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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-95-14/2-AR108*bis*

Date: 9 September 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Gabrielle Kirk McDonald, Presiding**
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **9 September 1999**

THE PROSECUTOR

v.

DARIO KORDIĆ AND MARIO ČERKEZ

DECISION ON THE REQUEST OF THE REPUBLIC OF CROATIA FOR REVIEW OF A BINDING ORDER

The Office of the Prosecutor:
Mr. Geoffrey Nice
Mr. Kenneth Scott
Ms. Susan Sommers
Mr. Patrick Lopez-Terres

Counsel for the Republic of Croatia:
Mr. David B. Rivkin, Jr.
Mr. Lee A. Casey
Mr. Darin R. Bartram

Counsel for the Accused Dario Kordić:
Mr. Mitko Naumovski
Mr. Turner T. Smith, Jr.
Mr. David Geneson

Counsel for the Accused Mario Čerkez:
Mr. Božidar Kovačić
Mr. Goran Mikuličić

I. INTRODUCTION

Background

1. The Appeals 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 ("the Tribunal") is seised of a request for review of a binding order of Trial Chamber III of 4 February 1999 ("the Binding Order"), filed by the Republic of Croatia ("Requesting State") on 11 February 1999.[1] In the Binding Order, Trial Chamber III ordered the Requesting State to disclose certain documents to the Office of the Prosecutor ("the Prosecution").

2. The Requesting State requests that the Appeals Chamber quash the Binding Order on the following two main grounds: 1) the Binding Order was issued without the Requesting State having been given notice and an opportunity to be heard; and 2) the Binding Order is inconsistent with the criteria for the issuance of binding orders as established by the Appeals Chamber's Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *The Prosecutor v. Blaškić* (Case No.: IT-95-14-T), of 29 October 1997 ("the Judgement").

3. Having considered the written submissions of the Requesting State and the Prosecution, the Appeals Chamber hereby renders its decision pursuant to the Statute and the Rules of Procedure and Evidence of the Tribunal ("the Statute" and "the Rules" respectively), as follows.

[1] Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents.

Procedural history

4. Pursuant to an *ex parte* request by the Prosecution, Trial Chamber III on 4 February 1999, issued the Binding Order to the Requesting State.. In its decision Trial Chamber III considered the Judgement and stated that -

> "[a]ny request for an order for production of documents issued under article 29, paragraph 2, of the Statute, whether before or after the commencement of a trial, must (1) identify specific documents and not broad categories. . . .; (2) set out succinctly the reasons why such documents are deemed relevant to the trial. . . .; (3) not be unduly onerous. . . .; (4) give the requested State sufficient time for compliance. . . " [and] that those conditions were mandatory and cumulative".

5. Trial Chamber III found Requests 1 to 27, 29 to 38 and 40 to be specific, relevant and not unduly onerous and requests number 28 and 39 not to meet the criterion of relevance as set out in the Judgement. Therefore, it ordered the Requesting State to disclose to the Prosecution the documents described in Requests 1 to 27, 29 to 38 and 40 in the Binding Order "as soon as possible and no later than within sixty days of the date of" that Order.

6. The Requesting State then filed an *ex parte* Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents on 11 February 1999 pursuant to Rule 108*bis* of the Rules. On 17 March 1999, the Appeals Chamber issued a scheduling order declaring the Prosecution and the Defence to be at liberty to file written submissions by 24 March 1999, addressing, *inter alia*, whether the issues raised by the request for review were of general importance relating to the powers of the Tribunal within the meaning of Sub-rule 108*bis*(A) of the Rules and, in the event the Appeals Chamber should hold the request to be admissible, whether the execution of the Binding Order should be suspended pending resolution of the Appeals Chamber's review. The Prosecution filed its response on 24 March 1999. [2] The Defence did not file any written submissions.

[2] Response to Notice of State Request for Review of Order to the Republic of Croatia for the Production of Documents.

7. On 26 March 1999, the Appeals Chamber rendered its decision on the admissibility of the request for review.[3] In that decision, the Appeals Chamber held the request admissible on the ground that the Requesting State was clearly directly affected by the Binding Order, which it found to concern issues of general importance relating to the powers of the Tribunal within the meaning of Rule 108*bis*. The Appeals Chamber further found it to be in the interests of justice that the Binding Order be suspended pending its review. On that same day, the Appeals Chamber also issued a scheduling order directing the Requesting State to submit a written brief by 9 April 1999, to which the Prosecution was to respond within seven days of the filing of the Requesting State's brief. In addition, the Appeals Chamber ordered that the Defence was at liberty to file any written submissions within the same time-period.

8. Briefs were filed by the Requesting State and the Prosecution on 9 and 16 April 1999,[4] respectively. The Defence did not file any written submissions.

II. THE REVIEW

Preliminary issue

9. The Requesting State requests that oral arguments be scheduled so that a full exposition of the issues involved may be provided for the Appeals Chamber's consideration. The Prosecution expresses no opinion on the matter.

10. The Appeals Chamber finds that it is not necessary to hear oral arguments prior to determination of the issues raised by the review. Consequently, the request is denied.

[3] Order on Admissibility of State Request for Review of Order to the Republic of Croatia for the Production of Documents Issued by Trial Chamber III on 4 Feb. 1999 and Request for Suspension of Execution of Order.
[4] Merits Brief of the Republic of Croatia on State Request for Review of Order to the Republic of Croatia for the Production of Documents ("*Merits Brief*") and the Prosecutor's Response to the "Merits Brief" of the

First Ground for Review: whether the Requesting State had a right to be notified and heard prior to the issuance of the Binding Order

1. Submissions of the Parties

(a) The Requesting State

11. The Requesting State contends that an Article 29(2) binding order for document production may not be issued without affording the requested State notice and an opportunity to be heard.[5] Its position is three-pronged. First, States have a right to notice and a hearing in Article 29(2) proceedings. Second, States must be accorded notice and a hearing before an Article 29(2) binding order is issued. Third, a State's right to be heard before an Article 29(2) binding order is issued includes the right to be heard on all of the Judgement's criteria, including that of relevance.

12. The Requesting State characterizes the first point as the right to be heard before judicial action is taken, a right that it claims to be part of the principle of due process.[6] After a brief survey of national and international legal texts, it concludes that "[t]here is no justification in law or reason for the International Tribunal to eschew this most basic rule of both national and international law, requiring that a party be heard before judicial action with respect to it is taken".[7] It submits that neither the Statute nor the Rules provide for such a derogation as to allow *ex parte* action on an Article 29(2) application, but that such an action may be justifiable only in "the most extreme and exigent circumstances".[8]

13. The second point is based on the alleged "significant consequences" for a State that is subject to an Article 29(2) binding order.[9] According to the Requesting State, it would be for the State affected by the order to prove that the order was issued in error, and to prove

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Republic of Croatia on State Request for review of Order to the Republic of Croatia for the Production of Documents Filed on 9 April 1999 ("*Prosecutor's Response*").
[5] *Merits Brief*, para. 10.
[6] *Ibid.*, para. 11.
[7] *Ibid.*, para. 15.
[8] *Ibid.*

this would be an unfair burden for the State which could have proved the request for the order to be unfounded before the order was issued.[10] Moreover, the issuance of the order without hearing the State on the requirements for binding orders may raise the "suspicion" that the Trial Chamber's action would suggest that the request for the order was well founded, and that the State had failed in its obligations to the Tribunal.[11] The Requesting State claims also that such orders may only be issued after "the applicant has satisfied each of the requirements articulated by the Appeals Chamber in the 29 October 1997 Judgement".[12] Lastly, the Requesting State argues that there is no "urgency or administrative necessity" to justify the issuance of the Binding Order *ex parte*, since the trial in the present case is yet to commence.

14. The Requesting State argues, in respect of the third point, that, as a matter of due process, it "is entitled to notice and a hearing on the legal sufficiency of the applicant's showing on each of the requirements for a binding order established in the 29 October 1997 Judgement, including relevance, before an Article 29(2) binding order issues".[13] The entitlement arises from the adversarial nature of the procedures "designed" by the United Nations Security Council for the Tribunal.[14] The Requesting State further argues that inferences drawn from the second and fourth criteria for binding orders laid down in the Judgement entitles it to be notified of an Article 29(2) application, and to be heard *before* a binding order is issued. [15] With regard to the second criterion, the Requesting State submits that even if the Prosecution may, in certain circumstances, be entitled to articulate the detailed reasons concerning relevance to the Trial Chamber alone, this criterion obligates the Prosecution to notify the Requesting State of, at least, the general grounds on which the Article 29(2) application is based. The Requesting State further submits that the language

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[9] *Ibid.*, para. 16.
[10] *Ibid.*, para. 20.
[11] *Ibid.*
[12] *Ibid.*, para. 16, and also para. 19.
[13] *Ibid.*, para. 28.
[14] *Ibid.*, paras. 26 and 27.
[15] *Ibid.*, para 27. The second criterion requires that a binding order "set[s] out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests"; whereas the fourth criterion states that the requested State must be given "sufficient time for compliance; this of course would not authorise any unwarranted delays by that state. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State".

used in the forth criterion implies a right to notice of an Article 29(2) application and a right to be heard prior to an order being issued.

(b) The Prosecution

15. As to the argument of the Requesting State that *ex parte* proceedings for binding orders are extraordinary, the Prosecution states that "no legal system contemplates that, in the course of an investigation or prosecution, a third party with relevant evidence must be consulted or asked permission before a subpoena or order can be addressed to that person".[16] As to the argument that the adversarial procedures of the Tribunal would be undermined if a binding order is issued to a State without it being notified and heard beforehand, the Prosecution contends that the Requesting State "is not a *party* to proceedings before the Tribunal", but that it should be treated like a witness, when it receives the Binding Order.[17] With respect to the claim of the Requesting State that it is entitled to be heard in respect of the criteria for binding orders laid down in the Judgement, the Prosecution argues that the relevance of evidence sought by binding orders is a matter which concerns the parties to the case and especially the Trial Chamber,[18] and that any challenge to the orders, on whatever grounds, is allowed by the Rules, but only after they are issued, and that the rights of the recipient of the orders are, therefore, safeguarded.[19] Concerning the point that reasonable time-limits could be set by way of consultation between the relevant Trial Chamber and the receiving State, as suggested by the Appeals Chamber in the Judgement, the Prosecution considers it as a matter of discretion rather than of duty on the part of the Trial Chamber.[20]

[16] *Prosecutor's Response*, para. 7.
[17] *Ibid.*, paras.10 and 13.
[18] *Ibid.*, paras. 11 to 13 and 15.
[19] *Ibid.*, paras. 14 to 18.
[20] *Ibid.*, para. 19.

2. Discussion and Findings

16. The Tribunal's competence extends to trying persons charged with serious violations of international humanitarian law.[21] In order for the Tribunal to discharge this function, it must rely upon the co-operation of States since it is not endowed with an enforcement mechanism of its own. In the Judgement, the Appeals Chamber held that the Tribunal is empowered to issue binding orders and requests to States pursuant to Article 29 of the Statute, which derives its binding force "from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolutions adopted pursuant to those provisions".[22] By affording judicial assistance to the Tribunal, States do not thereby subject themselves to the primary jurisdiction of the Tribunal, which is limited to natural persons. Rather, when issuing binding orders to States, the Tribunal exercises its "ancillary (or incidental) mandatory powers *vis-à-vis* States" as embodied in Article 29 of the Statute.[23]

17. The Requesting State contends that the principle of due process requires that it be afforded notice and an opportunity to be heard before a binding order for the production of documents is issued to it. Citing *Mathews v. Eldrige,* 424 U.S. 319, 333 (1976) (quoting in part *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)), it claims that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[24] The pertinent question then is what constitutes "meaningful" procedural guarantees, if any, for the Requesting State. As shown by the case law referred to by the Requesting State, "[d]ue process is flexible and calls for such procedural protection as the particular situation demands".[25] Furthermore, the Requesting State recognises that "a State involved in Article 29(2) proceedings is not a party before the International Tribunal".[26] Yet, it contends that the adversarial nature of the Tribunal's procedure entitles it to certain due process guarantees. Significant due process guarantees, however, are afforded to parties. Rule 2 defines parties as the Prosecutor and the accused.

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[21] Article 1 of the Statute.
[22] *Judgement*, para. 26.
[23] *Ibid.*, para. 28.
[24] *Merits Brief*, para. 12.
[25] *Merits Brief*, para. 12, referring to *Mathews v. Eldrige,* 424 U.S. 319, 334 (1976) (quoting in part *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
[26] *Ibid.*, para. 23.

Consequently, what constitutes "meaningful" has to be determined in that context. The Appeals Chamber agrees that the Requesting State is entitled to an opportunity to be "heard at a meaningful time and in a meaningful manner." It finds, however, that Rule 108*bis* sufficiently satisfies that purpose. Equity is done by affording the Requesting State an opportunity to challenge the Binding Order before it is implemented through the procedure established in Rule 108*bis*.

18. The Appeals Chamber now turns to the second point of the Requesting State which is based on the alleged "significant consequences" for a State that is subject to an Article 29(2) binding order. It is not persuaded by the argument that it would be unfair to relegate the Requesting State to an opportunity, after a Binding Order has been issued, to prove that it was issued erroneously for failure to meet the four criteria of the Judgement. Nor is the Appeals Chamber persuaded that the case for the Requesting State is improved by the argument that it would be more logical for the Requesting State to have an opportunity before the Binding Order was issued, to prove that the request for it was unfounded. In the view of the Appeals Chamber, the *ex parte* nature of a request for a Binding Order excludes the claimed right to a prior hearing. The Appeals Chamber stresses that the issuance of a binding order by a Trial Chamber does not indicate a finding of a failure of a State to fulfil its obligations under the Statute and the United Nations Charter. The Appeals Chamber also considers that there is no requirement of "urgency or administrative necessity", as claimed by the Requesting State, for binding orders to be issued on an *ex parte* basis. Such orders may become necessary whenever co-operation is found to be inadequate for the purpose of obtaining such documents as are required for the conduct of a trial.

19. In respect of the third point, the Appeals Chamber notes its close relationship with the first point raised by the Requesting State. The Appeals Chamber will not repeat what has already been stated in respect of the right to be heard based on the requirement of the principle of due process.[27] Instead, the Appeals Chamber will focus on the inferences drawn by the Requesting State from the second and fourth criteria in the Judgement.[28]

[27] *Supra*, para. 17.
[28] *Supra*, para. 14.

These inferences are not persuasive. The Requesting State submits that, while arguments concerning relevance may be *ex parte*, the general grounds on which a request is based should be disclosed to a State in an application under Article 29(2). The Appeals Chamber disagrees. Nothing in the second criterion provides for notification of, or hearings on, grounds of relevance, or on the general grounds on which a request is based, in advance of a binding order issuing. It is for the Trial Chamber and not the Requesting State to assess the relevance and admissibility of the documents requested. The fourth criterion established by the Judgement provides that "[r]easonable and workable deadlines could be set by the Trial Chamber after consulting the requested State."[29] The Requesting State submits that this language implies a right to notice of an Article 29(2) application and a right to be heard prior to an order being issued. Again, the Appeals Chamber disagrees. The correct inference is that, once the binding order is served on the State concerned, the State may come back to the Trial Chamber if it deems insufficient the time allowed by the order. Rescheduling for compliance obligations may be possible but it is clear that this happens only after the order is served.

20. For the foregoing reasons, the Appeals Chamber finds that the Requesting State had no right to be notified or to be heard before the Binding Order was issued to it.

Second Ground for Review: whether the Binding Order is inconsistent with the criteria for the issuance of binding orders established by the Judgement

1. Submissions of the Parties

(a) The Requesting State

21. The Requesting State submits that the criteria adopted in the Judgement are binding on the Trial Chambers as the law of the Tribunal, either through a rule of precedent, *stare decisis*, or through some similar means.[30] It contends that the Binding Order does not meet

[29] *Judgement*, para. 32.
[30] *Merits Brief*, paras. 29 to 42.

the mandatory and cumulative criteria laid down in the Judgement. Its arguments may be summarised as follows.

22. Regarding the first point that the criteria adopted in the Judgement are binding on the Trial Chambers, the Requesting States argues that the requirements of Rule 108*bis* support a rule of precedent since this provision limits interlocutory appeals by States to decisions concerning "issues of general importance relating to the powers of the Tribunal". The Requesting State submits that if the Appeals Chamber's decisions under Rule 108*bis* have no precedential effect on the Trial Chambers, there would be no purpose in reviewing matters of general importance.[31] It submits further that the importance of a uniform interpretation of the law is recognised in both common and civil law systems and that a number of international tribunals have informally adopted a rule of precedent.[32] It also emphasises the importance of consistent judicial decision-making for "a young and unprecedented institution" like the Tribunal.[33]

23. In its challenge to the Binding Order on the ground that it does not meet the mandatory and cumulative criteria laid down in the Judgement, the Requesting State relies on the following four arguments.

24. First, the Requesting State submits that the requirement that a binding order must identify specific documents and not broad categories has not been met. The material sought must be identified with enough specificity so that the individual documents can be separated from all other materials pertaining to the same individual and subject-matter and it must be possible to discern from the face of the request the precise number of documents sought.[34] For instance, requests 1, 4, 6 to 18, and 29 to 40 contained in the Binding Order do not, to the extent required, identify a particular document by title, date and author, nor do they attempt to identify a specific document through description, as allowed in exceptional

[31] *Ibid.*, paras. 29 to 32.
[32] *Ibid.*, paras. 33 to 39.
[33] *Ibid.*, para. 40.

circumstances. Rather, contends the Requesting State, these requests seek entire categories of documents.[35]

25. Second, the Judgement requires that, while the prosecution is entitled to request documents, these must be deemed relevant to the trial. If the materials sought are not specifically identified, the Trial Chamber cannot make an accurate determination as to whether each of those documents meets the criterion of relevance. Since the criterion of specificity is not here satisfied, it is impossible that all of the requested documents in the Binding Order can be deemed relevant to the trial.[36]

26. Third, the Requesting State contends that the Binding Order does not meet the requirement that a request for documents not be unduly onerous.[37] The Judgement establishes without exception that a party cannot request hundreds of documents and thereby rejects any rule that would allow the parties to engage in third-party discovery under Article 29(2). Since many of the requests in the Binding Order do not meet the standard of specificity, the Requesting State will have to engage in an extensive government-wide search in order to ensure compliance with the requests. Such identification and collection of categories of documents would unduly and unfairly tax its resources.[38]

27. Fourth, the Requesting State claims that the Judgement states that the Trial Chamber shall set reasonable and workable deadlines after consulting the requested State. The Binding Order fails to meet this requirement since it was issued in response to an *ex parte*

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[34] *Ibid.*, para. 43.
[35] *Ibid.* para. 46.
[36] *Ibid.*, para. 56.
[37] *Ibid.*, para. 57.
[38] *Ibid.*, paras. 58 to 59.

request by the Prosecution. Consequently, the Requesting State has not been consulted regarding the establishment of deadlines, with which it has to comply.[39]

(b) The Prosecution

28. The Prosecution agrees with the contention of the Requesting State that "the special need for unification of the Tribunal's jurisprudence and judicial economy justify the adoption of the rule of *stare decisis* for the decisions of law made by the Appeals Chamber".[40] The Prosecution contends, however, that the Requesting State's restrictive interpretation of the criteria laid down in the Judgement is erroneous and that a reasonable construction of these criteria leads to the conclusion that the Binding Order is indeed consistent with the Judgement. The Prosecution's submission in response may be summarised as follows.

29. First, the Prosecution claims that the Judgement does not prohibit the use of categories as such, but the use of broad categories. Therefore, if the description of the categories contains enough specific features to enable adequate identification of the documents required, the criterion for specificity is satisfied.[41]

30. Second, the Prosecution submits that on the basis of the materials provided to the Trial Chamber, it has satisfied itself that the requested documents are relevant to the trial of the accused. The requirement of relevancy in the Judgement has, therefore, been met. The Requesting State lacks *locus standi* to raise the issue of relevancy of the documents sought before the Tribunal.[42]

[39] *Ibid.*, 62.
[40] *Prosecution's Response,* para. 21
[41] *Ibid.*, para. 22 to 27.
[42] *Ibid.*, para 28.

31. Third, the Prosecution argues that the Judgement does not prohibit requests for hundreds of documents as contended by the Requesting State.[43] Instead, the prohibition, which flows from the requirement that requests cannot be unduly onerous, is restricted to those situations where the identification, location and scrutiny of the requested documents by the relevant authorities would be overly taxing and not strictly justified by the exigencies of trial.[44]

32. Fourth, in respect of the Requesting State's contention that the deadline established by the Binding Order is unreasonable, the Prosecution submits that it does not dispute the procedural right of the Requesting State to move Trial Chamber III in order to object to the deadline imposed or to seek an extension.[45]

3. Discussion and Findings

33. In the Binding Order, the Trial Chamber characterised the criteria established by the Judgement to be "mandatory and cumulative". Consequently, it considered itself to be clearly bound by them. The Appeals Chamber, therefore, takes the view that it is unnecessary in the present case to address the argument of the Requesting State that the criteria are binding on the Trial Chambers as the law of the Tribunal, either through a rule of precedent, *stare decisis*, or through some similar means.

34. The Appeals Chamber instead turns to the challenge by the Requesting State to the Binding Order on the ground that it does not meet the mandatory and cumulative criteria in the Judgement where the Appeals Chamber considered the permissible content of binding orders; more specifically whether binding orders "can be broad in scope or whether they

[43] *Ibid.*, para 25, quoting Separate Opinion of Judge Shahabuddeen, *The Prosecutor v. Blaškić*, Case No.: IT 95-14-T, T. Ch. II, 21 July 1998, Order to the Republic of Croatia for the Production of Documents.
[44] *Ibid.* See also paras. 29 to 34.
[45] *Ibid.*, para 35.

must indeed be specific".[46] It held that a binding order for the production of documents must -

> (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in number. . . . [W]here the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefore, and should still be required to identify the specific documents in question in some appropriate manner. [. . .]
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> (ii) set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests;
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> (iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and
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> (iv) give the requested State sufficient time for compliance; this of course would not authorise any unwarranted delays by that state. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State.[47]

35. In the present request for review, the Requesting State asserts that the Binding Order is inconsistent with the requirements established by the Appeals Chamber. Accordingly, the above criteria have to be interpreted and the requests contained in the Binding Order reviewed.

36. As a starting point, the Appeals Chamber observes that the criteria were adopted in the context of a finding that the Tribunal possesses the power pursuant to Article 29(2) of the Statute to issue binding orders for the production of documents to States and that such a power is crucial to the Tribunal being able to carry out its mandate of prosecuting and adjudicating cases of a very complicated nature which "sprawl over wide areas of law and fact".[48] The Appeals Chamber further notes that above criteria are not expressed in absolute terms and that they cannot be applied in the abstract. Rather, they can only be understood in conjunction with Article 29(2) and the purpose served by that provision.

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[46] *Judgement.*, para. 32.
[47] *Ibid.*
[48] *The Prosecutor v. Blaškić*, Case No.: IT-95-14-T, T. Ch. II, 21 July 1998, Order to the Republic of Croatia for the Production of Documents, Separate Opinion of Judge Shahabuddeen, p. 5.

37. The first criterion relates to the requirement of specificity. The contentious issue is the extent to which requests can be made for the production of documents identified solely by category. The Requesting State submits that the material sought must be identified with sufficient specificity so that the individual documents can be separated from all other materials pertaining to the same individual and subject-matter and that it must be possible to discern from the face of the request the precise number of documents sought. On this basis, the Requesting State challenges, in particular, requests 1, 4, 6 to 18, and 29 to 40. The Prosecution contends, on the other hand, that the criterion of specificity does not prohibit the use of categories, as such, providing the description of the categories contains enough specific features to enable adequate identification of the documents required.

38. The underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party. The question then is whether "documents which are only identifiable as members of a class, however clearly defined this may be and however readily the identification of its content may be made",[49] fall afoul of the requirement of specificity. The requirement of specificity clearly prohibits the use of *broad* categories, which, of course, in itself is a relative term. It does not, as correctly asserted by the Prosecution, prohibit the use of categories as such.

39. After having reviewed the requests contained in the Binding Order, especially requests 1, 4, 6 to 18 and 29 to 40, the Appeals Chamber finds that the Binding Order is not inconsistent with the criterion of specificity. Although, a requested category of documents has to be "defined with sufficient clarity to enable ready identification" of the documents falling within that category.[50]

[49] *Ibid.*, p. 3.
[50] *Ibid.*, p. 4.

40. The second criterion states that the requested documents have to be relevant to the trial of the accused. The Appeals Chamber takes the view that it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have *locus standi* to challenge their relevance. Having found that the criterion of specificity has indeed been met, the Appeals Chamber rejects the argument of the Requesting State that the Trial Chamber, because of lack of specificity, was unable to accurately determine the relevance of the documents sought.

41. The third criterion states that a binding order must not be unduly onerous. This criterion must be read together with the clearly illustrative statement that "a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial".[51] Contrary to the assertion of the Requesting State, this criterion does not automatically exclude all requests that involve the production of hundreds of documents. As noted above,[52] this criterion is relative. It entails the striking of a balance between the need, on the one hand, for the Tribunal to have the assistance of States in the collection of evidence for the purpose of prosecuting persons responsible for serious violations of international humanitarian law and the need, on the other hand, to ensure that the obligation upon States to assist the Tribunal in the evidence collecting process is not unfairly burdensome. Since the task with which the Security Council has entrusted the Tribunal is far from an easy one, the obligation which rests upon all Member States of the United Nations to "carry out the decisions of the Security Council"[53] by rendering assistance to the Tribunal pursuant to Article 29(2) of the Statute, for instance by complying with an order of a Trial Chamber for the production of evidence, will at times undoubtedly be onerous. Considering the nature of the complex charges heard by the Tribunal, it is hard to see how that can be avoided. Consequently, 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

[51] *Judgement*, para. 32.
[52] *Supra*, para. 36.
[53] Article 25 of the Charter of the United Nations.

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".[54]

42. In light of the foregoing, and after a review of the requests in the Binding Order, the Appeals Chamber concludes that the criterion that a binding order must not be unduly onerous has been satisfied.

43. The fourth criterion states that a State shall be given sufficient time for compliance with a binding order. As previously discussed,[55] it does not follow from this requirement that a State is entitled to be heard prior to the issuance of the binding order. It simply sets out the obvious in the sense that a State must be given a reasonable time-frame in which to comply. It follows from the statement that "[r]easonable and workable deadlines *could* be set by the Trial Chamber after consulting the requested State",[56] and that it falls within the discretion of the Trial Chamber to do so. The fact that the Binding Order was issued pursuant to an *ex parte* request by the Prosecution and that, consequently, the Requesting State was not consulted before the deadline for compliance was set, does not render the Binding Order inconsistent with this criterion. In addition, the procedure established in Rule 108*bis* does not preclude a State from moving the Trial Chamber for an extension of time for compliance, should the State deem the deadline to be unreasonable or unworkable.

44. In conclusion, the Appeals Chamber finds the Binding Order not to be inconsistent with the criteria enunciated by the Appeals Chamber in the Judgement.

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[54] *Judgement*, para. 32.
[55] *Supra*, para. 19.
[56] *Judgement*, para. 32. (Emphasis added.)

III. DISPOSITION

For the foregoing reasons, the Appeals Chamber **AFFIRMS** the Binding Order and **REINSTATES** the execution of that Order.

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

Gabrielle Kirk McDonald
Presiding Judge

Dated this ninth day of September 1999
At The Hague,
The Netherlands.

[Seal of the Tribunal]