



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

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

Date: 29 May 2013

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 29 May 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO SUBPOENA
THOMAS KARREMANS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for Thomas Karremans

Mr. Geert-Jan Alexander Knoops

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the Accused’s “Motion for Subpoena to Colonel Thomas Karremans”, filed on 25 April 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a subpoena, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), compelling Thomas Karremans to testify in this case on 2 July 2013 or another date to be set by the Chamber.¹ The Accused submits that he has met the requirements for the issuance of a subpoena pursuant to Rule 54 of the Rules.²

2. The Accused submits that in August 2012, counsel for Karremans informed him that Karremans was not willing to testify in this case because he was the subject of an ongoing criminal investigation by the authorities of the Kingdom of The Netherlands (“Dutch authorities”).³ In April 2013, after reading that the Dutch authorities had declined to prosecute Karremans, the Accused’s legal adviser contacted counsel for Karremans and requested that Karremans testify as a defence witness in July 2013.⁴ On 23 April 2013, the Accused’s legal adviser was informed that the victims’ group had appealed the Dutch decision not to prosecute Karremans, that the hearing would be held later this year, and that Karremans wished to await that ruling before considering whether he would testify.⁵ The Accused argues that his defence case will conclude before the end of this year and he cannot wait for the final conclusion of the proceedings against Karremans before obtaining his testimony.⁶ Therefore, the Accused submits that he has made reasonable efforts to obtain the voluntary co-operation of Karremans and has been unsuccessful.⁷

3. The Accused argues that Karremans has information that is relevant to his case, in particular to Counts 7 and 8 of the Third Amended Indictment (“Indictment”), which supports the Accused’s position that the Bosnian Muslim civilian population in Srebrenica was not deported or forcibly transferred but left at their own request after Srebrenica fell under the control of the Army of the

¹ Motion, paras. 1, 17.

² See Motion, para. 16.

³ Motion, para. 5.

⁴ Motion, para. 6.

⁵ Motion, para. 7, Annex A.

⁶ Motion, para. 8.

⁷ Motion, para. 9.

Republika Srpska (“VRS”).⁸ In support, the Accused cites portions of Karremans’ testimony from the trial of *Prosecutor v. Blagojević and Jokić* (“*Blagojević case*”) to argue that: (i) on 11 July 1995, “before the VRS had taken action to transport the Bosnian Muslim population of Srebrenica”, Karremans was informed that the population wished to be evacuated from the enclave; (ii) Karremans relayed this information to his superior, Colonel Cornelis Nicolai, who instructed him to set up a meeting with the VRS to facilitate the evacuation; and (iii) the meeting with Ratko Mladić at the Hotel Fontana on 11 July 1995 was initiated by Karremans.⁹

4. With respect to necessity, the Accused argues that the testimony of Karremans is necessary to his defence because he is the “only person who can testify to three points which support” his defence, namely that: (i) the Bosnian Muslim population wanted to leave Srebrenica before any effort was made by the VRS to transport them”; (ii) the UN was ready to facilitate the evacuation “as of 1800 hours on 11 July”; and (iii) the request for the evacuation was initiated by Karremans and not demanded or requested by the VRS.¹⁰

5. The Accused also states that he has “no objection to the protections against self-incrimination contained in Rule 90(E)” being provided to Karremans so that his testimony in this case will not be used against him in any further proceedings.¹¹

6. On 25 April 2013, the Office of the Prosecutor (“Prosecution”) informed the Chamber *via* e-mail that it did not wish to respond to the Motion.

II. Applicable Law

7. Rule 54 of the Rules provides that a Trial Chamber may issue a subpoena when it is “necessary for the purpose of an investigation or the preparation or conduct of the trial”. A subpoena is deemed “necessary” for the purpose of Rule 54 where a legitimate forensic purpose for obtaining the information has been shown:

An applicant for such [...] a subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.¹²

⁸ Motion, paras. 12–13.

⁹ Motion, para. 12.

¹⁰ Motion, para. 14.

¹¹ Motion, para. 15.

¹² *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić Decision*”), para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 (“*Halilović Decision*”), para. 6; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on

8. To satisfy this requirement of legitimate forensic purpose, the applicant may need to present information about such factors as the positions held by the prospective witness in relation to the events in question, any relationship that the witness may have had with the accused, any opportunity the witness may have had to observe those events, and any statement the witness has made to the Prosecution or to others in relation to the events.¹³

9. Even if the Trial Chamber is satisfied that the applicant has met the legitimate purpose requirement, the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means.¹⁴ Finally, the applicant must show that he has made reasonable attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.¹⁵

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.¹⁶ A Trial Chamber's discretion to issue subpoenas, therefore, is necessary to ensure that the compulsive mechanism of the subpoena is not abused and/or used as a trial tactic.¹⁷ In essence, a subpoena should be considered a method of last resort.¹⁸

III. Discussion

11. The Chambers notes that the Accused's legal adviser contacted counsel for Karremans in order to obtain his voluntary co-operation to testify but was told that Karremans wished to wait until a ruling is issued before the Dutch courts on the victims' appeal of the decision not to prosecute him.¹⁹ The Accused states that his defence case will conclude before the end of this year and therefore, he cannot wait for the conclusion of the Dutch proceedings before obtaining

Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 ("*Milošević* Decision"), para. 38.

¹³ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁴ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁵ *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on a Prosecution Motion for Issuance of a Subpoena ad Testificandum, 11 February 2009, para. 7; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005, para. 3.

¹⁶ *Halilović* Decision, para. 6; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

¹⁷ *Halilović* Decision, paras. 6, 10.

¹⁸ See *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena, filed confidentially and *ex parte* on 16 September 2005, para. 12. "Such measures [subpoenas], in other words, shall be applied with caution and only where there are no less intrusive measures available which are likely to ensure the effect which the measure seeks to produce".

¹⁹ Motion, paras. 5–7, Annex A.

Karremans' testimony.²⁰ Accordingly, the Chamber finds that the Accused has made reasonable efforts to obtain the voluntary co-operation of Karremans and has been unsuccessful.

12. In order to meet the necessity requirement for the issuance of a subpoena, the applicant must show that he has a reasonable basis for his belief that there is a good chance that the witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues that are relevant to his trial.²¹ The Accused is charged with being a participant in a joint criminal enterprise ("JCE") the objective of which was to eliminate the Bosnian Muslims in Srebrenica by, *inter alia*, forcibly removing the "women, young children and some elderly men" from Srebrenica.²² The Prosecution alleges that the objective of the JCE amounted to or included the commission of crimes such as deportation and forcible transfer.²³ The information that the Accused wishes to elicit from Karremans pertains to one of the core issues in this case, namely whether the Bosnian Muslim civilian population was forcibly removed from Srebrenica in July 1995. Accordingly, the Chamber finds that the prospective testimony of Karremans pertains to a clearly identified issue that is relevant to the Accused's case.

13. As the Chamber has previously stated, the information sought through the issuance of a subpoena must be of "*material* assistance" rather than merely helpful or of some assistance.²⁴ In other words, it must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.²⁵ The Accused argues that, based on Karremans' testimony in the *Blagojević* case, Karremans is the only person who can testify about the desire of the Bosnian Muslim civilian population to leave Srebrenica and that their transport was initiated by the UN and not the VRS.²⁶ Karremans, as the commander of the Dutch Battalion ("DutchBat") in Srebrenica, was in Potočari in July 1995 and involved in the transport of the Bosnian Muslim civilian population; he also attended the Hotel Fontana meetings held between 11 and 12 July 1995 with Mladić, among others. Given his position and unique perspective, the Chamber finds that his prospective testimony would materially assist the Accused in this case.

14. However, as stated above, even if the legitimate purpose requirement has been met, the issuance of a subpoena may be inappropriate if the information is obtainable through other means.

²⁰ Motion, para. 8.

²¹ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

²² Third Amended Indictment ("Indictment"), para. 20.

²³ Indictment, para. 20.

²⁴ Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 ("Papoulias Decision"), para. 15; *Milošević* Decision, para. 39 [emphasis in the original text].

²⁵ See Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

²⁶ Motion, para. 14.

The Chamber has already received evidence from numerous witnesses who testified about the situation in Srebrenica on 11 July 1995, including on the specific points raised by the Accused in his Motion. The Chamber has received evidence about the desire of the Bosnian Muslim civilian population to leave the enclave and the “evacuation” of the civilian population,²⁷ as well as the communications between UNPROFOR and the VRS regarding their “evacuation”.²⁸ The Chamber has also heard testimony from former members of DutchBat, including Karremans’ immediate subordinates who were in Potočari in July 1995 and testified about the events therein.²⁹ Finally, the Chamber has admitted into evidence a video of the three meetings which took place at the Hotel Fontana between 11 and 12 July 1995, in which Karremans, Mladić, and others discussed the situation in Srebrenica and the “evacuation” of the civilian population.³⁰ Accordingly, the Chamber finds that the information sought from Karremans by the Accused has already been obtained.

15. For the reasons stated above, the Chamber finds that the Accused has not met the requirements for the issuance of a subpoena, pursuant to Rule 54 of the Rules, for the testimony of Karremans.

²⁷ P3992 (UNMO report, 11 July 1995), P3993 (UNMO report, 11 July 1995), P4154 (UNMO Report, 11 July 1995), P5202 (UNPROFOR report, 11 July 1995), and P841 (UNMO report, 11 July 1995), are UNMO and UNPROFOR reports which describe the situation of the Bosnian Muslim civilians in Potočari arriving from Srebrenica; P5203 (UNPROFOR report, 11 July 1995; Letter from John Ryan to Yasushi Akashi, 11 July 1995), p. 2, a report from Yasushi Akashi to Kofi Annan at UN Headquarters, in which Akashi states that the population of Srebrenica is displaced, UNHCR staff report that virtually everyone in the enclave wishes to leave, and that an agreement with the Bosnian Serbs will be sought to allow the residents of Srebrenica to leave for Tuzla, if they so wish.

²⁸ D2022 (Debriefing Statement to Royal Dutch Army by Robert Franken), p. 2, in which Robert Franken stated that the evacuation of the refugees was agreed upon by both Smith and Mladić; D1958 (UNPROFOR orders for Defence of DutchBat, 11 July 1994), a UNPROFOR order in which Gobillard, the acting Commander for UNPROFOR, ordered the Dutch Battalion to enter into negotiations with the Army of Republika Srpska in order to achieve a ceasefire and protect the Bosnian Muslim civilian population in Srebrenica; P3974 (UNPROFOR letter re meetings with Ratko Mladić on 11 and 12 July 1995), a UNPROFOR report on 12 July 1995, from Karremans to Janvier describing the situation in Srebrenica and Potočari, and his meeting with Mladić on 11 July 1995.

²⁹ See e.g., testimony of Robert Franken, T. 23055–23118 (16 January 2012), T. 23119–23189 (17 January 2012); Evert Albert Rave, T. 22163–22238 (30 November 2011); and Pieter Boering, T. 22054–22134 (29 November 2011), T. 22135–22163 (30 November 2011).

³⁰ P4201 (Updated Srebrenica Trial video); P4202 (Written compilation booklet: Srebrenica Trial video), (ecourt) pp. 205–241.

IV. Disposition

16. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this twenty-ninth day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]