

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: 29 November 2010

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR BINDING ORDER:
UNITED NATIONS AND NATO

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

Office of Legal Affairs
United Nations, NY

The Accused:
Radovan Karadzic

North Atlantic Treaty Organization

1. Dr. Radovan Karadzic respectfully moves, pursuant to Article 29 and Rule 54*bis*, for an order to the United Nations and the North Atlantic Treaty Organization, compelling them to produce the following documents:

All memoranda or correspondence in the possession of the UN Office of Legal Affairs, UN Department of Peacekeeping Operations, UN Office of the Secretary General, or the North Atlantic Treaty Organization, written during the period 1 January 1994 through 1 October 1995 in which the issue of when UN peacekeepers might be considered "combatants" or "persons taking a direct part in hostilities" as a result of NATO or UN use of force in Bosnia was discussed

Background

2. Dr. Karadzic is charged in Count 11 of the Third Amended Indictment with taking UN personnel hostage in violation of Article 3 of the Statute. That article applies to "persons not taking a direct part in the hostilities."

3. On 25 May 1995, UNPROFOR commander General Rupert Smith ordered NATO airstrikes against a Bosnian Serb ammunition depot in Pale after the Serbs failed to return four heavy weapons which it had removed from the weapons collections point near Sarajevo after reports of a Muslim military offensive.

4. The Bosnian Serbs responded by detaining UN personnel. Whether these personnel were lawfully detained as prisoners of war or illegally detained as hostages is a critical issue to be determined by the Trial Chamber with respect to Count 11.

5. Planning for the airstrikes between UN and NATO had been going on for months prior to 25 May 1995. Because the Serbs had detained UN personnel in 1994, and because Dr. Karadzic had explicitly warned that the Bosnian Serbs would consider the UN combatants if it ordered airstrikes, the UN and NATO would have considered the issue of whether the use of airstrikes as a peace enforcement mechanism would render UN personnel as combatants.

6. In a memo written by UN Special Representative Akashi in connection with the events in Bihac in November 1994, he wrote that "The area strikes will require attacks on a number of air defence systems and fixed installations, as it is not possible to employ aircraft against Serb infantry in a populated area. The advantage of this option is its demonstration of United Nations' resolve. The Serbs will also be seen to have paid some price for violation of safe area and may, if strikes are extensive enough, be deterred from

further transgressions. **This option transforms UNPROFOR into a combatant** and will require withdrawal under adverse conditions."¹

7. Dr. Karadzic believes that the UN and NATO had evaluated the status of UN personnel in Bosnia if offensive air strikes were undertaken and may well have concluded that such actions would transform UN personnel on the ground into combatants.

8. In a parallel development, the United Nations Office of Legal Affairs had drafted a proposed treaty entitled the Convention on the Safety of United Nations and Associated Personnel. That treaty, which had been deposited on 9 December 1994, specifically excludes from its scope "a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies."²

9. UN resolutions on Bosnia had invoked its Chapter VII peace-enforcement powers. Therefore, it is likely that the United Nations and NATO had themselves concluded that the use of air power for an offensive strike against the Serbs would make UN troops in Bosnia combatants under international law.

10. The documents in which such matters were discussed by UN and NATO personnel are therefore highly relevant and exculpatory and are necessary to Dr. Karadzic's defence.

11. On 11 October 2010, Dr. Karadzic requested that the prosecution disclose any documents described in paragraph 1 that were in its possession.³ A follow up letter was sent on 26 October 2010.⁴ No documents have been produced by the prosecution pursuant to this request.

12. On 18 October 2010, Dr. Karadzic requested the documents described in paragraph 1 from NATO.⁵ No response has been received.

13. On that same day, Dr. Karadzic requested the documents described in paragraph 1 from the United Nations.⁶ On 9 November 2010, the United Nations

¹ Transcript of 6 October 2010, p. 7396; Exhibit P1681 (emphasis added)

² *Prosecutor v Abu Garda*, ICC 02/05-02/09, *Decision on the Confirmation of Charges* (8 February 2010) at para. 74; Article 2(2) of the Convention on the Safety of United Nations and Associated Personnel (9 December 1994)

³ A copy of his letter to OTP is attached as Annex "A".

⁴ A copy of this letter is attached as Annex "B".

⁵ A copy of his letter to NATO is attached as Annex "C".

responded that it declined to provide the requested material “as this would necessarily compromise the confidentiality required for the effective working of the internal decision-making processes of the Organization.”⁷

14. On 23 November 2010, Dr. Karadzic’s Legal Advisor Peter Robinson met with United Nations Senior Legal Officer Huw Llewellyn in New York. He requested that the United Nations use the mechanisms provided for in Rule 54 *bis* to maintain the confidentiality of its documents while at the same time allowing for their use to ensure a fair trial in Dr. Karadzic’s case. Mr. Llewellyn indicated that the UN was not willing to disclose the documents, if they exist, under those provisions.

Applicable Provisions

15. 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.

16. 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

17. 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 Nations and NATO before filing the motion. The jurisprudence

⁶ A copy of his letter to the UN is attached as Annex “D”.

⁷ A copy of the UN letter is attached as Annex “E”.

of the *ad hoc* Tribunals indicates that the United Nations and its organs, as well as NATO, may be the subject of a binding order.⁸

Specificity Requirement

18. 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.⁹ The application must “provide[s] sufficient clarity as to allow for the ready identification of the requested documents.”¹⁰

19. Dr. Karadzic has identified as narrowly as possible the documents to which this motion relates. He has limited his request to documents relevant to the narrow subject matter of when peacekeepers become combatants, further limited the subject matter to Bosnia, and limited the time period to that when NATO airstrikes were being contemplated.

20. Dr. Karadzic notes that in the past, the United Nations has adopted a practice of making categories of documents available for inspection by his Legal Advisor with conditions. Dr. Karadzic is willing to enter into a similar arrangement in this case, provided that he is able to use relevant materials in his trial, whether in open or closed session.

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

Relevance and Necessity Requirement

22 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.¹¹ The relevance

⁸ *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Third Motion for Stay of Proceedings* (27 August 2007) at para. 38; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the ex parte Defence Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents* (9 March 2004); *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.1, *Decision on Request of NATO for Review* (12 May 2006) at para. 8

⁹ *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.

¹⁰ *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.

¹¹ *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;

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.

23. The relevance of the documents is that they bear directly on an issue which can lead to Dr. Karadzic's acquittal on Count 11. If the UN or NATO concluded, or had a reasonable doubt that UN personnel in Bosnia would be considered "combatants" or "persons taking a direct part in the hostilities", this would directly support Dr. Karadzic's position that the detention of UN personnel as charged in Count 11 was not unlawful, and that he did not have the *mens rea* for the crime of hostage taking. Certainly it would be a miscarriage of justice if such documents were in the possession of the United Nations, which created this Tribunal, and were withheld from the defence.

24. The prosecution has not produced the requested documents and it is believed that the documents requested are likely not in its possession.

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

Efforts to Obtain the Material Voluntarily

26. 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 requested that the United Nations and NATO to provide the material voluntarily. They have not done so.

Procedural Matters

27. 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 organizations¹², he believes that justice would be better served by giving the United Nations and NATO the opportunity to be heard before a binding order is issued. Therefore, he requests that the Trial Chamber issue an invitation to the United Nations and NATO 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.

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.

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. 17.

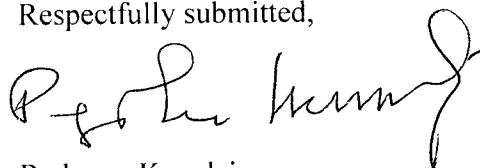
28. While this is a matter between a party and international organizations, Dr. Karadzic has no objection to the prosecution being served with all pleadings in this matter and making any submissions it deems appropriate.

Conclusion

29. It is respectfully requested that the Trial Chamber issue a binding order to the United Nations and NATO requiring it to produce the material specified in paragraph 1 of this motion.

Word count: 2161

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', written in a cursive style.

Radovan Karadzic

ANNEX "A"

Dr. Radovan Karadzic

11 October 2010

Mr. Alan Tieger
Office of the Prosecutor
ICTY

Dear Mr. Tieger,

Pursuant to Rules 66(B) and 68, I am requesting that the Office of the Prosecutor furnish me with copies of the following documents:

- (1) All memoranda or correspondence from the United Nations, NATO, or any member State, in the possession of the Office of the Prosecutor, in which the issue of when peacekeepers become combatants was discussed.

The issue was addressed in General Rose's testimony and it is material to my defence to determine whether the formulation provided by General Rose is contradicted or corroborated by other information in the possession of the prosecution.

Thank you for your cooperation.

Yours truly,


Dr. Radovan Karadzic

ANNEX "B"

Dr. Radovan Karadzic

29 October 2010

Ms. Hildegard Uertz-Retzlaff
Office of the Prosecutor
ICTY

Dear Ms. Uertz-Retzlaff,

On 11 October 2010, I requested that the Office of the Prosecutor furnish me with copies all memoranda or correspondence from the United Nations, NATO, or any member State, in the possession of the Office of the Prosecutor, in which the issue of when peacekeepers become combatants was discussed.

I am in receipt of your letter of 27 October 2010 in which you state that the request was too broad and insufficiently specific.

Let me explain in more detail what I am looking for.

The issue of whether UN personnel might become "combatants" if force such as air strikes was used by NATO or the UN was clearly on the mind of UN and NATO officials when considering the use of force, as we can see from some of the correspondence which has already been introduced into evidence in my trial.

It seems to me that the United Nations and NATO would have researched this issue and that memoranda or correspondence would have been generated from lawyers who were tasked with researching this issue, as well as policymakers who considered the implications of the use of force while UN forces were on the ground in Bosnia. That is the documentation I am looking for.

This documentation is material to my defence under Rule 66(B) because I contend that the UN personnel who are the subject of Count 11 of the indictment were properly taken as prisoners of war, not hostages. To the extent that the documentation reveals concerns that the UN personnel might be subject to treatment as combatants if force was used, it would also be exculpatory under Rule 68.

I hope this will enable you to search for and locate documents responsive to my request. Do not hesitate to contact my Legal Advisor Peter Robinson if you have any questions about this request.

Ms. Hildegard Uertz-Retzlaff

--page two--

Thank you for your cooperation.

Yours truly,

Dr. Radovan Karadzic

ANNEX "C"

Dr. Radovan Karadzic
International Criminal Tribunal for
the former Yugoslavia

18 October 2010

The Honorable Anders Fogh Rasmussen
Secretary General
North Atlantic Treaty Organization
Blvd Leopold III
Brussels, Belgium

BY FAX TO 1 212 963 4879

Dear Mr. Rasmussen,

I hereby request that NATO provide me with a copy of the following documents which are material to my defence:

- (1) All memoranda or correspondence in the possession of NATO written during the period 1 January 1994 through 1 October 1995 in which the issue of when peacekeepers might become combatants as a result of NATO or UN use of force in Bosnia was discussed.

The relevance of this material to my case is that I am charged in Count 11 of the Third Amended Indictment with the taking of UN personnel as hostages. Whether the UN personnel were lawfully taken as prisoners of war as a result of the use of force by NATO/UN is a live issue in my trial.

This request is time sensitive since the documents are needed during cross examination of former UN commander Rupert Smith, who is scheduled to testify in mid-November 2010 in my trial.

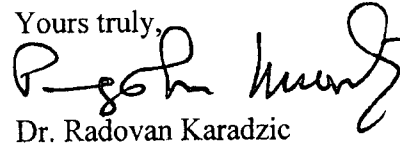
Should any of the relevant documents in the possession of NATO have originated from a member State or other international organization, you are kindly requested to advise me of that fact and request the consent of that State or organization to disclose the document to me.

The Honorable Anders Fogh Rasmussen
--page two--

Please feel free to contact my Legal Advisor Peter Robinson at peter@peterrobinson.com if you have any questions about this request..

Thank you for your continued cooperation.

Yours truly,



Dr. Radovan Karadzic

ANNEX "D"

Dr. Radovan Karadzic
International Criminal Tribunal for
the former Yugoslavia

18 October 2010

Mr. D. Stephen Mathias
Assistant Secretary General of the United Nations
Office of Legal Affairs
New York, NY 10017

BY FAX TO 1 212 963 4879

Dear Mr. Mathias,

I hereby request that the United Nations provide me with a copy of the following documents which are material to my defence:

- (1) All memoranda or correspondence in the possession of the UN Office of Legal Affairs, Department of Peacekeeping Operations, or Office of the Secretary General written during the period 1 January 1994 through 1 October 1995 in which the issue of when peacekeepers might become combatants as a result of NATO or UN use of force in Bosnia was discussed.

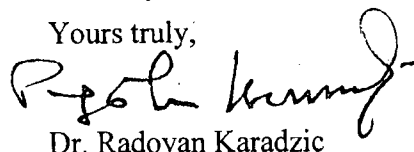
The relevance of this material to my case is that I am charged in Count 11 of the Third Amended Indictment with the taking of UN personnel as hostages. Whether the UN personnel were lawfully taken as prisoners of war as a result of the use of force by NATO/UN is a live issue in my trial.

This request is time sensitive since the documents are needed during cross examination of former UN commander Rupert Smith, who is scheduled to testify in mid-November 2010 in my trial.

Please feel free to contact my Legal Advisor Peter Robinson at peter@peterrobinson.com if you have any questions about this request..

Thank you for your continued cooperation.

Yours truly,



Dr. Radovan Karadzic

ANNEX "E"

United Nations  Nations Unies

HEADQUARTERS • SIEGE NEW YORK, NY 10017
TEL.: 1 (212) 963.1234 • FAX: 1 (212) 963.4879

9 November 2010

Dear Mr. Karadžić,

*Requests for United Nations Documents
The Prosecutor v Radovan Karadžić (Case No. IT-95-5/18)*

I refer to Mr. Mathias' letter of 25 October 2010 and to your response dated 29 October 2010 regarding various requests for United Nations documents that may be material to the preparation of your defence in the case against you before the International Tribunal for the former Yugoslavia ("the ICTY").

"Vance delegation" documents

In a letter dated 23 April 2010, you requested that the United Nations release to you "reports of Cyrus Vance, Herbert Okun, or other staff members of the Vance delegation concerning meetings held with Radovan Karadžić". In his letter of 25 October 2010, Mr. Mathias indicated that the relevant archives of the Department of Peacekeeping Operations (DPKO), the Department of Political Affairs (DPA), and former Secretary-General Perez de Cuellar that may contain the documents requested had been identified and the files could be made available for inspection at UN Headquarters in New York upon our receipt of your written agreement to all the exceptions and conditions set out in Annex I to the letter. Your letter of 29 October confirms your agreement to these exceptions and conditions. Therefore, your Legal Adviser, Mr. Peter Robinson, should make contact with Ms. Paola Casini (email: casinip@un.org) and Ms. Jill Annitto (email: annitto@un.org) of the Archives and Records Management Section (ARMS) to make arrangements for his visit to New York, giving them at least three days advance notice. They will then provide him with the necessary practical information with respect to his access to the material he wishes to inspect.

"Holbrooke" Documents

In his letter of 25 October 2010, Mr. Mathias indicated that one additional document could be released to you upon receipt of your agreement in writing to the conditions set out in Annex I thereto. I would like to point out that these conditions were required by Hungary and Slovenia in addition to Austria.

Mr. Radovan Karadžić
International Tribunal for the former Yugoslavia
The Hague

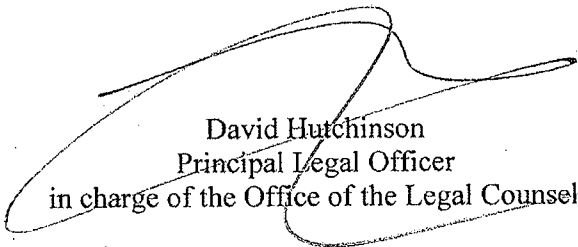
As your response indicates that you have agreed to these conditions, the document is hereby released to you as an attachment to this letter. Mr. Mathias also indicated that this Office was in the process of following up with those Member States that had not yet responded to the initial request for documents. Since that time, we have received consent from Ukraine for the release to you of one additional document, which is hereby released to you as an attachment to this letter.

Annex I to this letter shows those documents that are being released to you as attachments hereto. I wish to reiterate that the United Nations' preparedness to make these documents and others available to you should not be understood as constituting recognition of any obligation to make such documents available to you; nor is it to be understood as involving the assumption of any obligation to that effect. The United Nations' preparedness to provide documents to you is without prejudice to the immunity from legal process of the United Nations and its officials and to the inviolability of its archives.

Request of 18 October 2010

With respect to your request of 18 October 2010 for United Nations documents regarding the determination of when peacekeepers become considered combatants, the United Nations is not in a position to release to you any such documentation, as this would necessarily compromise the confidentiality required for the effective working of the internal decision-making processes of the Organization.

Yours sincerely,



David Hutchinson
Principal Legal Officer
in charge of the Office of the Legal Counsel

cc: Mr. Nambiar
Mr. Le Roy
Mr. Pascoe
Ms. Sisk