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CASE/AFFAIRE NO. IT-95-5/18-T (R. KARADŽIĆ) DATE 28 March 2013

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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-T
Date: 28 March 2013
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: 28 March 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL ANNEX

**DECISION ON THE ACCUSED'S MOTION TO COMPEL PRODUCTION OF SEVEN
DOCUMENTS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the United Kingdom

via the Embassy of the United Kingdom 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 seized of the “Motion to Compel Production of Seven Documents” filed by the Accused on 24 January 2012 (“Motion”) pursuant to Rule 54 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”) in which he requests that the Chamber issue an order to the United Kingdom of Great Britain and Northern Ireland (“UK”) aimed at compelling the UK to provide to him seven documents which he believes are necessary for his defence (“Seven Documents”).¹

I. Background and Submissions

1. The complex background related to this Motion was summarised in both the Chamber’s “Decision on Accused’s Motion to Compel Production of Seven Documents” issued confidentially on 21 August 2012 (“First Decision”) and its “Decision in Relation to the United Kingdom of Great Britain and Northern Ireland’s Response to the Trial Chamber’s Decision of 21 August 2012” issued confidentially on 23 November 2012 (“Second Decision”) and will not be repeated here.² For the purposes of this Decision, the Chamber recalls that the Seven Documents are said to be highly classified reports originating from another state (“Originator State”) and that the UK is unable to disclose them to the Accused due to the Originator State’s lack of consent to that course of action.³ Following further submissions by the Office of the Prosecutor (“Prosecution”), the UK, and the Accused, the UK eventually submitted that the Originator State would not disclose the Seven Documents to the Accused, but that it was willing to disclose summaries of the Seven Documents, on the condition that: (i) the Accused signs a confidentiality agreement, (ii) the Chamber issues an order pursuant to Rule 70 applicable to the summaries, and (iii) the identity of the Originator State remains secret. In response, the Accused agreed to accept the summaries of the Seven Documents on the “sole pre-condition of a confidentiality agreement” but the Originator State would not agree to this disclosure on that basis. Following this impasse, the UK engaged in further negotiation with the Originator State and eventually submitted that the Motion should be denied since the Accused would not agree to the Rule 70 conditions outlined above. The Accused in turn argued that agreeing to the Rule 70 conditions without first seeing the summaries of the Seven Documents would preclude him from later obtaining those Documents or from following up on the information contained therein with

¹ Motion, para. 1.

² First Decision, paras. 1–11; Second Decision, paras. 1–6.

³ Motion, para. 6; First Decision, paras. 2–3.

the Originator State, which in turn made the summaries of the Seven Documents unusable, thus making his position reasonable.⁴

2. Having considered the above submissions, the Chamber expressed concern that compelling the Accused to accept the summaries of the Seven Documents, along with the strict Rule 70 conditions (including the withholding of the identity of the Originator State), without him seeing those summaries first, may effectively amount to a blanket refusal by the UK to provide the information requested.⁵ Accordingly, the Chamber decided to stay its decision on the merits of the Motion and invited the UK, pursuant to Rule 54 *bis*(I), to disclose to it the redacted versions and the summaries of the Seven Documents in order to help the Chamber assess their usability in the context of the Accused's defence case.⁶ The Chamber also invited the UK to provide it with any further submissions pursuant to Rule 54 *bis*(F) to (G), if it so wished.⁷ On 19 October 2012, the UK responded confidentially, stating that due to the acute national security interests at stake, it requested an *in camera* and *ex parte* hearing, pursuant to Rule 54 *bis*(F) to (G), and proposed modalities for such a hearing, including that a single Judge travel to London to review the summaries and redacted versions of the Seven Documents.⁸ In the Second Decision, the Chamber invited the UK either to abandon its request that the review take place in London before a single Judge or to make substantive submissions on the merits of the Motion.⁹ As a result, on 14 December 2012, the UK responded, again confidentially, submitting that it was willing to revise the modalities for the review but requested that the Chamber schedule an "*in camera* and *ex parte* case management hearing at which these issues may be addressed".¹⁰

3. Having been granted leave to reply by the Chamber,¹¹ on 19 December 2012, the Accused filed confidentially the "Reply Brief: Motion to Compel Production of Seven Documents: Modalities of Ex Parte Hearing" ("Reply") objecting to the proposed case management hearing being held *ex parte*.¹² He argued that the modalities of the Chamber's inspection of the Seven Documents should be discussed *inter partes* and that should the

⁴ First Decision, paras. 5–10.

⁵ First Decision, para. 22–23.

⁶ First Decision, paras. 22–24, 26.

⁷ First Decision, para. 26(d).

⁸ United Kingdom of Great Britain and Northern Ireland's Response to the Trial Chamber's Decision of 21 August 2012, confidential, 19 October 2012, paras. 2–3, 5–6, 8.

⁹ Second Decision, paras. 19–20.

¹⁰ United Kingdom of Great Britain and Northern Ireland's Response to the Trial Chamber's Decision of 23 November 2012, confidential, 14 December 2013, para. 3.

¹¹ On 17 December 2012, the Accused filed confidentially the "Request for Leave to Reply: United Kingdom Proposal for *Ex Parte* Hearing"; the Chamber ordered the Accused to file his reply by 19 December 2012. T. 31625 (17 December 2012) (private session).

Originator State wish to make submissions to the Chamber, it should do so at an *inter partes* hearing.¹³

4. On 10 January 2013, two members of the Chamber's legal staff met with representatives of the UK at the UK Embassy in The Hague wherein the UK identified the modalities under which the *in camera* and *ex parte* hearing for the review of the Seven Documents should proceed. The UK proposed that, due to the highly confidential nature of the Seven Documents, the *in camera* and *ex parte* hearing take place at the UK Embassy in The Hague and that, other than the Judges of the Chamber, no other Tribunal staff be present. The UK and the Originator State would make their Rule 54 *bis* submissions during this hearing, following which the Chamber could review the summaries and redacted versions of the Seven Documents. The UK finally requested that no transcript be made of the hearing.

5. On 15 January 2013, the Chamber informed the parties, in private session, that the meeting of the 10 January 2013 took place, and that the Chamber would be issuing a follow-up decision in relation thereto.¹⁴ Accordingly, on 25 January 2013, the Chamber issued confidentially its "Order in Relation to the Accused's Motion to Compel Production of Seven Documents" ("Order") holding that it was in the interests of justice for it to conduct the review of the summaries and redacted versions of the Seven Documents at the UK Embassy in The Hague pursuant to Rule 4 of the Rules.¹⁵ The Chamber decided that the review would be conducted in the presence of the four Judges of this Chamber alone and that no transcript of the hearing would be made.¹⁶ The UK and the Originator State would be able to make submissions on their national security interests during the hearing but any submission they may wish to make on the requirements of Rule 54 *bis*, other than the national security objections, would be made in writing and on an *inter partes* basis, within 14 days of the hearing.¹⁷ On 18 February 2013, the Chamber issued a scheduling order, informing the parties that the said hearing would take place on 18 March 2013, at 9:30 a.m..¹⁸

6. Having now attended the hearing and reviewed the redacted versions and the summaries of the Seven Documents, the Chamber is able to rule on the merits of the Motion.¹⁹

¹² Reply, para. 2.

¹³ Reply, paras. 3–4.

¹⁴ T. 31846–31847 (15 January 2013) (private session).

¹⁵ Order, para. 9.

¹⁶ Order, para. 9.

¹⁷ Order, paras. 11–12.

¹⁸ Scheduling Order for Rule 4 Hearing, confidential, 18 February 2013.

¹⁹ Given that the Motion and some of the initial filings in relation thereto were filed publicly, as well as the fact that this Decision does not reveal any information that might jeopardise the UK and/or the Originator State's national

7. In light of its conclusion below, the Chamber does not consider it necessary to hear from the UK on the other requirements of Rule 54 *bis*.

II. Applicable Law

8. 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”.²⁰

9. 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;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

10. 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. The applicant’s obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, he or she made a reasonable effort to persuade the state to provide the requested information voluntarily.²⁵

security interests, the Chamber issues this decision publicly. However, the Chamber does not consider that any of the confidential filings related to the Motion, including decisions and orders summarised in this Decision, should be reclassified as public. Furthermore, due to its sensitive nature, the Chamber attaches the summary of what transpired at the Rule 4 hearing in a Confidential Annex.

²⁰Article 29(2)(c) of the Statute.

²¹*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.

²²Rule 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.

²³Rule 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*Sreten Lukić Decision*, para.7.

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*.²⁶

11. With regard to the information that originates from and/or is owned by third states, the Appeals Chamber has held that a state in possession of such information should not be forced to disclose it as it has “a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other states and entities”; if the state possessing the information “were to divulge the information without the consent of the information providers, other states could start doubting [its] willingness and ability to keep secrets entrusted to it”.²⁷ The Appeals Chamber further held that the “application of protective measures to this information handed-over by [the state in possession of information] would clearly not suffice to protect this national security interest.”²⁸

12. The Chamber also notes that Rule 70 allows for a state or organisation to provide information to the parties on a confidential basis.²⁹ This Rule is the basis for co-operation by states, organisations, and individuals with the Tribunal as it encourages them to share sensitive information on a confidential basis and guarantees that the confidentiality of the information they offer and of the information’s sources will be protected.³⁰ In providing information, the state is not required to justify its reasons for confidentiality on national security grounds or otherwise.³¹ Further, the confidentiality will not be lifted without the consent of the state.³²

13. In terms of the interaction between Rule 54 *bis* and Rule 70, the Appeals Chamber has stated that “a party may not bypass a [s]tate’s cooperative effort to assist it with gaining access to certain confidential information simply because that party does not want the [s]tate to be able to utilize the protections afforded to it through Rule 70”.³³ Furthermore, the Appeals Chamber has also held that invoking Rule 70 conditions in response to a request for documents “does not equal a [s]tate declining to ‘lend the requested support’” justifying the issuance of a binding order pursuant to Rule 54 *bis*.³⁴ However, according to the Appeals Chamber, Rule 70 should

²⁶ *Milutinović* USA Decision, para. 32; *Blaškić* Review, para. 31.

²⁷ *Milutinović* USA Decision, paras. 43–44; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006 (“*Milutinović* NATO Decision”), para. 19.

²⁸ *Milutinović* USA Decision, para. 44; *Milutinović* NATO Decision, para. 19.

²⁹ *Milutinović* USA Decision, para. 33, citing Rule 70 (B), (C), and (F) and *Prosecutor v. Milošević*, Case Nos. IT-02-54-AR108bis& IT-02-54-AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (“*Milošević* Rule 70 Decision”), paras. 20–21, 25.

³⁰ See *Milošević* Rule 70 Decision, para. 19.

³¹ *Milutinović* USA Decision, para. 33.

³² *Milutinović* USA Decision, para. 33.

³³ *Milutinović* USA Decision, para. 37.

³⁴ *Milutinović* USA Decision, para. 37.

not be used by states as “a blanket right to withhold, for security purposes, documents necessary for trial”, as this would violate fair trial rights and be contrary to the state’s obligation under Article 29 of the Statute.³⁵

III. Discussion

14. As a preliminary matter, and as acknowledged by the Accused himself,³⁶ the Chamber notes that the Tribunal’s jurisprudence is such that it does not allow it to compel the UK to disclose to the Accused the Seven Documents in question, due to the fact that they belong to the Originator State.³⁷ Thus, the issue that needs to be resolved before the Chamber can dispose of the Motion is whether the UK and the Originator State’s approach to this matter is such that it can be said that they are refusing – in a blanket manner – to disclose the information to the Accused, by invoking stringent Rule 70 conditions, including that the Accused accept the summaries under Rule 70 conditions, without inspecting them first.³⁸

15. Having now conducted the review of the redacted versions of the Seven Documents, as well as the summaries of the same, the Chamber is of the view that the summaries are of such nature and format that they can be used by the Accused for the purposes of his defence case. The information withheld from the summaries either relates to national security interests of the Originator State or is not relevant to the Accused’s case. Similarly, the information that the Accused has sought from the UK can be gauged from the summaries themselves. For that reason, the Chamber is of the view that the Accused will not be prejudiced if he accepts the summaries under the Rule 70 conditions imposed by the UK and the Originator State, both having, in the Chamber’s view, acted in the utmost good faith.

16. Similarly, the Chamber is satisfied that the UK and the Originator State have been co-operating with the Accused throughout this extensive litigation, and are not trying to withhold information in a blanket manner despite invoking stringent Rule 70 conditions. For that reason, it cannot be said that the Accused has satisfied one of the requirements of Rule 54 *bis*, namely that he has shown that the UK and the Originator State have refused to co-operate with him and with the Tribunal as mandated by Article 29 of the Statute. The Chamber shall, therefore, deny his Motion.

³⁵ *Milutinović USA Decision*, para. 38.

³⁶ *First Decision*, para. 4.

³⁷ *See above*, para. 11.

³⁸ *See above*, paras. 2, 13.

17. The Chamber notes that it is now open to the Accused to accept or refuse the UK's disclosure of the summaries to him under the Rule 70 conditions mentioned above.³⁹ Should he choose to accept them on that basis, he should inform the Chamber accordingly and submit a request for a Rule 70 order for the said summaries.

IV. Disposition

18. Accordingly, the Chamber, pursuant to Article 29 of the Statute and Rules 54 *bis* and 70 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-eighth day of March 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁹ See above para. 1.

CONFIDENTIAL ANNEX

Summary of the Rule 4 hearing

1. During the hearing the UK and the Originator State made submissions on their national security concerns including the sensitivity of what the information contained in the Seven Documents reveals about the Originator State's intelligence capabilities, the sensitivity of the disclosure of the identity of the Originator State, and the appropriateness of providing the Accused with summaries of the Seven Documents.

2. On the subject of the sensitivity of the information contained in the Seven Documents, the UK and Originator State addressed the risks associated with the disclosure of any information from the Seven Documents that could reveal the Originator State's intelligence capabilities. They outlined how any disclosure of information that could allow reliable inferences to be drawn about the Originator State's intelligence capabilities could have consequential grave damage to the national security of the Originator State and the UK.

3. On the subject of the Originator State's identity, the UK and the Originator State submitted that any disclosure of the Originator State's identity in any manner linked to the Seven Documents, the summaries thereof, or any information contained in the Seven Documents, could have grave consequences for the national security of both the Originator State and the UK.

4. On the subject of the appropriateness of providing summaries of the Seven Documents, the Originator State took the Chamber through the seven lightly redacted TOP SECRET intelligence reports for the purposes of addressing what information was responsive to the Motion and the adequacy and usability of the summaries from the Accused's perspective. The Originator State, supported by the UK, submitted that there could be no prejudice to the Accused from the non-disclosure of the Originator State's identity and that, moreover, there was no necessity for such disclosure, the UK and the Originator State having both demonstrated their good faith throughout the proceedings.