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International
Criminal Tribunal
for the Former
Yugoslavia

Court
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Tribunal Pénal
International pour
l'ex-Yougoslavie

Section des
Services
d'administration et
d'appui judiciaire

CASE/AFFAIRE NO. IT-95-5/18-PT **DATE** 08 July 2009

D22345

FROM/DE RAM DORAISWAMY, COURT OFFICER

TO/A

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<input type="checkbox"/> Trial Chamber I/ Chambre de 1ère instance I	<input type="checkbox"/> Chief of Investigations/ Chef des enquêtes	
<input type="checkbox"/> Trial Chamber II/ Chambre de 1ère instance II		<input checked="" type="checkbox"/> Legal Advisers MR. G. PETRONIJEVIĆ MR. P. ROBINSON MR. M. SLADOJEVIĆ
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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-05/18-PT

IN TRIAL CHAMBER No. 3

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Date: 08 July 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR BINDING ORDER:
GOVERNMENT OF NORWAY

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

The Accused:
Radovan Karadzic

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

- (1) All reports or memoranda concerning the suspected delivery of arms at Tuzla, Bosnia in February 1995 and the efforts to conceal those deliveries, including reports made by NorLogBat, NorMedCoy, or by the Norwegian commander of its troops assigned to UNPROFOR.
- (2) All reports or memoranda in which officials of the United Nations, United States, or NATO attempted to explain the sightings of Norwegian personnel in Tuzla of aircraft in February 1995.
- (3) Report from Colonel LeHardy to NordBat, no 3471 3/TAB/008 dated 18 February 1995 concerning the sighting of aircraft at Tuzla.
- (4) All correspondence between the government of Norway and the United Nations or any of its bodies or member States concerning the sighting of aircraft at Tuzla in February 1995
- (5) All reports of intelligence or security services or UNPROFOR members from Norway concerning the killings at the Markale market in Sarajevo, Bosnia on 5 February 1994 and 28 August 1995

Background

Smuggling of Arms to Tuzla

2. On the evening of 10 February 1995, Norwegian Captain Ivan Moldestad, a Norwegian helicopter detachment pilot assigned to the United Nations Protection Force for Bosnia (UNPROFOR) stationed in Tuzla, witnessed the drop off of suspected arms to the Bosnian Muslim Army by a Hercules C-130 transport plane, accompanied by two jet fighters, at the Tuzla air strip. The aircraft was also seen by a Norwegian sentry outside the UN medical unit in Tuzla. A Norwegian relief worker had met two Americans in plain clothes in a warehouse in Tuzla, in the process of unpacking arms. Sightings of aircraft making deliveries continued during February and March.¹ At the time, there was a No Fly Zone over Bosnia and a UN arms embargo.

3. Written reports were made of these incidents by the Norwegian logistical battalion and medical units. The commander of the Norwegian UNPROFOR battalion

¹ Cees Wiebes, *Intelligence and the War in Bosnia* @ 177, 192

drafted an official report (Vakrapport) which summarized all those reports.² A British Colonel, Christopher LeHardy, conducted an investigation for UNPROFOR, and made a report to the Norwegian battalion.³

4. The matter became a subject of concern in the United Nations. Apparently, the United States intervened and required Colonel LeHardy to write a second report, contradicting his earlier report, Captain Moldestad was threatened by US officers, and even US Secretary of Defence William Perry issued denials that the United States had been involved in shipping arms to the Bosnian Muslims in Tuzla.⁴

5. An investigation by the BBC, which included interviews with Bosnian Muslim Army officers, later determined that American military officers had arranged for the delivery of the arms and military equipment to the Bosnian Muslim Army in violation of the UN embargo and had attempted to cover-up the shipments.⁵

6. An investigation commissioned by the Dutch government uncovered records in Bosnian archives showing that on 14 February 1995 40 machine guns and other military equipment was delivered from Tuzla by helicopter for Zepa, largely to be forwarded in transit from there to Srebrenica.⁶ Both were UN safe zones from which the Bosnian Muslim Army launched attacks against the Bosnian Serbs.

Shelling of Civilians in Sarajevo

7. On 5 February 1994 and again on 28 August 1995, shells exploded on the Markale market in Sarajevo, killing a large number of civilians. Although these shellings were blamed on the Bosnian Serbs, a Dutch government investigation reported that various staff of intelligence and security services from Canada, the UK, Denmark, Sweden, Norway, Belgium, and the Netherlands had established independently of each other the shellings were committed by the Bosnian Muslim Army to attempt to show the Bosnian Serbs in a bad light and to obtain intervention on their behalf by the international community.⁷

² Wiebes, *Intelligence and the War in Bosnia* @ 183

³ Wiebes, *Intelligence and the War in Bosnia* @ 185

⁴ Wiebes, *Intelligence and the War in Bosnia* @ 185, 191-92

⁵ BBC, *Allies and Lies*, <http://news.bbc.co.uk/2/hi/programmes/correspondent/1390536.stm>.

⁶ Wiebes, *Intelligence and the War in Bosnia* @ 182

⁷ Wiebes, *Intelligence and the War in Bosnia* @ 68

Applicable Provisions

8. 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.

9. 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.

10. Norwegian law provides that:

"Norwegian courts and other authorities may, on request, provide the Tribunal with legal aid in connection with the consideration of matters that come under the jurisdiction of the Tribunal. Such legal aid may include the identifications and tracing of persons, the examination of witnesses and experts, the procurement of other evidence, the serving of documents and the arrest and detention of persons."⁸

Procedural History

11. On 25 May 2009, Dr. Karadzic served a letter on the government of Norway in which he requested copies of the five items set forth in paragraph 1 of this motion.⁹ On 12 June 2009, Dr. Karadzic received the following response from the Honorable Eva Bugge, Ambassador, Royal Norwegian Embassy in The Hague:

⁸ *Legislation Implementing the ICTY Statute*, Norway, Section 3, available at http://www.oup.com/uk/orc/bin/9780199203109/resources/cases/ch16/1994_norway_icty.pdf.

⁹ A copy of this letter is attached as Annex "A" to this motion.

Norwegian authorities will consider any requests for assistance or orders issued by the court in accordance with our national legislation on the cooperation with the International Criminal Tribunal for the former Yugoslavia, in the event that we receive such requests or orders. We do not find, however, that your request falls within the mentioned category.¹⁰

Argument

12. 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 State's assistance before filing the motion.

Specificity Requirement

13. 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 requested party.¹¹ The application must "provide[s] sufficient clarity as to allow for the ready identification of the requested documents."¹²

14. Dr. Karadzic has identified as narrowly as possible the documents or material information to which this motion relates. He has narrowed his query to documents identifiable through a limited time period, named personnel who would have personally generated or viewed the documents or information, and named a specific geographic location to which the records pertain.

15. Where it was not possible to identify the document by title, Dr. Karadzic has requested a narrow category of documents to be produced. The Appeals Chamber has recognized that under circumstances where the requesting party has not seen the documents, it can meet the specificity requirement by describing the documents by

¹⁰ A copy of this letter is attached as Annex B to this motion.

¹¹ *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. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

¹² *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. 39; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

category.¹³ A requested category of documents, defined with sufficient clarity to enable ready identification will suffice.¹⁴

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

Relevance and Necessity Requirement

17. 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.¹⁵ 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.

18. In this case, the material related to the smuggling of arms into Tuzla for onward shipment to the safe area of Srebrenica is relevant to rebut the allegation in the indictment that Dr. Karadzic was part of a joint criminal enterprise to eliminate the Bosnian Muslims of Srebrenica.¹⁶ The documents obtained will support Dr. Karadzic's defence that there was a legitimate military objective to commence operations in March 1995 directed at the enclaves, since they had become a safe haven to which weapons were being smuggled and from which attacks on Serb civilians were being launched.

19. In addition, the involvement of personnel of the United States, and other States, in violating the United Nations Arms Embargo, who gained access to Bosnia by virtue of their participation in United Nations missions such as UNPROFOR, is relevant to the 1995 detention of UN personnel as charged in Count 11, and their actual and perceived status as civilians or combatants.

20. Finally, documents showing the involvement of personnel of the United States and other States in violation of the United Nations Arms Embargo on the side of the Bosnian Muslims are relevant to the credibility and bias of international witnesses from

¹³ *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.39; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

¹⁴ *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.39; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

¹⁵ *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.

¹⁶ Third Amended Indictment at paras. 8, 20, 42, 44, 57, 74

those States to be called by the prosecution for the purpose of establishing violations of United Nations safe zones and other agreements on the part of Dr. Karadzic and the Bosnian Serbs.¹⁷

21. With respect to the shellings of the market in Sarajevo, the documents sought are relevant and necessary to directly rebut the allegations in the indictment that Dr. Karadzic and the Bosnian Serbs were responsible for these incidents.¹⁸ Indeed, the Trial Chamber has already taken judicial notice of adjudicated facts that the Bosnian Serbs were responsible for the first of these incidents.¹⁹

22. Dr. Karadzic has been unable to locate the documents sought from the government of Norway in a search of the disclosure material made available to him by the prosecution.

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

Efforts to Obtain the Material Voluntarily

24. Rule 54 *bis* requires that the party seeking a binding order have made efforts to obtain the material from the State voluntarily. Dr. Karadzic indeed requested the material from the government of Norway by letter hand delivered to its embassy in The Netherlands on 25 May 2009. The government of Norway responded by refusing to produce the documents.

25. Therefore, Dr. Karadzic has satisfied the requirement that he make efforts to obtain the material voluntarily.

Procedural Matters

26. Although Dr. Karadzic has a right to seek a binding order on an *ex parte* basis, subject to later challenge by the State²⁰, he believes that justice would be better served by giving the government of Norway the opportunity to be heard before a binding order is issued. Therefore, he requests that the Trial Chamber issue an invitation to the

¹⁷ For example United States Ambassador Herbert Okun, and Generals Rupert Smith and Michael Rose of the United Kingdom

¹⁸ See Third Amended Indictment, schedule G, numbers 8 and 19

¹⁹ *Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts* (5 June 2009) at fact 341

²⁰ *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.

government of Norway to respond to this motion, and to hold an oral hearing at which its representatives can make their views known and Dr. Karadzic can also be heard.

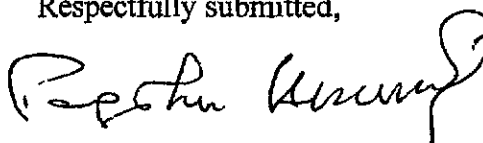
27. While this is a matter between a party and a State, Dr. Karadzic has no objection to the prosecution being served with all pleadings in this matter and making any submissions it deems appropriate.

Conclusion

28. It is respectfully requested that the Trial Chamber issue a binding order to the government of Norway requiring it to produce the material specified in paragraph 1 of this motion.

Word count: 2419

Respectfully submitted,



Radovan Karadzic²¹

²¹ The assistance of Legal Interns Kevin Griffith of Case Western University (USA), Anthony Navaneelan of the University of Toronto (Canada), and Alexandra Lampert of Stanford University (USA) in the research for this motion is gratefully acknowledged.

ANNEX “A”

Dr. Radovan Karadzic
International Criminal Tribunal for the former Yugoslavia
The Hague, Netherlands

25 May 2009

The Honorable Eva Bugge
Ambassador
Embassy of Government of Norway
Lange Vijverberg 11
NL2513 The Hague

Dear Madam Ambassador,

I am the former President of Republika Srpska, now awaiting trial at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague. I am charged with genocide, crimes against humanity, and war crimes stemming from the war in Bosnia during 1991-95.

I am preparing my defence to these charges, and attempting to gather all relevant documents and other material. In that connection, I am writing to request that the Government of Norway furnish me with copies of the following documents which are necessary for my defence:

- (1) All reports or memoranda concerning the suspected delivery of arms at Tuzla, Bosnia in February 1995 and the efforts to conceal those deliveries, including reports made by NorLogBat, NorMedCoy, or by the Norwegian commander of its troops assigned to UNPROFOR.
- (2) All reports or memoranda in which officials of the United Nations, United States, or NATO attempted to explain the sightings of Norwegian personnel in Tuzla of aircraft in February 1995.
- (3) Report from Colonel LaHardy to NordBat, no 3471 3/TAB/008 dated 18 February 1995 concerning the sighting of aircraft at Tuzla.
- (4) All correspondence between the government of Norway and the United Nations or any of its bodies or member States concerning the sighting of aircraft at Tuzla in February 1995
- (5) All reports of intelligence or security services or UNPROFOR members from Norway concerning the killings at the Markale market in Sarajevo, Bosnia on 5 February 1994 and 28 August 1995

Ambassador of Norway

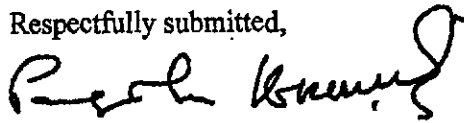
--page two--

I hereby authorize you to provide this information to my Legal Advisor, Peter Robinson, on my behalf. Mr. Robinson can be contacted by e-mail at peter@peterrobinson.com. You may also feel free to contact Mr. Robinson should you have any questions about this request.

If I have not had a response to this request by 15 June 2009, I will have no choice but to seek a binding order from the Trial Chamber directing your government to furnish me with the requested information. But I would very much hope that we can work together cooperatively.

Thank you for your consideration of this request.

Respectfully submitted,



Dr. Radovan Karadzic

ANNEX “B”

**ROYAL NORWEGIAN EMBASSY***The Ambassador*

Dr. Radovan Karadzic
Att: Legal Advisor Peter Robinson
International Criminal Tribunal for the Former Yugoslavia
The Hague

Your ref.:
25 May 2009

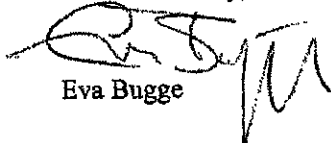
Our ref.:
358/09/rhau

Date:
12 June 2009

Reference is made to your letter dated 25 May 2009, where copies of certain documents are requested.

Norwegian authorities will consider any requests for assistance or orders issued by the Court in accordance with our national legislation on the cooperation with the International Criminal Tribunal for the former Yugoslavia, in the event that we receive such requests or orders. We do not find, however, that your request falls within the mentioned category.

Yours Sincerely,



Eva Bugge

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