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**UNITED NATIONS**

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| 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-AR108 *bis* |
| | Date: | 29 October 1997 |
| | Original: | English and French |

**IN THE APPEALS CHAMBER**

**Before:** **Judge Antonio Cassese, Presiding**
**Judge Adolphus Karibi-Whyte**
**Judge Haopei Li**
**Judge Ninian Stephen**
**Judge Lal Chand Vohrah**

**Registrar:** **Mrs. Dorothee de Sampayo Garrido-Nijgh**

**Judgement of:** **29 October 1997**

**PROSECUTOR**
**v.**
**TIHOMIR BLAŠKIĆ**

# JUDGEMENT ON THE REQUEST OF THE REPUBLIC OF CROATIA FOR REVIEW OF THE DECISION OF TRIAL CHAMBER II OF 18 JULY 1997

**The Office of the Prosecutor**

**Ms. Louise Arbour, Prosecutor** **Mr. Mark Harmon**

**The Republic of Croatia**

**Ambassador Ivan Šimonović** **Mr. Ivo Josipović**
**Mr. David B. Rivkin Jr.** **Mr. Lee A. Casey**

**Defence Counsel for Tihomir Blaškić**

**Mr. Russell Hayman**
**Mr. Anto Nobilo**

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# I. INTRODUCTION

## A. Background

1. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("International Tribunal") is seized of the question of the validity of a *subpoena duces tecum* issued by Judge Gabrielle Kirk McDonald to the Republic of Croatia ("Croatia") and its Defence Minister, Mr. Gojko Šušak, on 15 January 1997. This matter arises by way of a challenge by Croatia to the Decision of Trial Chamber II on 18 July 1997 ("Subpoena Decision")[1] upholding the issuance of the said *subpoena duces tecum* by Judge McDonald, and ordering compliance therewith by Croatia within 30 days. Croatia has challenged the legal power and authority of the International Tribunal to issue this compulsory order to States and high government officials. The legal issues that have been argued before this Chamber address the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* in general and, in particular, to a State; the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* to high government officials of a State and other individuals; the appropriate remedies to be taken if there is non-compliance with such *subpoenae duces tecum*; and other issues including the question of the national security interests of sovereign States.

## B. Procedural History

2. Pursuant to *ex parte* requests by the Office of the Prosecutor ("Prosecution") on 10 January 1997, Judge McDonald issued on 15 January 1997 *subpoenae duces tecum* to Croatia and its Defence Minister, Mr. Šušak[2], and also to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive of what was

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[1] Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, T. Ch. II, 18 July 1997 (*"Subpoena Decision"*).
[2] *Subpoena duces tecum* to the Republic of Croatia and to the Defence Minister Gojko Šušak, *ibid.*, Judge McDonald, 15 Jan. 1997.

formerly the Ministry of Defence of the Croatian Community of Herceg Bosna[3]. The requests for the *subpoenae duces tecum* were submitted for consideration to Judge McDonald, who issued them in her capacity as the Judge confirming the Indictment against Tihomir Blaškić[4].

3. In a letter dated 10 February 1997[5], Croatia declared "its readiness for full cooperation under the terms applicable to all states", but challenged the legal authority of the International Tribunal to issue a *subpoena duces tecum* to a sovereign State and objected to the naming of a high government official in a request for assistance pursuant to Article 29 of the Statute of the International Tribunal ("Statute").

4. On 14 February 1997, a hearing was held at which the addressees of the *subpoenae duces tecum* were requested to appear to answer questions relevant to the production of the subpoenaed documents. A representative of the Government of Bosnia and Herzegovina attended and explained the steps taken thus far in compliance with the *subpoena duces tecum*. Croatia did not attend, and Judge McDonald issued an Order of a Judge to ensure compliance with a *subpoena duces tecum*[6] requesting Croatia and Mr. Šušak to produce the documents or, in the event of non-compliance, requiring a representative of the Ministry of Defence personally to appear before her on 19 February 1997 to show cause of their non-compliance.

5. Representatives from both Croatia and Bosnia and Herzegovina attended the hearing on 19 February 1997. On 20 February 1997, Judge McDonald suspended the

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[3] *Subpoena duces tecum* 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 Herzeg Bosna, *ibid.*, Judge McDonald, 15 Jan. 1997.

[4] Indictment, *ibid.*, 10 Nov. 1995.

[5] Letter from Mr. Srećko Jelinić, *ibid.*, 10 Feb. 1997.

[6] Order of a Judge to ensure compliance with a *subpoena duces tecum, ibid.*, Judge McDonald, 14 Feb. 1997. Judge McDonald also, on 14 February 1997, issued an Order to ensure compliance with a *subpoena duces tecum* to Bosnia and Herzegovina and Mr. Ante Jelavić, the Minister of Defence; she issued further orders of compliance on 20 February 1997, 28 February 1997 and 7 March 1997 to Bosnia and Herzegovina and Mr. Jelavić, all pertaining to *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT.

9. The Prosecution submitted, on 20 March 1997, a Request of the Prosecutor in respect of issues to be briefed for the hearing of 16 April 1997 relating to *subpoenae duces tecum* by which it sought to narrow the scope of the issues to be briefed and, also on 21 March 1997, a Request for reinstatement of *subpoena duces tecum*. Both were opposed by Croatia. On 27 March 1997, the Trial Chamber denied the two requests of the Prosecution[11].

10. Bosnia and Herzegovina submitted its Brief on the Issues on 25 March 1997. On 1 April 1997, an Order inviting the defence to file a brief and participate in the hearing to discuss issues regarding *subpoenae duces tecum* was issued[12]. The Prosecution, the Minister of Defence of Bosnia and Herzegovina, and Croatia submitted briefs on 1 April 1997 regarding the *subpoenae duces tecum*. Croatia responded to the Prosecution's Brief on 11 April 1997. Also submitted prior to the 16 April 1997 hearing, with leave, were *amicus curiae* briefs from:

- Bartram S. Brown;
- Luigi Condorelli;
- The Croatian Association of Criminal Science and Practice;
- Marie-José Domestici-Met;
- Donald Donovan for the Lawyers Committee for Human Rights;
- Jochen A. Frowein, Georg Nolte, Karin Oellers-Frahm and Andreas Zimmermann, for the Max-Planck-Institute for Comparative Public Law and International Law;
- Annalisa Ciampi and Giorgio Gaja;
- Peter Malanczuk;
- Juristes sans frontières and Alain Pellet;
- Juan-Antonio Carrillo Salcedo;
- Bruno Simma;
- Thomas Warrick, Rochelle Stern and J. Stefan Lupp; and
- Ruth Wedgwood.

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[11] Order denying application in respect of the issues regarding *subpoenae duces tecum, ibid.*, T. Ch. II, 27 Mar. 1997.
[12] Order inviting defence to participate in hearing in respect of the issues regarding *subpoenae duces tecum, ibid.*, 1 Apr. 1997.

11. In a letter dated 15 April 1997, Mr. Jelinić, on behalf of Croatia, requested, *inter alia,* that Judge McDonald recuse herself from participating in the hearing set for 16 April 1997 as she was "the Judge who issued the order that is here at issue". On 16 April 1997, the Bureau of the International Tribunal, consisting of President Cassese, Vice-President Karibi-Whyte, and the two Presiding Judges of the Trial Chambers, Judge Jorda and Judge McDonald, met to consider this request. After stating her position on the issue, Judge McDonald retired and the Bureau considered the request in her absence. The Bureau concluded that the impartiality of Judge McDonald was in no way affected by her earlier participation in the issuing of the subpoena and that she was therefore not precluded by Rule 15 (A) of the Rules from further participation[13].

12. The hearing before Trial Chamber II was held on 16 and 17 April 1997. The Prosecution, Croatia, Bosnia and Herzegovina, a representative of its Minister of Defence, Mr. Ante Jelavić, and counsel for the accused, as well as several of those who submitted *amicus curiae* briefs[14], presented oral arguments. On 8 May 1997, Croatia submitted, with leave of the Trial Chamber, a final Brief in opposition to *subpoena duces tecum*, to which the Prosecution responded on 28 May 1997 after having been granted an extension of time.

13. Trial Chamber II delivered the Subpoena Decision on 18 July 1997. The issuance of the *subpoena duces tecum* to Croatia and its Defence Minister by Judge McDonald on 15 January 1997 was upheld; the said *subpoena duces tecum* which had been suspended on 20 February 1997 was reinstated, and Croatia was ordered to comply with its terms within 30 days. It was determined that a Judge or Trial Chamber of the International Tribunal has the power and authority to issue orders

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[13] Decision on the Croatian request for recusation of Judge McDonald, *ibid.*, Bureau, 16 Apr. 1997.

[14] Those who addressed the Trial Chamber were Alain Pellet, Luigi Condorelli, Vladimir Lujbanović on behalf of the Croatian Association of Criminal Science and Practice, Andreas Zimmermann for the Max-Planck-Institute, Ruth Wedgwood, Peter Malanczuk, and Donald Donovan for the Lawyers Committee for Human Rights.

such as *subpoena duces tecum* to States, high government officials and individuals. It held that while international law provides that it is for the State to determine how it will fulfil its international obligations, this does not mean it can enact national legislation imposing conditions on the fulfilment of such obligations, particularly with respect to State obligations under Chapter VII of the Charter of the United Nations. Security Council resolutions 827 and 1031 demonstrate the intention of the Security Council that States should give effect to and are bound to comply fully with orders of the International Tribunal. Their officials are likewise bound to comply with *subpoenae duces tecum* addressed to them in their official capacity. It was furthermore stressed that, whilst such officials are subject to the orders of the International Tribunal, States are also responsible for compliance and for requiring compliance with orders of the International Tribunal. National security considerations are not subject to absolute privilege and cannot be validly raised as an automatic bar to compliance with orders of the International Tribunal. A claim of national security having been raised, it falls within the competence of the Trial Chamber to determine the validity of this assertion by, for example, holding an *in camera*, *ex parte* hearing whereby it may examine such evidence. The Trial Chamber declined to consider the issue of remedies available for failure to comply with such orders as it was felt to be not ripe for consideration at that stage.

14. On 25 July 1997, pursuant to Rule 108 of the Rules, Croatia filed a Notice of appeal and request for stay of the Trial Chamber's Order of 18 July 1997. The Appeals Chamber was asked to review and set aside the Subpoena Decision, to quash the *subpoena duces tecum* issued by Judge McDonald to Croatia and its Minister of Defence on 15 January 1997 and to stay the Trial Chamber's Order of 18 July 1997, pending resolution of the appeal. The Appeals Chamber was also asked to instruct the Trial Chamber and Prosecution that no further compulsory orders under threat of sanction may be issued to States or their officials.

15. On 29 July 1997, the Appeals Chamber declared admissible Croatia's request for review of the Subpoena Decision under Rule 108 *bis* of the Rules[15]. It stayed the execution of the *subpoena duces tecum* issued by Judge McDonald to Croatia and its Minister of Defence on 15 January 1997 and the Order of Trial Chamber II to Croatia on 25 July 1997 pending resolution of the issues on appeal. The Appeals Chamber also, pursuant to Rule 74 of the Rules, invited interested *amici curiae* to submit briefs by 15 September 1997 addressing the following issues:

(1) the power of a Judge or Trial Chamber of the International Tribunal to issue a *subpoena duces tecum*;

(2) the power of a Judge or Trial Chamber of the International Tribunal to make a request or issue a *subpoena duces tecum* to high government officials of a State;

(3) the appropriate remedies to be taken if there is non-compliance with a *subpoena duces tecum* or request issued by a Judge or Trial Chamber; and

(4) any other issue concerned in this matter, such as the question of the national security interests of a sovereign State.

16. On 4 August 1997, the Prosecution filed a Motion to set aside the Decision of the Appeals Chamber of 29 July 1997. This was followed on 8 August 1997 by the filing by Croatia of its opposition to that motion. On 12 August 1997, the Appeals Chamber rejected the Prosecution's motion to set aside its Decision of 29 July 1997, confirmed the suspension of the execution of the *subpoena duces tecum* and the compliance order of Trial Chamber II to Croatia, confirmed the scheduling order and set the hearing of the appeal for 22 September and 23 September 1997[16].

17. The Brief on appeal of the Republic of Croatia in opposition to *subpoena duces tecum* was filed on 18 August 1997, and was followed by the Prosecution's

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[15] 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 Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, A. Ch., 29 July 1997.

[16] Decision on prosecution motion to set aside the Decision of the Appeals Chamber of 29 July 1997, *ibid.*, A. Ch., 12 Aug. 1997.

Brief in response on 8 September 1997. Croatia replied to the Prosecution's Brief on 15 September 1997. Pursuant to the invitation of the Appeals Chamber on 29 July 1997, the following submitted *amicus curiae* briefs:

- The People's Republic of China;
- The Government of the Kingdom of the Netherlands;
- The Governments of Canada and New Zealand;
- The Government of Norway;
- Ruth Wedgwood;
- Max Planck Institute for Foreign and International Criminal Law;
- Juristes sans frontières and Alain Pellet;
- Carol Elder Bruce; and
- Herwig Roggemann.

18. On 22 September 1997, the challenge of Croatia to the *subpoena duces tecum* issued by Judge McDonald and the Subpoena Decision was heard by the Appeals Chamber consisting of Judge Cassese (presiding), Judge Karibi-Whyte, Judge Li, Judge Stephen and Judge Vohrah. Oral submissions were made by Croatia, by the Prosecution, and by counsel for the accused and an oral statement was made by Ambassador Šimonović on behalf of Croatia.

19. After due consideration of the written briefs and oral arguments by the parties, and also having considered the submissions by *amici curiae*, the Appeals Chamber issues the following Judgement.

## II. DISCUSSION

### A. Preliminary Questions

#### 1. The legal meaning of the term "subpoena"

20. The Appeals Chamber deems it appropriate to deal at the outset with two issues that are preliminary to the various questions with which it is seized. The first issue may be regarded by some as pertaining more to nomenclature than to substance, but in reality relates to both: should the term "subpoena" be understood to mean an injunction accompanied by a threat of penalty in case of non-compliance? Or should one rather take the view propounded at the hearings before the Trial Chamber by the Prosecutor, and upheld by the Trial Chamber, that the term subpoena should be understood to mean only a binding order, without "necessarily imply[ing] the assertion of a power to imprison or fine, as it may in a national context"[17]?

21. As just pointed out, the Trial Chamber held that the word "subpoena" must be given the neutral meaning of "binding order". However, it left open the question of whether or not a penalty could be imposed for non-compliance with such an order. The Trial Chamber noted that, under Rule 54 of the Rules, "it would be incorrect to infer that a penalty was envisaged, just as it would be incorrect to infer that a penalty was excluded from consideration" (emphasis added)[18].

For a proper interpretation of the word "subpoena" used in Rule 54, the Appeals Chamber starts from the premise that (i) in common-law jurisdictions, where the word at issue is a term of art, it usually designates compulsory orders issued by courts, the non-compliance with which may be "sanctioned" as contempt of court, and (ii) in the French text of Rule 54, as correctly emphasised by the Trial Chamber, the

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[17] *Subpoena Decision*, *supra* n. 1, para. 62, and *see also* paras. 64 and 78.
[18] *Ibid.*, para. 61.

equivalent of "subpoena", namely "*assignation*", "does not necessarily imply any imposition of a penalty"[19]. Based on this premise, two interpretations seem possible. First, as suggested by one of the *amicus curiae*, one could argue that "the legal concepts incorporated in the rules are severed from their origin in one specific legal culture. In other words, the meaning of certain terms in the rules of the ICTY is not pre-determined by the interpretation of these terms in the legal culture from which they originate but must be ascertained independently in the context of the specific framework of the tasks and purposes of the ICTY"[20]. As a consequence, "it seems inconceivable that the use of the term *subpoena* in Rule 54 could include an authorization of Trial Chambers and/or Judges to impose penalties in case of unjustified non-compliance"[21]. A different interpretation has been suggested by another *amicus curiae*. According to this interpretation, in order to reconcile the two texts of Rule 54 and at the same time take account of the fact that States cannot be the subject of penalties or sanctions by an international court, the term "subpoena" in the English text should not be construed as always meaning a compulsory order not capable of being enforced by a penalty; rather, in light of the principle of effectiveness (*ut res magis valeat quam pereat*), that word should be given a narrow interpretation: it should only refer to compulsory orders, implying the possible imposition of a penalty, issued to individuals acting in their private capacity[22].

The Appeals Chamber upholds the latter interpretation. Rule 7 provides that in the event of discrepancy between the English and French texts of the Rules, "the version which is more consonant with the spirit of the Statute and the Rules shall prevail". Pursuant to this principle of construction, the Appeals Chamber has to take into account certain factors. Admittedly, Article 29, paragraph 2, of the Statute only mentions "orders" and "requests", without referring to "subpoenas". However, it

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[19] *Ibid.*, para. 61.

[20] *See amicus curiae* brief submitted by B. Simma, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, 14 Apr. 1997, ("*Simma Brief*") p. 9.

[21] *Ibid.*, p. 12. It should be noted that according to this *amicus curiae,* in any case, even in Anglo-American legal systems, "the issuance of a *subpoena* does not inevitably trigger the imposition of penalties in case of a non-compliance" (*ibid.*, p. 10).

[22] *See amicus curiae* brief submitted by A. Pellet and Juristes sans frontières, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-AR108 *bis,* 11 Apr. 1997.

would be contrary to the general principle of effectiveness (*principe de l'effet utile*), to make redundant the word "subpoena" in the English text of Rule 54 by giving it the neutral meaning of "binding order". Since, as shall be seen below (paragraphs 24 - 25 and 38), the International Tribunal is not empowered to issue binding orders under threat of penalty to States or to State officials, it is consonant with the spirit of the Statute and the Rules to place a narrow interpretation on the term of art at issue and construe it as referring only and exclusively to binding orders addressed by the International Tribunal, under threat of penalty, to individuals acting in their private capacity. The same holds true for the French term "*assignation*", which must be taken exclusively to refer to orders directed to such individuals and involving a penalty for non-compliance.

2. Whether the question of legal remedies is "ripe for consideration"

22. The second preliminary issue is whether, in adjudicating the various questions under consideration, the Appeals Chamber should also pronounce upon the legal remedies available in case of non-compliance with binding orders or subpoenas of the International Tribunal. The Trial Chamber held that this issue "is not yet ripe for consideration"[23], although it then hinted in passing at a host of remedies and penalties[24]. The Trial Chamber thus applied the so-called "ripeness doctrine" upheld by United States courts. Under this doctrine, a court should refrain from determining issues that are only hypothetical or speculative, or at any rate devoid of sufficient immediacy and reality as to warrant adjudication. It is well known that in the United States this doctrine is derived from the "case or controversy" clause of Article III of the United States Constitution and is intended to prevent courts from hearing complaints about agency action that has not yet injured the plaintiff[25]. The Appeals

[23] *Subpoena Decision*, *supra* n. 1, para. 1.
[24] *Ibid.*, paras. 62, 77 and 92.
[25] As held in *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967), by the United States Supreme Court, ripeness consists of a two-pronged test: first, are the issues fit for judicial review? Secondly, what hardship would the parties face if review is denied?

Chamber, with respect, determines that it is inappropriate to resort to this doctrine in these proceedings.

23. This conclusion rests on two grounds. First, whatever the merits of this doctrine, it appears to the Appeals Chamber to be inapposite to transpose it into international criminal proceedings. The Appeals Chamber holds that domestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings.

24. Secondly, even if the Appeals Chamber were to accept the importation of that doctrine into international criminal proceedings, its application would not lead to the results suggested by the Trial Chamber. Counsel for Croatia has submitted that, if faced with a similar situation, United States courts would probably hold that there was an actual controversy fit for judicial review, or at least determine that a declaratory judgement could be requested by the party concerned[26]. The Appeals Chamber emphasises that Croatia challenged both the power of the International Tribunal to issue subpoenas to States and its power to adopt sanctions in case of non-compliance. This was the subject-matter of the dispute. Accordingly, in her Order of 14 March 1997, Judge McDonald enumerated four categories of issues to be addressed by *amici curiae;* one such category concerned the measures to be taken in case of failure to execute a *subpoena duces tecum* or a request issued by a Judge or a Trial Chamber of the International Tribunal. This issue was fully ventilated in the briefs of Croatia, the Prosecutor and the various *amici curiae,* and closely debated in the oral submissions before the Trial Chamber. The question was therefore the subject of arguments and disagreements; in particular, Croatia and the Prosecutor held opposing views. Furthermore, it is unpersuasive to contend that, since the Trial Chamber only passed on the classes and characteristics of orders that the International Tribunal is empowered to issue, the question of remedies was still hypothetical or

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[26] Transcript, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis,* 22 Sept. 1997, ("*Appeals Transcript*"), pp. 26-27.

speculative at that stage. Indeed, given that the Trial Chamber held that Croatia was bound to comply with the *subpoena duces tecum*, it was of direct relevance for Croatia to know what remedies or sanctions would be available to the International Tribunal, were the subpoena to be ignored.

## B. Whether The International Tribunal Is Empowered To Issue Binding Orders To States

### 1. Can the International Tribunal issue subpoenas to States?

25. The Appeals Chamber holds the view that the term "subpoena" (in the sense of injunction accompanied by threat of penalty) cannot be applied or addressed to States. This finding rests on two grounds.

First of all, the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the 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[27]. Under current international law States can only

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[27] Consonant with the case-law of the International Court of Justice, the Appeals Chamber prefers to speak of "inherent powers" with regard to those functions of the International Tribunal which are judicial in nature and not expressly provided for in the Statute, rather than to "implied powers". The "implied powers" doctrine has normally been applied in the case-law of the World Court with a view to expanding the competencies of *political* organs of international organisations. *See, e.g.,* P.C.I.J. Reports, *Competence of the International Labour Organization* (Advisory Opinion of 23 July 1926), Ser. B, no. 13, p. 18; P.C.I.J. Reports, *Jurisdiction of the European Commission of the Danube* (Advisory Opinion of 8 Dec. 1927), Ser. B, no. 14, pp. 25-37; *Reparation for Injuries suffered in the Service of the United Nations*, I.C.J. Reports 1949, pp. 182-83; *International Status of South-West Africa*, I.C.J. Reports 1950, p. 136; *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, I.C.J. Reports 1954, pp. 56-58; *Certain Expenses of the United Nations*, I.C.J. Reports 1962, pp. 167-68; *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* I. C. J. Reports 1971, pp. 47-49, 52.
As is well known, reference to the Court's "inherent powers" was made by the International Court of Justice in the *Northern Cameroons* case (I.C.J. Reports 1963, p. 29) and in the *Nuclear Tests* case. In the latter case the Court stated that it "possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute. . . . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere

be the subject of countermeasures taken by other States or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations.

Secondly, both the Trial Chamber[28] and the Prosecutor[29] have stressed that, with regard to States, the 'penalty' attached to a subpoena would not be penal in nature. Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.

With regard to States, the Appeals Chamber therefore holds that the term "subpoena" is not applicable and that only binding "orders" or "requests" can be addressed to them.

2. Can the International Tribunal issue binding orders to States?

26. Turning then to the power of the International Tribunal to issue binding orders to States, the Appeals Chamber notes that Croatia has challenged the existence of such a power, claiming that, under the Statute, the International Tribunal only possesses jurisdiction over individuals and that it lacks any jurisdiction over States[30]. This view is based on a manifest misconception. Clearly, under Article 1 of the Statute, the International Tribunal has criminal jurisdiction solely over natural "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since [1 January] 1991". The International

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existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded" (*Nuclear Tests* case, I.C.J. Reports 1974, pp. 259-60, para. 23).

[28] *Subpoena Decision, supra* n. 1, paras. 61-64, 78.

[29] Prosecutor's Brief in response to the Brief of the Republic of Croatia in opposition to *subpoena duces tecum*, 8 Sept. 1997, ("*Prosecutor's Brief*") para. 24; *Appeals Transcript, supra* n. 26, pp. 90-91, 93.

[30] Brief on appeal of the Republic of Croatia in opposition to *subpoena duces tecum*, 18 Aug. 1997 ("*Croatia's Brief*"), pp. 5-14; *Appeals Transcript, supra* n. 26, pp. 10-12, 36-37. But *see ibid.*, p. 38 and pp. 42-43, where Croatia stated that under Article 29 of the Statute, the International Tribunal has the power to issue binding orders to States.

Tribunal can prosecute and try those persons. This is its primary jurisdiction. However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal. The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal. This obligation is laid down in Article 29[31] and restated in paragraph 4 of Security Council resolution 827 (1993)[32]. Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be "ordered" either by other States or by international bodies). Furthermore, the obligation set out - in the clearest of terms - in Article 29 is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States. The Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all Member States to comply with orders and requests of the International Tribunal. The nature and content of this

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[31] "1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

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:

(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal."

[32] "The Security Council, . . . *Acting* under Chapter VII of the Charter of the United Nations,

. . .

4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute".

obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an "obligation *erga omnes partes*"[33]. By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29[34] (on the manner in which this legal interest can be exercised, *see* below, paragraph 36).

As for States which are not Members of the United Nations, in accordance with the general principle embodied in Article 35 of the Vienna Convention on the Law of Treaties[35], they may undertake to comply with the obligation laid down in Article 29 by expressly accepting the obligation in writing. This acceptance may be evidenced in various ways. Thus, for instance, in the case of Switzerland, the passing

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[33] As is well known, in the *Barcelona Traction, Power & Light Co.* case, the International Court of Justice mentioned obligations of States "towards the international community as a whole" and defined them as obligations *erga omnes* (I.C.J. Reports 1970, p. 33, para. 33). The International Law Commission has rightly made a distinction between such obligations and those *erga omnes partes* (*Yearbook of the International Law Commission*, 1992, vol. II, Part Two, p. 39, para. 269). This distinction was first advocated by the Special Rapporteur, G. Arangio-Ruiz, in his Third Report on State Responsibility (*see ibid.*, 1991, vol. II, Part One, p. 35, para. 121; *see also* his Fourth Report, *ibid*, 1992, vol. Two, Part One, p. 34, para. 92).

[34] It is worth mentioning that in the *Lockerbie* case, the United States contended before the International Court of Justice that "irrespective of the right claimed by Libya under the Montreal Convention, Libya has a Charter-based duty to accept and carry out the decisions in the Security Council resolution [784 (1992)], and other States have a Charter-based duty to seek Libya's compliance" (I.C.J. Reports 1992, p. 126, para. 40). The Court did not however take any stand on this contention, in its Order of 14 April 1992 (*ibid.*). The fact that the obligation is incumbent on all States while the correlative "legal interest" is only granted to Member States of the United Nations should not be surprising. Only the latter category encompasses the "injured States" entitled to claim the cessation of any breach of Article 29 or to promote the taking of remedial measures. *See* on this matter Article 40 of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission (former art. 5 of Part Two). It provides as follows in para. 2 (c): "[injured State means] if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organisation concerned, are entitled to the benefit of that right", in International Law Commission, Report to the Forty-eighth Session of the General Assembly, 1996, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/51/10), ("*I.L.C. Draft Articles*").

[35] This Article provides that:
"An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."

in 1995 of a law implementing the Statute of the International Tribunal clearly implies acceptance of Article 29[36].

27. The obligation under consideration concerns both action that States may take only and exclusively through their organs (this, for instance, happens in case of an order enjoining a State to produce documents in the possession of one of its officials) and also action that States may be requested to take with regard to individuals subject to their jurisdiction (this is the case when the International Tribunal orders that individuals be arrested, or be compelled under threat of a national penalty to surrender evidence, or be brought to The Hague to testify).

28. The Prosecutor has submitted[37] that Article 29 expressly grants the International Tribunal "ancillary jurisdiction over States". However, care must be taken when using the term "jurisdiction" for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the Statute. With regard to States affected by Article 29, the International Tribunal does not, of course, exercise the same judicial functions; it only possesses the power to issue binding orders or requests. To avoid any confusion in terminology that would also result in a conceptual confusion, when considering Article 29 it is probably more accurate simply to speak of the International Tribunal's ancillary (or incidental) mandatory powers *vis-à-vis* States.

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[36] *See* the Federal Order on Cooperation with the International Tribunals for the Prosecution of Serious Violations of International Humanitarian Law of 21 December 1995.
As for the Federal Republic of Yugoslavia (Serbia and Montenegro), even if one were to doubt, in light of the General Assembly res. 47/1 of 22 September 1992, its status as a Member of the United Nations, its signing of the Dayton/Paris Accord of 1995 would imply its voluntary acceptance of the obligation flowing from Article 29 (*see* Article IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, General Assembly - Security Council, A/50/790, S/1995/999, 30 Nov. 1995, p. 4).

[37] *Prosecutor's Brief, supra* n. 29, pp. 3-4, 21-23; *Appeals Transcript, supra* n. 26, pp. 77-79.

29. It should again be emphasised that the plain wording of Article 29 makes it clear that the obligation it creates is incumbent upon all Member States, irrespective of whether or not they are States of the former Yugoslavia. The Appeals Chamber therefore fails to see the merit of the contention made by one of the *amici curiae*, whereby the obligation under discussion would be incumbent solely upon the former belligerents, i.e., States or Entities of ex-Yugoslavia[38]. This view seems to confuse the obligations stemming from the Dayton and Paris Accords of 21 November and 14 December 1995, which apply only to the States or Entities of the former Yugoslavia, with the obligation enshrined in Article 29, which has a much broader scope. It is evident that States other than those involved in the armed conflict may have in their possession evidence relevant to crimes committed in the former Yugoslavia, or they may have instituted proceedings against persons accused of crimes in the former Yugoslavia. Similarly, suspects, indictees or witnesses may live on their territory or evidentiary material may be located there. The cooperation of these States with the International Tribunal is therefore no less imperative than that of the States or Entities of the former Yugoslavia.

Nor does the Appeals Chamber see any merit in another possible contention: that since the International Tribunal is essentially intended to exercise functions that the national courts of the successor States or Entities of the former Yugoslavia have failed or are failing to discharge, it is essentially with regard to those States and Entities that the International Tribunal may exercise its primacy; hence, it is with respect only to them that the International Tribunal may demand the observance of Article 29, and consequently, issue compelling orders. The International Tribunal is not intended to replace the courts of any State; under Article 9 of the Statute it has concurrent jurisdiction with national courts. National courts of the States of the former Yugoslavia, like the courts of any State, are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of

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[38] *See amicus curiae* brief submitted by R. Wedgwood, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis*, 15 Sept. 1997, p. 3 ff.

international humanitarian law[39]. It is with regard to national courts generally that the International Tribunal may exercise its primacy under Article 9, paragraph 2, or, if those courts fail to fulfil that customary obligation, may intervene and adjudicate. The fact that the crimes falling within its primary jurisdiction were committed in the former Yugoslavia does not in any way confine the identity of the States subject to Article 29; all States must cooperate with the International Tribunal.

30. While it does not accept the foregoing argument, the Appeals Chamber does see some merit in the distinction drawn by the Prosecutor in her Brief[40] between "States located on the territory of the former Yugoslavia" and "third States which were not directly involved in the conflict and whose role, then as now, is that of concerned bystanders". Unlike the aforementioned *amicus curiae,* the Prosecutor does not draw any legal consequence from this distinction. According to her, the distinction may only have practical value in that "[t]he mandatory compliance powers expressly conferred by Article 29(2) of the Statute will rarely, if ever, need to be invoked with respect to such third States"[41]. Whether these mandatory powers will need to be invoked with regard to third States is, of course, a matter of speculation. The Appeals Chamber accepts however the practical difference between the two categories of States: those of the former Yugoslavia are more likely to be required to cooperate in the ways envisaged in Article 29. As the former belligerent parties, they are more likely to hold important evidence needed by the International Tribunal.

31. Having clarified the scope and purport of Article 29, the Appeals Chamber feels it necessary to add that it also shares the Prosecutor's contention that a distinction should be made between two modes of interaction with the International Tribunal: the cooperative and the mandatory compliance[42]. The Appeals Chamber endorses the Prosecution's contention that:

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[39] On this customary obligation, *see* the United States military manual, *The Law of Land Warfare*, 1956, para. 506 (*b*).
[40] *See Prosecutor's Brief, supra* n. 29, p.15.
[41] *Ibid.*
[42] *Ibid.*, pp. 14-16, para. 27; *see also Appeals Transcript, supra* n. 26, pp. 74-75.

> [A]s a matter of policy and in order to foster good relations with States, . . . cooperative processes should wherever possible be used, . . . they should be used first, and . . . resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary.[43]

In the final analysis, the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States. It is therefore to be regarded as sound policy for the Prosecutor, as well as defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29.

### 3. The possible content of binding orders

32. The Appeals Chamber shall now consider whether binding orders for the production of documents addressed to States can be broad in scope or whether they must instead be specific.

Croatia has submitted that the Trial Chamber ordered the production of "unspecified documents, identified only by category, and of no proven relevance", thereby substantially adopting "the highly controversial U.S.-style discovery process"[44]. In the Subpoena Decision the Trial Chamber averred that it is for the appropriate Judge or Trial Chamber "to make a preliminary assessment of whether the requested items appear relevant and admissible and are identified with sufficient specificity"[45]. The Appeals Chamber upholds this view. Any request for an order for production of documents issued under Article 29, paragraph 2, of the Statute, whether before or after the commencement of a trial, must:

> (i) identify specific documents and not broad categories. In other words, documents must be identified as far as possible and in addition be limited in

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[43] *Prosecutor's Brief, supra* n. 29, p. 15.
[44] *Croatia's Brief, supra*, n. 30, p. 50 and *see* pp. 43-52.
[45] *Subpoena Decision, supra* n. 1, para. 105.

number. The Appeals Chamber agrees with the submission of counsel for the accused[46] that, where the party requesting the order for the production of documents is unable to specify the title, date and author of documents, or other particulars, this party should be allowed to omit such details provided it explains the reasons therefor, and should still be required to identify the specific documents in question in some appropriate manner. The Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial referred to in Rule 89 (B) and (D), to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars;

(ii) set out succinctly the reasons why such documents are deemed relevant to the trial; if that party considers that setting forth the reasons for the request might jeopardise its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which its request rests;

(iii) not be unduly onerous. As already referred to above, a party cannot request hundreds of documents, particularly when it is evident that the identification, location and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial; and

(iv) give the requested State sufficient time for compliance; this of course would not authorise any unwarranted delays by that State. Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State.

### 4. Legal remedies available in case of non-compliance by a State

33. What legal remedies are available to the International Tribunal in case of non-compliance by a State with a binding order for the production of documents or, indeed, any binding order?

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[46] *Appeals Transcript, supra* n. 26, p. 140.

As stated above, the International Tribunal is not vested with any enforcement or sanctionary power *vis-à-vis* States. It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council.

The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded. The International Tribunal's power to report to the Security Council is derived from the relationship between the two institutions. The Security Council established the International Tribunal pursuant to Chapter VII of the United Nations Charter for the purpose of the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. A logical corollary of this is that any time a State fails to fulfil its obligation under Article 29, thereby preventing the International Tribunal from discharging the mission entrusted to it by the Security Council, the International Tribunal is entitled to report this non-observance to the Security Council.

34. The aforementioned powers have been incorporated by the International Tribunal into its Rules. According to Rule 7 *bis*:

> (A) In addition to cases to which Rule 11 [Non-compliance with a Request for Deferral] Rule 13 [Non Bis in Idem], Rule 59 [Failure to Execute a Warrant or Transfer Order] or Rule 61 [Procedure in Case of Failure to Execute a Warrant], applies, where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council.

> (B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8 [Request for Information], Rule 39 [Conduct of Investigations] or Rule 40 [Provisional Measures], the President shall notify the Security Council thereof.

In the light of the above, the adoption of Rule 7 *bis* is clearly to be regarded as falling within the authority of the International Tribunal. This conclusion is also supported by the fact that so far, either at the request of a Trial Chamber or *proprio motu*, on five different occasions the President of the International Tribunal has reported to the Security Council a failure by a State or an Entity to comply with Article 29[47]. The Security Council, far from objecting to this procedure, has normally followed it up with a statement made, on behalf of the whole body, by the President of the Security Council and addressed to the recalcitrant State or Entity[48].

35. It is appropriate at this juncture to illustrate the power of the International Tribunal to make such a judicial finding. When faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber

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[47] In the case of *Prosecutor v. Dragan Nikolić,* Case No. IT-94-2-R61, *see* the President's Report of 31 October 1995 (S/1995/910) concerning the failure or refusal of the Bosnian Serb administration in Pale to cooperate with the International Tribunal; in the case of *Prosecutor v. Mile Mrkšic, Miroslav Radić and Veselin Šljivančanin,* Case No. IT-95-13-R61, *see* the President's Report of 24 April 1996 (S/1996/319) concerning the failure or refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the International Tribunal; *see also* the President's Report of 22 May 1996 (S/1996/364) to the effect that the Federal Republic of Yugoslavia (Serbia and Montenegro) had violated its obligation to cooperate with the International Tribunal by failing to arrest General Ratko Mladić and Colonel Veselin Šljivančanin whilst on its territory; in the cases *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Cases Nos. IT-95-5-R61 and IT-95-18-R61, *see* the President's Report of 11 July 1996 (S/1996/556) concerning the refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to effect service of the warrant of arrest on the accused; in the case of *Prosecutor v. Ivica Rajić,* Case No. IT-95-12-R61, *see* the President's Report of 16 September 1996 (S/1996/763) concerning the refusal of the Federation of Bosnia Herzegovina and the Republic of Croatia to cooperate with the International Tribunal.

[48] *See* the preambular para. 7 of the Security Council resolution of 9 November 1995 (S/1995/940) referring to the President's Report (S/1995/910) in the matter of *Prosecutor v. Dragan Nikolić,* Case No. IT-94-2-R61; the statement of the President of the Security Council on 8 May 1996 concerning non-cooperation by the Federal Republic of Yugoslavia (Serbia and Montenegro) described in the Report of the President of the International Tribunal (S/1996/319); the statement of the President of the Security Council on 8 August 1996 (S/PRST/1996/34 - SC/6253) in reply to the Report of the President of the International Tribunal of 11 July 1996 (S/1996/556); the statement of the President of the Security Council on 20 September 1996 (S/PRST/1996/39) in reply to the Report of the President of the International Tribunal of 16 September 1996 (S/196/763).

or the President must be satisfied that the State has clearly failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. Depending upon the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal[49].

36. Furthermore, the finding by the International Tribunal must not include any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding.

As already mentioned, the International Tribunal may not encroach upon the sanctionary powers accruing to the Security Council pursuant to Chapter VII of the United Nations Charter. Furthermore, as the Appeals Chamber has stated above (paragraph 26), every Member State of the United Nations has a legal interest in seeking compliance by any other Member State with the International Tribunal's orders and requests issued pursuant to Article 29. Faced with the situation where a judicial finding by the International Tribunal of a breach of Article 29 has been reported to the Security Council, each Member State of the United Nations may act upon the legal interest referred to; consequently it may request the State to terminate

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[49] The significance of this judicial finding of the International Tribunal has been perceptively emphasised in the *amicus curiae* brief submitted by Luigi Condorelli, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, 11 Apr. 1997, ("*Condorelli Brief*"), para. 6.

its breach of Article 29. In addition to this possible unilateral action, a collective response through other intergovernmental organizations may be envisaged. The fundamental principles of the United Nations Charter and the spirit of the Statute of the International Tribunal aim to limit, as far as possible, the risks of arbitrariness and conflict. They therefore give pride of place to collective or joint action to be taken through an intergovernmental organization. It is appropriate to emphasise that this collective action:

(i) may only be taken after a judicial finding has been made by the International Tribunal; and

(ii) may take various forms, such as a political or moral condemnation, or a collective request to cease the breach, or economic or diplomatic sanctions.

In addition, collective action would be warranted in the case of repeated and blatant breaches of Article 29 by the same State; and provided the Security Council had not decided that it enjoyed exclusive powers on the matter, the situation being part of a general condition of threat to the peace.

37. It should be added that, apart from the cases provided for in Rule 7 *bis* (B), the President of the International Tribunal simply has the role of *nuncius*, that is to say, he or she shall simply transmit to the Security Council the judicial finding of the relevant Judge or Chamber.

## C. Whether The International Tribunal Is Empowered To Issue Binding Orders To State Officials

### 1. Can the International Tribunal subpoena State officials?

38. The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the

State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries[50], restated many times since. More recently, France adopted a position based on that rule in the *Rainbow Warrior* case[51]. The rule was also clearly set out by the Supreme Court of Israel in the *Eichmann* case[52].

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[50] *See, e.g.*, the statement made as early as 1797 by the United States Attorney-General in the *Governor Collot* case. A civil suit had been brought against Mr. Collot, Governor of the French island of Guadeloupe. The United States Attorney-General wrote: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under colour, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere *irregularity* in the exercise of his powers; and that the *extent* of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation", J. B. Moore, *A Digest of International Law*, 1906, vol. II, p. 23. The famous *McLeod* case should also be mentioned. On the occasion of the Canadian rebellion of 1837 against the British authorities (Canada being at the time under British sovereignty), rebels were assisted by American citizens who several times crossed the Niagara (the border between Canada and the United States) on the ship *Caroline,* to provide the insurgents with men and ammunitions. A party of British troops headed by Captain McLeod was then sent to attack the ship. They boarded it in the United States port of Fort Schlosser, killed a number of men and set the ship on fire. A few years later, in 1840, Captain McLeod was arrested in Lewiston (New York territory) on charges of murder and arson. An exchange of diplomatic notes between the two Governments ensued. The official position of the United States - which had already been set out in similar terms by Great Britain in 1838, with regard to the possible trial of another member of the British team that attacked the *Caroline* - was clearly enunciated by the United States Secretary of State Webster: "That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilised nations, and which the Government of the United States has no inclination to dispute . . . [W]hether the process be criminal or civil, the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of Government, and even from the operations of public war", *British and Foreign State Papers,* vol. 29, p. 1139.

[51] When the two French agents who had sunk the *Rainbow Warrior* in New Zealand were arrested by the local police, France stated that their imprisonment in New Zealand was not justified "taking into account in particular the fact that they acted under military orders and that France [was] ready to give an apology and to pay compensation to New Zealand for the damage suffered" (*see* the Ruling of 6 July 1986 of the United Nations Secretary-General, in United Nations Reports of International Arbitral Awards, vol. XIX, p. 213).

[52] The Court stated among other things that "The theory of 'Act of State' means that the act performed by a person as an organ of the State - whether he was head of the State or a responsible official acting on the Government's orders - must be regarded as an act of the State alone. It follows that only the latter bears responsibility therefor, and it also follows that another State has no right to punish the person who committed the act, save with the consent of the State whose mission he performed. Were it not so, the first State would be interfering in the internal affairs of the second, which is contrary to the conception of the equality of States based on their sovereignty", International Law Reports, vol. 36, at pp. 308-09; it should be noted that after this passage the Court expressed reservations about this Act of

2. Can the International Tribunal direct binding orders to State officials?

39. The Appeals Chamber will now consider the distinct but connected question of whether State officials may be the proper addressees of binding orders issued by the International Tribunal.

Croatia has submitted that the International Tribunal cannot issue binding orders to State organs acting in their official capacity. It argues that such a power, if there is one, would be in conflict with well-established principles of international law, in particular the principle, restated in Article 5 of the Draft Articles on State Responsibility adopted by the International Law Commission, whereby the conduct of any State organ must be considered as an act of the State concerned, with the consequence that any internationally wrongful act of a State official entails the international responsibility of the State as such and not that of the official[53]. The Prosecutor takes the opposite view. According to her, the power of the International Tribunal to address compulsory orders to State officials is based on substantially two grounds: first of all Article 7, paragraphs 2 and 4, and Article 18, paragraph 2, of the Statute[54]. It is the Prosecutor's contention that these provisions show that: "State officials acting in their official capacity may be bound by decisions, determinations and orders of the Tribunal"[55]. In particular, Article 18, paragraph 2, by providing that, "the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned", envisages that State officials may be directly addressed by the International Tribunal[56]. The other argument put forward by the Prosecutor is substantially based on a syllogism. The major premise is that the International Tribunal, under Article 29, must be endowed with the power to issue compelling orders to States. By the same token, it is also entitled to issue such orders to

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State doctrine; arguably, these reservations were set out for the main purpose of further justifying the proposition that the doctrine did not apply to war crimes and crimes against humanity.

[53] *Croatia's Brief, supra* n. 30, pp. 52-59.

[54] *Prosecutor's Brief, supra* n. 29, pp. 30-31, paras. 56-60.

[55] *Ibid.*, para. 56.

[56] *Ibid.*, para. 58.

individuals, because an international criminal court exhibiting the attributes of the International Tribunal "cannot possibly lack the power to direct its orders to individuals. Otherwise its powers would be wholly inferior to those of the national criminal courts over whom it has primacy"[57]. The minor premise of the syllogism is that, of course, State officials are individuals, although they act in their official capacity. The conclusion of the syllogism is that the International Tribunal must perforce be endowed with the power to address its orders to State officials[58].

40. The Appeals Chamber wishes to emphasise at the outset that the Prosecutor's reasoning, adopted by the Trial Chamber in its Subpoena Decision[59], is clearly based on what could be called "the domestic analogy". It is well known that in many national legal systems, where courts are part of the State apparatus and indeed constitute the judicial branch of the State apparatus, such courts are entitled to issue orders to other (say administrative, political, or even military) organs, including senior State officials and the Prime Minister or the Head of State. These organs, subject to a number of well-specified exceptions, can be summoned to give evidence, can be compelled to produce documents, can be requested to appear in court, etc. This is taken for granted in modern democracies, where nobody, not even the Head of State, is above the law (*legibus solutus)*.

The setting is totally different in the international community. It is known *omnibus lippis et tonsoribus* that the international community lacks any central government with the attendant separation of powers and checks and balances. In particular, international courts, including the International Tribunal, do not make up a judicial branch of a central government. The international community primarily consists of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take

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[57] *Ibid.*, para. 49.
[58] *See also Appeals Transcript, supra* n. 26, pp. 76, 85-87, 108-09.
[59] *Subpoena Decision, supra* n. 1, paras. 67-69.

into account this basic structure of the international community. It follows from these various factors that international courts do not necessarily possess, *vis-à-vis* organs of sovereign States, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State. Hence, the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law may be a source of great confusion and misapprehension. In addition to causing opposition among States, it could end up blurring the distinctive features of international courts.

41. It is therefore only natural that the Appeals Chamber, in order to address the issue raised above, should start by enquiring into general principles and rules of customary international law relating to State officials. It is well known that customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions.

The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium).* The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity. Similarly, other classes of persons (for example, spies, as defined in Article 29 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention IV of

1907), although acting as State organs, may be held personally accountable for their wrongdoing.

The general rule at issue has been implemented on many occasions, although primarily with regard to its corollary, namely the right of a State to demand for its organs functional immunity from foreign jurisdiction (*see* above, paragraph 38)[60]. This rule undoubtedly applies to relations between States *inter se*. However, it must also be taken into account, and indeed it has always been respected, by international organizations as well as international courts. Whenever such organizations or courts have intended to address recommendations, decisions (in the case of the Security Council acting under Chapter VII of the United Nations Charter) or judicial orders or requests to States, they have refrained from turning to a specific State official; they have issued the recommendation, decision or judicial order to the State as a whole, or to "its authorities"[61]. In the case of international courts, they have, of course, addressed their orders or requests through the channel of the State Agent before the court or the competent diplomatic officials.

42. The question that the Appeals Chamber must therefore address is as follows: are there any provisions or principles of the Statute of the International Tribunal which justify a departure from this well-established rule of international law?

As already noted, in her Brief the Prosecutor laid much stress on Article 7, paragraphs 2 and 4, and Article 18, paragraph 2, of the Statute[62]. The Appeals Chamber will consider whether this emphasis is correct, looking first at Article 7, paragraphs 2 and 4, of the Statute. Clearly, these are provisions that envisage the

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[60] This is only natural: States have always taken for granted that they are not allowed to address authoritative instructions or orders to a foreign State official; the only area where practical problems have arisen relates to cases where national courts endeavoured to sit in judgement over foreign individuals acting as State agents.

[61] On the decisions of the Security Council, *see Condorelli Brief, supra* n. 49, para. 4 and note 9. According to this learned author, the Security Council has also addressed its resolutions to specific national organs or institutions.

[62] However, in her oral arguments before the Appeals Chamber the Prosecutor substantially reduced her emphasis on this point, *see Appeals Transcript, supra* n. 26, pp. 106-09.

criminal responsibility of State officials, thus confirming the exception to the general rule on the protection of the internal organization of States, mentioned above. These provisions cannot therefore support the Prosecutor's submissions.

Neither do the Prosecutor's submissions find support in Article 18, paragraph 2. As rightly pointed out by Croatia[63], Article 18, paragraph 2, envisages the power of the Prosecutor to call upon a particular State official to lend assistance for the Prosecutor's investigations. It would be fallacious to infer from a provision which simply lays down the power to seek assistance from a State official, the existence of an obligation for such State official to cooperate. It follows from Article 18, paragraph 2, that the State cannot prevent the Prosecutor from seeking the assistance of a particular State official. This, however, does not mean that the particular State official has an international obligation to provide assistance. This obligation is only incumbent upon the State. Furthermore, the fact that the provision under consideration is not couched in mandatory terms becomes even more apparent if one contrasts it with the preceding provision in the same paragraph ("The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations"). Article 18, paragraph 2, was conceived of in the "cooperative" perspective rightly emphasised by the Prosecutor in her Brief and mentioned above. It cannot be attributed a mandatory purport which would be at odds with the plain text of the provision.

As for the other argument advanced by the Prosecutor, and based on a syllogism, it is unpersuasive, for it does not take into account the rule of customary international law referred to above; as noted above (paragraph 40), it is substantially based on a "domestic analogy".

43. The Appeals Chamber therefore finds that, both under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to

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[63] *Croatia's Brief, supra* n. 30, p. 55, note 30.

State officials. Even if one does not go so far as to term the obligation laid down in Article 29 as an obligation of result, as asserted by one of the *amici curiae*[64], it is indubitable that States, being the addressees of such obligation, have some choice or leeway in identifying the persons responsible for, and the method of, its fulfilment. It is for each such State to determine the internal organs competent to carry out the order. It follows that if a Judge or a Chamber intends to order the production of documents, the seizure of evidence, the arrest of suspects etc., being acts involving action by a State, its organs or officials, they must turn to the relevant State.

44. The Appeals Chamber considers that the above conclusion is not only warranted by international law, but is also the only one acceptable from a practical viewpoint. If, *arguendo,* one were to admit the power of the International Tribunal to address compelling orders to State officials, say, for the production of documents, there are two hypothetical situations which could result in the failure of the addressee to deliver the documents without undue delay and a consequent request by the International Tribunal for his appearance before the relevant Trial Chamber. It may be that the State official has been ordered by his authorities to refuse to surrender the documents; in this case, what would be the practical advantage of his being summoned before the International Tribunal, as was indicated in the *subpoena duces tecum* under discussion? Clearly, the State official would be unable to disregard the instructions of his Government: *ad impossibilia nemo tenetur*. Even the advantage of having the State official explaining publicly in court that his State refuses to surrender the documents is one that could be obtained by making public the official response of the relevant State authorities, declining to comply with Article 29. On the other hand, it may happen that a State official, on his own initiative, refuses to hand over the documents although his superior authorities intend to cooperate with the International Tribunal; this, for instance, may occur if that official places on the national legislation

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[64] That Article 29 lays down an obligation of result has been pointed out by Simma, *Simma Brief, supra* n. 20, p. 15.
Under Article 21, paragraph 1, of the Draft Articles on State Responsibility adopted on first reading by the International Law Commission, "There is a breach by a State of an international obligation requiring to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation", *I.L.C. Draft Articles, supra* n. 34.

concerning his tasks and duties an interpretation different from that advocated by his superior authorities. In this and other similar cases the Appeals Chamber fails to see the advantage of summoning such official before the International Tribunal. It is for his State to compel him, through all the national legal remedies available, to comply with the International Tribunal's order for the production of documents (*see,* however, the exception that the Appeals Chamber envisages below, at paragraph 51). Clearly, as State officials are mere instrumentalities in the hands of sovereign States, there is no practical purpose in singling them out and compelling them to produce documents, or in forcing them to appear in court. It is the State which is bound by Article 29 and it is the State for which the official or agent fulfils his functions that constitutes the legitimate interlocutor of the International Tribunal. States shall therefore incur international responsibility for any serious breach of that provision by their officials.

45. Whilst from a legal viewpoint the International Tribunal is barred from addressing orders to State officials as such, the Appeals Chamber accepts that it might prove useful in practice for the Registrar of the International Tribunal to notify the relevant State officials of the order sent to the State. This notification would serve exclusively to inform State officials who, according to the Prosecutor or defence counsel, may hold the documents, of the order sent to the State. If the central authorities are prepared and willing to comply with Article 29, this practical procedure may speed up the internal process for the production of documents.

## D. Whether The International Tribunal May Issue Binding Orders To Individuals Acting In Their Private Capacity

### 1. Is the International Tribunal empowered to subpoena individuals acting in their private capacity?

46. Neither Croatia nor the Prosecutor denies that the International Tribunal may issue binding orders in the form of subpoenas (that is, under threat of penalty), to individuals acting in their private capacity. However, the Appeals Chamber deems it

necessary to consider this matter with particular reference to the question of whether or not State officials may be subpoenaed *qua* private individuals. Furthermore, there seems to be disagreement about the remedies available to the International Tribunal in case of non-compliance.

47. The Appeals Chamber holds the view that the spirit of the Statute, as well as the purposes pursued by the Security Council when it established the International Tribunal, demonstrate that a Judge or a Chamber is vested with the authority to summon witnesses, to compel the production of documents, etc. However, the basis for this authority is not that, as the International Tribunal enjoys primacy over national criminal courts, it cannot but possess at least the same powers as those courts. Such an argument is flawed, for the International Tribunal exhibits a number of features that differentiate it markedly from national courts. It is, therefore, tantamount to a *petitio principii:* only after proving that the essential powers and functions of the two types of courts (the International Tribunal and national courts) are similar, could one infer that the International Tribunal has the same powers as national courts to compel individuals to produce documents, appear in court, etc. As stated above, the International Tribunal's power to issue binding orders to individuals derives instead from the general object and purpose of the Statute, as well as the role the International Tribunal is called upon to play thereunder. The International Tribunal is an international criminal court constituting a novelty in the world community. Normally, individuals subject to the sovereign authority of States may only be tried by national courts. If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation. Thus, the relation between national courts of different States is "horizontal" in nature. In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a

broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council).

In addition, the aforementioned power is spelt out in provisions such as Article 18, paragraph 2, first part, which states: "The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations" (emphasis added); and in Article 19, paragraph 2: "Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial" (emphasis added).

48. The spirit and purpose of the Statute, as well as the aforementioned provisions, confer on the International Tribunal an incidental or ancillary jurisdiction over individuals other than those whom the International Tribunal may prosecute and try. These are individuals who may be of assistance in the task of dispensing criminal justice entrusted to the International Tribunal. Furthermore, as stated above, Article 29 also imposes upon States an obligation to take action required by the International Tribunal *vis-à-vis* individuals subject to their jurisdiction.

### 2. Classes of persons encompassed by the expression "Individuals acting in their private capacity"

49. 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.

50. The same may hold true for the example propounded by the Prosecutor in her Brief[65]: "a government official who, while engaged on official business, witnesses a crime within the jurisdiction of the [International] Tribunal being committed by a superior officer". According to the Prosecutor: "It cannot be argued that the official concerned is immune from orders to testify as to what was seen"[66]. In this case, the individual was undoubtedly present at the event in his official capacity; however, arguably he saw the event *qua* a private individual. This can be illustrated by 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.

The situation differs for a State official (e.g., a general) who acts as a member of an international peace-keeping or peace-enforcement force such as UNPROFOR, IFOR or SFOR. Even if he witnesses the commission or the planning of a crime in a monotoring 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.

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[65] *Prosecutor's Brief, supra* n. 29, para. 63.
[66] *Ibid.*

His mandate stems from the same source as that of the International Tribunal, i.e., a resolution of the Security Council[67], and therefore he must testify, subject to the appropriate requirements set out in the Rules[68].

51. Another instance can be envisaged, which, although more complicated, is not unrealistic in States facing extraordinary circumstances such as war or the aftermath of war. Following the issue of a binding order to such a State for the production of documents necessary for trial, a State official, who holds that evidence in his official capacity, having been requested by his authorities to surrender it to the International Tribunal may refuse to do so, and the central authorities may not have the legal or factual means available to enforce the International Tribunal's request. In this scenario, the State official is no longer behaving as an instrumentality of his State apparatus. For the limited purposes of criminal proceedings, it is sound practice to "downgrade", as it were, the State official to the rank of an individual acting in a private capacity and apply to him all the remedies and sanctions available against non-complying individuals referred to below (paragraphs 57-59): he may be subpoenaed and, if he does not appear in court, proceedings for contempt of the International Tribunal could be instituted against him. Indeed, in this scenario, the State official, in spite of the instructions received from his Government, is deliberately obstructing international criminal proceedings, thus jeopardising the essential function of the International Tribunal: dispensation of justice. It will then be for the Trial Chamber to determine whether or not also to call to account the State; the Trial Chamber will have to decide whether or not to make a judicial finding of the State's failure to comply with Article 29 (on the basis of Article 11 of the International Law Commission's Draft Articles on State Responsibility[69]) and ask the President of the International Tribunal to forward it to the Security Council.

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[67] This would also apply to forces deployed under Article 53 of the United Nations Charter.

[68] This should apply to a *subpoena ad testificandum*. By contrast, it might not appear appropriate to issue to this officer a *subpoena duces tecum* concerning, for instance, a memorandum he submitted to his superior authorities with regard to the incident he witnessed. It would appear to be more proper to address the international organization on behalf of which he was to produce the document.

[69] This Article provides that:

"1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

3. Whether the International Tribunal may enter into direct contact with individuals or must instead go through the national authorities

52. Two more questions must be considered by the Appeals Chamber: the means by which the International Tribunal enters into contact with individuals, and the legal remedies available in case of non-compliance by individuals.

53. The Appeals Chamber will make two general and preliminary points. Firstly, a distinction should be drawn between the former belligerent States or Entities of ex-Yugoslavia and third States. The first class encompasses States: (i) on the territory of which crimes may have been perpetrated; and in addition, (ii) some authorities of which might be implicated in the commission of these crimes. Consequently, in the case of those States, to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardise investigations by the Prosecutor or defence counsel. In particular, the presence of State officials at the interview of a witness might discourage the witness from speaking the truth, and might also imperil not just his own life or personal integrity but possibly those of his relatives. It follows that it would be contrary to the very purpose and function of the International Tribunal to have State officials present on such occasions. The States and Entities of the former Yugoslavia are obliged to cooperate with the International Tribunal in such a manner as to enable the International Tribunal to discharge its functions. This obligation (which, it should be noted, was restated in the Dayton and Paris Accords), also requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance.

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2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of Articles 5 to 10."
Articles 5 to 10 deal with the imputability of wrongful acts to States, and also cover the responsibility of States for unlawful acts of individuals, *I.L.C. Draft Articles, supra* n. 34.

54. Secondly, the implementing legislation of the International Tribunal's Statute enacted by some States[70] provides that any order or request of the International Tribunal should be addressed to a specific central body of the country, which then channels it to the relevant prosecutorial or judicial agencies. It may be inferred from this that any order or request should therefore be addressed to that central national body.

Clearly, these laws tend to apply to the relations between national authorities and the International Tribunal the same approach that they normally adopt in their bilateral or multilateral treaties of judicial cooperation. These treaties are, of course, between equal sovereign States. Everything is therefore placed on a "horizontal" plane and each State is concerned with its sovereign attributes when it comes to the fulfilment of prosecutorial or judicial functions. It follows that any manifestation of investigative or judicial activity (the taking of evidence, the seizure of documents, the questioning of witnesses, etc.) requested by one of the contracting States is to be exercised exclusively by the relevant authorities of the requested State. This same

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[70] *See, e.g.*, Section 7 (1) of the Australian International War Crimes Act of 1995; Article 5 of the Belgian Law on the Recognition of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda of 1996; Articles 7 and 8 of the French Law No. 95-1 of 2 January 1995; Article 2 of the Hungarian Act XXXIX of 1996; Article 2 (2) of the Italian Decree-Law No. 544 of 28 December 1993; Section 4 (2) of the New Zealand International War Crimes Tribunal Act of 1995; Article 3 (1) of the Spanish Organization Act 15/1994 of 1994; Section 2 of the Swedish Act amending the Act relating to the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1995; Article 4 of the Swiss Federal Order on co-operation with the International Criminal Tribunal for the Former Yugoslavia of 1995; Articles 4 and 15 of the 1996 United Kingdom Statutory Instrument 1996 No. 716. *See also* Article 7 (2) of the Bosnia-Herzegovina Decree on Extradition at the Request of the International Tribunal of 1995; Article 2 of the 1996 Croatian Constitutional Act on the co-operation with the International Criminal Tribunal.
It should however be pointed out that other national laws prove more flexible. Thus, for instance, while Section 6 (1) of the Austrian Federal Law on co-operation with the International Tribunals of 1996 provides for the general principle that communication with the International Tribunal shall pass through the Ministry of Foreign Affairs, Section 6 (3) provides that: "In urgent cases as part of official criminal police assistance, direct communication between the Austrian authorities and the International Tribunal or communication through the International Criminal Police Organisation INTERPOL shall be permitted". Similarly, Section 2 of the Finnish Act on the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia of 1995, after designating the Ministry of Justice as the authority competent to receive "requests and notifications" from the International Tribunal, provides that the International Tribunal is allowed directly to contact the competent authorities either through diplomatic channels or through INTERPOL. Furthermore, under Section 3 of the Norwegian Act Relating to the Incorporation into Norwegian Law of the UN S.C. Resolution on the Establishment of an International Criminal Tribunal for the Former Yugoslavia of 1994, legal assistance to the International Tribunal is the responsibility of "Norwegian courts and other authorities".

approach has been adopted by these States *vis-à-vis* the International Tribunal, in spite of the position of primacy accruing to the International Tribunal under the Statute and its "vertical" status alluded to above[71]. However, whenever such implementing legislation turns out to be in conflict with the spirit and the word of the Statute, a well-known principle of international law can be relied upon to prevent States from shielding behind their national law in order to evade international obligations[72].

55. After these general remarks, the Appeals Chamber emphasises that a distinction should be drawn between two classes of acts or transactions:

(i) those which may require the cooperation of the prosecutorial or judicial organs of the State where the individual is located (conduct of on-site investigations, execution of search or arrest warrants, seizure of evidentiary material, etc.); and

(ii) those which may be carried out by the private individual who is the addressee of a subpoena or order, acting either by himself or together with an investigator designated by the Prosecutor or by defence counsel (taking of witness statements, production of documents, delivery of video-tapes and other evidentiary material, appearance in court at The Hague, etc.).

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[71] As perceptively pointed out in the *amicus curiae* brief submitted by J.A. Frowein *et al.* on behalf of the Max-Planck-Institute for Comparative Public Law and International Law, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-PT, ("*Frowein Brief*"), p. 11, the Statute of the International Tribunal to some extent reflects an oscillation, in the mind of the drafters, between the "horizontal" approach and the "vertical" approach. The former is reflected in the expression, used in Article 29, paragraph 2, "request for assistance"; the latter in the word, to be found in the same provision, "orders".

[72] *See, e.g.,* the *Polish Nationals in Danzig* case, where the Permanent Court of International Justice stated that: "It should . . . be observed that . . . according to generally accepted principles . . . a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (P.C.I.J., Ser. A/B, no. 44, 1931, at p. 24). In the *Georges Pinson* case, brought before the France - Mexico Claims Commission, the umpire dismissed the view that in case of conflict between the Constitution of a State and international law, the former should prevail, by pointing out that this view was "absolutely contrary to the very axioms of international law *(absolument contraire aux axiomes mêmes du droit international)*" (decision of 18 October 1928, in United Nations Reports of International Arbitral Awards, vol. V, pp. 393-94; unofficial translation). *See also* Article 27, first sentence, of the 1969 Vienna Convention on the Law of Treaties, whereby: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

For the first class of acts, unless authorized by national legislation or special agreements, the International Tribunal must turn to the relevant national authorities[73]. This is subject to an exception which relates to the States or Entities of the former Yugoslavia: in their situation, for the reasons set out above, some activities such as, in particular, the conduct of on-site investigations, may justifiably be carried out by the International Tribunal itself.

With respect to the second class, the International Tribunal will normally turn, once again, to the national authorities for their cooperation[74]. However, there are two situations where the International Tribunal may enter directly into contact with a private individual:

(i) when this is authorized by the legislation of the State concerned[75];

(ii) when the authorities of the State or Entity concerned, having been requested to comply with an order of the International Tribunal, prevent the International Tribunal from fulfilling its functions. This might arise in the above example (paragraph 49) of a State official who witnessed a crime or

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[73] For instance, Section 9, para. 1 of the Austrian Federal Law of 1996 allows the International Tribunal to "hear independently witnesses and accused persons in Austria and to inspect localities and take other evidence, provided that the Federal Ministry of Foreign Affairs has been advised in advance of the time and subject of such investigations". Similarly, Section 7 of the Finnish Act of 1994 allows the International Tribunal to operate on Finnish territory to take evidence or seek other forms of legal assistance from Finnish courts.

[74] This is the practice of the International Tribunal. For instance, on 16 October 1997, Trial Chamber II issued *subpoenae ad testificandum* to five witnesses and at the same time a request to the Goverment of Bosnia and Herzegovina to the effect that it serve the subpoenas on the five witnesses and also seek the appearance before the Chamber of the Custodian of the Records of the same Government. *See* Request to the Government of Bosnia and Herzegovina, *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, 16 Oct. 1997.

[75] It is worth noting that under Section 11, para. 1 of the Austrian Federal Law the International Tribunal may forward a summons and other "documents" to persons in Austria by mail. Under Section 11, para. 2, a witness is under a legal duty to execute a summons directly addressed to him or her. Furthermore, Article 23 of the Swiss Law provides that the procedural decisions of the International Tribunal may be directly mailed to the addressee domiciled in Switzerland. Section 8 of the Finnish Law provides that a witness "who in Finland has been summoned by the Tribunal to appear before the Tribunal is under the duty to comply with the summons". Section 4, para. 2, of the German Law provides that "should the Tribunal request the personal appearance of a person, . . . their appearance may be enforced with the same judicial means as may be ordered in the case of a summons by a German court or a German Prosecutor's Office". According to Frowein "this formula indicates that the Tribunal may directly summon individuals", *Frowein Brief, supra* n. 71, p. 45.
*See also* Section 7, para. 2, of the Dutch law (reference is made to persons "being transferred to the Netherlands by the authorities of a foreign State as witnesses or experts in the execution of a subpoena issued by the Tribunal).

> acquired possession of a document prior to becoming a State official, or in the other cases of State officials mentioned above (paragraph 50). In these examples the State authorities may be able, pursuant to their legislation or practice, to prevent the individual from testifying or delivering a particular document[76].

In the above-mentioned scenarios, the attitude of the State or Entity may jeopardise the discharge of the International Tribunal's fundamental functions. It is therefore to be assumed that an inherent power to address itself directly to those individuals inures to the advantage of the International Tribunal. Were it not vested with such a power, the International Tribunal would be unable to guarantee a fair trial to persons accused of atrocities in the former Yugoslavia. As was forcefully stated by the Prosecutor before the Appeals Chamber:

> So, if theoretically, [a State enacted] legislation barring access to its citizens for the purpose of compelling them to give evidence, we would say that in international law that legislation is invalid. We would then assert the Tribunal's entitlement to reach out directly to the individual by issuing an order to that effect, presumably permitting the individual to obey the higher order of international law, even in disobedience to his own domestic law. I think it would be counterproductive to suggest that we are at the mercy of using a State machinery when its citizens may be more willing than their government to discharge their obligations to this institution.
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> . . .
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> [If] there are reasons to believe that the witness would be willing to comply but the State, either because of its legislation or its attitude, if it has not enacted legislation, is not willing to assist, . . . we would have every entitlement to reach out directly, by mail might be the preferable, more prudent, course than sending members of our personnel to an unfriendly territory for that simple purpose.[77]

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[76] In this respect, it should be noted that on 20 August 1996 the Presiding Judge of Trial Chamber II, Judge McDonald, issued, at the request of the defence, summonses to certain witnesses to travel to The Hague to testify in the *Tadić* case. The summonses pointed out that under Rule 77 "[a] witness who refuses without sufficient cause to appear before the Tribunal is liable to a fine not exceeding US$10,000 or a term of imprisonment not exceeding six months" (*see Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Summons to testify before a Trial Chamber, 20 Aug. 1996). The summonses were handed to the witnesses by the defence counsel, and the witnesses testified in court.

[77] *See Appeals Transcript*, *supra* n. 26, pp. 118-20.

56. In the two aforementioned situations the International Tribunal may directly summon a witness, or order an individual to hand over evidence or appear before a Judge or Trial Chamber. In other words, the International Tribunal may enter into direct contact with an individual subject to the sovereign authority of a State. The individual, being within the ancillary (or incidental) criminal jurisdiction of the International Tribunal, is duty-bound to comply with its orders, requests and summonses.

### 4. The legal remedies for non-compliance

57. The second question which the Appeals Chamber will now consider is that of the legal remedies available for non-compliance by an individual with a subpoena or order issued by the International Tribunal. Here, a distinction needs to be made between:

(i) the sanctions and penalties that can be imposed by the authorities of the State where the individual is located; and

(ii) those that can be imposed by the International Tribunal.

The first set of sanctions or penalties is enumerated or hinted at in a number of implementing laws of States: these laws provide that, in case of non-compliance with an order of the International Tribunal, the national authorities shall apply the same remedies and penalties provided for in case of disregard of an order or injunction issued by a national authority[78]. In addition, as demonstrated in the valuable survey submitted by *amicus curiae*[79], most States, whether of common-law or civil-law persuasion, generally provide for the enforcement of summonses or subpoenas issued

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[78] *See, e.g.*, the laws of Finland (Section 8, para. 2), Germany (Sections 4, paras. 2 and 4); Italy (Article 10, para. 7); The Netherlands (Section 6); Norway (Section 7 refers to Sections 163-67 of the Penal Code for punishing witnesses who have given false testimony before the International Tribunal); Spain (section 7, para. 1); the United Kingdom (Article 9).

[79] *See amicus curiae brief* submitted by the Max Planck Institute for Foreign and International Criminal Law, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 *bis* ("*Max Planck Brief*"), 15 Sept. 1997, pp. 3-10.

by national courts. It is plausible that, in those States, the national authorities will be ready to assist the International Tribunal by resorting to their own national criminal legislation.

58. The Appeals Chamber holds the view that, normally, the International Tribunal should turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual with a subpoena or order issued by a Judge or a Trial Chamber. Legal remedies or sanctions put in place by the national authorities themselves are more likely to work effectively and expeditiously. However, allowance should be made for cases where resort to national remedies or sanctions would not prove workable. This holds true for those cases where, from the outset, the International Tribunal decides to enter into direct contact with individuals, at the request of either the Prosecutor or the defence, on the assumption that the authorities of the State or Entity would either prevent the International Tribunal from fulfilling its mission (*see* above, paragraph 55) or be unable to compel a State official to comply with an order issued under Article 29 (*see* above, the case mentioned in paragraph 51). In these cases, it may prove pointless to request those national authorities to enforce the International Tribunal's order through national means.

59. The remedies available to the International Tribunal range from a general power to hold individuals in contempt of the International Tribunal (utilising the inherent contempt power rightly mentioned by the Trial Chamber[80]) to the specific contempt power provided for in Rule 77. It should be added that, if the subpoenaed individual who fails to deliver documents or appear in court also fails to attend contempt proceedings, *in absentia* proceedings should not be ruled out. The Prosecutor contended in her oral submissions that it would be "hypothetical and speculative in the extreme to contemplate a trial *in absentia* on a charge of contempt"[81]. By contrast, counsel for Croatia conceded in their oral submissions that *in absentia* proceedings would be admissible, provided they met "the requirement of

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[80] *Subpoena Decision*, *supra* n. 1, para. 62.
[81] *Appeals Transcript*, *supra* n. 26, p. 121.

due process" and amounted to what in United States courts is called "civil contempt", "which would not be imposing 'criminal penalties', but could nonetheless compel someone by even imprisonment until they decided to comply with the court's order"[82].

The Appeals Chamber finds that, generally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal (i.e., persons accused of crimes provided for in Articles 2-5 of the Statute). Indeed, even when the accused has clearly waived his right to be tried in his presence (Article 21, paragraph 4 (d), of the Statute), it would prove extremely difficult or even impossible for an international criminal court to determine the innocence or guilt of that accused. By contrast, *in absentia* proceedings may be exceptionally warranted in cases involving contempt of the International Tribunal, where the person charged fails to appear in court, thus obstructing the administration of justice. These cases fall within the ancillary or incidental jurisdiction of the International Tribunal.

If such *in absentia* proceedings were to be instituted, all the fundamental rights pertaining to a fair trial would need to be safeguarded. Among other things, although the individual's absence would have to be regarded, under certain conditions, as a waiver of his "right to be tried in his presence", he should be offered the choice of counsel. The Appeals Chamber holds the view that, in addition, other guarantees provided for in the context of the European Convention on Human Rights should also be respected[83].

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[82] *Ibid.*, p. 59.

[83] In the *Colozza* case (judgement of 12 Feb. 1985), the European Court on Human Rights held that trials by default, which are not prohibited by Art. 6, para. 1, of the European Convention of Human Rights (whereby every person charged with a criminal offence is entitled to take part in the hearing) must however fulfil some basic conditions required by the notion of "right to a fair trial". It follows, among other things, that any waiver of the right to be present "must be established in an unequivocal manner" (*Publications of the European Court of Human Rights*, Ser. A, vol. 89, p. 14, para. 28); serious attempts must be made to trace the indictee and notify him of the opening of criminal proceedings (*ibid.*); in addition, once the indictee becomes aware of the criminal proceedings against him, he "should . . . be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge"(*ibid.*, p. 15, para. 29).

60. Of course, if a Judge or a Chamber decides to address a *subpoena duces tecum* or *ad testificandum* directly to an individual living in a particular State and at the same time notifies the national authorities of that State of the issue of the subpoena, this procedure will make it easier for those national authorities to assist the International Tribunal by enforcing the orders in case of non-compliance. If, by contrast, the Judge or Chamber decides not to notify those national authorities, the only response by the International Tribunal to an individual's failure to obey the subpoena will, necessarily, be resort to its own contempt proceedings.

## E. The Question Of National Security Concerns

### 1. Whether the International Tribunal is barred from examining documents raising national security concerns

61. Croatia has submitted that the International Tribunal does not have the power to judge or determine Croatia's national security claims[84]. Relying upon the *Corfu Channel* case, Croatia contends that "[t]he determination of the national security needs of each State is a fundamental attribute of its sovereignty"[85]. Both the Trial Chamber in the Subpoena Decision[86] and the Prosecutor[87] take the opposite view. The Trial Chamber, at the end of its extensive treatment of this delicate matter, concludes that:

> [A] State invoking a claim of national security as a basis for non-production of evidence requested by the International Tribunal, may not be exonerated from its obligation by a blanket assertion that its security is at stake. Thus, the State has the onus to prove its objection.[88]

The Trial Chamber goes on to suggest that:

> [F]or the purpose of determining the validity of the assertions of a particular State relating to national security concerns, the Trial Chamber [seized with the criminal case in question] may hold *in camera* hearings, in

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[84] *Croatia's Brief, supra* n. 30, pp. 59-64.
[85] *Ibid.*, p. 60; *see also Appeals Transcript, supra* n. 26, p. 65.
[86] *Subpoena Decision, supra* n. 1, paras. 107-49.
[87] *Prosecutor's Brief, supra* n. 29, paras. 67-73.
[88] *Subpoena Decision, supra* n. 1, para. 147.

> a manner which accords with the provisions of Sub-rule 66 (C) and Rule 79. Furthermore, with a view to . . . the secrecy of the information it may initially conduct an *ex parte* hearing in a manner analogous to that provided for in Sub-rule 66 (C).[89]

In her Brief, the Prosecutor has among other things averred that the Croatian position would "prevent the [International] Tribunal from fulfilling its Security Council-given mandate to effectively prosecute persons responsible for serious violations of international humanitarian law and thus, defeat its essential object and purpose. The effective administration of justice would be severely prejudiced"[90].

62. The Appeals Chamber holds that the claim submitted by Croatia must be dismissed, on three grounds.

Firstly, reliance upon the *Corfu Channel* case is inapposite. It is true that the International Court of Justice confined itself to taking note of the British refusal to produce, on account of "naval secrecy", the naval documents requested by the Court[91]. However, this request had been made on the strength of Article 49 of the Statute of the International Court of Justice[92] and Article 54 of its Rules[93]; the first of these two provisions, of course more authoritative, was undoubtedly couched in non-mandatory terms. The situation is different with the International Tribunal: Article 29 of its Statute is worded in strong mandatory language. More pertinent precedents include

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[89] *Ibid.*, para. 148.
[90] *Prosecutor's Brief, supra* n. 29, para. 73.
[91] *See Corfu Channel* case, I.C.J. Reports 1949, p. 32.
[92] "The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." (Emphasis added.)
[93] Article 54 of the Rules of the Court adopted on 6 May 1946 provided as follows: "The Court may request the parties to call witnesses or experts, or may call for (*demander*) the production of any other evidence on points of fact in regard to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute." Article 44 provides that:
"1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.
2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot."
It would seem that this provision has been replaced in the current Rules of the Court (adopted on 14 April 1978) by Article 62, paragraph 1, whereby: "The Court may at any time call upon (*inviter*) the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose."

the so-called *Sabotage* cases brought before the United States - German Mixed Claims Commission in the 1930s[94], the *Ballo*[95] case decided by the Administrative Tribunal of the International Labour Organisation in 1972; the *Cyprus* v. *Turkey* case, decided by the European Commission on Human Rights in 1976[96], and the *Godinez Cruz* case, decided by the Inter-American Court of Human Rights on 20 January 1989[97]. These cases show that there have been instances in which States have complied with judicial requests for the production of sensitive or confidential documents. The scrutiny of documents in those cases was undertaken by the judicial body *in camera.* In the

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[94] The German Agent asked to be allowed to inspect certain files of the United States Department of Justice. The Umpire dismissed the request, noting that it was "obvious that the Commission ha[d] no power to call on either Government to produce from its confidential files what, for reasons of State, it consider[ed] would be detrimental to its interests to produce, or would cause improper and unnecessary exposure of private persons and their conduct" (text reproduced in Sandifer, *Evidence Before International Tribunals*, (1st ed., 1939), p. 266). However, before reaching this decision the Umpire stated as follow: "I went to the [United States] Attorney-General and he was good enough to open the files to me confidentially, and while I think it not relevant to the point, I found that the conditions were very much as Mr. Martin [counsel to the Agent of the United States] had described them in his statement to the Commission. The Attorney-General stated that for reasons of state policy the Department could not permit a stranger, or, indeed, any American citizen, to go through those files. He allowed me to examine as many of the files touching the German matters as I desired, and perhaps it is fair for me to say that after an examination of them I can quite understand the Attorney-General's position in the matter, and can understand that it is a proper one in view of what the files contain" (*ibid.*, pp. 266-67).

[95] The Administrative Tribunal ordered the relevant organization (UNESCO) to make confidential files available to it. "Since the Organisation refused to include these documents in the dossier on the grounds that they had no bearing on Mr. Ballo's situation and that some of them were confidential, the Tribunal ordered them to be produced and took cognisance of them *in camera.* Noting that the documents were indeed of a confidential character, it decided not communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them. . . . After further consideration, however, the Tribunal reached its decision without relying on these documents." *See*, I.L.O. Administrative Tribunal, *Ballo v. UNESCO*, Judgement No. 191, 15 May 1972, in International Labour Office, *Official Bulletin*, vol. LV, Nos. 2, 3 and 4, 1972, p. 224 ff, at 227.

[96] Article 28 (a) of the European Convention on Human Rights provides that the Commission, "with a view to ascertaining the facts," "shall . . . undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities" (emphasis added). In the case at issue, Turkey, the respondent State, refused to permit the taking of evidence in the northern part of Cyprus, under Turkish control; the European Commission, lacking any power to enforce the obligation laid down in Article 28 (a), confined itself to submitting a report on Turkey's failure to comply with that provision to the Committee of Ministers of the Council of Europe (*see* Application 6780/74, Report of 10 July 1976, pp. 21-24).

[97] In an Order of 7 October 1987, the Court requested the Government of Honduras "to provide the organisational chart showing the structure of Battalion 316 and its position within the Armed Forces of Honduras". In response to this Order, the Government of Honduras "with respect to the organisational structure of Battalion 316, requested that the Court receive the testimony of its Commandant in closed hearing 'because of strict security reasons of the State of Honduras' ". In spite of the objections of the Inter-American Commission of Human Rights, the Court decided to hear the testimony on the structure of Battalion 316 in closed session (Organization of American States, Inter-American Court of Human Rights, Series C, no. 5, *Godinez Cruz* case, Judgement of 20 Jan. 1989, pp. 96-97).

*Cyprus v. Turkey* case, where the State in question had refused to comply with the request, the international body made a judicial finding of such refusal and reported it to the competent political body[98].

63. Secondly, a plain reading of Article 29 of the Statute makes it clear that it does not envisage any exception to the obligation of States to comply with requests and orders of a Trial Chamber. Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly, as demonstrated by Article 21, paragraph 4 (g), which bars the International Tribunal from "compelling" an accused "to testify against himself or to confess guilt". It follows 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.

64. Croatia has argued that, as the Statute operates within the framework of customary international law, there was no need for its drafters to restate therein the principles of State sovereignty, national security and the "act of State doctrine". These principles are firmly anchored in the Statute - so the argument goes - and there was "absolutely no need to provide explicit exemptions for that in the Statute"[99]. The Appeals Chamber takes the view that, in the context of national security, this argument is inapplicable.

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[98] It should be mentioned that in the *McIntire* case the respondent (The Food and Agricultural Organization) had refused to disclose a letter, contending that it came from the government of a sovereign State (United States), and that it must "for that reason be treated in the same way as a diplomatic communication". The Administrative Tribunal took note of this refusal and stated the following: "[W]hile it [the Tribunal] has not the power to express an opinion as to the merits of the reason given by the defendant Organisation, [it] deems it inadmissible that the considerations alleged by that Organisation can in any way prejudice the legitimate interests of the complainant; . . . the existence of a secret document concerning the complainant, the content of which is unknown to him and against which he is consequently powerless to defend himself obviously vitiates the just application of the Regulations to the complainant and affects not only the interests of the staff as a whole but also the interests of justice itself." *See* I.L.O. Administrative Tribunal, *McIntire v. FAO,* Judgement no. 13, 3 Sept. 1954, in International Labour Office, *Official Bulletin,* vol. XXXVIII, 1954, p. 273 ff, at 277-78 (emphasis added).

[99] *Appeals Transcript, supra* n. 26, p. 151.

Admittedly, customary international rules do protect the national security of States by prohibiting every State from interfering with or intruding into the domestic jurisdiction, including national security matters, of other States. These rules are reflected in Article 2, paragraph 7, of the United Nations Charter with regard to the relations between Member States of the United Nations and the Organization. However, Article 2, paragraph 7, of the Charter provides for a significant exception to the impenetrability of the realm of domestic jurisdiction in respect of Chapter VII enforcement measures[100]. As the Statute of the International Tribunal has been adopted pursuant to this very Chapter, it can pierce that realm.

Furthermore, although it is true that the rules of customary international law may become relevant where the Statute is silent on a particular point, such as the "act of State" doctrine, there is no need to resort to these rules where the Statute contains an explicit provision on the matter, as is the case with Article 29. Considering the very nature of the innovative and sweeping obligation laid down in Article 29, and its undeniable effects on State sovereignty and national security, it cannot be argued that the omission of exceptions in its formulation was the result of an oversight. Had the "founding fathers" intended to place restrictions upon this obligation they would have done so, as they did in the case of Article 21, paragraph 4 (g). Article 29 therefore clearly and deliberately derogates from the customary international rules upon which Croatia relies.

In short, whilst in the case of State officials the Statute clearly does not depart from general international law, as stated above (paragraphs 41 and 42) in the case of national security concerns the Statute manifestly derogates from customary international law. This different attitude towards general rules can be easily explained. In the case of State officials there is no compelling reason warranting a

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[100] Article 2, para. 7, provides that:
"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

departure from general rules. 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 (which are in any case the addressees of the obligations laid down in that provision). By contrast, as the Appeals Chamber will demonstrate in the following paragraph, to allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions.

65. Thirdly, as was persuasively submitted by the Prosecutor[101], to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and "defeat its essential object and purpose". The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined.

66. An important consequence follows from the foregoing considerations. Those instruments of national implementing legislation, such as the laws passed by

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[101] *Prosecutor's Brief, supra* n. 29, paras. 70-73. *See also* the *amicus curiae* brief submitted by A. Ciampi and G. Gaja, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-PT, 7 Apr. 1997, pp. 5-6.

Australia[102] and New Zealand[103], which authorise the national authorities to decline to comply with requests of the International Tribunal if such requests would prejudice the "sovereignty, security or national interests" of the State, do not seem to be fully in keeping with the Statute[104].

2. The possible modalities of making allowance for national security concerns

67. Having asserted the basic principle that States may not withhold documents because of national security concerns, the Appeals Chamber wishes, however, to add that the International Tribunal should not be unmindful of legitimate State concerns related to national security, the more so because, as the Trial Chamber has rightly emphasised[105], the International Tribunal has already taken security concerns into account in its Rules 66 (C) and 77 (B).

The best way of reconciling, in keeping with the general guidelines provided by Rule 89 (B) and (D), the authority of the International Tribunal to order and obtain from States all documents directly relevant to trial proceedings, and the legitimate demands of States concerning national security, has been rightly indicated by the Trial Chamber in the Subpoena Decision, where it suggested that *in camera, ex parte* proceedings might be held so as to scrutinise the validity of States' national security claims. The Appeals Chamber, while adopting the same approach, will now suggest practical methods and procedures that may differ from those recommended by the Trial Chamber.

68. First of all, account must be taken of whether the State concerned has acted and is acting bona fide. As the International Court of Justice pointed out in the

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[102] *See* Australian International War Crimes Tribunal Act 1995, Section 26, para. 3.
[103] *See* New Zealand International War Crimes Tribunals Act 1995, Section 57.
[104] It would seem that the Austrian Federal Law on Cooperation with the International Tribunals is more in keeping with the Statute for, after providing for the power of the Austrian authorities to withhold material affecting national security, it adds that the International Tribunal will be consulted by the Austrian authorities as to whether it can guarantee that the information be kept secret, if disclosed (Section 12, paras. 2 and 3).
[105] *Subpoena Decision, supra* n. 1, paras. 113-15.

*Nuclear Tests* case, "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential"[106]. 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 fulfilment 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.

Secondly, the State at issue may be invited to submit the relevant documents to the scrutiny of one Judge of the Trial Chamber designated by the Trial Chamber itself. Plainly, the fact that only one Judge and he or she alone undertakes a perusal of the documents should increase the confidence of the State that its national security secrets will not accidentally become public.

Thirdly, to ensure maximum confidentiality, if the documents are in a language other than one of the two official languages of the International Tribunal, in addition to the original documents the State concerned should provide certified translations, so that there is no need for the documents to be seen by translators of the International Tribunal.

Fourthly, the documents should be scrutinised by the Judge *in camera,* in *ex parte* proceedings, and no transcripts should be made of the hearing.

Fifthly, the documents that the Judge eventually considers to be irrelevant to the proceedings, as well as those the relevance of which is outweighed, in the appraisal of the Judge, by the need to safeguard legitimate national security concerns,

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[106] *Nuclear Tests* case, *supra* n. 27, para. 46, at p. 268.

should be returned to the State without being deposited or filed in the Registry of the International Tribunal. As to other documents, the State concerned may be allowed to redact part or parts of the documents, for instance, by blacking out part or parts; however, a senior State official should attach a signed affidavit briefly explaining the reasons for that redaction.

Finally, one should perhaps make allowance for an exceptional case: the case where a State, acting bona fide, considers one or two particular documents to be so delicate from the national security point of view, while at the same time of scant relevance to the trial proceedings, that it prefers not to submit such documents to the Judge. In this case, a minimum requirement to be met by the State is the submission of a signed affidavit by the responsible Minister: (i) stating that he has personally examined the document in question; (ii) summarily describing the content of the documents; (iii) setting out precisely the grounds on which the State considers that the document is not of great relevance to the trial proceedings; and (iv) concisely indicating the principal reasons for the desire of the State to withhold those documents. It will be for the Judge to appraise the grounds offered for withholding the documents. In case of doubt, he may request a more detailed affidavit, or a detailed explanation during *in camera, ex parte* proceedings. If the Judge is not satisfied that the reasons adduced by the State are valid and persuasive, he may request the Trial Chamber to make a judicial finding of non-compliance by the State with its obligations under Article 29 of the Statute and ask the President of the International Tribunal to transmit such finding to the Security Council.

69. It goes without saying that it will be for the relevant Trial Chamber to decide whether to adopt any of the aforementioned methods or procedures or to provide for other practical arrangements or protective measures, if need be in consultation with the interested State.

## III. DISPOSITION

For the foregoing reasons the **APPEALS CHAMBER**

(1) Unanimously **FINDS** that the International Tribunal is empowered to issue binding orders and requests to States, which are obliged to comply with them pursuant to Article 29 of the Statute and that, in case of non-compliance, a Trial Chamber may make a specific judicial finding to this effect and request the President of the International Tribunal to transmit it to the United Nations Security Council;

(2) Unanimously **FINDS** that the International Tribunal may not address binding orders under Article 29 to State officials acting in their official capacity;

(3) Unanimously **FINDS** that the International Tribunal may summon, subpoena or address other binding orders to individuals acting in their private capacity and that, in case of non-compliance, either the relevant State may take enforcement measures as provided in its legislation, or the International Tribunal may instigate contempt proceedings;

(4) Unanimously **FINDS** that States are not allowed, on the claim of national security interests, to withhold documents and other evidentiary material requested by the International Tribunal; however, practical arrangements may be adopted by a Trial Chamber to make allowance for legitimate and bona fide concerns of States;

(5) Unanimously **DECIDES** to quash the *subpoena duces tecum* issued by Judge McDonald and reinstated by Trial Chamber II addressed to Croatia and the Croatian Defence Minister, Mr. Gojko Šušak, it being understood that the Prosecutor is at liberty to submit to the appropriate Chamber, being Trial Chamber I, a request for a binding order addressed to Croatia alone.

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

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Antonio Cassese
Presiding

Judge Adolphus G. Karibi-Whyte attaches a Separate Opinion to this Judgement.

Dated this twenty-ninth day of October 1997
At The Hague
The Netherlands

[Seal of the International Tribunal]