

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<sup>1</sup>

Registrar: Mr. John Hocking

Date: 22 July 2009

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION FOR BINDING ORDER TO NATO

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

The Accused:  
Radovan Karadzic

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<sup>1</sup> Motion for Disqualification pending

1. Dr. Radovan Karadzic respectfully moves, pursuant to Article 29 and Rule 54bis, for an order to the North Atlantic Treaty Organization (“NATO”), compelling it to produce the following documents:

- (1) All reports or information received by the NATO Combined Air Operations Center (COAC) in Vicenza on 10 and 12 February 1995 concerning the sighting of aircraft in the area of the Tuzla, Bosnia<sup>2</sup>
- (2) All flying orders and other information indicating which aircraft and personnel were charged with monitoring the No Fly Zone over Tuzla on 10-12 February 1995
- (3) All information which tends to indicate that unauthorized aircraft were in the area of Tuzla on 10-12 February 1995<sup>3</sup>
- (4) All reports, memoranda, or minutes of meetings concerning the allegations that aircraft were in the area of Tuzla on 10-12 February 1995, or throughout the months of February and March 1995, or concerning allegations that those patrolling the area did not detect or report those aircraft<sup>4</sup>
- (5) All reports of investigation, statements, or documents obtained during the investigation into the “Black Flights to Tuzla” which took place during February-March 1995<sup>5</sup>
- (6) All correspondence between NATO and the United States or Turkey concerning the "Black Flights to Tuzla" during the period 10 February 1995 and 31 December 1996<sup>6</sup>

## **BACKGROUND**

2. On 9 October 1992, the Security Council adopted resolution 781, which imposed a ban on military flights over Bosnia that had not been approved in advance.<sup>7</sup> This was the well known ‘No Fly Zone resolution.’<sup>8</sup> NATO council imposed a No Fly Zone above the former Yugoslavia to monitor flight movements.<sup>9</sup>

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<sup>2</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177.

<sup>3</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 192-197.

<sup>4</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177, 185.

<sup>5</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177, 184, 191.

<sup>6</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 197.

<sup>7</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 158.

<sup>8</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 158.

<sup>9</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 158.

3. 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. Other UN observers, making use of night vision equipment, also saw the cargo aircraft and the fighter planes concerned. The reports were immediately forwarded to the NATO Combined Air Operations Center (CAOC) in Vicenza and the UNPF Deny Flight Cell in Naples.<sup>10</sup> The aircraft had come within range of the British Special Air Service (SAS) in Tuzla, and the British saw them land.<sup>11</sup> It was a confirmation that a clandestine American operation had taken place in which arms, ammunition and military communication equipment were supplied to the ABiH.<sup>12</sup> These night-time operations led to much consternation within the UN and NATO.<sup>13</sup>

4. Tuzla Air Base was chosen for the supplies to East Bosnia as it had better facilities than Sarajevo, it was at a lower altitude (237 meters) and climatologically it was a better location, which assured the pilots a better visibility during takeoff and landing.<sup>14</sup> The airport runways were out of the sight of VRS, and also outside VRS artillery range.<sup>15</sup>

5. The matter became a subject of concern in the United Nations. Apparently, the United States intervened and required British 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.<sup>16</sup>

6. 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.<sup>17</sup>

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<sup>10</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177.

<sup>11</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177.

<sup>12</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177.

<sup>13</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 177.

<sup>14</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 181.

<sup>15</sup> Cees Wiebes, *Intelligence and the War in Bosnia* @ 181.

<sup>16</sup> Wiebes, *Intelligence and the War in Bosnia* @ 185, 191-92.

<sup>17</sup> BBC, *Allies and Lies*, <http://news.bbc.co.uk/2/hi/programmes/correspondent/1390536.stm>.

7. 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.<sup>18</sup> Both were UN safe zones from which the Bosnian Muslim Army launched attacks against the Bosnian Serbs.

#### **APPLICABLE PROVISIONS**

8. Article 29 of the Statute and the jurisprudence of this International Tribunal oblige States “to cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

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.

#### **PROCEDURAL HISTORY**

10. On 2 June, 2009, Dr. Karadzic served a letter on NATO in which he requested copies of the items set forth in paragraph 1 of this motion.<sup>19</sup> No response was received. On 30 June 2009, Dr. Karadzic sent another reminder to NATO.<sup>20</sup> No response has ever been received.

#### **ARGUMENT**

##### **I. Applicability of Article 29 to NATO**

11. The Appeals Chamber has held that a binding order pursuant to Article 29 and Rule 54 *bis* may be issued to NATO.<sup>21</sup>

##### **II. Satisfaction of Rule 54*bis* requirements**

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<sup>18</sup> Wiebes, *Intelligence and the War in Bosnia* @ 182.

<sup>19</sup> A copy of this letter is attached as Annex “A” to this motion.

<sup>20</sup> A copy of this letter is attached as Annex “B” to this motion.

<sup>21</sup> *Prosecutor v. Dagoljub Ojdanic et al*, IT-05-87-AR108*bis*.1, *Decision on Request of the North Atlantic Treaty Organizations for Review* (15 May 2006) at para. 8

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 made reasonable and genuine efforts to obtain NATO's assistance before filing the motion.

**i). 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.<sup>22</sup> The application must "provide[s] sufficient clarity as to allow for the ready identification of the requested documents."<sup>23</sup> However, in order to ensure a fair trial, this criterion may be relaxed where the requesting party provides some particulars and has no other *bona fide* way of determining others. As stated by the Appeal Chamber:

"[t]he Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89(B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing those particulars."<sup>24</sup>

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 (February- March 1995), named personnel who would have personally generated or viewed the documents or information (NATO Combined Air Operations Center (COAC)), and named a specific geographic location to which the records pertain (Tuzla, Bosnia).

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

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<sup>22</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. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15.

<sup>23</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. 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.

<sup>24</sup> *Prosecutor v. Blaskic*, No. IT-95-14-AR109bis, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997), at para. 32; *Prosecutor v. Seselj*, No. IT-03-67-PT, *Decision on Requests by the Accused for Trial Chamber II to Issue Subpoena Orders* (3 June 2005); *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.17.

documents, it can meet the specificity requirement by describing the documents by category as long as they are not broad.<sup>25</sup> A requested category of documents, defined with sufficient clarity to enable ready identification will suffice.<sup>26</sup>

16. Therefore, Dr. Karadzic has satisfied the requirement of specificity. Dr. Karadzic is not required to be so specific as to result in instant identification or preclude the responsibility of NATO to search for the documents in its archives.<sup>27</sup>

#### **ii.) 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.<sup>28</sup> Request for materials that concern the most important issues in the case are, on their face, necessary for a fair determination of that case.<sup>29</sup> The requesting party does not need to demonstrate that the material *in fact* exists in order to meet the necessity requirements.<sup>30</sup> Requested documents are often confidential State materials, and in many cases it would be impossible for an applicant to prove their existence. The right to fair trial doesn't require an applicant to exhaust all other possible sources for the information as it would be too onerous and inhibit the right to a fair trial.<sup>31</sup>

18. In this case, the material related to the sighting of aircraft carrying supplies 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

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<sup>25</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.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.

<sup>26</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.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.

<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. 37.

<sup>28</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) at 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>29</sup> *Prosecutor v. Milutinovic et al.*, No. IT-05-87-PT, *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54bis* (17 November 2005) at para. 18.

<sup>30</sup> *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. 23.

<sup>31</sup> *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. 24.

eliminate the Bosnian Muslims of Srebrenica.<sup>32</sup> 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, documents showing the actual presence of an aircraft carrying weapons in violation of the United Nations Arms Embargo on the side of the Bosnian Muslims from NATO member States are relevant to the credibility and bias of international witnesses from 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.<sup>33</sup>

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

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

### **iii.) Efforts to Obtain the Material Voluntarily requirement**

22. Rule 54 *bis* requires that the party seeking a binding order have made reasonable efforts to obtain the material from the State voluntarily.<sup>34</sup> The Trial Chamber in *Simic* held that an unanswered letter, which was delivered through the Embassy of Federation of BiH, was sufficient to the Defense to meet the Rule 54*bis* "efforts" requirement.<sup>35</sup> Likewise, in *Mladic*, prosecution's requests to the Liaison officer in Banja Luka in July 2001, followed by three reminders and a letter to the President of Republica Srpska in March 2004, that all remain unanswered, were held to be 'genuine attempts' to obtain the information requested.<sup>36</sup>

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<sup>32</sup> Third Amended Indictment at paras. 8, 20, 42, 44, 57, 74.

<sup>33</sup> For example United States Ambassador Herbert Okun, and Generals Rupert Smith and Michael Rose of the United Kingdom.

<sup>34</sup> *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Decision on Sreten Lukic's Amended Rule 54 bis Application* (29 September 2006), at para. 7.

<sup>35</sup> *Prosecutor v. Simic et al*, No. IT-95-9-T, *Order for the Production of Documents*, (21 February 2003), at p.2.

<sup>36</sup> *Prosecutor v. Ratko Mladic*, No. IT-95-5/18-I, *Order to the Republica Srpska for the Production of Documents* (1 September 2004) at p.3

23. Dr. Karadzic requested the material from NATO by a letter that was sent to NATO's headquarters in Belgium on 2 June, 2009. Dr. Karadzic sent a reminder letter again on 30 June, 2009 but all his requests remain unanswered by NATO.

24. Therefore, Dr. Karadzic has satisfied the requirement by making reasonable and genuine efforts to obtain the material voluntarily from NATO.

### **III. Rule 54bis and the Originator Principle**

25. Unlike the Appeal Chamber's decision in *Ojdanic*, where the Appeal Chamber declined to require NATO to produce certain intelligence information because it was not the originator of the information, here, Dr. Karadzic is requesting the information that originated within NATO and remains under the control and authority of NATO as opposed to its member States.<sup>37</sup>

26. Thus, the originator principle does not preclude the Trial Chamber from issuing a Rule 54bis order compelling NATO to produce the documents requested by Dr. Karadzic in this motion.

### **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<sup>38</sup>, he believes that justice would be better served by giving NATO the opportunity to be heard before a binding order is issued. Therefore, he requests that the Trial Chamber issue an invitation to NATO 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.

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

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<sup>37</sup> *Prosecutor v. Dagoljub Ojdanic et al*, IT-05-87-AR108bis.1, *Decision on Request of the North Atlantic Treaty Organizations for Review* (15 May 2006) at para. 16.

<sup>38</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.

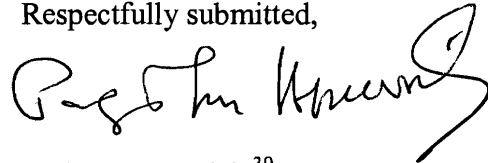


**Conclusion**

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

Word count: 2900

Respectfully submitted,



Radovan Karadzic<sup>39</sup>

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<sup>39</sup> The assistance of Legal Intern Rajat Rana of the University of Virginia (USA) to the research and preparation of this motion is gratefully acknowledged.

# **ANNEX “A”**

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

2 June 2009

The Honorable Jaap de Hoop Scheffer  
Secretary General  
North Atlantic Treaty Organization  
Blvd Leopold III  
1110 Brussels, Belgium

Dear Mr. Secretary-General,

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 NATO furnish me with copies of the following documents which are necessary for my defence:

- (1) All reports or information received by the NATO Combined Air Operations Center (COAC) in Vicenza on 10 and 12 February 1995 concerning the sighting of aircraft in the area of the Tuzla, Bosnia
- (2) All flying orders and other information indicating which aircraft and personnel were charged with monitoring the No Fly Zone over Tuzla on 10-12 February 1995
- (3) All information which tends to indicate that unauthorized aircraft were in the area of Tuzla on 10-12 February 1995
- (4) All reports, memoranda, or minutes of meetings concerning the allegations that aircraft were in the area of Tuzla on 10-12 February 1995, or throughout the months of February and March 1995, or concerning allegations that those patrolling the area did not detect or report those aircraft
- (5) All reports of investigation, statements, or documents obtained during the investigation into the "Black Flights to Tuzla" which took place during February-March 1995

Secretary General of NATO

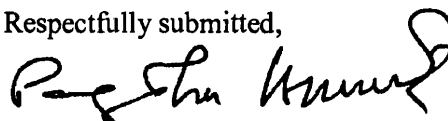
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- (6) All correspondence between NATO and the United States or Turkey concerning the "Black Flights to Tuzla" during the period 10 February 1995 and 31 December 1996
- (7) All reports, memoranda, or correspondence concerning the use of UNPROFOR, UN military observers, UNHCR, or nongovernmental organization personnel in Bosnia during April 1992-August 1995 to provide arms, ammunition, or military equipment to the Bosnian Muslims.
- (8) All reports, memoranda, or correspondence concerning the use of UNPROFOR, UN military observers, UNHCR, or nongovernmental organization personnel in Bosnia during April 1992-August 1995 to perform acts of a military or intelligence nature for their own governments or for NATO.

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](mailto:peter@peterrobinson.com). You may also feel free to contact Mr. Robinson should you have any questions about this request.

Thank you for your consideration of this request.

Respectfully submitted,



Dr. Radovan Karadzic

# **ANNEX “B”**

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

30 June 2009

The Honorable Jaap de Hoop Scheffer  
Secretary General  
North Atlantic Treaty Organization  
Blvd Leopold III  
Brussels, Belgium

Dear Mr. Secretary-General,

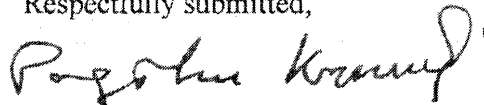
On 2 June 2009, I sent you a letter requesting that certain documents be provided by your government for use in my defence at the International Criminal Tribunal for the former Yugoslavia. The letter was hand delivered to your embassy. I have had no response from your government to my letter, another copy of which is attached,

I hereby implore you to respond to my request by e-mail to my Legal Advisor, Peter Robinson at [peter@peterrobinson.com](mailto:peter@peterrobinson.com).

I indicated in my original letter that if I did not have a response to my request by 23 June 2009, I would have no choice but to seek a binding order from the Trial Chamber directing your government to furnish me with the requested information. That date has come and gone. However, I have decided to provide your government with an additional opportunity to voluntarily cooperate with the Tribunal. Therefore, I have extended this deadline until 10 July 2009.

I hope we will hear from your government soon.

Respectfully submitted,



Dr. Radovan Karadzic