



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

Case No. IT-95-14-PT

Date: 18 March 1997

English

Original: French

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**IN THE TRIAL CHAMBER**

**Before:** Judge Claude Jorda, Presiding  
Judge Haopei Li  
Judge Fouad Riad

**Registrar:** Mr. Jean-Jacques Heintz, Deputy Registrar

**Decision of:** 18 March 1997

**THE PROSECUTOR**

v.

**TIHOMIR BLAŠKIĆ**

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**REFERRAL TO A JUDGE OF THE DEFENCE MOTION  
FOR ISSUANCE OF A SUBPOENA DUCES TECUM**

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**The Office of the Prosecutor:**

Mr. Mark Harmon  
Mr. Andrew Cayley  
Mr. Gregory Kehoe  
Mr. William Fenrick

**Counsel for the Defence**

Mr. Anto Nobile  
Mr. Russell Hayman

**Trial Chamber I,**

**HAVING CONSIDERED** the motion for the issuance of a subpoena duces tecum to the Republic of Bosnia and Herzegovina compelling the production of exculpatory documents filed on 28 February by Defence counsel for General Blaškić (hereinafter “the Defence”),

**HAVING HEARD** the arguments of the parties during the hearing of 12 March 1997,

**PURSUANT** to the provisions of Article 21 of the Statute of the Tribunal (hereinafter “the Statute”) and Rule 54 of the Rules of Procedure and Evidence (hereinafter “the Rules”),

**CONSIDERING** that the Defence is requesting that this Trial Chamber, pursuant to the provisions of Rule 54 of the Rules, issue a subpoena duces tecum to the Republic of Bosnia and Herzegovina demanding the discovery of a set of exculpatory documents which it alleges that it has been unable to obtain;

**CONSIDERING** further that the documents are said to be relevant and constitute exculpatory evidence which is therefore indispensable for preparing the defence; that, second, a subpoena duces tecum issued by a Judge is necessary in order to avoid any bias on the part of the requested State as regards the collection of evidence; that, third, pursuant to Article 21 paragraph (4) (e), the Defence has the same rights as the Prosecution in respect of the production of evidence;

**CONSIDERING** that, as regards the last point, reference was made at the hearing to the conduct and status of the *ex parte* proceedings before the Presiding Judge of Trial Chamber II, Judge McDonald, who received a request from the Prosecutor for the issuance of a subpoena duces tecum;

**CONSIDERING** further that on 15 January 1997, Judge McDonald granted the Prosecutor’s request and issued two subpoenas duces tecum addressed respectively (1) to Bosnia and Herzegovina and to the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian community of Herceg Bosna and (2) to the Republic of Croatia and to Mr. G. Šušak, Minister of Defence of the Republic of Croatia;

**CONSIDERING** further that Judge McDonald then issued several subpoenas, one on 14 February 1997 addressed to the two designated States and officials, and, then, on 20, 24 February and 7 March 1997, to Bosnia and Herzegovina and to its Minister of Defence in order to ensure compliance with the subpoenas duces tecum; that in a separate subpoena of 20 February, the Judge suspended her subpoena duces tecum addressed to Croatia; that, lastly, pursuant to a second subpoena issued on 7 March 1997, both the Prosecutor and the States and officials concerned were invited to file briefs in respect of several theoretical questions of principle;

**CONSIDERING** that the existence of the *ex parte* proceedings has been discovered and that the decisions were made public;

**CONSIDERING** that although the parties have agreed in principle as to the jurisdiction of this Trial Chamber to entertain such a motion and, possibly, pursuant to Rule 54 of the Rules, to grant such a motion, it, nonetheless, appears desirable that it be submitted to the Judge already hearing a related motion as part of the same case;

**CONSIDERING** that it is in the interest of the proper administration of justice for the two motions to be heard together by the same Judge for the reasons set forth below:

**CONSIDERING**, firstly, that uniformity of approach in decisions on similar questions should be ensured and any contradiction thus avoided;

**CONSIDERING**, second, that if during or at the conclusion of these proceedings and prior to the trial on the merits, the Trial Chamber hearing the case were to review the evidence submitted to the Defence by the third party in possession of that evidence in order to evaluate its relevance or exculpatory nature, the review might be tainted in such a way as to permit the parties to challenge the impartiality of that Trial Chamber, in particular, during the trial on the merits;

**CONSIDERING**, third, that on the occasion of the *ex parte* hearing pending before the Presiding Judge of Trial Chamber II, Judge McDonald invited the parties - the Prosecutor and the States and officials concerned - to file briefs in respect of several theoretical questions of principle: the power of a Judge to issue a subpoena duces tecum to a sovereign State, the power of a Judge to address such a subpoena or request to a high Government official of a State and the appropriate remedies to be taken in case of non-compliance with such decisions;

**CONSIDERING** further that in respect of the above it appears preferable that the request submitted to this Trial Chamber be reviewed and ruled on by the same Judge in view of a hearing and an exchange of documents which, when the Defence is also involved, would also permit holding *inter partes* proceedings;

**CONSIDERING** that it is therefore proper to refer the case as it now stands back to the Judge who on 10 January 1997 received the request from the Prosecutor to examine and to review this related request in order to ensure that, during *inter partes* proceedings, the rights and guarantees granted equally to the parties by the Statute, and in particular, by Article 21, are protected absolutely.

**FOR THE FOREGOING REASONS**

The Trial Chamber

**RULING** in public, *inter partes*, and unanimously,

**REFERS** the case as it now stands back to the Judge who received the request from the Prosecutor on 10 January 1997 to hear and to review the motion of Counsel for General Blaškić for issuance of a subpoena duces tecum to the Republic of Bosnia and Herzegovina demanding the production of exculpatory evidence;

**INSTRUCTS** the Registry to transmit without delay the motion filed on 28 February 1997 making the request for such issuance to Judge McDonald, Presiding Judge of Trial Chamber II;

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

Done this eighteenth day of March 1997  
At The Hague  
The Netherlands

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Claude Jorda  
Presiding Judge of  
Trial Chamber I