

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

MOTION FOR SUBPOENA TO INTERVIEW:
GENERAL SEAD DELIC and BRIGADIER REFIK BRDJANOVIC

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

The Accused:
Radovan Karadzic

1. Radovan Karadzic respectfully moves, pursuant to Rule 54, for the issuance of a subpoena to General Sead Delic, former Commander of the Bosnian Army's 2nd Corps headquartered in Tuzla, and Brigadier Refik Brdjanovic, Commander of the Black Wolves Special Forces Unit, compelling them to submit to an interview by the defence of Radovan Karadzic.

Background

The "Black Flights to Tuzla"

2. On 10 February 1995, at about 17:45, Air Force Captain Oivind Moldestad of the Norwegian Battalion, from the UNPROFOR base at the "Blue Factory" just outside of Tuzla, saw two twin engine fighter aircraft flying at about 3000 feet above Tuzla. He called the duty officer in Sarajevo, a British Tornado pilot, who told him that there were no NATO flights operating that night. A few minutes later a guard came and told Moldestad that he had heard the sound of a C-130 over the Tuzla Airport.¹

3. Captain Moldestad was later provided with a NATO document by a Norwegian colleague that showed that at 1700 hours on 10 February, NATO aircraft had been stood down and replaced by a US Navy E-2 Hawkeye.²

4. Captain Moldestad later said that he strongly believed that the Americans had delivered arms to the ABiH on that evening.³

5. One U.S. official who served in the region said that the United States had a hand in facilitating at least some arms deliveries by its Muslim allies to a government-held airport at Tuzla in northern Bosnia early in 1995. The flights, according to an informed U.S. diplomat, were carried out by "Turkish or private contractors using special funding the U.S. knew about." This official, who was serving in the region at the time, said he thought the United States provided information on scheduling the flights and told the C-130s when "the coast is clear."⁴

6. A British General later stated that these were without a doubt American arms deliveries and that American private companies were involved.⁵

¹ BBC *Allies and Lies* at pp. 10-11

² BBC *Allies and Lies* at p. 13

³ Interview with BBC Panorama, at pp. 14-15

⁴ William Drozdiak and David Ottaway, "US Accused of Covert Bosnia Aid", *Washington Post* (28 July 1995)

⁵ Wiebes, *Intelligence and the War in Bosnia*, 177

7. Norwegian Lt. Saeterdal, a sentry on guard duty outside Norwegian medical UN unit in Tuzla also heard and saw the lights of the Hercules and accompanying jet fighters.⁶ Other UN observers, making use of night vision equipment, also saw the cargo aircraft and fighter planes.⁷

8. Reports of sighting of C-130 and jet fighters immediately forwarded to NATO Combined Air Operations Center (COAC) in Vicenza and the UNPF Deny Flight Cell in Naples.⁸

9. As a result of the sighting, UNPROFOR patrols were dispatched from Tuzla Air Base. They were refused access to the Tuzla Highway Strip area, a backup airport about 1-2 km north-east of Tuzla Air Base, by the Bosnian Army A patrol did manage, however, to gain access to the area from another side. This patrol observed 5 trucks involved in loading or unloading equipment at a hangar area in the vicinity of the assumed headquarters for the Bosnian government army's 241st Brigade.⁹

10. This patrol was surrounded by 30 ABiH soldiers. Although they saw 5 trucks near old hangars, they were forced to leave before they could see more.¹⁰ ABiH soldiers were under command of Brig. Refik Brdjanovic¹¹ Numerous cargo vehicles and 300 ABiH troops in a highly agitated state were present.

11. Refik Brdjanovic, in an interview with BBC, confirmed that boxes labeled "US Army" had been delivered to Tuzla by air drop and that they contained anti-tank and surface to air missiles. He said that an American named Jim Campbell and his assistant Jack Collins were involved in arranging these deliveries.¹²

12. Two days later, on 12 February 1995, another C-130 Hercules accompanied by two fighters was seen at Tuzla by Norwegian personnel.¹³ UNPROFOR observed a jet aircraft over Tuzla at 19:12; a jet aircraft and large prop over Tuzla at 19:30, and three jet

⁶ Wiebes, *Intelligence and the War in Bosnia*, 177

⁷ Wiebes, *Intelligence and the War in Bosnia*, 177; Document #1C produced by United Kingdom at para. 37

⁸ Wiebes, *Intelligence and the War in Bosnia*, 177

⁹ Norwegian report of 8 March 1995

¹⁰ Wiebes, *Intelligence and the War in Bosnia*, 183; BBC, *Allies and Lies*

¹¹ BBC. *Allies and Lies*.

¹² BBC. *Allies and Lies*, at pp. 17-18

¹³ Wiebes, *Intelligence and the War in Bosnia*, 183

aircraft flying in the Tuzla area at 20:40¹⁴ British SAS Lt. Col LeHardy, using night vision goggles, observed 3 jet aircraft high over Tuzla West.¹⁵

13. Lt. Col. LeHardy was asked to send a report to the UNPROFOR command of the incidents. His assessment was that a low altitude extraction of cargo had likely been carried out. No aircraft other than US were operating in the area.¹⁶

14. A few days after the air drop, an aid worker named Per Kjell went to relieve himself near a warehouse in the area and observed three Americans with what appeared to be military equipment. They slammed the door when they saw him.¹⁷

15. On 14 February 2010, UNPROFOR Commander General Bertrand De Lapresle concluded that two clandestine resupplies of high value military equipment such as anti-tank or surface-to-air missiles had probably taken place.¹⁸

16. General Hasan Sadic, who was the commander of the Bosnian Army's 2nd Corps until late 1994 told BBC that he had arranged for the drop zone at the Tuzla Airport, but could tell them nothing about the February 1995 shipments, since by that time he was attaché in Turkey. His successor as Commander of the 2nd Corps was General Sead Delic.

The Efforts to Obtain the Documents and Interviews

17. On 2 June 2009, Dr. Karadzic served a letter on the government of Bosnia in which he requested copies of the following items among others:

- (1) All minutes, notes, reports, or memoranda of any meeting between a representative of the government of Bosnia and Herzegovina and any representative of the governments of the United States or Turkey, or private individuals or organizations from the United States at which shipments of arms, ammunition, or military equipment that were delivered to Tuzla was discussed during the period 1 January 1995 through 31 March 1995.
- (2) All reports, photographs, or records of cargo delivered to Tuzla by C-130 transport during February and March 1995.
- (4) All contracts, agreements, or reports or memoranda reflecting agreements for the purchase of arms, ammunition, or military equipment by the

¹⁴ La Presle to Annan, UNPROFOR #247

¹⁵ UNPROFOR #257 at para. 5b

¹⁶ LeHardy report at paras. 7-9

¹⁷ BBC. *Allies and Lies*, at p. 17

¹⁸ Wiebes, *Intelligence and the War in Bosnia*, 184; UN Document batch #2, page 76; OTP disclosure

government of Bosnia and Herzegovina or any individuals affiliated with the government of Bosnia and Herzegovina which were delivered, in whole or in part, in Tuzla by C-130 transport during February and March 1995

- (5) All instructions, orders, and requests issued by the Army of Bosnia and Herzegovina concerning the delivery, unloading, distribution or protection of arms, ammunition, or military equipment arriving in Tuzla by air during February and March 1995.
- (6) All notes, reports, or recordings of intercepted conversations between 10 February 1995 and 31 March 1995 in which the delivery of arms, ammunition, or military equipment arriving in Tuzla by air was discussed.¹⁹

The government of Bosnia did not respond to Dr Karadzic's request.

18. On 30 June 2009, Dr Karadzic served a follow up letter on the government of Bosnia.²⁰ No response was received.

19. On 20 July 2009, Dr. Karadzic wrote to the High Representative for Bosnia, asking for his help in obtaining compliance with his request.²¹ His letter was ignored.

20. On 31 August 2009, Dr. Karadzic filed a *Motion for Binding Order: Government of Bosnia* in which he requested the above described documents.

21. The government of Bosnia has indicated that it cannot locate any of the requested documents.²²

22. On 29 November 2010, Dr. Karadzic requested that the Bosnian government make General Sead Delic and Brigadier Refik Brdjanovic available for interview in light of the professed inability of the Bosnian government to locate documents relating to the Tuzla shipments.²³

23. On 21 December 2010, the government of Bosnia responded to the request as follows:

¹⁹ A copy of this letter was attached as Annex "A" to Dr. Karadzic's *Motion for Binding Order: Government of Bosnia* (31 August 2009)

²⁰ A copy of this letter is attached as Annex "B" to Dr. Karadzic's *Motion for Binding Order: Government of Bosnia* (31 August 2009).

²¹ A copy of this letter is attached as Annex "C" to Dr. Karadzic's *Motion for Binding Order: Government of Bosnia* (31 August 2009).

²² See letter of Bosnian government dated 25 November 2009, letters filed by the Bosnian government on 29 April 2010, and letter of Bosnian government dated 15 November 2010.

²³ *Letter to Bosnia* (29 November 2010)

It is hereby noted that the authorities in Bosnia and Herzegovina may satisfy the defence of the accused after the Trial Chamber issues a decision on the necessity of procuring the said documents or grants approval for said activities to be conducted.²⁴

24. This motion now seeks that approval.

Argument

25. Rule 54 provides that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

26. The jurisprudence of the *ad hoc* Tribunals indicates that the proper method for obtaining the testimony of a person who was or is a government official is by subpoena, rather than an order to the State pursuant to Rule 54 *bis*.²⁵

27. The jurisprudence of the *ad hoc* Tribunals also indicates that the Trial Chamber has the power to require a prospective witness to attend at a nominated place and time in order to be interviewed when the requesting party shows that (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (2) the witness' information may materially assist its case; and (3) the witness' information may be necessary and appropriate for the conduct and fairness of the trial.²⁶

²⁴ See letter of Ministry of Foreign Affairs dated 7 December 2010 attached to the submission of the Bosnian government.

²⁵ *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena for Douglas Lute and John Feeley* (8 July 2009) at para. 8

; *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 27; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 4

²⁶ *Prosecutor v. Krstić*, IT-98-33-A, *Decision on Application for Subpoenas*, (1 July 2003) at para. 10; *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para. 4; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at para. 4

28. When the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet with the witness and assess his testimony.²⁷

29. In this case, as detailed above, Dr. Karadzic has made reasonable efforts to obtain the voluntary cooperation of the Bosnian government to conduct the interviews of General Delic and Brigadier Brdjanovic.

30. There are reasonable grounds to believe that both men have information which can materially assist Dr. Karadzic's case. As the commander of the 2nd Corps at the time of the Tuzla air drops in February 1995, General Delic would have been informed of the shipments and who they came from. He would also have seen documentation on the shipments and would know where those documents were kept. Brigadier Brdjanovic has already indicated that he was personally involved in receiving the shipments.

31. The information from these men can be used in two ways. First, to direct the Bosnian government to the precise documents concerning these events, which it seemingly has been unable to locate. And, second, to serve as the basis of a written statement of these men which can be used pursuant to Rule 92 *ter* or Rule 92 *bis* so that Dr. Karadzic can provide the Trial Chamber with evidence of these events during the trial.

32. The Trial Chamber has already found that documents relating to arms which found their way to Srebrenica were relevant to the general requirements of the charges of crimes against humanity as well as Dr. Karadzic's state of mind and thus to a live and

²⁷ *Prosecutor v Ndindliyiimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana* (23 June 2004); *Prosecutor v Ndindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindliyiimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8;

important issue in the case.²⁸ The information sought from these men directly relates to that issue.

33. The Trial Chamber has also found that the issue of UN personnel's involvement in arms smuggling bears relevance to Dr. Karadzic's case.²⁹ The information sought from these men, particularly about the means in which arms were smuggled into Bosnia within a UN imposed "No-Fly Zone", directly relates to that issue.

34. Therefore, Dr. Karadzic has demonstrated that the information from these men may materially assist his case, and is necessary for a fair determination of the issues being tried.

Procedural Matters

35. A subpoena should designate the place and time for the person to appear for an interview. To minimize any inconvenience to the witnesses, Dr. Karadzic suggests that the interview be held at the ICTY's Liaison Office in Sarajevo on Friday, 18 February 2010 at 1 pm. Dr. Karadzic will be represented by his Legal Advisor Peter Robinson.

36. Dr. Karadzic further suggests that the government of Bosnia be requested to serve the subpoenas on these men. States are obligated, when requested by the Tribunal, to effect service of a subpoena, and to provide any assistance that may be requested by the Registry to facilitate the attendance of witnesses.³⁰

37. Dr. Karadzic requests that this motion be served upon the government of Bosnia and for further service on General Delic and Brigadier Brdjanovic, and that both the government of Bosnia and the witnesses be invited to respond to the motion if they wish to do so.

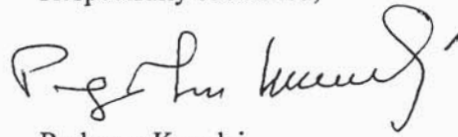
²⁸ *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)*(19 May 2010) at para. 22

²⁹ ²⁹ *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)*(19 May 2010) at para. 27

³⁰ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT* (25 August 2004) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoena for Witness BW* (24 June 2004)

Word count: 2802

Respectfully submitted,

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

Radovan Karadzic