia was discussed.[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 United Nations and NATO before filing the Motion".[2] With regard to the specificity of the requested documents, the Accused explains that he has narrowed his request to the subject matter of when peacekeepers became combatants, the geographic scope to Bosnia and Herzegovina ("BiH"), and the time period to when NATO air strikes were being contemplated.[3]

3. 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 requested documents bear directly "on an issue which can lead to [his] acquittal on Count 11" of the Third Amended Indictment ("Indictment").[4] He also submits that the opinion of the UN or NATO that UN personnel were combatants or persons taking a direct part in the hostilities would support his position that he did not have the *mens rea* for the crime of hostage-taking,[5] and that it would be a miscarriage of justice if these documents were in the possession of the UN

[1] Motion, para. 1.
[2] Motion, para. 17.
[3] Motion, para. 19.
[4] Motion, para. 23.
[5] Motion, para. 23.

but were withheld from the defence.[6] The Accused does not specify separate reasons as to the necessity of the requested documents.

4. On 2 December 2010, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Submission on Karadžić's Motion for Binding Order: United Nations and NATO" ("Prosecution Response"), stating that it does not take a position on the Motion but opting to make some observations regarding the Accused's arguments on relevance and necessity.[7] First, the Prosecution submits that the Accused erroneously suggests that the lawfulness of the initial detention of the UN personnel is relevant to Count 11 since (i) the Appeals Chamber has held that the prohibition against hostage-taking extends to *any* person taking no active part in the hostilities, including those placed *hors de combat*",[8] and (ii) the Pre-Trial Chamber in this case has held that the lawfulness of detention depends not on the circumstances in which any individual comes into the hands of the enemy but rather upon the whole circumstances relating to the manner in which, and reasons why, they are held, including whether they are held to gain an advantage or obtain a concession from the other side.[9] Therefore, the Accused's statement that the critical issue in this case is whether the UN personnel were legally detained as prisoners of war is misleading.[10] Second, the Prosecution submits that the internal beliefs of UN and NATO members of staff about the status of UN personnel is not probative of either the objective status of the UN personnel, or the Accused's mental state at the time.[11]

5. Having been invited to respond to the Motion,[12] NATO filed its response on 15 December 2010 ("NATO Response") stating "[t]he Organisation conducted a search of its records for the requested documentation, but no responsive documents have been found".[13]

6. On 15 December 2010, the UN filed its confidential response to the invitation ("UN Response") arguing that the Motion should be denied.[14] In support, the UN first cites Article II of the Convention on the Privileges and Immunities of the United Nations ("UN Convention") and argues that it provides for the inviolability of the UN archives. Thus, according to the UN,

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[6] Motion, para. 23.

[7] Prosecution Response, para. 1.

[8] Prosecution Response, para. 3, citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("Appeals Chamber Decision"), para. 22.

[9] Prosecution Response, para. 3, citing *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 ("Pre-Trial Chamber Decision"), para. 65.

[10] Prosecution Response, para. 3.

[11] Prosecution Response, para. 4.

[12] *See* Invitation to the United Nations and the North Atlantic Treaty Organisation, 2 December 2010.

[13] NATO Response, p. 2.

it is under no legal obligation to release its documents for use in proceedings at the Tribunal, although it has a "policy of maximum cooperation with the international criminal tribunals and has developed a practice of disclosing documents on a voluntary basis in certain circumstances in order to facilitate the work of these tribunals".[15] The UN then submits that if there were documents in its possession that discussed whether or not peacekeepers may become combatants, these would contain internal opinions on questions of humanitarian law and would therefore be sensitive documents the UN would not be willing to disclose.[16] In addition, any internal discussions on this issue could "seriously jeopardize the safety of current and future peacekeeping operations".[17] The UN also argues that the Motion does not meet the requirements of Rule 54 *bis* because (i) the internal opinions of the UN cannot be probative of the *mens rea* of the Accused and are, therefore not relevant to the Accused's defence; and (ii) the broad range of documents covered by the request renders the search for them unduly onerous.[18]

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".[19] The Appeals Chamber has held that "states" under Article 29 refers to all Member States of the United Nations, whether acting individually or collectively, and therefore, under a purposive construction of the Statute, Article 29 also applies to "collective enterprises undertaken by States" such as an international organisation or its competent organs.[20]

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

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[14] UN Response, 15 December 2010.

[15] UN Response, pp. 2–3.

[16] UN Response, p. 3, citing the Secretary-General's bulletin on Information Sensitivity, Classification and Handling, 12 February 2007, ST/SGB/1007/6, para. 1.2.

[17] UN Response, p. 4.

[18] UN Response, pp. 4–5.

[19] Article 29(2)(c) of the Statute.

[20] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006 ("*Milutinović* NATO Decision"), para. 8, citing *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, 18 October 2000, para. 36.

documents;[21] (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;[22] (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;[23] and (iv) the request cannot be unduly onerous upon the state.[24]

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".[25] 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".[26]

10. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.[27] 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,[28] or whether they relate to the "defence of the accused".[29] 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.[30]

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[21] *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.

[22] 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.

[23] 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.

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

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

[26] *Blaškić* Review, para. 32.

[27] *Kordić* Decision, para. 40.

[28] *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.

[29] *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).

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

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".[31]

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 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.[32] 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*.[33]

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".[34]

III. Discussion

13. The Chamber recalls the Pre-Trial Chamber's "Decision on Six Preliminary Motions Challenging Jurisdiction", issued on 28 April 2009 ("Decision on Jurisdiction") dealing with the Accused's challenge to Count 11 of the Indictment.[35] The Pre-Trial Chamber noted that common article 3 of the Geneva Conventions of 1949 "not only prohibits the taking of civilian hostages, but also of others who are 'taking no active part in the hostilities'".[36] It also held that unlawful detention is an element of the offence of hostage taking but that "the lawfulness of detention does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the manner in which, and reason why, they are held".[37] The Appeals Chamber upheld the Pre-Trial Chamber and held

[31] *Milutinović* US Decision, para. 25.

[32] *Sreten Lukić* Decision, para.7.

[33] *Milutinović* US Decision, para. 32.

[34] *Kordić* Decision, para. 38; *Blaškić* Review, para. 26.

[35] The Chamber there found that the Accused's challenge was a challenge to the form of the Indictment rather than a challenge to jurisdiction. *See* Decision on Jurisdiction, para. 58.

[36] Decision on Jurisdiction, para. 58.

[37] Decision on Jurisdiction, para. 65. The Pre-Trial Chamber referred to the jurisprudence of this Tribunal in relation to unlawful detention, including jurisprudence to the effect that detention could be lawful if undertaken

that "common Article 3 clearly refers the prohibition on taking hostage of *any* person taking no active part in the hostilities".[38]

14. The Chamber also recalls its decision on the Accused's binding order motion relating to the Federal Republic of Germany ("Germany Decision"), where the documents sought by the Accused related to the UN's alleged involved in arms smuggling into BiH in February 1995 and thus, according to the Accused, showed the UN's "actual or perceived status".[39] When assessing whether or not this alleged arms smuggling by the UN is relevant to the Accused's case in the context of Count 11, the Chamber held this to be the case (Judge Kwon dissenting), on the basis that the reasons why the UN personnel were detained in the first place would go to the issue of whether that detention was unlawful or not.[40] The majority also noted that the elements of the offence of hostage-taking under Article 3 of the Tribunal's Statute, including the *mens rea* requirements of that offence, are yet to be addressed by this Tribunal and that, therefore, evidence relating to the Accused's state of mind in relation to the UN and its activities at the time might be relevant to the case.[41] The Chamber left open the issue of whether involvement in arms smuggling, if proven, could possibly transform UN personnel into active participants in the hostilities.[42]

15. Having recalled some of the earlier decisions relating to Count 11 and the relevance of the status of UN personnel allegedly taken hostage in 1995,[43] the Chamber will now turn to the requirements of Rule 54 *bis*, and whether the Accused has met them. With respect to the relevance of the documents sought, the Accused submits that they directly support his defence that he did not have the requisite *mens rea* for the crime of hostage-taking.[44] He makes no further arguments in support of this conclusion. As stated above, the Chamber has yet to make any conclusions as to the elements of the crime of hostage-taking, including the *mens rea* requirements. However, the specific documents requested in this Motion, namely, internal documents of the UN discussing what effect (if any) the use of force by NATO may have on the legal status of UN personnel in BiH, do not appear to have any bearing, nor can they shed any

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to, for example, protect those detained or when security reasons so impel. *See* Decision on Jurisdiction, para. 61, citing *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000, para. 708.

[38] Appeals Chamber Decision, para. 22.

[39] *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. 1–2.

[40] Germany Decision, paras. 25–26. Judge Kwon attached a partial dissent from the majority on these issues.

[41] Germany Decision, para. 27. Judge Kwon dissenting.

[42] Germany Decision, para. 27, Judge Kwon dissenting.

[43] *See also* Decision on Accused's Motion to Compel Interview: General Sir Rupert Smith, 25 January 2011, recalling that the Chamber had previously determined that the status of UN personnel allegedly taken hostage after the NATO air strikes of 25 and 26 May 1995 might be a live issue in this case, para. 11.

[44] Motion, para. 23.

light on the Accused's state of mind at the time when the alleged hostage-taking took place. The Accused was not a party to these internal UN discussions, if such discussions took place at all, and there is no evidence that he was aware either that the UN allegedly engaged in these discussions or their content.

16. Further, any internal UN discussions about the possible legal status of UN personnel in light of events at the time are not in any way determinative of the actual legal status of the UN personnel allegedly taken hostage immediately following the 25 and 26 May 1995 NATO air strikes. At most, these documents would only shed light on the internal deliberations of various UN offices (Office of Legal Affairs, Department of Peacekeeping Operations, and the Office of the Secretary-General) and what, if any, these UN offices might have thought was the status of UN personnel in BiH following the NATO air-strikes. The actual determination of the legal status of the UN personnel allegedly taken hostage in BiH in May 1995 and the lawfulness of their detention are matters for the Chamber to decide at the end of the case, in light of the facts in evidence. Therefore, the Chamber is not satisfied that the documents sought in the Motion are relevant or necessary to the Accused's defence.

17. Given that the Accused has not satisfied one of the requirements of Rule 54 *bis*, the Chamber does not need to consider the remaining requirements and the Accused's arguments related thereto.

IV. Disposition

18. 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 **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this eleventh day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]