

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: 6 January 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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MOTION TO COMPEL INTERVIEW:  
GENERAL RUPERT SMITH

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The Office of the Prosecutor:

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:

Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves the Trial Chamber, pursuant to Rule 54, for an order compelling prosecution witness General Rupert Smith to submit to an interview by the defence before giving testimony.

2. General Smith had been contacted in 2009 by the Victims and Witnesses Section along with other witnesses and asked whether he would be willing to be interviewed by the defence. He declined.

3. By letter of 7 December 2010, Dr. Karadzic asked General Smith to reconsider. He noted that:

..there is information that I would like to ask you about which I believe is necessary to my defence, but will not be elicited by the prosecution during the trial. For example, I am charged with hostage taking and the issue of whether UN personnel were "persons not taking an active part in the hostilities" at the time of the air strikes on 25-26 May 1995 is an important one in determining my culpability for those events. I would like to ask you about the relationship between NATO and UNPROFOR, and the gathering and sharing of information between UNPROFOR and NATO prior to the air strikes. I believe that you are uniquely placed to provide accurate information on that subject.<sup>1</sup>

4. On 21 December 2010, General Smith replied and indicated he continued to decline to be interviewed by the defence. He provided no reason.<sup>2</sup>

5. The Appeals Chamber has held that where a witness whom a party seeks to subpoena is scheduled to testify during the trial, a Trial Chamber may refuse the request where its sole rationale is to prepare for a more effective cross-examination.<sup>3</sup> However, given that during cross-examination the defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.<sup>4</sup>

6. The Appeals Chamber went on to hold that the Trial Chamber erred in failing to examine whether the defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination. If

<sup>1</sup> A copy of the letter is attached as Annex "A" to this motion.

<sup>2</sup> A copy of this letter is attached as Annex "B" to this motion.

<sup>3</sup> *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 10

<sup>4</sup> *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 14

such examination discloses a need for the defence to interview the witnesses, as mentioned above, subpoenas should issue.<sup>5</sup>

7. The scope of the testimony of General Rupert Smith is set forth in the amalgamated witness statement dated 22 October 2009.<sup>6</sup> While he discusses the hostage situation at paragraphs 116-138, he makes no mention of the relationship between NATO and UNPROFOR, and the gathering and sharing of information between UNPROFOR and NATO prior to the air strikes.

8. It is Dr. Karadzic's contention that as of 25 May 1995, personnel of the United Nations in Bosnia were not "persons taking no active part in the hostilities" and were therefore lawfully detained as prisoners of war.

9. In order to determine whether UN personnel were "persons taking no active part in the hostilities", the Trial Chamber must consider whether the use of force by NATO, at the express request of General Smith, in bombing the Bosnian Serb ammunition depot in Pale on 25 May 1995, rendered UN personnel in Bosnia subject to the law of armed conflict as combatants.

10. The Convention on the Safety of United Nations and Associated Personnel, which was passed by the UN General Assembly on 7 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."<sup>7</sup>

11. Judge Christopher Greenwood of the International Court of Justice, in an article before his elevation to the bench, has written that where a UN force is engaged in hostilities as a belligerent, it is treated in exactly the same way as the armed forces of a State.<sup>8</sup> If UN personnel are captured, they are entitled to be treated as prisoners of war.<sup>9</sup>

<sup>5</sup> *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 15

<sup>6</sup> 65 ter #22686

<sup>7</sup> *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)

<sup>8</sup> Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 *Duke Journal of Comparative & International Law* 185, 188 (1996)

<sup>9</sup> Greenwood, *Protection of Peacekeepers: The Legal Regime*, 7 *Duke Journal of Comparative & International Law* 185, 189 (1996)

12. Once it is established that the United Nations was a belligerent, all active duty personnel of the United Nations are considered to be persons taking a direct part in hostilities.<sup>10</sup> As the ICRC has stated, “Members of regularly constituted forces are not civilians, regardless of their individual conduct or of the function they assume within the armed forces.”<sup>11</sup>

13. Therefore, it is material to Dr. Karadzic’s case to establish that the NATO air strikes on 25 May 1995 were attributable to the United Nations. This requires inquiry into the contacts between NATO and UNPROFOR. Those contacts were at the level of General Rupert Smith as he was the principal contact for NATO at UNPROFOR. Persons lower in the chain of command are not believed to have had direct contact with NATO concerning the planning and execution of the air strikes.

14. The prosecution has not disclosed any written communications between UNPROFOR and NATO concerning the planning or execution of the 25 May 1995 air strikes and it is believed that such communications were primarily oral between General Smith and the NATO command. It would be inefficient and unfair to require Dr. Karadzic to explore the details of such communications during his questioning without having the opportunity to learn the nature of those contacts in advance and focus his examination.

15. In addition to the communications with NATO, General Smith is also privy to secret “black” operations conducted by UN personnel to target Bosnian Serb sites for NATO bombing. In the *Ribic* trial in Canada, involving a prosecution of a member of the Bosnian Serb Army for the same hostage taking, a former Canadian officer testified that he was part of a secret unit which worked behind Bosnian Serb lines to select targets for NATO air strikes and guide those air strikes through forward air control. He was one of the forward air controllers involved in guiding in the bombs that were dropped in Pale in May 1995. He spent about a week planning the operation and then deployed in the area around 13 or 14 May. His job was to go out and select targets and to confirm other targets.

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<sup>10</sup> International Committee of the Red Cross, *Customary International Humanitarian Law* Volume II: Chapter 1; Dinstein Yorman The Conduct of Hostilities under the Law of International Armed Conflict (University of Cambridge: 2004).at p. 113

<sup>11</sup> Nils Melzer, Interpretive guidance on the notion of direct participation in hostilities (ICRC 2009), [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf), p. 31

16. The witness testified that he wore a UNPROFOR uniform during some of these operations and that he obtained information on targets from UNMOs in Bosnia.

17. The witness, whose testimony is summarized in a document attached to this motion as Annex C, testified that very few people were aware of these “black ops” missions, but that General Rupert Smith was always aware of them.<sup>12</sup>

18. The prosecution has not disclosed any information about these operations and it is believed that due to their clandestine nature, oral communication was primarily used. It would likewise be inefficient and unfair to require Dr. Karadzic to explore the details of such operations during his questioning of General Smith without having the opportunity to learn the details of these operations in advance and focus his examination.

19. The issues of NATO/UNPROFOR coordination and use of UN personnel and equipment to target Bosnian Serb facilities for air strikes are outside the scope of the prosecution’s direct examination of General Smith, but at the same time are material to the defence. Therefore, this situation falls squarely within the circumstances in the *Halilovic* case in which the Appeals Chamber held that the defence should have the opportunity to interview the prosecution witness, even if the witness declines to consent to such an interview.

20. Dr. Karadzic notes that General Smith was a member of a force that was supposed to be impartial. He has spent dozens of hours meeting with the prosecution and testifying for the prosecution in a number of cases at this Tribunal. It is no great imposition to require him to spend three hours with the defence so that his questioning by the defence at trial can be focused and productive.

21. General Smith has provided no reason why he does not wish to submit to such an interview. The Appeals Chamber has suggested that an alternative for a witness who has declined to meet with the defence is for the witness to be subpoenaed before the Trial Chamber where the Judge can explain to him the importance of his cooperation to assist in producing a just result in the trial.<sup>13</sup> The Trial Chamber might wish to consider addressing General Smith in writing or orally in an effort to persuade him that it is the interest of justice for him to agree to be interviewed by the defence.

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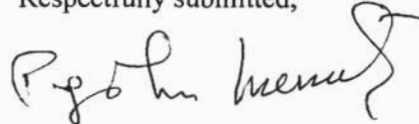
<sup>12</sup> The actual transcripts of the testimony are already in the possession of the prosecution and can be disclosed to the Trial Chamber upon request.

<sup>13</sup> *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 12

22. For all of the above reasons, it is respectfully requested that the Trial Chamber order General Rupert Smith to submit to an interview by the defence in advance of his testimony as a prosecution witness.

Word count: 1786

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  
International Criminal Tribunal for  
the former Yugoslavia

7 December 2010

General Rupert Smith  
c/o ICTY Victims and Witnesses Unit

Dear General Smith,

I hope this letter finds you doing well these days.

I have been advised by the Office of the Prosecutor that you will be testifying at my trial in February. I have also been advised by the ICTY Victims and Witnesses Unit that when you were contacted some time ago about whether you would be willing to be interviewed by me or my defence team prior to your testimony, you declined. I am writing in the hope that you might reconsider your decision.

I would like to meet you at the United Nations Detention Unit in The Hague after you arrive here to give your testimony and interview you about some issues that are important for my defence. Alternatively, if you are uncomfortable speaking to me directly, my Legal Advisor Peter Robinson can interview you in the United Kingdom or in The Hague.

I have interviewed many persons who have testified as prosecution witnesses, including General Michael Rose, and those interviews have been useful not only for me, but for the Trial Chamber. They help me decide what topics a witness can speak about, what documents he is familiar with, and what questions are useful for me to ask in the courtroom. This serves to focus the questioning in court. The interviews serve a similar function to those in which you have participated in before when you have come to The Hague to give testimony.

I am sure you will agree with the Appeals Chamber of the ICTY, which has repeatedly held that a witness is not a partisan of one side or the other, but is there to simply tell the truth. It would facilitate the truth seeking process if you could make yourself available to my defence in the same spirit that you make yourself available to the prosecution.

General Rupert Smith

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The Appeals Chamber has also held that given that during cross-examination the defence can elicit from a Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case, and the Trial Chamber may issue an order compelling the prosecution witness to submit to an interview by the defence.

Indeed, there is information that I would like to ask you about which I believe is necessary to my defence, but will not be elicited by the prosecution during the trial. For example, I am charged with hostage taking and the issue of whether UN personnel were "persons not taking an active part in the hostilities" at the time of the air strikes on 25-26 May 1995 is an important one in determining my culpability for those events. I would like to ask you about the relationship between NATO and UNPROFOR, and the gathering and sharing of information between UNPROFOR and NATO prior to the air strikes. I believe that you are uniquely placed to provide accurate information on that subject.

Therefore, I would appreciate it if you would consider submitting to an interview with me or my defence team prior to giving testimony at my trial.

I am sending this letter through the Victims and Witness Section, and you may reply to them, or you may feel free to contact my Legal Advisor Peter Robinson at [peter@peterrobinson.com](mailto:peter@peterrobinson.com). He would also be pleased to answer any questions you may have about the interview. Please respond by the end of the month, so that there will be time to arrange the logistics of the interview, or to apply for an order from the Trial Chamber if necessary.

Thank you very much for your consideration of this request.

Yours truly,



Radovan Karadzic

cc: Office of the Prosecutor

# **ANNEX “B”**

Dr Radovan Karadzic  
ICTY

22 December 2010

Dear Dr Karadzic,

I write in reply to your letter of 7 December 2010 in which you ask me to reconsider submitting to an interview prior to giving testimony at your trial.

I recognise that for one in your position such a request is a serious matter and in that understanding I have given it considerable thought.

Nevertheless, I will not submit to interview by you or your advisor.

Yours sincerely



Rupert Smith

# **ANNEX “C”**

Summary of Witness B testimony:

Transcript of 20 November 2002

He was lead instructor at the NATO forward air controllers school in Bosnia in 1995 teaching foreign nationals.<sup>14</sup> Some forward air controllers were assigned primary tasks for UNPROFOR battalions while other forward air controllers were given the additional role of providing their services to NATO. In the summer of 1995, that role expanded to providing forward air control to NATO Task Forces Alpha and Beta.<sup>15</sup>

Task Force Alpha was comprised of French Foreign Legion while Task Force Beta was a British unit. They were there under NATO command and did not wear blue helmets.<sup>16</sup>

Above the forward air controller in the chain of command was a tactical air command post and above him is the Air Operations Center, located in General Rupert Smith's headquarters in Sarajevo.<sup>17</sup>

The entire time he was in Bosnia as a forward air controller, he was engaged in intelligence gathering activity.<sup>18</sup> He located targets so that NATO would have a better idea of where weapons systems were located. This would protect NATO aircraft from being shot down and to prepare a target list in case the opposing hostile forces took action against the UN and it was necessary to strike those targets.<sup>19</sup>

He changed from UN uniform to camouflage uniform and sometimes even donned the uniform of the enemy or wore civilian attire to blend in with the surroundings.<sup>20</sup>

He received information on potential targets from a wide variety of sources including UNMOs, European Commission monitors, Red Cross, UNHCR, Doctors without Borders.<sup>21</sup> UNMOs played an integral role in target selection.<sup>22</sup> They were an integral part of the day-to-day intelligence and information gathering apparatus of the overall UN mission.<sup>23</sup>

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<sup>14</sup> P. 20

<sup>15</sup> P. 21

<sup>16</sup> P. 22

<sup>17</sup> P. 51

<sup>18</sup> P. 31

<sup>19</sup> P. 32

<sup>20</sup> P. 34

<sup>21</sup> P. 45

<sup>22</sup> P. 53

<sup>23</sup> P. 135

UNMOs provided them information on locations of targets and equipment and evaluations of the capability of the forces.<sup>24</sup> UNMOs had provided intelligence information on what was in the Pale ammunition dumps.<sup>25</sup>

Forward air controllers used UNMOs houses as safe houses to hide and to store equipment.<sup>26</sup> The Czech General who was in charge of the UNMOs at the time told him that they were really an extended arm of UNPROFOR.<sup>27</sup>

As a forward air controller, he guided in planes and laser-guided munitions and dumb bombs.<sup>28</sup>

There was never really an answer given to them about their authority to conduct offensive operations.<sup>29</sup> It was his understanding that if you're conducting offensive operations or defensive operations in a situation where you bring harm to one of the three sides, you will be considered a combatant and are a legitimate target for hostile forces to engage.<sup>30</sup>

Once an air strike started, from his perspective he and those around him were considered combatants.<sup>31</sup> The minute they started air strikes, it was obvious that all parties to the offensive action were combatants.<sup>32</sup> Once the operations began, they involved dozens of special operating units maneuvering on the ground and conducting forward air control, and everyone was a target who wore blue or was in a position to potentially assist or pass on target information.<sup>33</sup>

UNMOs were also combatants once the air strikes began because they were part of the mission, providing information.<sup>34</sup>

He was told by his commander that he was considered a legitimate combatant target of any hostile force that he was conducting hostile actions against.<sup>35</sup> A Canadian JAG lawyer during an ICRC briefing in Geneva, said that once air strikes started, everybody involved on their side would be open to honest and legal target for any of the hostile forces to engage without any negative feedback from the Security Council.<sup>36</sup>

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<sup>24</sup> P. 136-37

<sup>25</sup> Pp. 248-49

<sup>26</sup> P. 79

<sup>27</sup> P. 133

<sup>28</sup> P. 79

<sup>29</sup> P. 84

<sup>30</sup> P. 85

<sup>31</sup> P. 85, 203

<sup>32</sup> P. 86

<sup>33</sup> P. 87

<sup>34</sup> P. 88

<sup>35</sup> P. 89

<sup>36</sup> P. 90

He was told that once bombs were dropped, the war was on and that UNPROFOR and NATO would be combatants.<sup>37</sup>

At a certain point in time, he began to favor the Muslims, who were the underdog.<sup>38</sup> The fundamental strategy was to bomb the Serbs to the negotiating table.<sup>39</sup>

He was one of the forward air controllers involved in guiding in the bombs that were dropped in Pale in May 1995.<sup>40</sup> He spent about a week planning the operation and then deployed in the area around 13 or 14 May.<sup>41</sup> His job was to go out and select targets and to confirm other targets.<sup>42</sup>

The main target was surface to air missiles and the secondary targets were those which would have the biggest negative impact on the Bosnian Serbs. An ammunition depot was good because it was close to the Serb headquarters, away from civilian houses, and would make a huge explosion that could be seen all over Bosnia.<sup>43</sup>

The purpose of the air strikes was to demonstrate to the Serbs that if you don't bring all the heavy weapons back into the storage areas, there will be consequences.<sup>44</sup>

There were four teams of forward air controllers in the Pale area during the May 1995 bombing, with 4-5 persons to a team.<sup>45</sup> There were about 60 planes in the first part of the air strikes to try and get the Serbs to turn on their radars so that they could be targeted. About 35-45 aircraft came in the second wave to drop the bombs.<sup>46</sup>

He would line one plane up with the laser and the codes. He would talk to the air controller in one of the planes and work with him so he could spot the target. The air controller in one of the planes would lase the target and then another plane would drop the bomb.<sup>47</sup> They used a 2000 pound bomb called Paveway on the munitions depot at Pale to create a good explosion.<sup>48</sup>

They had about 100 targets in the Pale area.<sup>49</sup>

They set up a laser in the grass with sight of the target, selected a code on the laser. When it came time to hit the target, they fired the laser, it fired a code at that target, and the aircraft picks up the code and links with it. They drop the bomb and it

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<sup>37</sup> P. 94

<sup>38</sup> Pp 114-15

<sup>39</sup> P. 116

<sup>40</sup> P. 137

<sup>41</sup> P. 138

<sup>42</sup> P. 139

<sup>43</sup> P. 141-42

<sup>44</sup> P. 143

<sup>45</sup> P. 145

<sup>46</sup> P. 154

<sup>47</sup> P. 156

<sup>48</sup> P. 157

<sup>49</sup> P. 162

follows along the painted target.<sup>50</sup> Other targets are lased by the air controller in one of the planes.<sup>51</sup>

He also had to calculate the air defence systems so that the pilot could get in and out of the area. There was little to no air defence capability in that area.<sup>52</sup>

In their planning of the air strikes, they fully expected the Serbs to take UN personnel hostage.<sup>53</sup> Before the air strike at Pale, he told the Czech General in charge of the UNMOs to make sure they are no longer in the area.<sup>54</sup> A blanket order was given to all UNMOs to leave prior to the air strike.<sup>55</sup>

General Smith hated the Serbs.<sup>56</sup>

The Rules of Engagement for this mission were that lethal force was authorized to achieve the aim of the mission.<sup>57</sup>

Transcript of 21 November 2002:

Redactions were made in this transcript.<sup>58</sup>

The first time he saw Captain Rechner he was tied to a lightening rod at the Pale ammo dump.<sup>59</sup> He saw him for about 20 minutes while he was crawling around observing the target.<sup>60</sup>

During the bombing, he communicated with the NATO aircraft from backpack and vehicle mounted radios.<sup>61</sup> After the ammo depot, the targets were air defence weapons, a barracks, a small foot bridge, a hand held air defence rocket. There were probably a dozen targets struck in the first day. Another 18 targets were struck the second day, not only in Pale.<sup>62</sup>

Bomb damage assessments were made and kept at NATO.<sup>63</sup>

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<sup>50</sup> P. 164

<sup>51</sup> P. 165

<sup>52</sup> Pp. 169-70

<sup>53</sup> P. 177

<sup>54</sup> Pp. 178-79

<sup>55</sup> Pp. 183-84

<sup>56</sup> P. 194, 264

<sup>57</sup> P. 195

<sup>58</sup> Pp. 205, 217 229-34, 241, 246, 251, 256-59, 286-90

<sup>59</sup> P. 202

<sup>60</sup> P. 245

<sup>61</sup> P. 204

<sup>62</sup> P. 207

<sup>63</sup> P. 219

During the morning of the bombing, he was sneaking around from target location to target location and was furious when the bombing commenced at 10 am instead of at 12 as planned. He was exposed at that point.<sup>64</sup>

After the hostages were taken, he had to go out and confirm there was no UN presence at any of his targets.<sup>65</sup>

On their radios they had open channels to communicate with UNPROFOR and encrypted channels to communicate with NATO.<sup>66</sup>

His equipment included laser designator and laser designator beacons which could be dropped on the target, as well as encrypted radios, computing devices to enable GPS fixation on the ground, and optical devices.<sup>67</sup> He carried rifles, pistols, grenades, anti-tank rockets, mines, and a 50 caliber machine gun.<sup>68</sup>

75% of the operations he did were black ops, covert.<sup>69</sup> General Smith was always aware of these missions.<sup>70</sup>

He saw UNMOs with weapons. Most UNMOs carried personal side arms for self-defence. They always had rifles in their homes.<sup>71</sup>

All three sides were extremely devious, extremely nasty, and all participated in war crimes en masse.<sup>72</sup>

He doesn't call Ribic a hostage, he was a prisoner of war. It wasn't a hostage taking.<sup>73</sup> Rechner was a legitimate target. He was a combatant at that point in time.<sup>74</sup>

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<sup>64</sup> Pp. 226-27

<sup>65</sup> P. 236

<sup>66</sup> P. 250

<sup>67</sup> Pp. 252-53

<sup>68</sup> P. 255

<sup>69</sup> P. 256

<sup>70</sup> P. 259

<sup>71</sup> P. 267

<sup>72</sup> P. 272

<sup>73</sup> P. 276

<sup>74</sup> P. 277