

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

Before: Judge O-Gon Kwon, Presiding  
Judge Howard Morrison  
Judge Melville Baird  
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Date: 24 January 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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THIRD MOTION FOR BINDING ORDER:  
UNITED STATES OF AMERICA

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The Office of the Prosecutor:  
Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

United States of America

The Accused:  
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves, pursuant to Article 29 and Rule 54bis, for an order to the United States of America, compelling it to produce the following documents:

- (1) (E) All reports or memoranda of investigation and interviews conducted by the Department of Defence, National Security Council, or Central Intelligence Agency concerning the delivery of arms, ammunition, or military equipment by air to Tuzla in February-March 1995.

## **Background**

### **The “Black Flights to Tuzla”**

2. On 10 February 1995, at about 17:45, Air Force Captain Oivind Moldestad of the Norwegian Battalion, from the UNPROFOR base at the “Blue Factory” just outside of Tuzla, saw two twin engine fighter aircraft flying at about 3000 feet above Tuzla. He called the duty officer in Sarajevo, a British Tornado pilot, who told him that there were no NATO flights operating that night. A few minutes later a guard came and told Moldestad that he had heard the sound of a C-130 over the Tuzla Airport.<sup>1</sup>

3. Captain Moldestad was later provided with a NATO document by a Norwegian colleague that showed that at 1700 hours on 10 February, NATO aircraft had been stood down and replaced by a US Navy E-2 Hawkeye.<sup>2</sup>

4. Captain Moldestad later said that he strongly believed that the Americans had delivered arms to the ABiH on that evening.<sup>3</sup>

5. One U.S. official who served in the region said that the United States had a hand in facilitating at least some arms deliveries by its Muslim allies to a government-held airport at Tuzla in northern Bosnia early in 1995. The flights, according to an informed U.S. diplomat, were carried out by “Turkish or private contractors using special funding the U.S. knew about.” This official, who was serving in the region at the time, said he thought the United States provided information on scheduling the flights and told the C-130s when “the coast is clear.”<sup>4</sup>

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<sup>1</sup> BBC *Allies and Lies* at pp. 10-11

<sup>2</sup> BBC *Allies and Lies* at p. 13

<sup>3</sup> Interview with BBC Panorama, at pp. 14-15

<sup>4</sup> William Drozdiak and David Ottaway, “US Accused of Covert Bosnia Aid”, *Washington Post* (28 July 1995)

6. A British General later stated that these were without a doubt American arms deliveries and that American private companies were involved.<sup>5</sup>

7. Norwegian Lt. Saeterdal, a sentry on guard duty outside Norwegian medical UN unit in Tuzla also heard and saw the lights of the Hercules and accompanying jet fighters.<sup>6</sup> Other UN observers, making use of night vision equipment, also saw the cargo aircraft and fighter planes.<sup>7</sup>

8. Reports of sighting of C-130 and jet fighters immediately forwarded to NATO Combined Air Operations Center (COAC) in Vicenza and the UNPF Deny Flight Cell in Naples.<sup>8</sup>

9. As a result of the sighting, UNPROFOR patrols were dispatched from Tuzla Air Base. They were refused access to the Tuzla Highway Strip area, a backup airport about 1-2 km north-east of Tuzla Air Base, by the Bosnian Muslim Army A patrol did manage, however, to gain access to the area from another side. This patrol observed 5 trucks involved in loading or unloading equipment at a hangar area in the vicinity of the assumed headquarters for the Bosnian government army's 241st Brigade.<sup>9</sup>

10. This patrol was surrounded by 30 ABiH soldiers. Although they saw 5 trucks near old hangars, they were forced to leave before they could see more.<sup>10</sup> ABiH soldiers were under command of Brig. Refik Brdjanovic<sup>11</sup> Numerous cargo vehicles and 300 ABiH troops in a highly agitated state were present.

11. Refik Brdjanovic, in an interview with BBC, confirmed that boxes labeled "US Army" had been delivered to Tuzla by air drop and that they contained anti-tank and surface to air missiles. He said that an American named Jim Campbell and his assistant Jack Collins were involved in arranging these deliveries.<sup>12</sup>

12. Two days later, on 12 February 1995, another C-130 Hercules accompanied by two fighters was seen at Tuzla by Norwegian personnel.<sup>13</sup> UNPROFOR observed a jet

<sup>5</sup> Wiebes, *Intelligence and the War in Bosnia*, 177

<sup>6</sup> Wiebes, *Intelligence and the War in Bosnia*, 177

<sup>7</sup> Wiebes, *Intelligence and the War in Bosnia*, 177; Document #1C produced by United Kingdom at para. 37

<sup>8</sup> Wiebes, *Intelligence and the War in Bosnia*, 177

<sup>9</sup> Norwegian report of 8 March 1995

<sup>10</sup> Wiebes, *Intelligence and the War in Bosnia*, 183; BBC, *Allies and Lies*

<sup>11</sup> BBC. *Allies and Lies*.

<sup>12</sup> BBC. *Allies and Lies*, at pp. 17-18

<sup>13</sup> Wiebes, *Intelligence and the War in Bosnia*, 183

aircraft over Tuzla at 19:12; a jet aircraft and large prop over Tuzla at 19:30, and three jet aircraft flying in the Tuzla area at 20:40<sup>14</sup> British SAS Lt. Col LeHardy, using night vision goggles, observed 3 jet aircraft high over Tuzla West.<sup>15</sup>

13. Lt. Col. LeHardy was asked to send a report to the UNPROFOR command of the incidents. His assessment was that a low altitude extraction of cargo had likely been carried out. No aircraft other than US were operating in the area.<sup>16</sup>

14. A few days after the air drop, an aid worker named Per Kjell went to relieve himself near a warehouse in the area and observed three Americans with what appeared to be military equipment. They slammed the door when they saw him.<sup>17</sup>

15. On 14 February 2010, UNPROFOR Commander General Bertrand De Lapresle concluded that two clandestine resupplies of high value military equipment such as anti-tank or surface-to-air missiles had probably taken place.<sup>18</sup>

16. UNPROFOR spokesperson Michael Williams later said that “our supposition was that an arms delivery had taken place and that given the difficulty of the operation, and also that jet fighters had also been seen in the vicinity at that time, that the operation probably involved the United States in some way.”<sup>19</sup>

17. On 17 February 1995, memorandum of these incident was prepared by USAF Colonel Douglas Richardson entitled “Tuzla sightings”.<sup>20</sup>

18. Subsequent investigation by NATO indicated that United States aircraft had been in the air over Tuzla on 10 and 12 February as part of NATO’s enforcement of the No Fly Zone.<sup>21</sup>

19. An investigation into the supplies of arms to Bosnia in violation of the UN Arms Embargo was undertaken by agencies and branches of the United States government resulting in Congressional hearings and reports.

20. The Congressional reports indicate that specific investigations into who was responsible for the February 1995 arms shipments to Tuzla were undertaken by the

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<sup>14</sup> La Presle to Annan, UNPROFOR #247

<sup>15</sup> UNPROFOR #257 at para. 5b

<sup>16</sup> LeHardy report at paras. 7-9

<sup>17</sup> BBC. *Allies and Lies*, at p. 17

<sup>18</sup> Wiebes, *Intelligence and the War in Bosnia*, 184; UN Document batch #2, page 76; OTP disclosure

<sup>19</sup> Interview with BBC Panorama, at p. 15

<sup>20</sup> Wiebes, *Intelligence and the War in Bosnia*, pp. 187-88

<sup>21</sup> Report of USAF Colonel Timothy Jones, 18 February 1995

United States Department of Defence and Central Intelligence Agency<sup>22</sup>, as well as the National Security Council.<sup>23</sup> Although it was concluded that the United States government was not directly involved in these shipments, the reports of the investigations are likely to provide important information as to the identity of those responsible for the shipments.

### **The Efforts to Obtain the Documents**

21. On 2 June 2009, Dr. Karadzic served a letter on the United States Embassy in The Netherlands in which he requested copies of numerous items material to the preparation of his defence including the items requested in paragraph 1 of this motion.<sup>24</sup> A motion for binding order was filed on 11 September 2009, but was dismissed by the Trial Chamber without prejudice after the United States indicated its willingness to work with Dr. Karadzic's defence team to produce the material voluntarily.<sup>25</sup> A second motion for binding order was filed on 7 December 2010 but did not include item (1)(E) as the United States had agreed to produce those materials.<sup>26</sup>

22. During the past year, Dr. Karadzic and the United States have been working diligently to resolve the issues relating to his request. This process has resulted in the production to Dr. Karadzic of 218 documents by the United States and the withdrawal or narrowing of many of Dr. Karadzic's requests.

23. The United States had earlier indicated that it would produce the items requested under item (1)(E). However, in January 2011, in its latest communications with the defence, the United States has indicated it has located only one report and may or may not produce it, depending on the result of a declassification review.

24. Given that almost 19 months has passed since the items were requested, and the absence of an unequivocal commitment on the part of the United States to produce all of the material requested under item (1)(E), Dr. Karadzic has determined that the matter should be placed before the Trial Chamber to bring it to a conclusion. Should the United

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<sup>22</sup> Report of the United States Senate Select Committee on Intelligence, *US Actions Regarding Iranian and Other Arms Transfers to the Bosnian Army 1994-1995* (November 1996) at pp. 11-12

<sup>23</sup> Final Report of the Select House Subcommittee to Investigate the United States' Role in Arms Transfers to Croatia and Bosnia (10 October 1996) at p. 146

<sup>24</sup> Annex "B" to *Motion for Binding Order: United States of America* (11 September 2009)

<sup>25</sup> *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (United States of America)* (12 October 2009)

<sup>26</sup> *Second Motion for Binding Order: United States of America*

States produce all of the material requested in item (1)(E) during the litigation of this motion, Dr. Karadzic would be pleased to withdraw the motion.

### **Applicable Provisions**

25. Article 29 of the Statute provides that:

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

26. Rule 54 *bis* of the Rules of Procedure and Evidence provides in pertinent part that:

[A] party seeking an order that a State produce documents or information must (1) identify as far as possible the documents or information to which the application relates; (2) indicate how they are relevant to any matter in issue and necessary for a fair determination of that matter; and (3) explain the steps that have been taken by the applicant to secure the State's assistance.

### **Argument**

27. Dr. Karadzic has met the three requirements of Rule 54 *bis*. 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.

#### **Specificity Requirement**

28. The underlying purpose of the requirement of specificity is to allow a State or international organization, 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 requested party.<sup>27</sup> The application must "provide[s] sufficient clarity as to allow for the ready identification of the requested documents."<sup>28</sup>

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<sup>27</sup> *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 38; *Prosecutor v Milutinovic et al*, No.

29. Dr. Karadzic has identified as narrowly as possible the documents or material information to which this motion relates and has limited his request to specific documents which he has identified as being in existence and in the possession of the United States.

30. Therefore, Dr. Karadzic has satisfied the requirement of specificity.

#### **Relevance and Necessity Requirement**

31 Under Rule 54 *bis*, a request for a binding order must set out why the requested documents are deemed relevant and necessary for the trial.<sup>29</sup> The relevance and necessity requirements serve the purpose of shielding States from requests which will not result in useful information for the party or the Trial Chamber.

32. This Trial Chamber has already ruled that evidence of the very arms smuggling incidents involving Tuzla is relevant and necessary for Dr. Karadzic's case.<sup>30</sup> The information requested from the United States goes directly to that issue.

33. The prosecution has not produced any of the requested documents and it is not believed to be in possession of any of them.

34. Therefore, Dr. Karadzic has satisfied the requirement of relevance and necessity.

#### **Efforts to Obtain the Material Voluntarily**

35. Rule 54 *bis* requires that the party seeking a binding order have made efforts to obtain the material from the State or international organizations voluntarily. As described above, Dr. Karadzic made extensive efforts to obtain the material voluntarily over the past 18 months. While the United States has been cooperative, it has failed to furnish the documents specified in paragraph 1 for almost 19 months.

IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

<sup>28</sup> *Prosecutor v Kordić & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 39; *Prosecutor v Milutinović et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

<sup>29</sup> *Prosecutor v. Tihomir Blaskic*, No. IT-95-14-AR108bis, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para. 32; *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (17 November 2005) at para. 19.

<sup>30</sup> *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (Republic of Germany)* (19 May 2010) at paras. 34-35

**Procedural Matters**

36. Although Dr. Karadzic has a right to seek a binding order on an *ex parte* basis, subject to later challenge by the State or international organizations<sup>31</sup>, he believes that justice would be better served by giving the United States the opportunity to be heard before a binding order is issued. Therefore, he requests that the Trial Chamber issue an invitation to the United States to respond to this motion, and, if necessary, to hold an oral hearing at which its representatives can make their views known and Dr. Karadzic can also be heard.

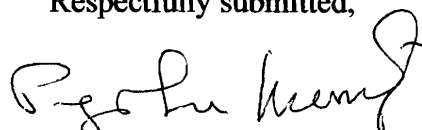
37. While this is a matter between a party and a State, Dr. Karadzic has no objection to the prosecution being served with all pleadings in this matter and making any submissions it deems appropriate.

**Conclusion**

38. It is respectfully requested that the Trial Chamber issue a binding order to the United States of America requiring it to produce the material specified in paragraph 1 of this motion.

Word count: 2576

Respectfully submitted,



Radovan Karadzic

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<sup>31</sup> *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108bis, *Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 17.