



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: 22 August 2012

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: 22 August 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S FIFTH 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 “Fifth Motion for Binding Order: United States of America”, filed on 28 June 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a binding order pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”) to the United States of America (“U.S.”) requesting it to produce to him “[a]ll reports or cables of a meeting between U.S. Deputy Assistant Secretary of State Ralph Johnson and Bosnian President Alija Izetbegovic on or about 19 April 1992”.¹ Specifically, the document that the Accused seeks through the Motion is a cable allegedly authored by Johnson, which describes a meeting with Izetbegović in Sarajevo in April 1992, indicating that the U.S. encouraged Izetbegović not to accept the peace plan proposed by Ambassador Cutileiro (“Cutileiro Plan”).²

2. The Accused submits that the Motion meets the requirements of Rule 54 *bis* of the Rules because his request is “specific, calls for relevant and necessary documents, and he has taken steps to obtain the assistance of the United States before filing the motion”.³ He submits that his request meets the specificity requirement because he has identified the document by the date and the participants in the meeting.⁴ With regard to the relevance and necessity requirement, the Accused submits that the record of this meeting is relevant to prove that he “never had the objective to expel Muslims, by war or otherwise, and that it was the Muslims, encouraged by the United States, who caused the rejection of the Cutileiro Plan and the outbreak of the war in Bosnia”.⁵ The Accused submits the document is necessary because it provides a “credible, contemporaneous account” to support his position and will corroborate the testimony of Cutileiro, who is expected to be a

¹ Motion, para. 1.

² Motion, paras. 12–13.

³ Motion, para. 22.

⁴ Motion, para. 23.

⁵ Motion, para. 25.

defence witness.⁶ Further, the Accused submits that he has requested the U.S. to provide the document to him voluntarily but that the U.S. has refused to do so.⁷

3. On 23 July 2012, following an invitation by the Chamber to respond to the Motion,⁸ the U.S. filed the “Response of the United States of America to the Trial Chamber’s 10 July 2012 ‘Invitation to the United States of America’” (“Response”) arguing that the Motion should be denied.⁹ The U.S. submits that the Motion fails to meet one of the requirements of Rule 54 *bis*, namely that the state to which the request is directed has declined to co-operate.¹⁰ On the contrary, the U.S. argues that it has continuously co-operated with the Accused and has provided him with the document responsive to his request but that the information sought by the Accused is simply not reflected in the document.¹¹ According to the U.S., this document contains verbatim excerpts from the record of a meeting that took place in Sarajevo in April 1992 between Johnson and Izetbegović.¹² The U.S. submits that the purpose of this meeting was to discuss the “possibility of the establishment of diplomatic relations and to bring a shipment of humanitarian aid in the form of food and blankets” during which, according to the records, Izetbegović voiced support for the Cutileiro Plan.¹³ The U.S. submits that despite the Accused’s assertions to the contrary, its records contain nothing further from this April 1992 meeting.¹⁴ In addition, the U.S. contacted Johnson who recalled having only one meeting with Izetbegović in April 1992 and no other discussions with him about the Cutileiro Plan.¹⁵ Further, the U.S. argues that the information sought by the Accused, namely that the U.S. allegedly encouraged Izetbegović to reject the Cutileiro plan, is “neither relevant nor necessary for a determination as to the Accused’s guilt or innocence of the charges he is facing”.¹⁶ The U.S. submits that the Accused has chosen not to believe the U.S. and to call into question its credibility.¹⁷

II. Applicable Law

4. 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

⁶ Motion, para. 26.

⁷ Motion, para. 28.

⁸ Invitation to the United States of America, 10 July 2012.

⁹ Response, pp. 1, 6.

¹⁰ Response, pp. 1, 4.

¹¹ Response, pp. 1, 6.

¹² Response, p. 2.

¹³ Response, p. 2.

¹⁴ Response, pp. 2–3.

¹⁵ Response, p. 3.

¹⁶ Response, pp. 5, 6.

¹⁷ Response, p. 5.

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”.¹⁸

5. 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;¹⁹ (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;²⁰ (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;²¹ and (iv) the request cannot be unduly onerous upon the state.²²

6. 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.²³ If the requesting party is unable to specify the title, date, and author of the requested documents, but is able to identify the requested documents in an 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”.²⁴

7. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.²⁵ 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,²⁶ or whether they relate to the “defence of the accused”.²⁷

¹⁸ Article 29(2)(c) of the Statute.

¹⁹ *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*”), 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.

²⁰ Rule 54 *bis* (A) (ii) of the Rules; *Blaškić Review*, paras. 31, 32(ii); *Kordić Decision*, para. 40; *Milutinović USA Decision*, paras. 21, 23, 25, 27.

²¹ 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.

²² *Blaškić Review*, para. 32 (iii); *Kordić Decision*, para. 41.

²³ *Milutinović USA Decision*, para. 15; *Blaškić Review*, para. 32; *Kordić Decision*, para. 39.

²⁴ *Blaškić Review*, para. 32.

²⁵ *Kordić Decision*, para. 40.

²⁶ See *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, 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.

²⁷ See *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.

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.²⁸ Furthermore, the applicant is not required to make a showing that all other possible avenues have been exhausted.²⁹ Therefore, it is reasonable for an applicant 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”.³⁰

8. 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 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.³¹ 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*.³²

9. 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’”.³³

III. Discussion

10. As stated above, a party seeking a binding order under Rule 54 *bis* must satisfy a number of requirements before the order may be issued by the Chamber. One such requirement is that the document requested must be relevant to any matter at issue and necessary for a fair determination of that matter. In the Motion, the Accused seeks a document which would confirm the information provided to him by Cutileiro during an interview with the Accused’s legal adviser on 20 February 2012, namely that the U.S. encouraged Izetbegović not to accept the Cutileiro Plan in April 1992.

²⁸ *Milutinović* USA Decision, para. 23.

²⁹ *Milutinović* USA Decision, para. 25.

³⁰ *Milutinović* USA Decision, para. 25.

³¹ *Sreten Lukić* Decision, para.7.

³² *Milutinović* USA Decision, para. 32; *Blaškić* Review, para. 31.

³³ *Kordić* Decision, para. 41, citing *Blaškić* Review, para. 32.

The Accused argues that this information is relevant to show that he never had the objective to “expel Muslims, by war or otherwise” and that it was the Bosnian Muslims who caused the war by rejecting the plan proposed by Cutileiro. The Chamber finds, however, that the issue of who was responsible for starting the war is not relevant to the Accused’s defence case. Similarly, what a U.S. representative may have told Izetbegović with respect to accepting or not accepting the Cutileiro Plan is certainly not relevant to any issue in the case, including the Accused’s individual criminal responsibility as Izetbegović’s rejection of the Cutileiro plan has already been discussed during this case and is not in dispute.³⁴

11. As for necessity, the Accused argues that this information is necessary to provide a “credible and contemporaneous account” to support his position that he never had the objective to “expel Muslims and Croats from Serbian areas of Bosnia” and to corroborate the future testimony of Cutileiro.³⁵ The Chamber notes that the necessity requirement obliges the Accused to show that this information is necessary for a fair determination of a matter at trial. However, given its lack of relevance, the Chamber finds that this information is not necessary to determine any matter at trial. Therefore, the Chamber finds that the request fails to meet both the relevance and necessity requirements under Rule 54 *bis*.

12. Another requirement for a binding order under Rule 54 *bis* is that the applicant must prove that he has used reasonable efforts to persuade the state concerned to provide the requested information voluntarily, and that the state has refused to do so.³⁶ The U.S. has already provided the Accused with a document that is responsive to his request but which does not reflect the information his legal adviser has obtained from Cutileiro. However, this does not amount to the U.S. refusing to voluntarily co-operate with the Accused with respect to his request. To the contrary, the Chamber finds that the U.S. has continuously co-operated with the Accused in searching for and providing documents responsive to his multiple requests,³⁷ including the current request. Given that the Motion fails to meet two of the requirements of Rule 54 *bis*, the Chamber need not consider the remaining requirements and the Accused’s arguments related thereto.

13. The Chamber has warned the Accused in the past that he should focus his investigatory efforts on matters that are directly related to the charges against him and has denied motions in

³⁴ See P776, Herbert Okun’s testimony in the *Prosecutor v. Krajišnik* case, Case No. IT-00-39, T. 4324–4325; Patrick Treanor, T. 14411–14412 (8 June 2011).

³⁵ Motion, paras. 2, 3, 25, 26.

³⁶ *Milutinović* USA Decision, para. 32.

³⁷ See Decision on the Accused’s Third Motion for Binding Order (United States of America), 17 February 2011.

which his request for documents did not meet the requirements of relevance and necessity.³⁸ Again, the Chamber reiterates its position that the use of binding order motions should only be utilised to seek information that is directly relevant to the case and not used as a trial tactic to generate publicity or as a vehicle to voice the Accused's personal political views about the war.

IV. Disposition

14. Accordingly, the 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 twenty-second day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁸ See Decision on the Accused's Motion for Binding Order (The Kingdom of Saudi Arabia), 30 June 2011; Decision on the Accused's Second Motion for Binding Order (The Islamic Republic of Iran) and Motion for Subpoena to Interview General Director Sadeghi, 10 May 2011; Decision on the Accused's Motion for Binding Order (United Nations and NATO), 11 February 2011.