



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: 10 May 2011

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: 10 May 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S SECOND MOTION FOR BINDING ORDER
(THE ISLAMIC REPUBLIC OF IRAN) AND MOTION FOR SUBPOENA TO
INTERVIEW GENERAL DIRECTOR SADEGHI**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

The Government of Iran

via Embassy of the Islamic
Republic of Iran to
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Standby Counsel

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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 Accused’s “Second Motion for Binding Order: Government of Iran”, filed on 7 December 2010 (“Binding Order Motion”), and the “Motion for Subpoena to Interview: General Director Sadeghi”, filed on 5 April 2011 (“Subpoena Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Binding Order Motion the Accused requests the Chamber to issue a binding order to the Islamic Republic of Iran (“Iran”) pursuant to Article 29 of the Statute of the Tribunal (“Statute”) and Rule 54 *bis* of its Rules of Procedure and Evidence (“Rules”), requesting Iran to provide him with the following documents:

(1) Contract dated 3 December 1994 between the Ministry of Defence and Armed Forces Support (M.O.D.L.E.X.) and Matimco Sprl of Belgium for ammunition to be delivered to Croatia.

(2) All records of the three shipments made pursuant to the above contract between December 1994 and April 1995.¹

2. The Accused submits that his request meets the requirements of Rule 54 *bis* because it “is specific and seeks a narrow category of documents which have already been determined to be relevant and necessary to his defence.”² Further, he submits that he has made efforts to obtain the documents voluntarily but has received no response from Iran.³ He notes that Iran has previously indicated it could not locate any records of arms shipments to the Bosnian Muslims via Croatia.⁴

3. Following an invitation to respond to the Binding Order Motion issued by the Chamber,⁵ Iran requested an extension of time to provide its response,⁶ and, on 20 January 2011, the Chamber granted it three months to do so.⁷ On 11 March 2011, Iran filed correspondence (“Correspondence”) submitting that the documents requested in the Binding Order Motion did

¹ Binding Order Motion, para. 5.

² Binding Order Motion, para. 6.

³ Binding Order Motion, paras. 2, 6.

⁴ Binding Order Motion, para. 7.

⁵ See Invitation to the Islamic Republic of Iran, 16 December 2010.

⁶ See Correspondence from Islamic Republic of Iran, 14 January 2011.

⁷ See Decision on Request from the Government of the Islamic Republic of Iran, 20 January 2011.

not satisfy the criteria of relevance under Rule 54 *bis* of the Rules, but that in any event it had conducted a search of its archives for the requested documents and had found none.⁸

4. In the Subpoena Motion, which was filed in response to the Correspondence, the Accused requests the Chamber to issue a subpoena pursuant to Rule 54 of the Rules compelling General Director Sadeghi, an Iranian national who served as General Director of Export of the Iranian Ministry of Defence Logistics Section in 1994-1995, to submit to an interview with him.⁹ The information the Accused seeks from Mr. Sadeghi concerns an alleged order between a Mr. Jacques Monsieur, doing business as Matimco SPRL, and the Iranian Ministry of Defence for a shipment of ammunition to Pula in Croatia, which, according to the Accused, was destined for the Bosnian Muslims.¹⁰ The Accused submits that during the course of his investigations, information he obtained indicates that the person acting on behalf of Iran in connection with this order was Mr. Sadeghi.¹¹ The Accused submits that he has reasonable grounds to believe that Mr. Sadeghi has information which can materially assist his case, “including firsthand knowledge of the contract for the sale of 203mm ammunition to the Bosnian Muslims and the shipments pursuant to the contract”.¹² On 15 March 2011, the Accused wrote a letter to Iran requesting that it make Mr. Sadeghi available for an interview but no response to his letter was ever received.¹³

II. Applicable Law

5. Article 29 of the Statute obliges states to “co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”. This obligation includes the specific duty to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] [...] the service of documents”.¹⁴ Orders to states for the production of documents are made under Rule 54 *bis* of the Rules.

6. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely: (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of

⁸ Correspondence, p. 1.

⁹ Subpoena Motion, para. 1.

¹⁰ Subpoena Motion, para. 4.

¹¹ Subpoena Motion, para. 6.

¹² Subpoena Motion, para. 14.

¹³ Subpoena Motion, para. 8.

¹⁴ Article 29(2)(c) of the Statute.

documents;¹⁵ (ii) the requested documents must be “relevant to any matter in issue” and “necessary for a fair determination of that matter” before a Chamber can issue an order for their production;¹⁶ (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;¹⁷ and (iv) the request cannot be unduly onerous upon the state.¹⁸

7. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.¹⁹ In determining whether the documents sought by an applicant are relevant, Chambers have considered criteria such as whether they relate to the “most important” or “live” issues in the case,²⁰ or whether they relate to the “defence of the accused”.²¹ As for the necessity requirement, it obliges the applicant to show that the requested materials are necessary for a fair determination of a matter at trial. The applicant need not make an additional showing of the actual existence of the requested materials, but is only required to make a reasonable effort before the Trial Chamber to demonstrate their existence.²² Furthermore, the applicant is not required to make a showing that all other possible avenues have been exhausted but simply needs to demonstrate “either that: [he or she] has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or that the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54 *bis* order.”²³

8. 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:

¹⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006 (“*Milutinović* US Decision”), paras. 14–15; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997 (“*Blaškić* Review”), para. 32; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108bis, 9 September 1999 (“*Kordić* Decision”), paras. 38–39.

¹⁶ Rule 54 *bis* (A) (ii) of the Rules; *Blaškić* Review, paras. 31, 32(ii); *Kordić* Decision, para. 40; *Milutinović* US Decision, paras. 21, 23, 25, 27.

¹⁷ Rule 54 *bis* (A) (iii) of the Rules; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić Amended Rule 54 *bis* Application, 29 September 2006 (“*Sreten Lukić* Decision”), para.7.

¹⁸ *Blaškić* Review, para. 32 (iii); *Kordić* Decision, para. 41.

¹⁹ *Kordić* Decision, para. 40.

²⁰ See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Second Application of General Ojdanić for Binding Orders pursuant to Rule 54*bis*, 17 November 2005 (“*Second Ojdanić* Decision”), paras. 21, 25; *Prosecutor v. Milutinović et al.*, Separate and concurring opinion of Judge Iain Bonomy in the Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 23 March 2005.

²¹ See e.g., *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Requests by the Accused for Trial Chamber II to issue Subpoena Orders, 3 June 2005, p. 4; *Sreten Lukić* Decision, para. 13 (see footnote 45).

²² *Milutinović* US Decision, para. 23.

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.²⁴

9. 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 statements the witness has made to the Prosecution or to others in relation to the events.²⁵

10. Furthermore, the Trial Chamber may also consider whether the information the applicant seeks to elicit through the use of a subpoena is necessary for the preparation of his or her case and whether the information is obtainable through other means.²⁶ In this regard, the Appeals Chamber has stated that a Trial Chamber's considerations 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".²⁷ Finally, the applicant must show that it has made reasonable attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.²⁸

11. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁹ 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.³⁰ In essence, a subpoena should be considered a method of last resort.³¹

²³ *Milutinović* US Decision, para. 25.

²⁴ *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 6; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10 (citations omitted); *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. 38.

²⁵ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²⁶ *Halilović* Decision, para. 7; *Krstić* Decision, paras. 10–12; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin and Talić* Decision"), paras. 48–50; *Milošević* Decision, para. 41.

²⁷ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. See also *Brđanin and Talić* Decision, para. 46.

²⁸ *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.

²⁹ *Halilović* Decision, para. 6; *Brđanin and Talić* Decision, para. 31.

³⁰ *Halilović* Decision, paras. 6, 10.

³¹ 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".

III. Discussion

(i) Binding Order Motion

12. The Chamber recalls its 6 June 2010 “Decision on the Accused’s Motion for Binding Order (The Islamic Republic of Iran)” (“First Binding Order Decision”) whereby it found that the categories of documents requested by the Accused in his first binding order motion with respect to Iran did not meet the requirements of specificity and relevance pursuant to Rule 54 *bis* of the Rules.³² With respect to the specificity of the documents requested in this Binding Order Motion, the Accused has now narrowed the scope of requested documents from his first binding order motion to Iran, and has identified specific documents.

13. The Chamber recalls its earlier finding, by majority, that the issue of the alleged smuggling of arms to Srebrenica is relevant to the Accused’s case in so far as it relates to the Accused’s state of mind in July 1995, and 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. Accordingly, the Chamber found, by majority, Judge Kwon dissenting, that documents that go to this issue are necessary for a fair determination of this case.³³

14. However, while arms smuggling into Srebrenica in 1995 may be relevant to the Accused’s case, the Chamber recalls its previous finding in the First Binding Order Decision that cargo manifests from Iranian aircraft which allegedly landed in Croatia in 1992 and 1994 were too far removed temporally from the time period relevant to this case, namely 1995, and also provided no geographical link to the territory of Bosnia and Herzegovina (“BiH”). Thus, these documents were considered not strictly necessary for the determination of the Accused’s case.³⁴ Similarly, in the present Binding Order Motion, the Accused requests documents (a contract and records of shipments) from Iran that pertain to an alleged arrangement between an Iranian government agency and an arms dealer doing business as Matimco SPRL for the sale and delivery of ammunition to Pula, Croatia, between December 1994 and April 1995.³⁵ These documents, if they exist, would only pertain to the sale of ammunition from Iran and their delivery to Croatia. The Accused does not suggest that they would contain any information about how this ammunition was allegedly smuggled from Croatia into BiH, and specifically into

³² First Binding Order Decision, paras. 20–23.

³³ See Decision on the Accused’s Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010 (“Germany Decision”), paras. 20–22. Judge Kwon attached a partial dissent from the majority on these issues.

³⁴ First Binding Order Decision, para. 21.

³⁵ Motion, paras. 3- 5.

Srebrenica. It is only this latter issue that the Chamber has found, by majority, and continues to consider to be relevant to the Accused's case. Thus, as with the documents sought in the Accused's earlier binding order motion against Iran, these documents also pertain to acts that are far removed from the issues relevant to his case and the Chamber is not satisfied that they are relevant to the issue of whether Srebrenica was militarised in July 1995, or to the Accused's state of mind at that time. As such, the documents are not necessary for the fair determination of the Accused's case. In this respect, the Chamber reminds the Accused, yet again, that he should focus his investigatory efforts on matters directly related to the charges against him and not on matters which he considers necessary to give a broad account of events in BiH and the surrounding region but which have no actual bearing on the charges against him. The Chamber also reiterates that the broad issue of whether various states were involved in, or aware of, arms smuggling is not a matter for its determination or consideration in this case.³⁶

(ii) Subpoena Motion

15. Having found that the documents requested in the Binding Order Motion do not satisfy the relevance and necessity criteria of Rule 54 *bis*, the Chamber will proceed in determining the Subpoena Motion without issuing an invitation to Iran to respond to it.

16. The Chamber reiterates that it will only issue a subpoena should it consider that the information sought is necessary and will materially assist the applicant, and if that information is not obtainable by any other means. The information sought through an interview with Mr. Sadeghi concerns the same subject matter as the documents sought in the Binding Order Motion. The Accused submits that through his interview with Mr. Sadeghi, he will be able to direct Iran to the location of the documents or he will use the information obtained in the interview as a basis for a written statement which he intends to offer into evidence pursuant to Rule 92 *ter* or Rule 92 *bis* of the Rules.³⁷ Having determined above that the documents requested in the Binding Order Motion do not satisfy the relevance and necessity criteria of Rule 54 *bis*, the Chamber finds that the information sought through the issuance of a subpoena is not necessary and will not materially assist the Accused in relation to issues relevant to his case.

³⁶ First Binding Order Decision, para. 20.

³⁷ Subpoena Motion, para. 15.

IV. Disposition

17. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute, and Rules 54 and 54 *bis* of the Rules, hereby **DENIES** the Binding Order Motion and the Subpoena Motion.

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



Judge O-Gon Kwon
Presiding

Dated this tenth day of May 2011
At The Hague
The Netherlands

[Seal of the Tribunal]