

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

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

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Date: 28 April 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC

With Public Annexes A and C, and Confidential Annexes B and D

**RESPONSE OF THE UNITED STATES OF AMERICA
TO THE TRIAL CHAMBER'S 13 APRIL 2011
"INVITATION TO THE UNITED STATES OF AMERICA"**

Office of the Prosecutor

Mr. Alan Tieger

Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadzic

United States of America

Ms. Karen K. Johnson

Mr. Richard Visek

Introduction

The United States of America respectfully requests that the Trial Chamber dismiss Radovan Karadzic's "Fourth Motion for Binding Order: United States of America," filed on 12 April 2011 ("54bis Motion" or "Motion"). The Motion fails to meet the basic threshold for issuance of a 54bis order – namely, that the party to which the request is directed has declined to cooperate. On the contrary, the United States has fully cooperated with Accused and provided him with all the documents it has located that are responsive to his request. For that reason, the United States will not here address whether the Motion meets the specific requirements of Rule 54bis.¹ The United States will, however, offer a few observations on the frivolity and vexatiousness of the Motion, and on certain of the pertinent misstatements and mischaracterizations that it contains.

I. Background

Accused's Motion requests the Trial Chamber to order the United States of America to provide:

“(1)(E) All reports or memoranda of investigation and interviews conducted by the Department of Defense, National Security Council,² or Central Intelligence Agency concerning the delivery of arms, ammunition, or military equipment by air to Tuzla in February-March 1995.”

In the alternative, the Motion asks that the Trial Chamber require the United States to provide affidavits affirming that it cannot locate the material.

On April 14, 2011, the United States received the Trial Chamber's "Invitation to the United States of America," in which it invited the United States to file a response to Accused's Motion within fourteen days.

¹ The United States will not address whether Accused's request meets the requirements of specificity, relevance, and necessity, or the issue of whether it is unduly onerous. However, should the Chamber determine that it needs to examine these matters, the United States respectfully requests it be given the opportunity to present a filing with its views.

² Accused has variously identified this entity as the NSC (National Security Council) or the NSA (National Security Agency). Regardless of which he means, the position of the United States Government as expressed in the instant filing is unchanged.

II. Observations on the Motion

This is the second time that the United States has faced a *54bis* motion on this particular category of material. The material was also the subject of the Accused's Third Motion for a Binding Order, filed on January 24, 2011, and dismissed on February 17, 2011. The United States responded to that motion on February 11, 2011, and will not repeat here the procedural and contextual information provided at the time. However, the United States made clear in its February 11 response that it had only one remaining document potentially responsive to Accused's request, and that it was working to declassify it and coordinate the release of some of the material contained therein with its third-party originators. The United States subsequently provided that document to Accused on April 11, 2011.³ The provision of the final potentially responsive document represented the end point in a lengthy and painstaking cooperative process, during the course of which the United States had provided Accused with other information related to the alleged Tuzla flights.

The following day, on April 12, Accused filed the instant Motion. While conceding that "the United States has been cooperative," he nevertheless elected not to accept the representations made by the United States, and asked the Trial Chamber to order the United States to produce the requested material or to provide affidavits affirming that "it cannot locate the requested material."⁴ Given that the United States has not only provided Accused with material responsive to his request, but has previously informed the Trial Chamber and the Accused that it has located no additional responsive documents, the Motion must be considered frivolous and vexatious.

The Motion's lack of foundation becomes more evident after a review of a few of its misstatements and mischaracterizations. The Motion seeks to convince the Trial Chamber that there exist important materials – specifically, "three reports" by U.S. Government agencies on

³ That final potentially responsive document was a Department of Defense historian's report entitled "A Brief History of Operations Provide Promise and Deny Flight (February-March 1995)." The United States is in the process of seeking authorization from a third-party originator to release one page of supporting material contained therein.

⁴ Motion at para. 42.

alleged February 1995 arms shipments to Tuzla – that are necessary to his case⁵ and, to that end, it paints a picture of clandestine arms flights to Tuzla and of robust U.S. investigations of those claims. Accused contends that the three reports may provide “important information as to the identity of those responsible for the shipments.”⁶

However, Accused has ignored or misrepresented the evidence before him. The very material he has used to support some of his central claims in fact vitiates them. The real picture that emerges from these materials is that there was no reliable evidence to establish that these clandestine Tuzla flights occurred, there was limited U.S. investigation into the allegations, and the United States had scant documentation. Indeed, the materials contain no indication that any U.S. agency prepared a report of investigation on the alleged flights (and, in fact, in its diligent searches, the United States has been unable to find any such reports).

To illustrate these points, the United States will flag three instances in which Accused’s Motion takes liberties with his supporting evidence.

The Motion’s Background section consists of a series of allegations about the February 1995 “Black Flights to Tuzla.” Among the materials cited in the section is a NATO report, about which Accused says: “[s]ubsequent 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.”⁷ In fact, the report in question (a joint NATO/UNPROFOR report) concluded that there was no substantiated evidence that arms had been delivered by air to Tuzla.⁸ (In citing to the report but ignoring its conclusion, Accused is at best being selective and at worst misleading, since the context within which he offers the statement could be interpreted to suggest the

⁵ Motion at para. 20.

⁶ *Id.* This statement shows that Accused is engaged in a fishing expedition, which is improper in the context of a 54*bis* motion. In addition, his reason for seeking the documents does not appear to be consonant with the Trial Chamber’s articulation of what material may be relevant, per the 9 June 2010 “Decision on the Accused’s Motion for Binding Order (The Islamic Republic or Iran)” at para. 20.

⁷ Motion at para. 18.

⁸ See discussion in “Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers (‘The Iranian Green Light Subcommittee’), pp. 478-482, attached as Annex A. See also the report itself: “Final Report of Possible Fixed Wing Flight Activity at Tuzla 10/12 Feb 95” by Col. Timothy Jones, NATO/UNPROFOR Investigating Team Chief (hereinafter “NATO/UNPROFOR Final Report”), attached as confidential Annex B. Both documents were among the materials provided by the United States to the Accused.

opposite – i.e., the U.S. was involved in the alleged flights.)

Later in the Motion, Accused seeks to establish that the three “reports” on the alleged February 1995 Tuzla flights he has requested exist and are in the possession of the United States. In support, Accused provides excerpts from two Congressional reports: (1) a U.S. Senate Committee report entitled “U.S. Actions Regarding Iranian and Other Arms Transfers to the Bosnian Army, 1994-1995” (hereinafter “Senate Report”); and (2) the “Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers (‘The Iranian Green Light Subcommittee’)” (hereinafter “House Report”).⁹ The Senate and House Reports both examined the allegation that the Clinton Administration had given a “green light” to Iranian arms shipments into Bosnia. The Tuzla allegations are neither the focus of, nor central to, either report.

Accused’s excerpt from the Senate Report is misleading at several levels.¹⁰ First, the first two sentences of his excerpt do not relate to the alleged February 1995 Tuzla flights at all, but to two different sets of allegations.¹¹

Second, the excerpt’s third and fourth sentences are drawn from the Report’s paragraph on the Tuzla allegations, but omit a critical sentence. The full paragraph reads as follows (with the restored sentence underlined):

The Department of Defense investigated the Tuzla allegations, both as part of a NATO investigation and for U.S. policymakers. While the documentation of that investigation is scant, its conclusions – as reported both to the public and, in private briefings, to U.S. officials – were that there was no air activity that would suggest arms deliveries and certainly no U.S. involvement. DoD and CIA documents on the Tuzla incidents that the Committee has seen, as well as the recollections of both CIA analysts and senior Defense Department officials, strongly support the conclusion that there was no U.S. role in any clandestine military airlifts.

⁹ Motion at paras. 38 and 39.

¹⁰ The relevant section of the Senate Report is attached as Annex C. The United States provided the Senate Report to the Accused on October 14, 2009.

¹¹ *Id.* The first sentence relates to allegation “(1)” in the Senate Report; the second sentence to allegation “(2).” The Tuzla allegations are number “(3).”

Accused's cut and paste of the Senate Report could lead a reader to make a number of mistaken assumptions, including that there existed some significant amount of documents, and that such documents supported the existence of clandestine military airlifts – albeit clearing the U.S. of any role in them. In reality, the Senate Report paints a different picture: it mentions Department of Defense (DoD) and Central Intelligence Agency (CIA) “documents,” but notes that documentation was scant and briefings on the investigation were done orally, and it says DoD's investigation concluded that there were no clandestine arms-smuggling flights.

Accused's excerpt from the House Report similarly fails to capture the real picture. The excerpt refers to DoD, CIA, and National Security Agency (NSA) “materials” and makes clear that there was no evidence of U.S. involvement in the alleged Tuzla flights. The excerpt does not, however, address the issue of whether these agencies prepared any reports, or, more critically, whether there was evidence of any flights at all. Notably, Accused does not cite to the far more extensive and complete discussion of the alleged Tuzla flights that appears later in the report, prepared by the minority (Democratic) members of the subcommittee based upon the same evidence as was before their majority (Republican) colleagues.¹² This lengthier discussion – which also contains no suggestion of any “reports” by U.S. Government agencies – makes clear that the agencies found no evidence that the clandestine flights had occurred: “[The Tuzla allegations] were investigated at the time they occurred by NATO, the Defense Department and the Central Intelligence Agency. No evidence confirming the reports was discovered. The Minority also has not been able to identify credible evidence of the alleged flights.”¹³

Thus, the supporting evidence upon which Accused has based his Motion fails to substantiate the claim that any reports were created and, significantly, indicates there was no evidence to confirm that the flights ever occurred.

III. Argument

The Appeals Chamber has made clear that binding orders against States are exceptional measures for dealing with uncooperative States, should be “strictly justified by the exigencies of

¹² This discussion in the House Report is contained in Annex A. The United States provided the House Report to the Accused on October 14, 2009.

¹³ *Id.* at p. 478.

the trial,” and should be “reserved for cases in which they are really necessary.”¹⁴ This is patently not one of those cases.

Accused has failed to satisfy the threshold requirement that a *54bis* motion can only be filed *after* a State has declined to lend the requested support.¹⁵ Far from declining to lend support, the United States has gone to extraordinary efforts since receiving Accused’s information request. It has made diligent searches of its relevant holdings. It has declassified material as necessary, and coordinated with third-party originators as appropriate. The United States has now provided to Accused all the potentially responsive documents it has located in response to his lengthy information request, including all the potentially responsive documents it has found on the alleged Tuzla flights,¹⁶ and it has more than once informed Accused of that fact.

Accused’s Motion seeks to cast doubt on these good-faith representations of the United States. It asks the Trial Chamber to order the United States to produce the allegedly missing material, or, in the alternative, to require the United States to produce affidavits affirming that it cannot locate it.

Accused’s request, however, is without foundation. Indeed, his Motion has mischaracterized materials the United States has provided to him. As a result, the Motion asks the Chamber to issue a binding order against the United States for alleged “missing reports” that it is not clear were ever created, to substantiate events that appear never to have occurred, in order to establish the identity of those responsible for those non-events.

The United States stands by the assertions it made in its February 11 filing with the Court regarding the searches it has made in regard to this document request. Nevertheless, in order to

¹⁴ See, *Prosecutor v. Milutinovic et al.*, Decision on Request of the United States of America for Review (12 May 2006), at para.s 25 and 27.

¹⁵ “Only after a State declines to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29.” *Id.* at para. 32.

¹⁶ Although the United States has been unable to locate a record of documents provided to the Congressional committees by executive agencies, some of these documents may be among those already provided to Accused. In fact, the House Report (at pp. 481 and 482) mentions that the committee received the NATO/UNPROFOR Final Report from the Department of Defense. The NATO/UNPROFOR Final Report was among the supporting material on the Tuzla flight allegations that was attached to the final document the United States provided to Accused on April 11, 2011, “A Brief History of Operations Provide Promise and Deny Flight (February-March 1995).”

assist the Trial Chamber, the United States has attached a further statement regarding the searches it has made.¹⁷ The Statement makes clear that the United States has cooperated fully on this request.

Conclusion

For the above-mentioned reasons, the United States respectfully requests that Accused's 54*bis* Motion be dismissed.

Word count: 2,404

A handwritten signature in black ink, consisting of stylized initials 'KK' followed by a long horizontal line extending to the right.

Karen K. Johnson
Deputy Legal Counselor

Dated This 28th Day of April 2011
In The Hague, the Netherlands

¹⁷ Attached as confidential Annex D.