UNITED NATIONS

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: 14 July 2011

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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: **14 July 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR SUBPOENA TO INTERVIEW MIROSLAV TUĐMAN

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

The Government of Croatia
via the Embassy of the Republic of Croatia to The Netherlands

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Mr. Luka Mišetić

The Accused
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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 "Motion for Subpoena to Interview: Miroslav Tuđman", filed on 6 September 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), a subpoena to Miroslav Tuđman, former director of the Croatian Intelligence Service ("HIS"), compelling him to submit to an interview by one of the Accused's legal advisers.[1]

2. The background to this Motion is complex and stems from the Accused's "Motion for Binding Order: Government of Croatia" filed on 11 September 2009 ("Binding Order Motion") which is still pending before the Chamber. In the Binding Order Motion, the Accused requests that the Republic of Croatia ("Croatia") provide him with documents relating to, *inter alia*, the alleged smuggling of arms first into Tuzla and then onwards to Srebrenica in February and March of 1995, documents relating to the use of the United Nations ("UN") personnel as a means to provide arms to the Muslims in Bosnia and Herzeegovina ("BiH"), as well as documents relating to general arms smuggling to the BiH Army ("ABiH") in the period of 1992 through 1995.[2] Following its search for the requested documents, and subsequent delivery of a number of documents found, Croatia informed the Accused and the Chamber on 19 August 2010 that it was unable to locate the remaining documents, including those relating to alleged arms smuggling and the alleged use of the UN personnel in the arms smuggling.[3]

3. On 2 June 2009, prior to filing the Binding Order Motion, the Accused sent a letter to Croatia, requesting documents relating to alleged shipments of arms from Iran to Croatia during the period of May 1994 through September 1995, "many" of which then "ended up in the so-called 'safe zones' of Srebrenica and Zepa", and also requesting to interview Miroslav Tuđman in relation to those shipments.[4] Croatia responded to his letter on 22 July 2009 stating that it

[1] Motion, para. 1.
[2] Binding Order Motion, para. 1.
[3] Confidential Correspondence from Croatia, dated 9 August but filed on 19 August 2010. *See also* Motion, para. 7.
[4] Motion, paras. 4–5.

was not in possession of the documents requested and that "concerning [the Accused's] wish to organize an interview with Mr. Miroslav Tuđman, the practice is that such interviews are organized by the defence teams and not by the Croatian government."[5] The Accused's legal adviser then contacted Miroslav Tuđman privately but, after a protracted correspondence, Tuđman declined to submit to an interview.[6] As a result, the Accused filed the present Motion, seeking a subpoena designating the time and the place for Tuđman to appear for an interview.[7]

4. In the Motion, the Accused argues that, having served as the director of HIS, Miroslav Tuđman "is particularly well placed to reveal what documents exist which reflect the agreement with Iran to ship arms to the Bosnian Muslims, the acquiescence of the United States and other United Nations Member States, the opening up of naval or air routes which had been blockaded, the use of humanitarian convoys to smuggle the arms into [BiH], and the nature and amount of arms which were smuggled into [BiH] during 1994–1995."[8] According to the Accused, the information obtained during the interview could be used in two ways, namely to direct Croatia to the documents concerning these events as requested in the Binding Order Motion, and to serve as the basis of Tuđman's written statement which could be then tendered into evidence by the Accused.[9] The Accused argues that obtaining this information may materially assist his case and is necessary for a fair determination of the issues being tried.[10] In that respect, he notes that the Chamber has already found that "documents relating to arms which found their way to Srebrenica" and to the issue of "UN personnel's involvement in arms smuggling" bear relevance to his case, and that the information sought from Tuđman regarding in particular the "means in which arms were smuggled into [BiH]", directly relates to those issues.[11]

5. On 7 September 2010, the Office of the Prosecutor ("Prosecution") informed the Chamber and the Accused, *via* email, that it did not intend to respond to the Motion. On 8 September 2010, the Chamber issued an invitation to Croatia to provide a response to the Motion by 30 September 2010.[12] Croatia filed its confidential response on 30 September 2010 ("Croatia's First Response"), stating its position that interviews of this nature should be arranged by the defence independently, rather than through the organs of Croatia.[13] It also noted, however, citing the "Judgement on the Request of the Republic of Croatia for Review of the

[5] Motion, para. 5, Annex B.
[6] Motion, paras. 8–9, Annexes C and D.
[7] Motion, paras. 22–24.
[8] Motion, para. 15.
[9] Motion, para. 16.
[10] Motion, para. 21.
[11] Motion, paras. 17–19.
[12] Invitation to Croatia Regarding Motion for Subpoena of Miroslav Tuđman, 8 September 2010.
[13] Croatia's First Response, p. 2.

Decision of Trial Chamber II of 18 July 1997" issued on 29 October 1997 by the Appeals Chamber in the *Blaškić* case ("*Blaškić* Decision"), that if Miroslav Tuđman "were questioned about matters related to his former duty as Director of [HIS], that is, a former state official, different modalities would be applied."[14]

6. On 18 November 2010, the Presiding Judge of this Chamber sent a confidential letter to Miroslav Tuđman ("First Letter"), informing him of the Motion and encouraging him to reconsider his position and submit to an interview voluntarily or, alternatively, to advise the Chamber in writing of his decision not to do so.[15]

7. On 2 December 2010, Tuđman filed confidentially, through his lawyer, "Mr. Miroslav Tudjman's Response to the Trial Chamber's Correspondence of 18 November 2010" ("Tuđman's First Response"). In it, Tuđman notes that the Accused seeks to interview him for the purpose of obtaining intelligence information which belongs to Croatia and states that he has not been given permission by Croatia to disclose such information to the Accused. He also recalls that Croatia is relying on the *Blaškić* Decision to assert privilege regarding the information he has learned in his official capacity while he was the director of HIS and that, if he were to disclose any such information, either voluntarily or pursuant to a subpoena, he would be subject to criminal prosecution in Croatia.[16] Thus, Tuđman submits that, unless Croatia issues an official decision allowing him to disclose state secrets, he will refuse to answer the Accused's questions that relate to his duties as the director of HIS.[17]

8. In addition, Tuđman argues that the Accused has not met the criteria for a subpoena under Rule 54 of the Rules, as issuing this subpoena is not yet "necessary" and should only be done once the Accused has secured a decision from Croatia relieving him of his obligation to protect state secrets and once he has resolved any Rule 54*bis* and Rule 70 privilege issues that Croatia may wish to assert.[18] Tuđman also argues that former intelligence officials should be protected from "potential abuse of process" that could result from the precedent sought by the Accused and that, therefore, the Chamber should strictly enforce the requirement that a requesting party prove that the information sought from the intelligence officials is not available through other means.[19] Tuđman adds that intelligence officials are in fact immune from subpoenas or binding orders under the jurisprudence of the Tribunal, despite the Appeals

[14] Croatia's First Response, pp. 2–3.
[15] *See* First Letter.
[16] Tuđman's First Response, paras. 3–8.
[17] Tuđman's First Response, para. 9.
[18] Tuđman's First Response, paras. 10–11.
[19] Tuđman's First Response, paras. 12–13.

Chamber decision in the *Krstić* case, as that decision limited its ruling to the particular type of officials at issue in that case.[20] Finally, Tuđman submits that the most efficient way of proceeding is for him to provide Croatia with his answers to the questions posed by the Accused. This would allow him to speak freely and without fear of criminal prosecution, following which Croatia can then review his answers and assert any Rule 54 *bis* or Rule 70 privileges.[21] This in turn would also dispense with the need to issue a subpoena as the Accused would obtain the information he seeks through other means.[22] Should, however, the Chamber decide that a subpoena is necessary, Tuđman requests that the Chamber allow all interested parties to provide it with argument and legal authorities concerning whether intelligence officials are immune from the Tribunal's subpoenas.[23]

9. On 7 December 2010, having been granted leave to do so,[24] the Accused filed confidentially his "Reply to the Filing of Miroslav Tuđman" ("First Reply to Tuđman") asking the Chamber to issue an invitation to Croatia to respond to the question of whether it would authorise Miroslav Tuđman to disclose state secrets regarding the above mentioned issues.[25] He also submits that while he has no objection to the participation of the representatives of Croatia during the interview, or the use of Rule 54 *bis* to protect sensitive information from disclosure to the public,[26] he does not see the advantage of having the interview conducted by representatives of the Croatian government as he is seeking information which would lead not only to the location of relevant documents but also to oral testimony during his defence case.[27]

10. The Chamber issued the said invitation confidentially on 15 December 2010, inviting Croatia to respond by 7 January 2011.[28] The response by Croatia was filed confidentially on 11 January 2011 ("Croatia's Second Response"), stating that if a former state official "decides to testify before the [Tribunal] and during testimony is questioned about the circumstances of performing his duties, i.e. if Miroslav Tuđman is questioned about matters related to performance of his duties as the former [director of HIS], [Croatia] is prepared to release him from the duty of keeping an official secret […] in which case Rules 54 *bis* and 70 of the [Rules]

[20] Tuđman's First Response, paras. 14–16.
[21] Tuđman's First Response, paras. 17–20, 22.
[22] Tuđman's First Response, para. 21.
[23] Tuđman's First Response, para. 23.
[24] Hearing, T. 9370 (7 December 2010) (private session).
[25] First Reply to Tuđman, paras. 4, 9.
[26] First Reply to Tuđman, para. 5. The Chamber notes that there are two paragraphs marked with number five but this citation refers to the first such paragraph.
[27] First Reply to Tuđman, paras. 6–8.
[28] Second Invitation to Croatia Regarding Motion for Subpoena of Miroslav Tuđman, 15 December 2010 ("Second Invitation").

must be complied with in order to protect national security interests."[29] Croatia also notes that it would place at Tuđman's disposal an expert who would assist him if "additional consultations and questions are necessary".[30]

11. On 25 January 2010, in private session, the Chamber orally instructed the Accused to contact both Miroslav Tuđman and the Croatian representatives directly, in order to see if an agreement could be reached in light of Croatia's Second Response.[31] Having done so, the Accused filed confidentially his "Request for Invitation to Government of Croatia: Interview of Miroslav Tuđman" on 28 February 2011 ("Request for Invitation") in which he explained that, having contacted Tuđman's lawyer, he was advised that Tuđman would still not agree to an interview unless he received a written permission from Croatia to reveal state secrets.[32] As a result, the Accused sent two letters to the Croatian Embassy in The Hague, inquiring whether Croatia was willing to provide such a written permission, but received no response.[33] Thus, he filed the Request for Invitation, asking the Chamber to issue an invitation to Croatia to comment on whether it would be willing to issue an official decision relieving Tuđman of his obligation not to disclose state secrets.[34] The Chamber granted this request on 3 March 2011.[35]

12. On 9 March 2011, Croatia filed confidentially its response ("Croatia's Third Response"), stating that if Miroslav Tuđman is "willing to testify in the [Accused's] case, he should personally ask for the permission for the exemption from secrecy" in which case Croatia would give such permission.[36] As a result of this filing, on 10 March 2011, the Accused filed confidentially his "Supplemental Submission Concerning Interview of Miroslav Tuđman" ("Submission") in which he argues that Tuđman cannot be expected to make such an application when "the interview is being conducted at the request of the Tribunal" and asks the Chamber to direct Croatia to issue a decision granting exemption from secrecy to Tuđman so that he can submit to the interview voluntarily.[37]

13. Instead of issuing such an order, the Chamber decided that the Presiding Judge should send another confidential letter to Miroslav Tuđman with a view to moving the matter along on a voluntary basis. The Presiding Judge did so on 18 March 2011 ("Second Letter"),

[29] Croatia's Second Response, p. 2.
[30] Croatia's Second Response, pp. 2–3.
[31] Hearing, T. 10739–10740 (25 January 2011) (private session).
[32] Request for Invitation, para. 11.
[33] Request for Invitation, paras. 11–12.
[34] Request for Invitation, para. 13.
[35] Invitation to Croatia Regarding Request for Interview of Miroslav Tuđman, 3 March 2011 ("Third Invitation").
[36] Croatia's Third Response, p. 3.
[37] Submission, para. 2.

encouraging Tuđman to request permission to reveal state secrets in light of the fact that Croatia was willing to give him that permission and the fact that he was willing to agree to an interview once such permission was given.[38] However, on 24 March 2011, Tuđman filed "Mr. Miroslav Tuđman's Response to the Trial Chamber's Correspondence of 18 March 2011" ("Tuđman's Second Response"), stating that he was "unwilling to voluntarily cooperate with the Accused" because he did not "wish to voluntarily assist the Accused, or to be perceived as having voluntarily assisted the Accused."[39] He also submits that if he is compelled to give an interview, he would decline to answer questions because of his obligation to protect state secrets and would assert the "'intelligence agent immunity' privilege" referred to in his First Response.[40] However, Tuđman also submits that if the subpoena is issued compelling him to sit for an interview with the Accused's representative, he will comply with "any and all of the Trial Chamber's orders."[41]

14. On the instruction of the Chamber, the Accused filed his confidential "Reply to Response of Miroslav Tuđman" on 11 April 2011 ("Second Reply to Tuđman") in which he agrees with the position taken by Miroslav Tuđman and argues that the onus is on Croatia to co-operate with the Tribunal by providing an official decision relieving Tuđman of his obligation not to disclose state secrets.[42] He thus asks that the Chamber issue an order to Croatia requesting it to relieve Tuđman of this obligation.[43] The Accused also submits that he is opposed to Tuđman providing information to Croatia directly before it is transmitted to him by Croatia as that would be cumbersome, would likely require follow up communications, and would "result in dissatisfaction and suspicion as to whether the information is complete and credible."[44]

II. Applicable Law

15. 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". This power includes the authority to "require a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the

[38] *See* Second Letter.
[39] Tuđman's Second Response, paras. 2–3.
[40] Tuđman's Second Response, para. 4.
[41] Tuđman's Second Response, para. 7.
[42] Second Reply to Tuđman, para. 2.
[43] Second Reply to Tuđman, paras. 3, 6.
[44] Second Reply to Tuđman, para. 5.

preparation or conduct of the trial".[45] The Appeals Chamber has stated that a Trial Chamber's assessment must "focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair".[46] 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.[47]

16. 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.[48]

17. 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.[49] 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.[50]

18. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[51] A Trial Chamber's discretion to issue subpoenas, therefore, is necessary to ensure that the compulsive mechanism of the subpoena is

[45] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10.

[46] *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 7. *See also Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 ("*Milošević* Decision"), para. 41.

[47] *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also Milošević* Decision, para. 38.

[48] *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

[49] *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

[50] *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.

[51] *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.

not abused and/or used as a trial tactic.[52] In essence, a subpoena should be considered a method of last resort.[53]

III. Discussion

A. Confidentiality of the filings

19. As noted above, the Motion was filed publicly, as was the Chamber's invitation to Croatia to respond to it. Croatia then filed its First Response confidentially. In an effort to encourage Miroslav Tuđman to co-operate with the Accused voluntarily, the Presiding Judge sent him the First Letter confidentially. From then on, all the subsequent filings relating to the Motion were filed confidentially.

20. It has now become clear, however, that Miroslav Tuđman is not willing to co-operate with the Accused. Thus, the Chamber is of the view that his submissions, as well as the other filings related to the Motion, can be made public. The same is the case with the submissions made by Croatia, as they do not reveal any confidential information but simply reiterate Croatia's position regarding the arrangements for interviews, which were largely already made public by the Accused in his Motion.

21. Accordingly, the Chamber will order that all the filings related to this Motion be reclassified as public.[54] Similarly, the discussions related to the Motion, which were conducted in court, in private session, shall also be made public.[55]

B. Subpoena versus order to Croatia

22. Attempts by the Accused to interview Miroslav Tuđman on a voluntary basis have now come to a stalemate. On the one hand, Tuđman is willing to be interviewed if he is given written permission from Croatia relieving him of his obligation not to disclose state secrets but,

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[52] *Halilović* Decision, paras. 6, 10.

[53] *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 *ex parte* and confidential 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".

[54] The filings in question are as follows: Croatia's First Response, First Letter, Tuđman's First Response, First Reply to Tuđman, Second Invitation, Croatia's Second Response, Request for Invitation, Third Invitation, Croatia's Third Response, Submission, Second Letter, Tuđman's Second Response, and Second Reply to Tuđman.

[55] These discussions took place on 7 December 2010 at T. 9370, lines 1 to 18, and on 25 January 2011 at T. 10739, line 10 to T. 10740, line 24. Both the transcript and the audio visual record of the discussions shall be made public.

on the other hand, he is not willing to ask for that permission himself. At the same time, Croatia states that it is willing to give the permission in question, but it requires that Tuđman personally ask for it. As a result, neither Croatia nor Tuđman is willing to initiate the first step in moving the process along. The Accused thus argues that the onus is on Croatia to do so and that the alternative to issuing a subpoena would be for the Chamber to issue an order to Croatia, in light of its duty to co-operate with the Tribunal, directing it to produce the said permission.[56] The Accused does not, however, refer to any case law, nor does he explicitly point to any provisions in the Rules or the Tribunal's Statute ("Statute"), which would support his request and justify the issuance of such an order to Croatia in these specific circumstances.

23. In light of the fact that the Accused's request for a subpoena is still pending, and bearing in mind that both Croatia and Miroslav Tuđman seem to be willing to co-operate as long as certain conditions are in place, the Chamber considers that it is not necessary to rule on the Accused's request that an order to Croatia be issued. Instead, the Chamber considers that it should simply proceed to dispose of the Motion and this without hearing more on this issue from the parties involved.

C. Requirements for subpoena

24. As can be seen from the procedural history related to the Motion, both the Accused and the Chamber have attempted to obtain the voluntary co-operation of Miroslav Tuđman. However, these attempts resulted in Tuđman explicitly stating that he is not willing to co-operate with the Accused on a voluntary basis, nor does he want to be perceived as having voluntarily assisted the Accused.[57] Accordingly, the Chamber is satisfied that the Accused has made reasonable attempts to obtain the voluntary co-operation of Miroslav Tuđman, but was ultimately unsuccessful.

25. Another requirement that the Accused has to satisfy before a subpoena can be issued here is to show that it is necessary for the purpose of an investigation or conduct of his trial. To do so, the Accused has to show that there exists a legitimate forensic purpose for the information he seeks, namely that he has 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 his trial. As noted above, the Accused is interested in obtaining from Miroslav Tuđman information about the "arrangements for and the actual shipments of arms into Croatia for the Bosnian Muslims in 1994–1995" and, in particular,

[56] Submission, paras. 2–4; Second Reply to Tuđman, paras. 2–3.
[57] Tuđman's Second Response, paras. 2–3.

the agreement with Iran to ship arms to the Bosnian Muslims, the acquiescence of the United States and other United Nations member states, the opening up of naval or air routes which had been blockaded, the use of humanitarian convoys to smuggle the arms into BiH, and the type and amount of arms which were smuggled into BiH during 1994–1995.[58] In terms of the relevance of these issues to the Accused's trial, the Chamber recalls its 19 May 2010 "Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany)" ("Germany Decision"), where it found, by majority, Judge Kwon dissenting, that "documents related to the smuggling of arms to Srebrenica are necessary for the determination of the Accused's state of mind in July 1995, as well as to the Chamber's determination of the general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with responsibility".[59] In the same Decision, the Chamber also found, by majority, Judge Kwon dissenting, that whether or not United Nations personnel actively participated in hostilities, by virtue of being involved in arms smuggling, might be an issue in this case, depending on the yet to be determined elements of the offence of hostage-taking under Article 3 of the Statute.[60] Finally, the Chamber recalls that one of the allegations against the Accused is that he restricted the passage of humanitarian aid convoys to the enclaves in BiH, including Srebrenica,[61] whereas his defence is that the Bosnian Serbs had a good reason to be concerned about the contents of those convoys.[62] Accordingly, insofar as the Accused's interview with Tuđman covers these three issues, the Chamber is satisfied, by majority, Judge Kwon partially dissenting,[63] that they are clearly identified issues relevant to his case and that if information is obtained in relation thereto, it may materially assist the Accused in the conduct of his case. In this respect, the Chamber notes that the Accused is interested in a number of additional issues, such as an alleged agreement between Iran and Croatia to ship weapons to Croatia and the acquiescence of the United States to these activities. The Chamber recalls that it has already held that these sorts of issues are not relevant to the Accused's trial.[64]

[58] Motion, paras. 2, 15.

[59] Germany Decision, paras. 21–22.

[60] Germany Decision, paras. 25–27.

[61] Third Amended Indictment, paras. 9–14, 68–70, 74.

[62] Motion, para. 19.

[63] Regarding the relevance of first two issues—namely, information relating to alleged smuggling of arms to Srebrenica and U.N. personnel's alleged active participation in hostilities—Judge Kwon dissents on the same basis on which he dissented in the Germany Decision. *See* Germany Decision, Partially Dissenting Opinion of Judge Kwon, paras. 6–13. *See also* Decision on Accused's Motion for Subpoena to Interview General Sead Delić and Brigadier Refik Brđanović, 5 July 2011, para. 13 note 31. Regarding the third issue, Judge Kwon agrees with the majority's finding that information relating to alleged restrictions of humanitarian convoys is relevant. However, he dissents below on the grounds that the Accused does not have a reasonable basis for his belief that there is a good chance that Tuđman will be able to provide such information.

[64] *See* Decision on the Accused Motion for Binding Order (The Islamic Republic of Iran), 9 June 2010, paras. 20–21.

26. Turning next to whether the Accused has a "reasonable basis" for his belief that there is a "good chance" that Miroslav Tuđman will provide him with relevant information, the Chamber notes that Tuđman was the director of HIS at the relevant time. It is arguable that by virtue of this position, he would have been privy to all sorts of information, coming from both his own operatives as well as from the foreign intelligence services. Therefore, in the Chamber's view, Judge Kwon dissenting,[65] the Accused has successfully demonstrated a reasonable basis for his belief that there is a good chance that Tuđman will be able to give him the information regarding the clearly identifiable issues outlined as relevant in the preceding paragraph.

27. As to whether Miroslav Tuđman can be considered to be a "prospective witness" in this case, the Chamber recalls that the Accused seeks to conduct the interview *both* for the purpose of directing Croatia to certain documents requested in the Binding Order Motion *and* to use the information provided by Tuđman on the events identified above as the basis of a written statement, which would then be tendered into evidence.[66] Thus, the Accused is clearly treating Miroslav Tuđman as a prospective witness in this case. Also relevant to this issue is Tuđman's submission that, as an intelligence official, he enjoys a certain privilege from being issued with a subpoena or, in other words, enjoys a "functional immunity" referred to in the *Blaškić* Decision.[67] In essence, Tuđman is arguing that the Chamber should apply the ruling of the Appeals Chamber in the *Blaškić* Decision where it was held that state officials are mere instruments of the state who have a functional immunity and that, therefore, a subpoena could not be issued to them for information obtained in the course of their official duties.[68] However, in the *Krstić* case in 2003, the Appeals Chamber, by majority, clarified that this ruling was limited to applications for production of state documents and proceeded to rule that where a party seeks to interview a state official who is a prospective witness, it should do so by applying for a subpoena under Rule 54.[69] The Appeals Chamber also clarified that while the ruling in *Blaškić* applied to a custodian of state documents, "it is not apt in relation to a state official who can give evidence of something he saw or heard (otherwise, perhaps, than from a state document)."[70] It also noted that the Appeals Chamber in *Blaškić* did not say that functional immunity would include immunity against being compelled to give evidence about what the

[65] Regarding the first two issues, Judge Kwon maintains his dissent as discussed s*upra* note 63. Regarding the third issue, while Judge Kwon agrees that information relating to alleged dispatches of ammunition disguised as humanitarian aid is relevant, he dissents on the grounds that the Accused does not have a reasonable basis for his belief that there is a good chance that Tuđman will be able to provide such information. Judge Kwon reasons that the Accused's request is nothing more than a "fishing expedition" and is solely premised on the belief that Tuđman may provide information by virtue of his position as director of HIS at the relevant time.

[66] Motion, para. 16.

[67] Tuđman's First Response, paras. 12–16.

[68] *Blaškić* Decision, para. 38.

[69] *Krstić* Decision, paras. 22–23.

official saw or heard in the course of exercising his official functions.[71] While the Appeals Chamber did mention the question of whether any such immunity may nevertheless apply to certain categories of officials, it decided that it was not necessary to deal with that question[72] and also expressed the view, albeit *obiter*, that it would be incorrect to suggest that functional immunity against prosecution exists in the context of international courts.[73] Accordingly, the Chamber considers that as long as during the interview Miroslav Tuđman is asked about the events he saw or heard in relation to the relevant issues outlined above, which in turn makes him a prospective witness in this case, he can be subpoenaed to submit to an interview with the Accused's legal adviser despite the fact that he may have seen the events in question, or heard about them, in the course of exercising his official functions as the director of HIS.

28. The Chamber therefore finds, by majority, Judge Kwon dissenting, that the Accused has shown that there is a legitimate forensic purpose in obtaining the information sought through his interview with Miroslav Tuđman.

29. With respect to the requirement that the information sought must not be obtainable through other means, the Chamber notes that the Accused has attempted to obtain the information at issue here through his Binding Order Motion, but that he has been largely unsuccessful. At the same time, through his former position, Miroslav Tuđman may have first-hand knowledge of the information sought by the Accused that others would not have, in particular the means in which the arms were allegedly smuggled into Srebrenica, as well as whether humanitarian convoys or United Nations personnel were involved in arms smuggling in BiH. Tuđman argues that the information the Accused seeks from him is in fact obtainable through other means because he is prepared to provide Croatia with answers to the Accused's questions but without submitting to a direct interview with the Accused's legal adviser. While this may be a potentially plausible way of obtaining the sought information in some circumstances, the Chamber agrees with the Accused that in the present circumstances it is unlikely to lead to a satisfactory result for him and would therefore not be conducive to an expeditious and efficient conduct of the proceedings. Accordingly, the Chamber is satisfied by majority, Judge Kwon dissenting,[74] that the information identified above as relevant to the Accused's case is not obtainable by him through any other means at this stage.

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[70] *Krstić* Decision, para. 24.
[71] *Krstić* Decision, para. 27.
[72] *Krstić* Decision, para. 27.
[73] *Krstić* Decision, para. 26.
[74] Judge Kwon maintains his dissent that the information sought from Tuđman lacks a legitimate forensic purpose and therefore the issuance of a subpoena is not necessary. *Supra* notes 63, 65.

30. Having found that the various requirements for a subpoena are satisfied, it remains within the Chamber's discretion to decide whether or not to issue the subpoena. Due to the coercive nature of a subpoena and the implication that failure to comply might lead to criminal sanctions, the Chamber must take a cautious approach and take into account all the surrounding circumstances before determining that this measure of last resort be taken.[75] The Chamber recalls, in particular, that the Appeals Chamber has held that subpoenas should not be issued lightly, especially in cases where a potential witness refuses to be interviewed.[76] It has also held that a subpoena is a "weapon which must be used sparingly" and that Trial Chambers should guard against it "becoming a mechanism used routinely as a part of trial tactics".[77] The Chamber recalls that Miroslav Tuđman has indicated that, if a subpoena was issued, he would be willing to comply with "any and all of the Chamber's orders."[78] This would presumably include making a request for permission to be relieved by Croatia of his obligation not to reveal state secrets. Also, the Chamber recalls that Croatia has offered to provide, and the Accused has agreed to the presence of, a Croatian representative during any interview. This representative would be able to assist Tuđman in relation to any concerns he may have in answering the Accused's questions. Finally, the Chamber notes that the Accused has already agreed to any Rule 54 *bis* or Rule 70 conditions Croatia may assert during the interview. Accordingly, given the safeguards already put in place to alleviate both Miroslav Tuđman's and Croatia's concerns, the Chamber is convinced by majority, Judge Kwon dissenting, that Miroslav Tuđman can and should be subpoenaed so that the Accused's legal advisor can interview him with respect to the relevant matters set out above in paragraph 25.

IV. Disposition

31. Accordingly, the Trial Chamber, by majority, Judge Kwon dissenting, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion and **ORDERS** as follows:

(a) the Registry of the Tribunal shall take whatever steps reasonably necessary to ensure that the attached Subpoena is transmitted immediately to Croatia so that it can be served;

[75] *See* Decision on Motion for Subpoena to Douglas Lute and John Feeley, 8 July 2009, para. 11.
[76] *Krstić* Decision, para. 12.
[77] *Halilović* Decision, para. 10
[78] Second Tuđman Response, para. 7.

(b) Croatia shall comply with the instructions in the Order attached to this Decision; and

(c) the Registry shall reclassify as public all the filings related to this Motion and listed in footnote 54 above, as well as the transcript and the audio visual record of discussions relating to the Motion, as outlined in footnote 55.

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

Judge O-Gon Kwon
Presiding

Dated this fourteenth day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]