

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: 20 October 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public w/Public and Confidential Annexes

MOTION TO COMPEL INTERVIEW:
WITNESS B

The Office of the Prosecutor:

Government of Canada

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadzic

1. Dr. Radovan Karadzic respectfully moves for an order directing an individual known as Witness B to submit to an interview by his Legal Advisor Peter Robinson, and directing the government of Canada to facilitate the interview. He contends that Witness B has information that is relevant and necessary for his defence and that his efforts to arrange a voluntary interview have failed.

Background

2. During the trial of Nicholas Ribic, a VRS soldier prosecuted in the courts of Canada for the May 1995 hostage taking in Bosnia, the defence offered testimony from an individual identified only as Witness B. Witness B testified that he acted as a forward air controller for NATO in connection with the 26 May 1995 air strikes on the Pale ammunition depot that led to the alleged hostage-taking in charged in Court 11.¹

3. Witness B was a member of the Canadian armed forces deployed in Bosnia. During the months leading up to the air strike, he acted as part of a team of covert operatives who worked behind the Bosnian Serb lines to scout targets for possible NATO air strikes and to gather intelligence. He received intelligence information from UNMOs who were the only international personnel allowed to be stationed behind the Bosnian Serb lines. UNMOs provided him information on locations of targets and equipment and evaluations of the capability of the forces, and had provided intelligence information on what was in the Pale ammunition depot. Forward air controllers used UNMOs houses as safe houses to hide and store equipment.

4. Witness B testified that there were four teams of forward air controllers in the Pale area during the May 1995 bombing, with 4-5 persons to a team. They lined the NATO planes up with the laser and the codes, talked to the air controller in the planes and helped them spot the target and drop the bombs.

5. Witness B further testified that on 26 May 1995, he saw Captain Patrick Rechner tied to a lightening rod at the Pale ammunition depot while Witness B was crawling around observing the target. After the hostages were taken, he had to go out and confirm there was no UN presence at any of his targets.

¹ A complete summary of Witness B's testimony in the *Ribic* case is attached as Annex "A". The transcripts of the testimony have been provided to the prosecution and can be made available to the Trial Chamber upon request.

6. Witness B explicitly stated that General Rupert Smith was personally aware of the covert activities of the forward air controllers in Bosnia. During his testimony, General Smith explicitly denied that forward air controllers were deployed in connection with the 25 May 1996 NATO air strikes.² In an interview prior to his testimony, General Smith extensively denied the allegations of Witness B.³

7. Witness B testified that the UN personnel who were detained were not hostages, but were combatants who were taken as prisoners of war.

Efforts to Interview Witness B

8. Dr. Karadzic has requested to interview Witness B in a series of correspondence with the government of Canada. Witness B declined to submit to an interview, but indicated that he was willing to answer written questions. However, in his written answers, he declined to identify any of the other persons who were performing forward air controller duties in Pale with him.⁴

9. On 10 May 2011, Dr. Karadzic wrote a letter imploring Witness B to meet with his legal advisor and explained why it was important to obtain information which could corroborate Witness B's information before he testified.⁵ On 7 October 2011, the government of Canada indicated that Witness B again declined an interview.⁶

Argument

10. 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.

11. 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*.⁷

² Transcript of 15 February 2011, p. 11880

³ A copy of the transcript of this interview is attached as Confidential Annex "B".

⁴ A copy of those written answers are attached as Confidential Annex "C".

⁵ A copy of this letter is attached as Confidential Annex "D".

⁶ A copy of this letter is attached as Confidential Annex "E".

⁷ *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

12. 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.⁸

13. In this case, as detailed above, Dr. Karadzic has made reasonable efforts to obtain the voluntary cooperation of Witness B.

14. There are reasonable grounds to believe that Witness B has information which can materially assist Dr. Karadzic's case. His testimony pertains directly to the issue of whether UN personnel were acting as combatants in May 1995 when the alleged "hostage taking" charged in Count 11 took place. The Pre-Trial Chamber has held that "unlawful detention" is an element of the crime of hostage taking.⁹ The Trial Chamber has already noted that "whether or not UN personnel actively participated in hostilities might be an issue in this case."¹⁰ Judge Kwon indicated in a separate opinion that "I agree that whether the victims of alleged hostage taking have actively participated in hostilities and the manner in which and the reasons why they were held are all important issues in this case."¹¹

; *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

⁸ *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

⁹ *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 65

¹⁰ *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)* (19 May 2010) at para. 26

¹¹ *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany)* (19 May 2010) Separate Opinion of Judge Kwon at para. 10

15. The testimony of Witness B also pertains directly to the credibility of prosecution witness Rupert Smith, who denied that UN personnel were engaged in the activities in which Witness B claims that he and his associates engaged.

16. The information from Witness B, particularly the identity of the other persons with whom he was working, is necessary and appropriate for the conduct and fairness of the trial. Unless a pre-testimony interview is conducted, Dr. Karadzic will be unable to obtain information which can corroborate Witness B by identifying and interviewing those other persons. Dr. Karadzic would be reduced to arguing that the Trial Chamber should believe the word of Witness B over that of General Smith. This would be an unsatisfactory state of affairs for both Dr. Karadzic and the Trial Chamber.

17. Obtaining information from Witness B in advance, and identifying sources of corroboration through an interview, is not only appropriate, but necessary for the conduct and fairness of the trial.¹²

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

Procedural Matters

19. A subpoena should designate the place and time for the person to appear for an interview. To minimize any inconvenience to Witness B, Dr. Karadzic suggests that the interview be held at the Canada Department of Justice in Ottawa on Thursday, 5 January 2012 at 2 pm. Dr. Karadzic will be represented by his Legal Advisor Peter Robinson. Dr. Karadzic has no objection to the presence of representatives of the government of Canada at the interview/

20. Dr. Karadzic further suggests that the government of Canada be requested to serve the subpoena on Witness B. 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 the witness.¹³

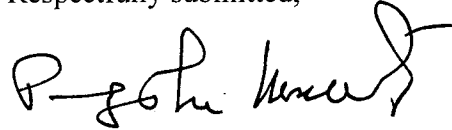
¹² Written questions and answers are inadequate because Witness B declines to identify the persons with whom he was working.

¹³ *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)

21. Dr. Karadzic requests that this motion be served upon the government of Canada for its own information, and for further service on Witness B, and that both the government of Croatia and Witness B be invited to respond to the motion if they wish to do so.

Word count: 1795

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a stylized flourish at the end.

Radovan Karadzic

ANNEX "A"

Transcript of 20 November 2002

Portions of the transcript were redacted.¹⁴

He has combat stress PTSD and a head wound which causes a little bit of short-term memory loss.¹⁵

He was lead instructor at the NATO forward air controllers school in Bosnia in 1995 teaching foreign nationals.¹⁶ 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.¹⁷

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.¹⁸

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.¹⁹

The entire time he was in Bosnia as a forward air controller, he was engaged in intelligence gathering activity.²⁰ 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.²¹

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.²²

He received information on potential targets from a wide variety of sources including UNMOs, European Commission monitors, Red Cross, UNHCR, Doctors without Borders.²³ UNMOs played an integral role in target selection.²⁴ They were an

¹⁴ P. 35-39, 41-44, 47, 49-52, 56-60, 62-66, 70-74, 80-83, 97, 111-13, 117-18, 120, 123-26, 133-36, 151-52, 181-82, 187,

¹⁵ P. 17

¹⁶ P. 20

¹⁷ P. 21

¹⁸ P. 22

¹⁹ P. 51

²⁰ P. 31

²¹ P. 32

²² P. 34

²³ P. 45

²⁴ P. 53

integral part of the day-to-day intelligence and information gathering apparatus of the overall UN mission.²⁵

UNMOs provided them information on locations of targets and equipment and evaluations of the capability of the forces.²⁶ UNMOs had provide intelligence information on what was in the Pale ammunition dumps.²⁷

Forward air controllers used UNMOs houses as safe houses to hide and to store equipment.²⁸ The Czech General who was in charge of the UNMOs at the time told him that they were really an extended arm of UNPROFOR.²⁹

As a forward air controller, he guided in planes and laser-guided munitions and dumb bombs.³⁰

There was never really an answer given to them about their authority to conduct offensive operations.³¹ 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.³²

Once we started an air strike, from his perspective he and those around him were considered combatants.³³ The minute they started air strikes, it was obvious that all parties to the offensive action were combatants.³⁴ 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.³⁵

UNMOs were also combatants once the air strikes began because they were part of the mission, providing information.³⁶

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.³⁷ A Canadian JAG lawyer during an ICRC briefing in Geneva, said that once air strikes started,

²⁵ P. 135

²⁶ P. 136-37

²⁷ Pp. 248-49

²⁸ P. 79

²⁹ P. 133

³⁰ P. 79

³¹ P. 84

³² P. 85

³³ P. 85, 203

³⁴ P. 86

³⁵ P. 87

³⁶ P. 88

³⁷ P. 89

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.³⁸

He was told that once bombs were dropped, the war was on and that UNPROFOR and NATO would be combatants.³⁹

At a certain point in time, he began to favor the Muslims, who were the underdog.⁴⁰ The fundamental strategy was to bomb the Serbs to the negotiating table.⁴¹

He was one of the forward air controllers involved in guiding in the bombs that were dropped in Pale in May 1995.⁴² He spent about a week planning the operation and then deployed in the area around 13 or 14 May.⁴³ His job was to go out and select targets and to confirm other targets.⁴⁴

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.⁴⁵

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.⁴⁶

There were four teams of forward air controllers in the Pale area during the May 1995 bombing, with 4-5 persons to a team.⁴⁷ 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.⁴⁸

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.⁴⁹ They used a 2000 pound bomb called Paveway on the munitions depot at Pale to create a good explosion.⁵⁰

They had about 100 targets in the Pale area.⁵¹

³⁸ P. 90

³⁹ P. 94

⁴⁰ Pp 114-15

⁴¹ P. 116

⁴² P. 137

⁴³ P. 138

⁴⁴ P. 139

⁴⁵ P. 141-42

⁴⁶ P. 143

⁴⁷ P. 145

⁴⁸ P. 154

⁴⁹ P. 156

⁵⁰ P. 157

⁵¹ P. 162

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 follows along the painted target.⁵² Other targets are lased by the air controller in one of the planes.⁵³

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.⁵⁴

In their planning of the air strikes, they fully expected the Serbs to take UN personnel hostage.⁵⁵ 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.⁵⁶ A blanket order was given to all UNMOs to leave prior to the air strike.⁵⁷

General Smith hated the Serbs.⁵⁸

The Rules of Engagement for this mission were that lethal force was authorized to achieve the aim of the mission.⁵⁹

Transcript of 21 November 2002:

Redactions were made in this transcript.⁶⁰

The first time he saw Captain Rechner he was tied to a lightning rod at the Pale ammo dump.⁶¹ He saw him for about 20 minutes while he was crawling around observing the target.⁶²

During the bombing, he communicated with the NATO aircraft from backpack and vehicle mounted radios.⁶³ 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.⁶⁴

⁵² P. 164

⁵³ P. 165

⁵⁴ Pp. 169-70

⁵⁵ P. 177

⁵⁶ Pp. 178-79

⁵⁷ Pp. 183-84

⁵⁸ P. 194, 264

⁵⁹ P. 195

⁶⁰ Pp. 205, 217 229-34, 241, 246, 251, 256-59, 286-90

⁶¹ P. 202

⁶² P. 245

⁶³ P. 204

⁶⁴ P. 207

Bomb damage assessments were made and kept at NATO.⁶⁵

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.⁶⁶

After the hostages were taken, he had to go out and confirm there was no UN presence at any of his targets.⁶⁷

On their radios they had open channels to communicate with UNPROFOR and encrypted channels to communicate with NATO.⁶⁸

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.⁶⁹ He carried rifles, pistols, grenades, anti-tank rockets, mines, and a 50 caliber machine gun.⁷⁰

75% of the operations he did were black ops, covert.⁷¹ General Smith was always aware of these missions.⁷²

He saw UNMOs with weapons. Most UNMOs carried personal side arms for self-defence. They always had rifles in their homes.⁷³

All three sides were extremely devious, extremely nasty, and all participated in war crimes en masse.⁷⁴

He doesn't call Ribic a hostage, he was a prisoner of war. It wasn't a hostage taking.⁷⁵ Rechner was a legitimate target. He was a combatant at that point in time.⁷⁶

⁶⁵ P. 219

⁶⁶ Pp. 226-27

⁶⁷ P. 236

⁶⁸ P. 250

⁶⁹ Pp. 252-53

⁷⁰ P. 255

⁷¹ P. 256

⁷² P. 259

⁷³ P. 267

⁷⁴ P. 272

⁷⁵ P. 276

⁷⁶ P. 277