

# XVIII

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## The International Criminal Tribunal and Subpoenas for State Documents

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**T**HE CONTEMPORARY ENFORCEMENT of international humanitarian law faces a world different from Nuremberg. The World War Two Allies, confronted with criminality of staggering proportions, conducted the trials of Nazi leaders after Germany's unconditional surrender. Captured Nazi archives provided a documentary outline of the Reich's unimaginable plans and Allied military occupation of Germany allowed the Nuremberg prosecutors direct access to witnesses.

In prosecuting war crimes in modern civil conflicts, the judicial starting point is transformed. The internationalization of war crimes prosecutions is seen as a way to restore confidence and allow reconciliation. But prosecutions may begin while a conflict is still underway. Achievement of a ceasefire or peace agreement does not mean that former belligerents welcome the prospect of being held responsible for serious violations of international humanitarian law. International peacekeepers can separate opposing forces and protect international aid workers, yet are unlikely to have a force structure sufficient to protect all potential witnesses against irregulars and hooligans. There is no occupation government that displaces the civil administration of the former belligerents. While political sentiment may change over time, the wartime

political parties are likely to remain influential long after the fighting stops. Former belligerents will lack credibility in trying war crimes accusations against their own forces and their opponents. International war crimes prosecutors will also be hard put to rely on the belligerents for the faithful collection of evidence and eyewitness testimony.

What this means for war crimes prosecutions is brought home in the experience of the International Criminal Tribunal for the former Yugoslavia. The Tribunal was created by the United Nations Security Council in 1993 under Chapter VII,<sup>1</sup> in the middle of the armed conflict in Bosnia and Herzegovina. In November 1995, while the Dayton Peace Accord was under negotiation, the Tribunal indicted a number of defendants for their roles in ethnic cleansing in the Lasva Valley. A prominent defendant was Colonel Tihomir Blaškić, who held the position of regional military commander for the Croatian Defense Council of Herceg-Bosna, an internationally unrecognized Bosnian Croat entity within the Republic of Bosnia and Herzegovina.<sup>2</sup> Blaškić surrendered to the Tribunal on April 1, 1996, and was permitted to remain under house arrest in The Hague.

### The Blaškić Subpoenas

On January 15, 1997, the Tribunal Prosecutor issued trial subpoenas for the production of records from, variously, the Government of Croatia, Croatian Defense Minister Gojko Šušak, the Government of Bosnia and Herzegovina, and the custodian of records of the central archive of the former Ministry of Defense of Herceg-Bosna. These subpoenas have become the center of controversy. The practical outcome of the case may define whether an international criminal tribunal is able to function effectively as a truth-determining forum, for the advantages of impartiality and credibility enjoyed by an international tribunal are of little use if such a court cannot procure the production of evidence necessary to a fair and accurate adjudication. The subpoena dispute tests whether an international court can effectively substitute itself for national tribunals in the trial of war crimes, genocide, and crimes against humanity.

The evidence requested in the subpoenas *duces tecum* addressed to the Republic of Croatia and to Bosnia and Herzegovina focuses on military operations in Central Bosnia. The requested disclosures were broad, and came surprisingly late in the trial process, more than a year after the original Blaškić indictment. The subpoena to Croatia included requests for Blaškić's notes and writings sent to the Croatian Ministry of Defense and to the

defense authorities of Herceg-Bosna, communications received from those quarters, communications between the Croatian Ministry of Defense and other officials of Herceg-Bosna, records on Croatia's contribution of weapons, supplies, and military units to the Bosnian conflict, and files on investigations or prosecutions concerning the 1993 attacks against Muslim civilians in Ahmici and other villages in the Lasva Valley.

The scope of the prosecutor's demand might seem ambitious until one recalls that proving grave breaches of the Geneva Conventions requires evidence that the Bosnia conflict was "international" in each particular sector of the fighting. Otherwise, according to the Tribunal's earlier decisions in the Tadić case,<sup>3</sup> the charges of grave breach cannot be sustained, since the universal jurisdiction of grave breaches only applies in international conflicts. In the case of Tihomir Blaškić, an officer of the Croatian Defence Council ("HVO") of the Croatian Community of Herceg-Bosna, it is Croatia's involvement with the HVO and the fighting in central Bosnia that will determine the international nature of the conflict for purposes of grave breaches of the Geneva Conventions.

Many of the subpoenaed records are also central to the proof of command responsibility. Command responsibility holds that it is not sufficient to place liability on the foot soldier who carries out an illegal action or atrocity. Rather, a system of restraint in wartime depends on the role of a commanding officer in controlling his troops, and his duty in the chain of command to prevent and punish wanton acts. A commanding officer is to be held criminally liable for *failing to attempt to control* his troops where he knows that widespread atrocities are being committed, as well as for ordering troops to take such reprehensible action. This is a necessary part of deterrence, and the moral responsibility and retribution which criminal law seeks to serve.

Proof of command responsibility is likely to come from one of two sources—the testimony of military personnel about the commander's orders and actions or the documentary record of a military operation, including copies of written orders and communications. Either way, the information must come from "official" sources.

Command responsibility is central in the charges against Blaškić. He may not have personally participated in the murders and mayhem committed against Muslim civilians in 1993 in the Lasva campaign area. Rather, Blaškić will bear criminal responsibility if he ordered or encouraged his troops to engage in the atrocities,<sup>4</sup> or if he failed to monitor or control their actions, allowing the troops to run amok.<sup>5</sup>

A more controversial theory of command responsibility might dispense with the need for any particularized evidence. Criminal liability could flow, on an aggressive theory, from the simple fact of the defendant's position in the chain of command and the widespread commission of atrocities by troops under his command. But even if this were an attractive theory—and, to be clear, it is not provided for by the Tribunal's statute<sup>6</sup>—the defendant must surely be permitted an affirmative defense, to show that he justifiably did not know of the misconduct, or made efforts to stop its execution. "Official" sources are likely to be important for exculpatory evidence.

In cases between sovereign States, the fact-finder ordinarily relies upon the State parties to produce pertinent evidence. There is no general right of "discovery" against the opposing State in an international adjudication, say, before the International Court of Justice, although a special master can be assigned to investigate and report to the Court and an adverse inference can be drawn from a State party's failure to muster proof.<sup>7</sup> Each State is required to make its case, based on its own records and witnesses, and is free to judge whether to disclose sensitive documents to strengthen the case, or to retain the advantages of confidentiality.

Criminal trials are a different matter. They are not State-to-State contests. A criminal conviction deprives an individual of his liberty and reputation, and involves a rights-based claim to fairness. Criminal proof presumes there will be a completeness of investigation and documentation to give meaning to the high standard for conviction, whether it is phrased as "proof beyond a reasonable doubt" or another test of similar gravity. In a national setting, a criminal court has wide latitude to demand the production of evidence from third parties and even from official sources. In an international setting, individuals do not ordinarily enjoy legal personality, but when placed on trial for international criminal responsibility, they must be guaranteed fair process.

Criminal justice is a newcomer in international fora. The *ad hoc* tribunals created by the Security Council for the former Yugoslavia and Rwanda are the first charged with the international enforcement of the law of war since Nuremberg. It is hardly surprising, then, to have difficult problems of first impression. The question of how to obtain evidence is a fundamental test, both to assure effectiveness in enforcing international humanitarian law, and to assure fairness to individual defendants.

The subpoena *duces tecum* issued in the Blaškić case to Bosnia and Herzegovina was accepted by the Bosnian government, although Bosnia indicated that it could not assure the compliance of a nominally subordinate official, the custodian of records of the former Defense Ministry of

Herceg-Bosna.<sup>8</sup> Croatia, however, disputed the authority of the International Tribunal to issue a subpoena *duces tecum* on several grounds: 1) it is improper to issue a mandatory order to a sovereign State, especially an order that purports to carry a “penalty” for non-compliance, as might be implied by the word “subpoena”; 2) no order can be addressed to a particular State official, here, Croatian Defense Minister Šušak, and States are entitled to decide how to comply with requests for disclosure; and 3) Croatia can withhold information affecting national security, a judgment that Croatia reserves to itself.

Croatia turned over some of the documents requested by the Prosecutor, but continued to challenge the authority of the Tribunal to enforce any subpoena demand. The Tribunal judge who issued the subpoenas, Judge Gabrielle Kirk McDonald of the United States, set down the matter for full briefing and hearing before the three judges of Trial Chamber II, including Judge Elizabeth Odio Benito of Costa Rica and Judge Saad Saood Jan of Pakistan. She also invited *amicus curiae* to address four questions: whether a subpoena *duces tecum* can issue to a State, whether it can issue to a high government official of a State, whether claims of national security privilege must be accepted, and the appropriate remedies in the event of non-compliance.

### The Trial Chamber Decision

On the first question, in a decision rendered on July 18, 1997,<sup>9</sup> the Trial Chamber adroitly placed to one side the distracting controversy over nomenclature. The term “subpoena” is used in the Court’s own rules,<sup>10</sup> but the Trial Chamber noted that the real dispute was “the International Tribunal’s authority and power to issue *binding compulsory orders*, rather than the particular nomenclature used for such orders.”<sup>11</sup> This power could either be granted expressly, or could be inherent in the authority of the Tribunal.

Judge McDonald held that there was such a power. The Tribunal was created by the Security Council under Chapter VII authority as a subordinate organ,<sup>12</sup> yet “must also be possessed of a large degree of independence in order to constitute a truly separate institution and in order to be able to fulfil properly its judicial mandate, free from political considerations.”<sup>13</sup> For a criminal trial chamber, it is “imperative” to have “all the relevant evidence before it when making its decisions,” if only to “guarantee the rights of the accused.”<sup>14</sup> Croatia conceded that the Security Council could have granted the Tribunal the power to issue binding orders against States in an authorizing statute—it was a delegable power—and simply disputed whether the Council had done so.<sup>15</sup> An absence of express power to issue orders against States in the Statute of the

Tribunal would not determine the matter, Judge McDonald found, since the Tribunal's granted powers must also be interpreted to make it an effective institution. A teleological interpretation of the powers of UN organs was relied on by the International Court of Justice in the *Reparations Case*,<sup>16</sup> the *Effects of Awards Case*,<sup>17</sup> and the *Certain Expenses Case*.<sup>18</sup>

The Tribunal must have "the inherent power to compel the production of documents necessary for a proper execution of its judicial function," Judge McDonald concluded.<sup>19</sup> Because many of the crimes within the Tribunal's compass involve military operations, military records "may constitute vital evidence."<sup>20</sup> National courts have the power to compel the production of evidence from third parties, whether in the criminal justice systems of France, Germany, Pakistan, Spain, Scotland, Canada, or the United States.<sup>21</sup> The European Court of Justice enjoys the power to compel State parties to produce all documents and information "which the court considers desirable," and may compel non-party member States and institutions "to supply all information which the Court considers necessary for the proceedings."<sup>22</sup> Similar power was necessary for the International Tribunal for the former Yugoslavia to fairly adjudicate war crimes cases.

The decision did not rest on teleology alone. The Tribunal's Statute sustained the power to gather evidence by compulsory orders, Judge McDonald found. Article 19 of the Statute, approved by the Security Council, entitles a judge to issue "any . . . orders as may be required for the conduct of the trial," and Article 29 requires that States comply with any orders issued by a trial chamber of the Tribunal.<sup>23</sup> The mandatory nature of these measures is hardly surprising in a Tribunal created under Chapter VII authority. The power of the Tribunal to bind States is shown, for example, in the Tribunal's right to require States to defer a national prosecution in favor of the international case. The Report of the Secretary-General on the establishment of the Tribunal similarly notes that orders for the surrender or transfer of defendants "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."<sup>24</sup>

On the issue of possible penalties for non-compliance, the Trial Chamber was more reticent, finding the question not necessary for decision. The term "subpoena" is not meant to be a root-and-branch transplant from common law systems, Judge McDonald found; the alternative term "*assignation*" is used in the authentic French text. There is, therefore, no necessary connotation of penalty or coercive action.<sup>25</sup> It remains an open question what penalty, if any, may attend a State failure to comply with an order of production, Judge

McDonald said. And a “penalty” could amount to no more than a “note of non-compliance and reference of the matter to the Security Council.”<sup>26</sup>

Addressing subpoenas to named government officials was also approved by the Trial Chamber. The Tribunal has the power to direct binding orders to States and to private individuals; hence, it broke no barrier to permit their direction to named officials of the government. Although a State may designate a liaison to assist in the production of evidence, it cannot shield particular government officials from the duty of production. “The International Tribunal must have powers that are both practical and effective,” Judge McDonald noted, “and, as a criminal institution, this dictates that it seek the most direct route to any evidence which may have a bearing on the finding of guilt or innocence of the accused.”<sup>27</sup>

However, the Trial Chamber made a considerable concession to the conflicting obligations that may constrain a State official. States and individuals have a duty of compliance with the binding orders of the Tribunal. But a resistant State may interfere with an official’s attempt to comply, and forbid him to turn over desired documents. It could be unfair to place an individual in such a difficult position of conflict, Judge McDonald concluded. On the principle of *ultra posse nemo tenetur*—that an impossible act cannot be required—and because the Tribunal lacks police power to protect individuals against State retaliation, such an official is permitted to explain why compliance is not within his individual choice.<sup>28</sup> Of course, other witnesses may face local retaliation for compliance with orders to testify, but the Tribunal did not say what would happen if an ordinary witness made the same plea.

Judge McDonald also made clear that overbreadth or lack of specificity of a subpoena remains a potentially valid ground for challenge. Looking to national practice, the Tribunal noted that trial subpoenas could not be used for “fishing expeditions,” but had to look toward the production of admissible or potentially admissible evidence. Croatia’s objections on grounds of overbreadth were referred to the separate Trial Chamber conducting the Blaškić trial.<sup>29</sup>

Finally, the Trial Chamber ruled that national security claims deserved careful consideration but not automatic deference.<sup>30</sup> The need for pertinent evidence at trial had to be weighed alongside the valid interest that States may have in the protection of sensitive information. Any blanket exemption would cripple the doctrine of command responsibility, since the records of military operations lie at the center of proof of a commander’s conduct. National security claims have to be made with specificity, and evaluated by the Tribunal in light of the procedures available to minimize the prejudice of disclosure, such

as redaction of documents and closed proceedings. In the last analysis, the responsibility for weighing the concerns belongs to the Tribunal itself.<sup>31</sup>

### **The Appeals Chamber Decision**

After the decision of Trial Chamber II in July 1997, Croatia immediately took an appeal. Although the Blaškić trial had already begun on June 24, 1997, the Appeals Chamber stayed enforcement of the trial subpoenas.<sup>32</sup> The appeal attracted *amicus curiae* briefs from several governments.<sup>33</sup> The decision was delivered several months later, on October 29, 1997, with an opinion by President of the Tribunal Antonio Cassese,<sup>34</sup> dramatically headlined by the Tribunal's press office as "unanimously quash[ing]" the subpoenas issued to Croatia and Defense Minister Šušak,<sup>35</sup> but importantly holding that "binding orders" could be issued to Croatia,<sup>36</sup> and that there was no absolute national security privilege.

The overall judgment was in fact complicated, but two architectural features are clear. Each calls into some question the future competence of the International Tribunal as a judicial fact-finding body. First, the Appeals Chamber went out of its way to hold that the Tribunal lacks any direct enforcement powers against States to obtain the production of evidence. If a State declines to produce evidence pursuant to a binding order, the Tribunal's only recourse is to report the matter to the Security Council.<sup>37</sup> The Tribunal, in the Appeals Chamber's view, cannot even recommend a course of action to the Council.<sup>38</sup> There is little explanation of this result, especially against a background in which the European Court of Justice is now permitted to sanction States in civil cases.<sup>39</sup> Judge Cassese notes, simply, that "[h]ad the drafters of the [Tribunal's] Statute intended to vest the International Tribunal with such a power they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions."<sup>40</sup> The time pressure on the Security Council in creating the Tribunal in 1993 may not warrant such a spare account of the drafters' intention. One can instead take the result as the Appeals Chamber's estimate of what structure will or will not disturb some member countries.<sup>41</sup> The danger, of course, is that this dependency of the Tribunal potentially involves the Security Council in the intimate decisions of the conduct of a trial. Although the failure of a requested country to surrender or arrest an indicted defendant is, under the Court's judge-made rules,<sup>42</sup> also reported to the Security Council, the entry of politics into enforcement is perhaps less troubling at the pretrial stage than to have politics shape the availability of inculpatory and exculpatory

evidence in an ongoing case. The limits of the autonomy of the Tribunal as an independent judicial institution are sharply drawn by this outcome.<sup>43</sup>

One may also wonder why the Appeals Chamber chose to address penalties at this stage of the proceeding, before it is known whether Croatia would comply with the Tribunal's orders of production. Judge McDonald held that it was premature to decide possible penalties for non-compliance. Judge Cassese supposed that this depended on an idea of "ripeness" peculiar only to American jurisprudence, though judicial prudence is surely not so culturally specific. Under a "tariff" theory of jurisprudence, a disobedient party may wish to know the "cost" of his defiance in advance, but a Court wishing to establish its authority does not owe a duty to the recalcitrant to announce in advance the costs and benefits of resistance.

The Appeals Chamber's second restriction was to allow States to decide who can testify as a document custodian.<sup>44</sup> A named official cannot be called to appear in court, the appellate judges held, because States traditionally have had the right under customary international law to decide how they will go about fulfilling their international obligations, and individual officials are insulated from liability for acts undertaken on behalf of the State. But, as the Appeals Chamber remarks without stopping, the major exception to this immunizing rule of "acts of State" has been the law of war crimes and international humanitarian law.<sup>45</sup> It is a fundamental tenet of the modern law of war that State officials cannot take refuge from individual responsibility for illegal acts by invoking a claim of superior orders or State authority. It is surprising then, indeed, that the appeals judges should resurrect a doctrine of "acts of State" when it weakens the very procedures seeking to give teeth to the law of war.

The Court's misstep may be a result of not comprehending the full function of a custodian of documents as an evidentiary witness at trial. Documents cannot be assumed to be authentic, accurate, or complete. A custodian of documents is needed to authenticate the documents as genuine, to describe the routine by which they were kept, to describe how they were searched for and retrieved, and to say whether the run of documents is known to be complete. Even in ordinary conditions of peacetime, all custodians are not created equal—the evidentiary weight of the documents may depend on the persuasiveness of the testimony of the custodian. In the fog of war, with fluid conditions on a military front, the testimony of a custodian of documents is even more critical—to establish, for instance, whether a set of incoming reports from a field commander is preserved in whole or only in part. Commissioning the former belligerent States in the Yugoslav conflict to pick and choose which officials will be available to testify can undercut the strength

of the prosecution's evidence, and imperil a defendant's search for exculpatory evidence.

Equally troublesome is the Appeals Chamber's intimation that the Tribunal may not call *factual eyewitnesses* who happen to be government officials. Although Croatia's challenge concerns document subpoenas, with no issue or decision in the Trial Chamber concerning subpoenas *ad testificandum*, the Appeals Chamber went out of its way to address what eyewitnesses can be subjected to a subpoena or binding order to testify. An individual acting in a private capacity could be subpoenaed before the Tribunal, the Appeals Chamber said.<sup>46</sup> But a State official could not be summoned, either by subpoena or binding order.<sup>47</sup> And on the crucial question of when a witness has acted in an official capacity, the Appeals Chamber gave the following enigmatic explanation:

It should be noted that the class of "individuals acting in their private capacity" also includes State agents who, for instance, witnessed a crime *before* they took office, or found or were given evidentiary material of relevance for the prosecution or the defence *prior* to the initiation of their official duties. In this case, the individuals can legitimately be the addressees of a subpoena. Their role in the prosecutorial or judicial proceedings before the International Tribunal is unrelated to their current functions as State officials.<sup>48</sup>

But if the official witnessed an atrocity at first hand *while serving in office*, the result is more equivocal. The Appeals Chamber posed

the example of a colonel who, in the course of a routine transfer to another combat zone, overhears a general issuing orders aimed at the shelling of civilians or civilian objects. In this case the individual must be deemed to have acted in a private capacity and may therefore be compelled by the International Tribunal to testify as to the events witnessed. By contrast, if the State official, when he witnessed the crime, was actually exercising his functions, i.e., the monitoring of the events was part of his official functions, then he was acting as a State organ and cannot be subpoenaed, as is illustrated by the case where the imaginary colonel overheard the order while on an official inspection mission concerning the behaviour of the belligerents on the battlefield.<sup>49</sup>

It is not entirely clear, from this loosely drafted hypothetical, whether the Appeals Chamber is resting on a distinction between "subpoenas" and "binding orders," but it might appear from the heading of the section—"Whether the International Tribunal May Issue Binding Orders to Individuals Acting in Their Private Capacity"—that the colonel tasked to monitor battlefield

operations is to be insulated from any form of compulsory process. This is an extraordinary *bouleversement*, potentially depriving the Tribunal of a critical source of testimony. A charitable reading of the opinion is to dismiss this as unnecessary dicta and superfluous illustration.

One may also speculate that perhaps the Appeals Chamber was primarily concerned with the *initial addressee* of an order to testify—that a binding order still could be directed to the State in question, requiring the eyewitness testimony of the particular named official. After all, the vital nature of official eyewitness testimony is self-evident. This reading of Judge Cassese’s opinion is warranted by his ultimate conclusion that no grave harm should be done to the efficacy of proof. “[I]n the case of State officials there is no compelling reason warranting a departure from general rules [of international law]. To make use of the powers flowing from Article 29 of the Statute, it is sufficient for the International Tribunal to direct its orders and requests to States . . . .” By contrast, Judge Cassese observes, Croatia’s claim of an unbounded national security privilege would shield “documents that might prove of decisive importance to the conduct of trials” and would “be tantamount to undermining the very essence of the International Tribunal’s functions.”<sup>50</sup>

Nonetheless, the impracticality of the Tribunal’s etiquette of address remains. The Appeals Chamber notes later that, at least in contacting private individuals, it “might jeopardise investigations” to go through the governments of former belligerent States or entities, “some authorities of which might be implicated in the commission of these crimes.”<sup>51</sup> This would seem equally true in the case of official eyewitnesses who formerly served as officials or employees of the belligerent governments.

Despite the general immunity of international organizations from judicial process, the Tribunal does not extend the umbrella of “public capacity” to members of international peacekeeping forces. If a member of UNPROFOR, IFOR, or SFOR “witnesses the commission or the planning of a crime in a monitoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country.”<sup>52</sup> It is less than clear why the national versus international structure of a military organization should change the availability of an individual eyewitness at trial, unless the Appeals Chamber believes that members of a troop-contributing country have a greater duty of obedience to Security Council decisions than do the soldiers of belligerents.

One promising caveat noted by the Appeals Chamber is that where a State has been required to produce documents for trial and the pertinent State official resists doing so, if the State is unable to coerce his compliance, then “it is sound practice to ‘downgrade’, as it were, the State official to the rank of an individual acting in a private capacity,” and subject him to a subpoena and proceedings for contempt.<sup>53</sup>

But the Appeals Chamber also limits the scope of subpoena power in a fashion that could make prosecutions more difficult. Citing Croatia’s stylized complaint against “highly controversial U.S.-style discovery process,” the Appeals Chamber strictureed that any requests must identify “specific documents,” rather than “broad categories,” must not be “unduly onerous” or “overly taxing” and certainly could not number in the “hundreds of documents.”<sup>54</sup> In trying to reconstruct battlefield supervision, these may not be realistic limits.

Still, in important steps forward, the Appeals Chamber sustains the holding that States are subject to binding orders of the Tribunal for the production of documentary evidence, and dismisses Croatia’s contention that an absolute national security privilege should be recognized. Claims that the disclosure of military documents will prejudice national security must be substantiated by submitting the documents to the scrutiny of a Judge of the Trial Chamber for *in camera* review, to decide whether they are relevant to the proceeding and whether their relevance is “outweighed, in the appraisal of the Judge, by the need to safeguard legitimate national security concerns.”<sup>55</sup> Redaction of parts of a document may be permitted before their use at trial. In the “exceptional case” of “one or two particular documents” of great “delica[cy] from the national security point of view,” a State may be excused from submitting the documents to the Judge based on generic representations of the reasons for this. In a world in which it is dangerous to compromise human intelligence sources and the capability of national technical means, this is a wise exception. The Tribunal faces a considerable dilemma. On the one hand, the proof of command responsibility for atrocities in wartime may often crucially depend on evidentiary use of the belligerents’ military records. On the other hand, even former belligerents, and certainly “third party” countries, may have a legitimate concern about national security. The ethical standards attending international judicial office and the procedural precautions described in the Appeals Chamber’s opinion may not persuade national governments that they can afford the risks of complete disclosure in the most serious cases. Thus, allowing some practical elbow room in the opinion was the wisest course.

Interestingly, here the Appeals Chamber humors a distinction among State actors. Unlike its earlier insistence that no distinction should be recognized among the sources of obligation to the Tribunal, even for former belligerent States bound by the Dayton Accord,<sup>56</sup> the Appeals Chamber is willing to credit a particular State's track record of cooperation with the Tribunal in assessing a national security claim.<sup>57</sup>

As a matter of interpretive method, one may question the acrobatics of the "clear statement" rule—why the Appeals Chamber is willing to assume that the drafters of the Tribunal's statute intended to preserve the procedural immunity of State officials from subpoena, while newly compelling the disclosure of national security documents. The Appeals Chamber heralds the "innovative and sweeping obligation laid down in Article 29" with "its undeniable effects on State sovereignty and national security."<sup>58</sup> "Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly," the Appeals Chamber offers, adding that "it would be unwarranted to read into Article 29 limitations or restrictions on the powers of the International Tribunal not expressly envisaged either in Article 29 or in other provisions of the Statute."<sup>59</sup> One wonders why this interpretive principle applies to the national security exception, but not to the subpoena of State officials or the imposition of coercive measures on former belligerents that decline to produce necessary documents.

One of the difficulties of the method of the *Blaškić* appeals opinion, in the long run, is what it means for the permanent International Criminal Court. The ambivalence toward a tribunal's inherent powers in crafting a workable procedure for investigations and trial places a heavy burden on the prospective State parties of a permanent court, to assure that the new treaty provides for most serious contingencies that a court will face. Unlike a domestic judiciary, where structure and procedure can be crafted by the courts over time in a dialogue with the legislative branch, creational acts in the international system are far more occasional, and treaty amendment will be a slow and cumbersome process. Thus the statute for a permanent court addressed by the Rome diplomatic conference in 1998 must be measured against the strict standard of whether its text yields a workable institution or a stillborn structure. In light of *Blaškić*, one cannot count upon the creative powers of judges to fill out an incomplete sketch.

Notes

Many of the documents cited in this article are available on the web-site of the International Criminal Tribunal for the former Yugoslavia. <http://www.un.org/icty/>.

1. S.C. Res. 827, May 25, 1993, U.N. S/RES/827 (1993) (approving Report of the Secretary-General and adopting the Statute of the Tribunal).

2. See Indictment, Prosecutor v. Dario Kordic, Tihofil a/k/a Tihomir Blaškić, Mario Cerkez, Ivan a/k/a Ivica Santic, Pero Skopljak, Zlatko Aleksovski, No. IT-95-14, Nov. 10, 1995; superseded as to defendant Blaškić by Amended Indictment, Prosecutor v. Tihomir Blaškić, No. IT-95-14-T, Nov. 15, 1996, and by Second Amended Indictment, *id.*, Apr. 25, 1997.

3. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Duško Tadić a/k/a "Dule", No. IT-94-1-AR72, Appeals Chamber, Oct. 2, 1995, para. 81; Opinion and Judgment, Prosecutor v. Duško Tadić a/k/a "Dule", Trial Chamber, May 7, 1997, paras. 559, 560, 602-608 (Tadić found not guilty on charges of grave breaches of the Geneva Conventions because armed forces of Republika Srpska were not, at pertinent date and place, *de facto* organs or agents of the Federal Republic of Yugoslavia); *id.*, para. 571 ("the extent of the application of international humanitarian law from one place to another in the Republic of Bosnia and Herzegovina depends upon the particular character of the conflict with which the indictment is concerned. This depends in turn on the degree of involvement of the [armed forces] and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA [Yugoslav People's Army] on 19 May 1992.").

4. In the words of the Second Amended Indictment, if he "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution" of the illegal acts.

5. In the words of the Second Amended Indictment, if he "knew or had reason to know that subordinates were about to perform illegal acts or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

6. See Statute of the International Tribunal, in the Secretary General's Report on Aspects of Establishing of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, art. 7(3), U.N. Doc. S/25704 (May 3, 1993), 32 I.L.M. 1159 (1993).

7. See I.C.J. Statute art. 50.

8. Bosnia and Herzegovina also accepted a subpoena *duces tecum* issued at the request of defendant Blaškić for the production of any exculpatory documents.

9. Decision on the Objections of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Prosecutor v. Blaškić, No. IT-95-14-PT, Trial Chamber II, July 18, 1997 [hereinafter Blaškić Subpoena Trial Chamber Decision].

10. See Rule 54 of the Rules of Procedure and Evidence, as amended January 1995, in Second Annual Report of the Tribunal, August 23, 1995, and in U.N. Doc. A/50/365:

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. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 14 (emphasis added).

12. See U.N. CHARTER art. 29.

13. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 22.

14. *Id.*, paras. 31 & 32.

15. *Id.*, para. 25.

16. Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 171.

17. Effects of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13, 1954, 1954 I.C.J. 47.
18. Certain Expenses of the United Nations, 1962 I.C.J. 151.
19. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 41.
20. *Id.*, para. 34.
21. *Id.*, paras. 36-39.
22. See Statute of the European Court of Justice, art. 21; Statute of the Court of Justice of the European Coal and Steel Community, art. 24; and Statute of the Court of Justice of Euratom, art. 22(1).
23. Statute of the International Tribunal, *supra* note 6, art. 29(2):  
States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . (b) the taking of testimony and the production of evidence.
24. Secretary-General's Report, *supra* note 6, para. 126, cited in Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 50.
25. Blaškić Subpoena Trial Chamber Decision, *supra* note 9, para. 61.
26. *Id.*, para. 60.
27. *Id.*, para. 69.
28. *Id.*, paras. 94-96.
29. *Id.*, paras. 97-106. As of the date of this writing, in March 1998, Croatia's challenges to the scope of the subpoenas still have not been resolved.
30. *Id.*, para. 131.
31. *Id.*, paras. 133, 148-49.
32. Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum*) and Scheduling Order, Prosecutor v. Blaškić, No. IT-95-14-AR108 *bis*, Appeals Chamber, July 29, 1997.
33. *Amicus curiae* briefs were filed by the People's Republic of China, the Government of the Kingdom of the Netherlands, the Governments of Canada and New Zealand, and the Government of Norway. Briefs were also filed by Carol Elder Bruce, Juristes Sans Frontières and Alain Pellet, Max Planck Institute for Foreign and International Criminal Law, Herwig Roggemann, and Ruth Wedgwood.
34. Judge Cassese was joined by Judges Haopei Li of China, Ninian Stephen of Australia, and Lal Chand Vohrah of Malaysia. Judge Adolphus G. Karibi-Whyte of Nigeria filed a separate opinion dissenting only as to the procedure for determining national security claims. See note 55, *infra*.
35. ICTY Press Release, CC/PIO/253-E, Oct. 29, 1997: "SUBPOENA ISSUE: THE APPEALS CHAMBER UNANIMOUSLY QUASHES THE SUBPOENAE ISSUED TO CROATIA AND ITS DEFENCE MINISTER. Prosecutor free to submit a new request for 'a binding order to Croatia alone.'"
36. Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, Prosecutor v. Blaškić, No. IT-95-14-AR108 *bis*, Appeals Chamber, Oct. 2, 1997, para. 26 [hereinafter Blaškić Subpoena Appeals Chamber Decision]. Subpoenas, though expressly provided for in Rule 54 of the Tribunal, could only be issued to individuals acting in a private capacity. *Id.*, para. 21.
37. *Id.*, para. 33.
38. *Id.*, para. 36.
39. See Treaty Establishing the European Community, art. 171; *cf.* Statute of the European Court of Justice, art. 24; but see EUROPEAN COURTS: PRACTICE AND PRECEDENTS §§ 11-63 (Richard Plender ed., 1997).

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40. Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 25.

41. The Appeals Chamber's doubt that the Security Council would allow enforcement powers to a subordinate body is challenged by Security Council Resolution 1022 (Nov. 22, 1995), suspending economic sanctions against the Federal Republic of Yugoslavia and Republika Srpska (the Bosnian Serb entity). Resolution 1022 allowed economic sanctions to be automatically reimposed by the High Representative or the military commander of IFOR if either official "informs the Council via the Secretary-General that [the parties] are failing significantly to meet their obligations under the Peace Agreement." The Council could block the reimposed sanctions only with the concurrence of the Council's five permanent members.

Judge Cassese noted, in a November 1996 conference on the Bosnian peace process held at Yale University, that "it was clear when the Security Council passed Resolution 1022 that they regarded cooperation with our Tribunal as a crucial feature of the Dayton Agreement." The High Representative and IFOR commander were given the "clear message . . . that they were free to trigger sanctions." See Remarks of Antonio Cassese, in *AFTER DAYTON: HAS THE BOSNIAN PEACE PROCESS WORKED?* (Ruth Wedgwood ed., Council on Foreign Relations Press, forthcoming 1998).

Resolution 1022 was rescinded on October 1, 1996, after the completion of national elections in Bosnia and Herzegovina. See S.C. Res. 1074, Oct. 1, 1996.

42. See Rules 59(B) and 61(E) of the Rules of Procedure of the Tribunal.

43. Cf. Amicus Curiae Brief submitted by the Netherlands, Prosecutor v. Blaškić, No. IT-95-14-AR108 bis, Sept. 12, 1997, para. 17:

The effectiveness of the Tribunal might be impaired if it is always dependent on decisions to be taken by the Security Council in cases where states continue to refuse to cooperate. For this reason the Netherlands believes there is some basis for arguing that the implied powers of the ICTY make it desirable for there to be a provision comparable to Rule 77 [a court-made rule on contempt] which would be applicable to states so that fines or other penalties may be imposed whenever the Tribunal establishes that a state has not fulfilled its obligations. In order to clarify this important issue, the Tribunal might ask the Security Council to give a ruling on the question of whether in carrying out its mandate, the Tribunal is entitled to impose fines or other sanctions on a state when it has established that the state has failed to execute an order or subpoena.

44. Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, paras. 38, 43, 45.

45. *Id.*, para. 41.

46. *Id.*, para. 46.

47. *Id.*, paras. 38, 43.

48. *Id.*, para. 49 (emphasis added).

49. *Id.*, para. 50.

50. *Id.*, para. 84.

51. *Id.*, para. 53.

52. *Id.*, para. 50.

53. *Id.*, para. 51.

54. *Id.*, para. 32.

55. *Id.*, para. 68. Judge Adolphus Karibi-Whyte dissented on this issue on the ground that the decision on claims of national security had to be taken by the full Trial Chamber, not a single Judge.

56. *Id.*, para. 29. But see Remarks of Antonio Cassese, in *AFTER DAYTON*, *supra* note 41 ("the obligation to cooperate with our tribunal . . . was restated and even spelled out in the Dayton Agreement" and "extended to the two entities that previously were not directly bound

by it, namely the Federation of Bosnia and Herzegovina and the Republika Srpska.”). *See also* Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 26, n. 36 (“even if one were to doubt” the status of the Federal Republic of Yugoslavia as a member of the United Nations, because of its suspension from participation in the work of the General Assembly under General Assembly Res. 47/1, 22 Sept. 1992, “its signing of the Dayton/Paris Accord of 1995 would imply its voluntary acceptance of the obligations flowing from Article 29.”).

57. “The degree of bona fide cooperation and assistance lent by the relevant State to the International Tribunal, as well as the general attitude of the State vis-à-vis the International Tribunal (whether it is opposed to the fulfillment of its functions or instead consistently supports and assists the International Tribunal), are no doubt factors the International Tribunal may wish to take into account throughout the whole process of scrutinising the documents which allegedly raise security concerns.” Blaškić Subpoena Appeals Chamber Decision, *supra* note 36, para. 68.

58. *Id.*, para. 64.

59. *Id.*, para. 63.