

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 2012

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION TO COMPEL PRODUCTION
OF SEVEN DOCUMENTS

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

Government of United Kingdom

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves the Trial Chamber, pursuant to Rule 54 *bis*, for an order directed to the United Kingdom aimed at compelling the production of seven documents necessary for his defence.

Background

2. On 11 September 2009, Dr. Radovan Karadzic filed his *Motion for Binding Order: Government of United Kingdom*. The motion sought production of 14 categories of documents relevant to his case.

3. The documents sought were:

Arms Smuggling into Tuzla in February-March 1995:

- (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 United Kingdom personnel serving in Bosnia.
- (2) All reports of British Special Air Services (SAS) in Tuzla of sightings of aircraft suspected of delivering arms to the Bosnian Muslims on or about 10 February 1995
- (3) Report of Colonel C.A. LeHardy to MA Commander, BHC "Incident at TAB" dated 13 February 1995
- (4) Memorandum or report entitled "Reports of Possible Fixed Wing Activity at Tuzla 10/12 Feb 1995" dated 18 February 1995
- (5) Report from Colonel LaHardy to NordBat, no 3471 3/TAB/008 dated 18 February 1995 concerning the sighting of aircraft at Tuzla.
- (6) A 1995 internal Defence Intelligence Staff (DIS) analysis which concluded that arms were smuggled into Bosnia and the entire operation was probably led by the US National Security Council.
- (7) All information received by the DIS from the Germany military intelligence service or the Bundesnachrichtendienst concerning delivery of arms to Bosnia in 1995.
- (8) All correspondence or notes or memoranda of communications between the government of the United Kingdom and the United Nations or any of its bodies concerning the shipments of arms to Tuzla in February 1995
- (9) All correspondence or notes or memoranda of communications between the government of the United Kingdom and the United States concerning the shipments of arms to Tuzla in February 1995

- (10) All reports, minutes, or notes of the meetings of Ministers of Defence of UK, France, and Germany and US Secretary of Defence at Key West, Florida on 3-5 March 1995 concerning arms supplies to Bosnia.

Responsibility for Shellings at Markale Market, Sarajevo

- (11) All reports of intelligence or security services, Special Air Services (SAS) or UNPROFOR members from the United Kingdom concerning the killings at the Markale market in Sarajevo, Bosnia on 5 February 1994 and 28 August 1995

Violations of Neutrality by International Personnel in Bosnia

- (12) All reports, memoranda or correspondence concerning the use of UNPROFOR, UN military observers, UNHCR, or non-governmental organization personnel in Bosnia during April 1992—August 1995 to provide arms, ammunition, or military equipment to the Bosnian Muslims.
- (13) All reports, memoranda, or correspondence concerning the use of UNPROFOR, UN military observers, UNHCR, or non-governmental organization personnel in Bosnia during April 1992-August 1995 to perform acts of a military or intelligence nature for their own government or for NATO.

Karadzic Involvement and Knowledge of Srebrenica Events

- (17) All reports, transcripts, or notes of statements made by Radovan Karadzic between 9 July and 4 August 1995 about the Srebrenica events including information from signals and human intelligence.

4. Similar motions were filed for binding orders to France¹, Germany², and the United States.³

5. On 14 October 2009, Dr. Karadzic withdrew his Motion as to the United Kingdom after receiving 37 pages of responsive documents and a representation from the United Kingdom that it possessed no other documents relevant to the request. At that time, he specifically “reserves the right to make further requests to the United Kingdom should he learn that it is in possession of other relevant documents.”⁴

¹ *Motion for Binding Order: Government of France* (24 August 2009)

² *Motion for Binding Order: Government of Germany* (13 August 2009)

³ *Motion for Binding Order: Government of United States of America* (11 September 2009)

⁴ *Withdrawal of Motion for Binding Order: Government of United Kingdom* (14 October 2009).

6. On 9 November 2011, some two years later, Dr. Karadzic received a letter from the government of the United Kingdom which indicated that:

It has come to our attention that seven documents potentially relevant to your request...are in the United Kingdom's possession. The United Kingdom is, however, unable to release these documents to you. The documents in question are highly classified reports provided to the United Kingdom by a third State. The third State in question has not provided its consent to the disclosure of the documents. As a consequence, according to the originator principle, and for reasons of national security, the United Kingdom is prevented from disclosing the documents to you. We are sorry about the delay in informing you of this issue.⁵

7. On 10 November 2011, Dr. Karadzic requested that the Trial Chamber invite the United Kingdom to identify the State which was the originator of the seven documents so that he could seek those documents directly from that State.⁶

8. On 17 November 2011, the Trial Chamber issued its *Invitation to the United Kingdom of Great Britain and Northern Ireland* in which it invited the United Kingdom to respond.

9. On 5 January 2012, the United Kingdom indicated that it declined to identify the State from whom the seven documents originated.⁷

The Problem

10. Dr. Karadzic accepts that under the Appeals Chamber jurisprudence, a State cannot be compelled to produce documents originating with another State, absent the Originator State's consent.⁸

11. However, it is equally established by the Appeals Chamber jurisprudence that a State may not decline to produce documents for national security reasons, but instead

⁵ This letter was attached as Annex A to the *Motion for Invitation to United Kingdom* (10 November 2011).

⁶ *Motion for Invitation to United Kingdom* (10 November 2011)

⁷ *United Kingdom of Great Britain and Northern Ireland Response to the Trial Chamber's Order of 17 November Requesting Submissions* (5 January 2012).

⁸ *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. 45; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.1, *Decision on Request of NATO for Review* (12 May 2006) at para. 20

must avail itself of the procedures of Rule 54 *bis* (F) to (I) designed to protect the State's national security interests.⁹

12. Therefore, the issue arises as to how to obtain documents to which Dr. Karadzic is entitled, but which the United Kingdom is entitled not to produce out of deference to the Originator State.

13. The simple solution would be if the United Kingdom discloses the identity of the Originator State. Dr. Karadzic could then seek the documents directly from the Originator State. However, the United Kingdom declines to identify the Originator State.

14. Clearly an Originator State cannot avoid its obligation to cooperate with the Tribunal by hiding behind a State which is in possession of a copy of its documents. The Appeals Chamber has noted that a State's withholding, for security purposes, of documents necessary for trial would "jeopardize the very function of the International Tribunal and defeat its essential object and purpose," and would be "contrary to a State's obligation to cooperate with the International Tribunal under Article 29 of the Statute."¹⁰

15. The Appeals Chamber has further noted that the withheld documents "might prove crucial for deciding whether the accused is innocent or guilty."¹¹ This may indeed be the case for the seven documents which are the subject of this motion. The documents may include evidence that the Bosnian Muslims fired the mortar which landed on the Markale Market (request #11, above) or evidence from intercepted conversations that Dr. Karadzic was unaware of the killing of the men of Srebrenica (request #17).¹²

16. Therefore, it is essential that a mechanism be found to obtain the seven documents in order to provide a fair trial to Dr. Karadzic.

⁹ *Prosecutor v Blaskic*, No. IT-95-14-AR108bis, *Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II Decision of 18 July 1997* (29 October 1997) at para. 65; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)* (19 May 2010) at para. 41; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Binding Order Motion (The French Republic)* (30 June 2010) at para. 28

¹⁰ *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. 38

¹¹ *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. 38

¹² The Trial Chamber has already found that many of the documents requested in the binding order to be relevant and necessary to Dr. Karadzic's defence. *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)* (19 May 2010) at paras. 19-29; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Binding Order Motion (The French Republic)* (30 June 2010) at paras. 20,26

The Solution

17. Dr. Karadzic sees two possible solutions to this problem: (1) to order the United Kingdom to disclose the identity of the Originator State or (2) to require the United Kingdom to litigate the issue of production of the documents in the place of the Originator State.

18. In its pleading in which it convinced the Appeals Chamber to adopt the Originator Principle in the *Milutinovic* case, the United States noted that:

“If the applicant has reason to believe that a State is in possession of another State’s information and does not know the identity of the originating State, the burden is on the Applicant to demonstrate to the Trial Chamber that this is the case. In such unusual instances, the Trial Chamber should direct States that are the subject of a compulsory production order to seek authorization from the originating State for approval to release the information. In extraordinary cases, such as those involving States that have a history of not cooperating fully with the Tribunal, the requested State could also be required to inform the Chamber that it has potentially responsive information and provide the Chamber with the identity of the originating State.”¹³

19. Therefore, even the State urging adoption of the Originator Principle recognized that the Tribunal could require that the identity of the Originator State be disclosed.

20. In national systems, including the United Kingdom, courts have compelled the disclosure of the identity of a third party when necessary. For example, there is a well-established principle that disclosure of the identity of a wrongdoer may be compelled against anyone against whom the plaintiff has a cause of action in relation to the same wrong.¹⁴ In a case where an employer brought a claim for breach of confidence against a former employee, the court required the employee to disclose the identities of those third parties with whom he had business contacts.¹⁵ In another case, the court ordered a third

¹³ *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54bis* (2 December, 2005) p. 18.

¹⁴ *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133; *887 P. v T. Ltd.* [Ch. 1996 P. No. 6984]; *Ricci v Chow* [1987] 1 W.L.R. 1658; *Loose v. Williamson and Another* [1978] 1 W.L.R. 639; *Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*, [2009] 1 W.L.R. 2579

¹⁵ *Intelsec Systems Ltd. v. Grech-Cini*, [2000] 1 W.L.R. 1190

party to disclose of the identity of the trustees to a potential beneficiary of a trust.¹⁶

21. At the International Criminal Court, pursuant to Article 73 of the Rome Statute, the Originator State who is a State party is required to “either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72.”¹⁷

22. Therefore, it is submitted that the Trial Chamber has the power to compel the United Kingdom to disclose the identity of the Originator State.

23. However, a more accommodating and expeditious way of proceeding may be to give the United Kingdom the opportunity to assert any defences the Originator State may have to production of the documents. This would allow the United Kingdom to comply with the wishes of the Originator State that its identity not be disclosed, while at the same time give the Originator State the same procedural rights to object to the production of the documents. If after such a procedure, the United Kingdom is ordered to produce the seven documents, the Originator State would be in no position to complain that the United Kingdom had breached any duties of confidentiality owed to it.

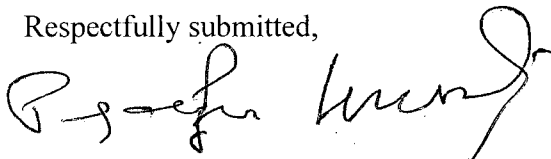
24. Therefore, it is respectfully requested that the Trial Chamber invite the United Kingdom to either (1) identify the Originator State; or (2) assert any defences that the Originator State may have to production of the seven documents, within 14 days. The Trial Chamber is also requested to hold an oral hearing at which Dr. Karadzic and the United Kingdom and/or the Originator State may be heard. At the conclusion of such a hearing, it is respectfully requested that the Trial Chamber order production of the seven documents.

¹⁶ *Murphy v Murphy*, [1999] 1 W.L.R. 282

¹⁷ Member States of the United Nations and required by Article 29 to cooperate with the Tribunal just as State Parties are required to cooperate with the ICC

Word count: 2345

Respectfully submitted,

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

Radovan Karadzic¹⁸

¹⁸ The assistance of Legal Intern John Tso of China to the research for this motion is gratefully acknowledged.