IT-98-33-A
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UNITED
NATIONS

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

Case: IT-98-33-A

Date: 1 July 2003

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Mehmet Güney

Registrar: Mr Hans Holthuis

Decision of: 1 July 2003

PROSECUTOR

v

Radislav KRSTIĆ

DECISION ON APPLICATION FOR SUBPOENAS

Counsel for the Prosecutor:

Mr Norman Farrell

Counsel for the Accused:

Mr Nenad Petrušić
Mr Norman Sepenuk

1. The appellant Radislav Krstić ("Krstić") has applied for subpoenas to be issued to two prospective witnesses, requiring each of them to attend at a location (to be nominated) in Bosnia and Herzegovina.[1] The purpose of such attendance is to give counsel for Krstić the opportunity to interview them there in anticipation of adding material to his application, already made pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), for the admission of additional evidence in support of his appeal against conviction.

2. The application for the issue of subpoenas is made pursuant to Rule 54, which provides:

> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

That Rule applies *mutatis mutandis* to proceedings in the Appeals Chamber.[2] The issues which the application raises are of some significance to the Tribunal's procedures generally, and for that reason the present Decision is given publicly notwithstanding that the Motion was filed on a confidential basis.[3]

3. The significance of these issues arises from the fact that, increasingly, applications for the admission on appeal of additional evidence follow the revelation by the prosecution after judgment has been given by the Trial Chamber, pursuant to its continuing obligations of disclosure under Rule 68,[4] of witness statements which it had taken from persons with knowledge of the events considered by the Trial Chamber and which – to use a neutral term – are capable of placing those events in a different light.

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[1] Two motions for the issue of a subpoena were filed, one for each witness and each entitled: (Confidential) Defence Motion for the Issuance of Subpoena for Witness, 1 Apr 2003. A (Confidential) Addendum to Defence Motion for the Issuance of Subpoena for Witness, 3 Apr 2003, was also filed. These are collectively referred to as the "Motion".

[2] Rule 107.

[3] There is, however, nothing in this decision which reveals material which could justify it remaining confidential.

[4] Rule 68 ("Disclosure of Exculpatory Material") provides: "The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence." This obligation continues after judgment: *Prosecutor v Blaškić*, IT-95-14-PT, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filing, 26 Sept 2000, par 32; *Musema c/ Le Procureur*, ICTR-96-13-A, Arrêt («Defence Motion under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal»), 18 May 2001, pp 3-4; *Rutaganda c/ Le Procureur*, ICTR-96-3-A, Décision Sur La «*Urgent Defence Motion for Disclosure Pursuant to Rules 66(B) and 68 of the Rules of Procedure and Evidence, and for a Reconsideration of Deadlines Imposed in Judge Jorda's Order of December 12, 2002*», 13 Feb 2003, p 5; *Prosecutor v Kordić & Čerkez*, IT-95-14/2-A, Scheduling Order, 17 Mar 2003, p 4.

4. In order to have those statements admitted into evidence on appeal in any such case, the defence is required primarily to establish that, although the statement itself clearly "was not available at trial",[5] the evidence which it reveals was also not available at trial in any form. The defence often seeks to satisfy this requirement by asserting that an attempt had been made before or during the trial to ascertain from such prospective witnesses what evidence they could give, but that the prospective witnesses had either failed or declined to co-operate.

5. However, before additional evidence will be admitted pursuant to Rule 115, the defence is obliged to demonstrate not only that the evidence was not available at trial but also that the evidence could not have been discovered through the exercise of due diligence,[6] which means that the defence must show (*inter alia*) that it made use of –

> [...] all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber,[7]

and that it had brought any difficulties in relation to obtaining evidence on behalf of the accused, including those arising from intimidation or inability to locate witnesses, to the attention of the Trial Chamber.[8] This obligation of due diligence is therefore directly relevant to the procedures of the Tribunal (in particular, Rule 54) both before and during trial, as well as on appeal.

6. In response to the application by Krstić in his conviction appeal for the admission of additional evidence pursuant to Rule 115,[9] the prosecution submitted, as it does in almost all cases, that due diligence had not been exercised by the defence at the trial. It nominated Rule 54 (making orders that witnesses attend to give evidence) and Rule 71 (taking evidence by way depositions) as containing the relevant "mechanisms of protection and compulsion" which should have been used by him – but which had not been used by him – either before or during the trial.[10]

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5 Rule 115(B).

6 *Prosecutor v Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 Oct 1998 ("*Tadić* Rule 115 Decision"), pars 35-45; *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreškić* Conviction Appeal Judgment"), par 50; *Prosecutor v Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002 ("*Delić* Review Decision"), par 10.

7 *Tadić* Rule 115 Decision, pars 40, 44-45, 47; *Kupreškić* Conviction Appeal Judgment, par 50.

8 *Tadić* Rule 115 Decision, par 40; *Kupreškić* Conviction Appeal Judgment, par 50.

9 Response to Defence Motions for Admission of Additional Evidence Under Rule 115, 31 Jan 2003, par 155.

10 Reference might have been made to Rule 75 (protective measures for witnesses) as well. Consideration could also be given to seeking assistance from the State in which the witness resides, pursuant to Article 29 of the Tribunal's Statute, by taking testimony, similar to the widespread procedure of letters of request for legal assistance (see *Halsbury's Laws of England* (4th Edn), Vol 17, pars 294-296) or to the procedure of letters rogatory available under the European Convention on Mutual Assistance in Criminal Matters, 20 April 1959.

7. Krstić replied to the prosecution's submission that due diligence had not been exercised by stating that no defence lawyer would compel a witness to give evidence or would attempt to take that witness's deposition (particularly in the presence of the prosecution) unless the defence had "at least some inkling that the witness had useful information to offer",[11] or would call the witness "cold" without prior information as to what the witness would say.[12] Krstić also asserted that relief under Rule 54 would be refused, as not being "necessary" where the witness has refused to be interviewed.[13]

8. The Appeals Chamber accepts that, in a situation where the defence is unaware of the precise nature of the evidence which a prospective witness can give and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to use "all mechanisms of protection and compulsion available" to force the witness to give evidence "cold" in court without first knowing what he will say. That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty.[14] Accordingly, it is generally inappropriate in this situation to consider orders to the prospective witness to attend to give evidence (Rule 54) or for taking his evidence by way of deposition for use later in the trial (Rule 71).[15]

9. The Reply, however, wrongly assumes that Rule 54 is limited to making orders that the prospective witness attend to give evidence before the relevant Chamber. It is clear, both from the terms of the Rule itself and from what the Appeals Chamber said in the *Tadić* Rule 115 Decision,[16] that the requirement that "all mechanisms of protection and compulsion available" be used by the defence was not intended to be limited to the situation where the defence is aware of what evidence the prospective witness can give but where the prospective witness is unwilling (for whatever reason) to cooperate. In the exercise of due diligence, the appropriate mechanisms must also be used in the situation where the defence is unaware of the precise nature of the

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[11] The Krstić Defence has here confused the procedure provided by Rule 71, whereby evidence is taken for use later in the trial, with the formalised procedure available in the United States for ascertaining what that witness can say, in the absence of the other party (in what is also called a "deposition").

[12] Defence Reply to the Prosecution's Response to Defence Motions for Admission of Additional Evidence Under Rule 115, 12 Feb 2003 ("Reply"), par 7.

[13] Reply, par 7.

[14] Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal (IT/125 Rev 1), 12 July 2002, Article 3(ii) and (iii). That duty of loyalty must, of course, be discharged consistently with the duty owed by counsel to the Tribunal to act with independence in the administration of justice.

[15] In par 12, *infra*, it is suggested that Rule 54 could be utilised so that a judge could explain to the prospective witness the importance of his cooperation and how he will be afforded protection by the Tribunal if it is required.

[16] See footnote 6, *supra*.

evidence the prospective witness can give and where the defence is unable to obtain his cooperation by speaking to it.

10. Rule 54 permits a judge or a Trial Chamber to make such orders or to issue such subpoenas as may be "necessary [...] for the preparation or conduct of the trial". Such a power clearly includes the possibility of a subpoena being issued requiring a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial. By analogy with applications for access to confidential material produced in other cases (where a legitimate forensic purpose for that access must be shown), an order or a subpoena pursuant to Rule 54 would become "necessary" for the purposes of that Rule where a legitimate forensic purpose for having the interview has been shown. An applicant for such an order or subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.[17]

11. The assessment of the chance that the prospective witness will be able to give information which will materially assist the defence in its case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) and any statements made by him to the prosecution or to others in relation to those events. The test would have to be applied in a reasonably liberal way but, just as in relation to such applications for access to confidential material, the defence will not be permitted to undertake a fishing expedition – where it is unaware whether the particular person has any relevant information, and it seeks to interview that person merely in order to discover whether he has any information which may assist the defence.

[17] cf *Prosecutor v Hadžihasanović et al,* Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct 2001, par 10; *Prosecutor v Kordić & Čerkez*, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p 4; *Prosecutor v Blaškić,* Decision on Appellant's Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and Hearing Transcripts filed in the Prosecutor v Blaškić, 16 May 2002, par 14; *Prosecutor v Kvočka et al,* Decision on Momčilo Gruban's Motion for Access to Material, 13 Jan 2003, par 5; *Prosecutor v Kordić & Čerkez*, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* Case, 23 Jan 3003, p 3.

12. Where the prospective witness had previously been uncooperative with the defence, such a course would obviously be adopted only if the judge or Trial Chamber considered that it was reasonably likely that there would be cooperation if such an order were made. That is not a determination which the defence may safely make for itself. If it were decided by the judge or the Trial Chamber that such a course is unlikely to produce the cooperation sought, or if such an order is made without success, an alternative course could be to make an order or to issue a subpoena pursuant to Rule 54 requiring the prospective witness to appear before the Tribunal, when the judge who issued the order can explain to him the importance of his cooperation to assist in producing a just result in the trial, and how he will be afforded protection by the Tribunal if it is required. If this produces the cooperation sought, the defence can interview him before he is released by the Tribunal, but in private.[18]

13. In some cases, once the difficulties encountered by the defence have been brought to the attention of the Chamber, it may be that the prosecution, in accordance with its duty to assist the Tribunal to arrive at the truth and to do justice for (*inter alia*) the accused,[19] will use its own resources and its somewhat more extensive powers (including the power of persuasion) to facilitate an interview directly between the prospective witness and the defence.

14. What must also be emphasised is that the obligation of the defence to report to the Trial Chamber its inability to obtain the cooperation of a prospective witness, to which the *Tadić* Rule 115 Decision refers, is intended not only as a first step in exercising due diligence but also as a means of self-protection, in that a contemporaneous record then exists that the cooperation of the prospective witness had not been obtained. Such a record avoids the inevitable charge by the prosecution – when the defence later seeks to have additional evidence admitted in an appeal against conviction – that there is no support for the claim by the defence that it had attempted but failed to obtain the cooperation of the prospective witness.

15. Of course, such a report to the Trial Chamber does not *by itself* satisfy the obligation of due diligence. The defence must also seek relief from the Trial Chamber by which the uncooperative prospective witness will be compelled to cooperate. If the Trial Chamber denies the relief sought from the Tribunal as being inappropriate in the particular case, or (where relief

[18] Both types of order will need to ensure that the prospective witness is given the expenses necessary for him to comply with their terms.

[19] Prosecutor's Regulation No 2 (1999), Standards of Professional Conduct for Prosecution Counsel, 14 Sept 1999, par 2(h).

is granted) if all the steps available within the Tribunal prove to be unsuccessful, counsel would, in the usual case, be deemed to have acted with due diligence in relation to that witness.

16. If, as a result of these steps not being followed by the defence in the particular case, due diligence has not been satisfied, the defence will, again in the usual case where additional evidence is tendered in an appeal against conviction pursuant to Rule 115, be required to undertake the additional burden of establishing that the exclusion of the additional evidence would lead to a miscarriage of justice.[20]

17. Where – as in the present case – an appellant seeks the issue of a subpoena to a prospective witness to be interviewed in anticipation of tendering that person's evidence on appeal pursuant to Rule 115, the legitimate forensic purpose to be established must be slightly adapted. An appellant must establish that there is a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in relation to clearly identified issues arising in his appeal against conviction, that the defence has been unable to obtain the cooperation of the witness, and that it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness. If those matters are established, then – subject only to one general issue raised by the prosecution in the present case – the appellant would be entitled to the orders which he seeks pursuant to Rule 54.

18. Each of the two prospective witnesses in question in the present application gave a statement to the prosecution after the trial and thus has been cooperative with the prosecution.[21] Krstić has argued that the statements indicate that each of these two men has knowledge of issues which are relevant to his appeal, and that it is reasonably likely that further questions of them will elucidate the precise nature of that knowledge. The material provided by Krstić to establish those matters cannot be revealed in this public Decision. The prosecution has very fairly stated that it has no objection in principle to the defence interviewing both prospective witnesses,[22] which statement appears clearly (in its context) to accept that such material is sufficient to establish what has been stated as being required for the issue of a subpoena to each of them, subject to the one general issue which the prosecution has raised. The Appeals Chamber

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[20] *Delić* Review Decision, par 15.

[21] Each statement has already been made the subject of a Rule 115 application. At issue in the present case is whether, as a result of what these two men have already said, either of them is able to elaborate upon certain aspects of their statements and thus produce further material to be included in an additional Rule 115 application.

[22] Prosecution's Response to Defence Requests for Subpoenas, 11 Apr 2003 ("Response"), par 3.

(Judge Shahabuddeen dissenting) is satisfied that, subject to that general issue raised by the prosecution, Krstić would be entitled to the issue of the subpoenas he seeks. To the remaining general issue the Appeals Chamber now turns.

19. The prosecution accepts that the Tribunal has power to issue a subpoena to a person to give evidence as a witness or to produce documents where that person obtained the information of which evidence is to be given, or the documents which that person is to produce, as an individual acting in his or her private capacity.[23] That concession is correct. In the *Blaškić* Subpoena Decision,[24] the Appeals Chamber held that such a power was an incidental or ancillary jurisdiction conferred by the Tribunal's Statute.[25] The prosecution points out, however, that, at the time of the events concerning which Krstić says that these prospective witnesses might give evidence, each was an officer in the Army of a State or an Entity,[26] and that whatever relevant information they may have would have been gained by them in their capacity as State officials and related to their official functions, rather than as individuals acting in their private capacity.[27] This appears to be so from the material provided in the Motion and from the statements which the prospective witnesses gave to the prosecution. In those circumstances, the prosecution says, the Chamber "may be limited" in its power to issue a subpoena to them.[28] The prosecution bases this submission upon a number of statements made by the Appeals Chamber in the *Blaškić* Subpoena Decision.

20. The Appeals Chamber stated in the *Blaškić* Subpoena Decision that a subpoena may be issued to a State official where the information to be provided was gained before he took office as such and where the evidence is unrelated to his "current" function as a State official,[29] or where he gained that information at the time he was a State official but he was not actually exercising his official functions when he gained it.[30] In these circumstances, the State official gained the information in his private capacity and not his official capacity. Where, however, he gained the information in the course of exercising his official functions, the Appeals Chamber

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[23] Response, pars 8, 11.

[24] *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaškić* Subpoena Decision").

[25] *Blaškić* Subpoena Decision, pars 46-48.

[26] The prosecution appears to suggest that the jurisprudence of the Appeals Chamber draws no relevant distinction between them (Response, pars 13-14). That suggestion requires some consideration but, in the light of the outcome of this Decision, it is unnecessary to do so in the present case.

[27] Response, par 17.

[28] *Ibid*, par 16.

[29] *Blaškić* Subpoena Decision, par 49. The currency would appear to relate to the time he is to give information, but the position is unclear.

[30] *Blaškić* Subpoena Decision, par 50.

stated, he enjoys a functional immunity.[31] The Appeals Chamber went on to state that any international body such as this Tribunal must take into account the sovereignty of each State,[32] that customary international law protects the internal organisation of each sovereign State,[33] and that, 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".[34] It dismissed "the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity".[35] In that case, the Appeals Chamber held that, in order to compel the production of certain documents, it was necessary to issue a binding order to the relevant State, pursuant to Article 29 of the Statute, to produce the information required, leaving it to the State to identify the person responsible for providing the State's compliance with that order.[36]

21. The prosecution is content that if need be the Motion by Krstić should be treated as seeking the making of such a binding order,[37] and it concedes that the requirements to be satisfied before a binding order can be made have been satisfied,[38] except perhaps one requirement in relation to one of the prospective witnesses.[39] Counsel for Krstić has informed the Appeals Chamber orally that he has not filed a reply to the prosecution's Response because he does not believe that he can be of any further assistance on this point.

22. It is, however, necessary first to determine whether these statements made by the Appeals Chamber in the *Blaškić* Subpoena Decision prevent the issue of a subpoena to a witness who is

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[31] *Ibid*, par 38.
[32] *Ibid*, par 40.
[33] *Ibid*, par 41
[34] *Ibid*, par 44.
[35] *Ibid*, par 38.
[36] *Ibid*, par 43.
[37] Response, par 23.
[38] Paragraph 12 of the Response states: "It is submitted that Rule 54*bis*, concerning the production of documents, does not involve materially different considerations and appears to offer useful guidance on the issuing of the production of a witness subpoenas [*sic*]. In this regard, Rule 54*bis*(A) provides that an applicant for binding orders must (i) specify the information sought as precisely as possible, (ii) indicate how the information is relevant to a matter in issue and necessary for a fair determination of the case/the preparation of the case; and (iii) explain the steps taken to secure the state's assistance." Whether the requirements which the prosecution identifies are correct has not yet been the subject of any decision but, again in the light of the outcome of this Decision, it is unnecessary to deal with this issue in the present case.
[39] Response, pars 19-22. The requirement which the prosecution asserts has not clearly been satisfied in relation to this witness is the third – that, before a binding order is made, steps must be taken to secure the assistance of the State concerned (*Ibid*, pars 21-22). The prosecution points out that, although the Krstić Defence did obtain the assistance of the relevant Government, it did not inform that Government that the prospective witness had declined to be interviewed or otherwise afford that Government a reasonable opportunity to cooperate by forcing the witness to give an interview (*Ibid*, par 22). This consideration is not relevant to the issue of a subpoena, and thus it is unnecessary to deal with the issue in the present case.

expected to give evidence of what he saw or heard at a time when he was a State official and in the course of exercising his official functions.

23. The *Blaškić* Subpoena Decision was concerned with the production of documents. The subpoena in question had been directed to the Republic of Croatia and to its incumbent Defence Minister to produce documents. The nature of those documents is not described, but it is reasonably clear from that Decision that the documents concerned were State documents, and that both the State and the Minister of State to whom the subpoena was directed were required to produce them merely as the custodians of those documents. It is common place in the law that, where the documents to be produced are the documents of either a State or a corporation, only the State or the corporation can be required to produce them, and that it is for the State or the corporation to do so through its proper officer. The issue of a subpoena to the Defence Minister to produce the documents would have had to be set aside upon that basis in any event. The decision of the Appeals Chamber that a subpoena could not be directed to a State, but that a binding order to do so should have been sought pursuant to Article 29 of the Tribunal's Statute, was directed to the production of documents, not to giving evidence.

24. The *Blaškić* Subpoena Decision did not have to determine, and it was not directly concerned with, the issue of whether a subpoena could be issued to a person to give evidence of what he saw or heard at a time when he was a State official and in the course of exercising his official functions. The justification for the ruling that a subpoena could not be addressed to State officials acting in their official capacity was stated to be that "[s]uch officials are mere instruments of a State and their official action can only be attributed to the State".[40] Such a statement is very relevant to a custodian of State documents, but it is not apt in relation to a State official who can give evidence of something he saw or heard (otherwise, perhaps, than from a State document). Unlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give. The reference to the absence of any "practical purpose [...] in compelling [State officials] to produce documents or in forcing them to appear in court" can be relevant solely to State officials who are the custodians of State documents.[41]

25. The only ruling made by the Appeals Chamber in the *Blaškić* Subpoena Decision which is directly relevant to a State official who is expected to give evidence of something he saw or heard (otherwise than from a State document) during the course of exercising his official duties

[40] *Ibid*, pars 38, 44.
[41] *Ibid*, par 44.

is that he enjoys a functional immunity. The existence of such a functional immunity is not in issue in this case. What is in issue in the present Decision is the extent of that functional immunity. The *Blaškić* Subpoena Decision said this of the existence of that immunity:[42]

> 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,[43] restated many times since. More recently, France adopted a position based on that rule in the *Rainbow Warrior* case.[44] The rule was also clearly set out by the Supreme Court of Israel in the *Eichmann* case.[45]

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[42] *Ibid*, par 38. Footnotes 43-45 are part of the *Blaškić* Subpoena Decision.

[43] *See, eg,* 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", JB 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.

[44] 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).

[45] 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 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.

The issue is developed subsequently:[46]

> 41. [...] 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.
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> 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*). [...]
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> 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).[47] 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".[48] 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.
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> [...]
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> 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 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*,[49] 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.

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[46] *Blaškić* Subpoena Decision, pars 41, 43. Footnotes 47-49 are part of the *Blaškić* Subpoena Decision.

[47] 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.

[48] On the decisions of the Security Council, *see Condorelli Brief* [*Amicus curiae* brief submitted by Luigi Condorelli, 11 Apr 1997], par 4 and note 9. According to this learned author, the Security Council has also addressed its resolutions to specific national organs or institutions.

[49] That Article 29 lays down an obligation of result has been pointed out by Simma [*Amicus curiae* brief submitted by Bruno Simma, 14 Apr 1997], 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", *ILC Draft Articles* [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)].

26. The reasoning of the Appeals Chamber in the *Blaškić* Subpoena Decision is that, as the State official has acted on behalf of the State, only the State can be responsible for the acts of that official,[50] and that, as a corollary, the State may demand for its State officials (where their acts are attributed only to the State) a "functional immunity from foreign jurisdiction".[51] Such a rule, the Appeals Chamber states, undoubtedly applies to relations between States *inter se*, but it must be taken into account and has always been respected by, *inter alia*, international courts.[52] All of the authorities which the Appeals Chamber cited in support of the functional immunity upon which it relied relate to an immunity against prosecution. It may be the case (it is unnecessary to decide here) that, between States, such a functional immunity exists against prosecution for those acts, but it would be incorrect to suggest that such an immunity exists in international criminal courts.[53] The Charter of the International Military Tribunal in Nuremberg denied such an immunity to "Heads of State or responsible officials in Government Departments",[54] as does this Tribunal's Statute.[55]

27. But it is abundantly clear from the passages already quoted from the *Blaškić* Subpoena Decision, and from pars 23-24, *supra*, that the statement made in par 38 of that Decision – that "The Appeals Chamber dismisses the possibility of the International Tribunal

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[50] See pars 38(iii) and 41, and footnotes 43-45, *supra*.

[51] See par 41, *supra*.

[52] See par 41, *supra*.

[53] In *Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v Belgium)*, 14 Feb 2002 (the *Yerodia* Case), General List No 121 [unreported], at par 61, the International Court of Justice said: "Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. [...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia [...]."

[54] Charter, Article 7: "The official position of defendants whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." See also Article II of Control Council Law No 10. In its Judgment, the Nuremberg Tribunal stated (at pp 222-223): "It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, and where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. [...] The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings [...]. On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law." Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 – 1 October 1946 (1947).

[55] Article 7.2: "The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

addressing subpoenas to State officials acting in their official capacity" – can be justified only in relation to the production of documents in their custody in their official capacity. The Appeals Chamber did not say that the functional immunity enjoyed by State officials includes an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions. Nothing which was said by the Appeals Chamber in the *Blaškić* Subpoena Decision should be interpreted as giving such an immunity to officials of the nature whose testimony is sought in the present case. No authority for such a proposition has been produced by the prosecution, and none has been found. Such an immunity does not exist. No issue arises for determination in this case as to whether there are different categories of State officials to whom any such immunity may apply, and it is unnecessary to determine such an issue here.

28. Should a State official give evidence before the Tribunal, whether under compulsion or voluntarily, he cannot be compelled to answer any question relating to any information provided under Rule 70, or as to its origin, if he declines to answer on grounds of confidentiality.[56] As regards the possibility that the witness may be asked questions which raise issues of national security, a procedure analogous to Rule 54*bis* may have to be adopted.

Disposition

29. The Appeals Chamber (Judge Shahabuddeen dissenting) orders that subpoenas be issued requiring the two prospective witnesses identified in the Motion to attend at a location in Bosnia and Herzegovina, and at a time, to be nominated by the Krstić defence after consultation with the prosecution (and, if need be, with the Victims and Witnesses Section), to be interviewed there by the Krstić defence.

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

Dated this 1st day of July 2003,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

Judge Shahabuddeen appends a dissenting opinion.

[Seal of the Tribunal]

[56] Rule 70(D). See, generally, *Prosecutor v Milošević*, IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 Oct 2002.

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. Appreciating its liberal intent and drawn to it in many ways, I feel obliged to explain my inability to agree with today's decision on both of the points which it addresses.

A. Competence of the Tribunal to subpoena a State official to testify as to what he has seen or heard in his official capacity

2. The first point on which I am not able to agree is a holding by the Appeals Chamber that it is competent to subpoena a State official to testify as to what he has seen or heard in his official capacity. *Blaškić*[1], which might be thought to stand in the way, is sought to be distinguished on the argument that that case was confined to production of State documents. Today's decision, in paragraph 19, correctly takes the view "that whatever relevant information [the two potential witnesses] may have would have been gained by them in their capacity as State officials". However, the decision proceeds on the basis that this does not immunise them from subpoenas requiring them to give evidence of what they saw and heard, short of producing State documents. I should have wished to support this proposition but, on reflection, it gives me difficulties. The chief one arises from the view that *Blaškić* is to be confined to State documents. So, perhaps, this argument may be examined.

3. In *Blaškić*, the Appeals Chamber took the view that a subpoena could not issue to a State official to produce documents in his custody in his official capacity. The same object could however be achieved by issuing a binding order against the State requiring it to produce the documents through some person to be designated by it. The sanction for disobeying such an order would not be the application by the Chamber of the criminal penalties by which a subpoena is enforced, but a report to the Security Council of the failure of the State to meet its obligation to cooperate with the Tribunal under Article 29 of the Statute.

4. Thus, *Blaškić* did indeed deal with documents, but it seems to me that it is the reasoning of the Appeals Chamber in making its holding in that case which is important. That reasoning logically

[1] IT-95-14-AR108*bis*, of 29 October 1997.

extends to any other information acquired by the official in his official capacity as a State official. This is how the case has been consistently and authoritatively understood in the Tribunal.

5. *Blaškić* was decided by the Appeals Chamber on 27 October 1997. Rule 54*bis* was first adopted on 17 November 1999. It provided an elaborate procedure to be observed where a party requested "an Order under Rule 54 that a State produce documents or information ...". It is reasonable to assume that the judges of the Tribunal who adopted the new Rule intended it to be based on *Blaškić,* that they understood the reasoning of the case to mean that both documents and information (where these were acquired by a State official in his official capacity) could only be obtained from the State, and that in particular such information could not be obtained, either by subpoena or by binding order, directly from that State official. Acting legislatively, the judges of the Tribunal therefore fashioned a careful regime for obtaining such information from the State through a binding order procedure, including provisions for giving protection to the State for its national security interests. It was pointless for them to do all of this if all the while it was and remained possible to obtain the information directly from the State official himself by issuing a subpoena against him. By necessary implication, the Rule excluded the possibility of issuing a subpoena against a State official in respect of information gained by him in his official capacity.

6. On this approach, which is revisited later, it is not really necessary to consider the scope of *Blaškić*: the new Rule is all that is relevant. However, assuming that the scope of that case is still open for examination, it is proposed to consider four views that the case was not intended to extend to information in the sense of matters which the witness saw and heard ("information"), short of the production of a State document (including, perhaps, production of information gained from such a document).

7. First, it may be said that the Appeals Chamber in *Blaškić* would have appreciated that the individual criminal responsibility of State officials, as provided for by Article 7(2) of the Statute of the Tribunal and as otherwise recognised in paragraph 41 of the judgment in that case, could not be established without competence to subpoena other State officials to testify as to their information. In other words, the provision by Article 7(2) of individual criminal responsibility on the part of State officials impliedly authorised the Tribunal to issue a subpoena to other State officials requiring them to testify as to what they had seen and heard in such cases.

8. In my respectful view, that does not follow. This is because the approach in question overlooks a distinction between the evidence of an act and the mode by which the evidence is brought to the

court. The issuance of a subpoena or the making of a binding order is only a mode by which the evidence is brought to court. Even if a binding order is made, the evidence will still be available through this mode to support an Article 7(2) prosecution.

9. Also, if the fact that State officials have individual criminal responsibility means that functional immunity is withdrawn from other State officials in respect of what they saw or heard in their official capacity, it is difficult to appreciate why the withdrawal of the immunity should not extend to State documents; it should be possible to subpoena the production of such documents.

10. Further, information may be required from a State official in a case in which a person who is not a State official is charged. In such a case, the argument based on the individual criminal responsibility of State officials could not be drawn upon. Immunity would not exist if a State official was charged but would presumably exist if the charge was against someone else. So, an argument resting on the individual criminal liability of State officials is of limited efficacy.

11. Second, it may be said that the Appeals Chamber in *Blaškić* would have appreciated that any functional immunity of State officials automatically disappeared with the establishment of international criminal courts. In my view, however, there is no substance in the suggested automaticity of disappearance of the immunity just because of the establishment of international criminal courts. If that is the result, it does not come about, as it were, through some simple repulsion of opposed juridical forces; a recognisable legal principle would have to be shown to be at work, such as an agreement to waive the immunity.

12. International criminal courts are established by States acting together, whether directly or indirectly as in the case of the Tribunal, which was established by the Security Council on behalf of States members of the United Nations. There is no basis for suggesting that by merely acting together to establish such a court States signify an intention to waive their individual functional immunities. A presumption of continuance of their immunities as these exist under international law is only offset where some element in the decision to establish such a court shows that they agreed otherwise. It may be thought that, in the case of the Tribunal, Article 29 of the Statute shows that they agreed otherwise, but that provision is directed to an obligation to cooperate; that obligation can be satisfied by a binding order which does not involve criminal sanctions inconsistent with the traditional functional immunity of States. Neither is an agreement to waive that immunity shown by Article 7(2) of the Statute, which has already been dealt with. It is difficult to see what else in the Statute shows that the establishment of the

Tribunal as an international criminal court indicated an intention by States to abandon their individual functional immunities.

13. Third, it may be said that *Blaškić* can be explained by reference to a principle of law which does not lead to an extension of that case to information, as distinguished from State documents. In paragraph 23 of its decision in this case the Appeals Chamber says that it "is common place in the law that, where the documents to be produced are the documents of either the State or a corporation, only the State or the corporation can be required to produce them, and that it is for the State or the corporation to do so through its proper officer", and accordingly that the "issue of a subpoena to the Defence Minister [in *Blaškić*] to produce the documents would have had to be set aside upon that basis in any event".

14. However, that does not appear to be the basis on which the Appeals Chamber in fact proceeded in that case. The Appeals Chamber spoke of the maxim *par in parem non habet imperium* and considered that it was on this basis – a principle of international law - that functional immunity arose. It is true that the decisions cited by the Appeals Chamber in illustration of the working of that principle in international criminal cases concerned prosecutions, and not subpoenas. But, in paragraph 41 of its judgment in that case, the Appeals Chamber gave the reason: "international courts ... have of course addressed their orders or requests through the channel of the State Agent before the court or the competent diplomatic officials".

15. Fourth, there seems to be an argument as to the extent of the information which attracts the immunity. On the one hand, not all kinds of information attract immunity; *Blaškić* itself recognised that. On the other hand, it is not right to narrow the definition of information to material collected in some central place under the authority of the State, such as its archives. A State acts through its officials; it has information held by them over the whole field of its activity, national and international, including information of matters seen or heard by them. It is not useful to attempt to refine the matter beyond the point reached in *Blaškić*.

16. As I understand that case, the test which it lays down is whether the material was acquired by the proposed witness in his capacity as a State official. I believe that today's decision correctly finds that the test was met in this case; it is notwithstanding this that the decision determines that the two potential witnesses are to be subpoenaed. By contrast, the same finding that the test was met in this case leads me to the view that the required information can be made available to the Appeals Chamber

through the making of a binding order against the State; and, from the pleadings, I gather that the prosecution is not opposed to that course.

17. In the result, one comes to this: If, as I hold, the reasoning of this Chamber in *Blaškić* covers this case, then, in keeping with the settled jurisprudence of the Tribunal, what has to be considered is whether, in reality, that decision is now being departed from and, if so, whether there are cogent reasons for the departure. I think that today's decision does represent a departure, and that the departure is not supported by cogent reasons.

18. There is a last point. It is raised in the alternative to the foregoing questions of interpretation of *Blaškić*. Let it be assumed that the reasoning in that case does not cover this case, that that case was confined to State documents, and that consequently no question of departing from it arises in this case. Still there is Rule 54*bis*. It seems to me that the true interpretation of the Rule is that, if it is desired to have information gained by a State official in his capacity as such an official, the only permissible course is to move for a binding order against the State under that provision. Even if the Rule misunderstood that case, what has to be now addressed is the validity of the Rule and not the interpretation of the case.

19. There is only one basis on which the validity of the Rule could be questioned. That basis is that the Rule exceeded the province of the rule-making competence confided to the judges by Article 15 of the Statute. However, this provision empowered the judges to make "rules of procedure and evidence ...". It would appear to provide authority for the making of Rule 54*bis*. The Rule is thus valid. On a true interpretation, it excludes the issuance of a subpoena against a State official for information gained by him in his official capacity. For this reason and for others mentioned above, I am respectfully unable to support today's decision to the opposite effect.

B. Competence to subpoena potential witnesses to attend a defence interview

20. The second point on which I am not able to agree with today's decision arises out of paragraph 29 of the decision, reading that the "Appeals Chamber orders that subpoenas be issued requiring the two prospective witnesses identified in the Motion to attend at a location in Bosnia and Herzegovina, and at a time, to be nominated by the Krstić defence after consultation with the prosecution (and, if need be, with the Victims and Witnesses Section), to be interviewed there by the Krstić defence".

21. An original defence motion of 1 April 2003 requested the "Appeals Chamber to issue subpoena for [a named] witness ... to appear before the Chamber and give his testimony". Another motion, of the same date and relating to another witness, was in like terms. The motions looked to the witnesses being required to testify in the ordinary way before the Appeals Chamber. I should have had no difficulty with these motions.

22. However, on 3 April 2003, the original requests were modified by an addendum. The addendum referred to the "two motions for the issuance of subpoena for [the] witnesses" and stated that it "confirms that the order sought by the defence from the Appeals Chamber is one requiring the witnesses to attend at some location within Bosnia so that the witnesses may be interviewed by the defence in anticipation of adding material to the Rule 115 application in relation to these two witnesses".

23. On the basis of the order of the Appeals Chamber, the place and time of the proposed defence interview are to be nominated by the defence "after consultation with the prosecution". Apparently, however, the prosecution has no right to participate in the interview, the interview will not be held under oath, and it will not be part of proceedings conducted by the Tribunal itself, including proceedings held by it through depositions. The interview will be an out-of-court one, in anticipation of adding material to an existing Rule 115 application brought by the defence in relation to these two witnesses. There is also no suggestion that the witnesses are required for the purpose of producing documents: no documents have been described or referred to in the requests to the Appeals Chamber. The witnesses are "required" for the purpose of giving general information at the proposed defence interview.

24. The Appeals Chamber correctly proceeds on the basis that the amended motions are seeking subpoenas. As is known, a subpoena is enforced by the application of criminal sanctions. I am not persuaded that the Appeals Chamber has competence to issue the requested subpoenas. The Chamber has power to facilitate the attendance of a potential witness at a defence interview, but it does not have power to compel such attendance.

25. The distinction is illustrated by what happened in *Tadić*.[2] The case involved an application by Tadić to admit additional evidence in an appeal by him. He feared that officials in the State (or Entity) where the evidence had to be collected could be obstructive, and he accordingly moved an *ex parte*

[2] *Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin*, IT-94-1-A-R77, of 31 January 2000.

"Motion for Binding Order against" that State for certain reliefs. Pursuant to that motion, the Appeals Chamber granted him an order to the State requiring it to "inform Defence Counsel of the precise whereabouts of [certain] individuals" and to "use all the means in its power during [a certain] period ... to enable Defence Counsel without any restriction or interference to interview and take statements from the individuals ...".[3] The necessary arrangements were then made by the authorities of the State, and the individuals were in due course interviewed by counsel and co-counsel for Tadić at a police station.[4] But no subpoena was issued by the Appeals Chamber to the individuals themselves requiring them to attend the interview held by defence counsel.

26. Thus, the Appeals Chamber assisted the investigation by clearing the way for the individuals to come forward to the defence, but did not apply compulsion on them to come forward to the defence. This, it may be thought, represents the correct position. However, there are opposing considerations; these have to be considered.

27. It is argued that the Appeals Chamber derives competence to grant the amended motions from Rule 54 of the Rules of Procedure and Evidence of the Tribunal, which, with appropriate modifications, applies in relation to appeals by virtue of Rule 107. Rule 54 reads:

> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purpose of an investigation or for the preparation or conduct of the trial.

28. The language used in Rule 54 is admittedly wide, but it is as short as it is wide; it has to be interpreted and applied in a reasonable way. The provision grants general power to issue subpoenas, but whether it grants power to issue a subpoena in a particular case depends on the nature of the case. Thus, despite the apparent amplitude of the Rule, it was held in *Blaškić*[5] that it did not give power to issue a subpoena to a State or to its Minister of Defence to produce State documents. In the instant case, it is one thing for the Appeals Chamber to use its powers under the Rule to remove any difficulties which might prevent a potential witness from coming forward to the defence; it is another thing for the Appeals Chamber to use its powers under the Rule to compel the potential witness to come forward to the defence, and more particularly under the threat of penal sanctions.

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[3] Order to Republika Srpska, IT-94-1-A, of 2 February 1998.
[4] *Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin,* IT-94-1-A-R77, of 31 January 2000, para. 7.
[5] IT-95-14-AR108*bis*, of 29 October 1997.

29. It may be said that *Blaškić* recognises that the Tribunal has power to make a binding order on a State to furnish documents to a party and that in like manner the Tribunal is competent to issue a subpoena to a potential individual witness to attend a defence interview for the purpose of giving information to the defence. However, in making a binding order on a State to furnish documents to a party, the Tribunal is acting under Article 29 of the Statute relating to the obligation of States to cooperate with the Tribunal. The sanction is a report to the Security Council; that is not applicable to individuals. Thus, the *Blaškić* principle rests on a basis which is peculiar to the special statutory obligation of a State to cooperate with the Tribunal.

30. Argument may also be made that the right claimed is consistent with the recognised right of access by the defence to confidential material produced in other cases before the Tribunal, including the criterion of a legitimate forensic purpose used in such cases. But that right of access is not relevant. The prosecution knows of the confidential material; it is fair that the defence should also have it; and the whole process is under the control of the Tribunal. The gap is too wide to be safely bridged by analogy.

31. One may point to the predisposing fact that in certain jurisdictions a court may order a non-party to produce specified documents to a party at a stated time and place.[6] But this facility does not extend beyond documents and seems to be confined to civil proceedings. These are criminal proceedings, and what is visualised is the giving of general information and not the mere production of documents.

32. It is also the case that deposition procedure in some countries involves the taking of sworn evidence from a witness in the office of an attorney. But there both parties are entitled as of right to be present, the proceedings are subject to the standing regulations of the court, some agency of the court is present, and the evidence is really part of the evidence before the court or at least can be produced there. In these respects, the present case is different. The reference in the decision to the Victims and Witnesses Section of the Tribunal is insufficient to change anything, that Section being concerned with the privacy and protection of witnesses and being involved, under the decision, only, and then optionally, in the nomination of the place and time of the interview. Further, proceedings in the office of an attorney are really directed to gaining knowledge of the evidence on the other side, the object being to avoid "trial by surprise" or, as it has been said, to deny a "sporting theory of justice". A party may indeed produce its own witnesses, but the idea is not to enable that party to gain knowledge of the expected testimony of its own witnesses; that is a matter which the party should know when it decides

[6] Civil Procedure Rule 31.17 (U.K.).

to lead evidence from its own witness. Also, the procedure appears to be confined to civil proceedings. The matter is not advanced by reference to cases relating to letters of request or letters rogatory.[7]

33. A major argument is that it is, as a general matter, imprudent for counsel to lead evidence from a witness without the benefit of a proof of the proposed evidence of the witness. That, it may be thought, supports the issuing of subpoenas in this case requiring the witnesses to be interviewed by the defence. But the decision whether a witness is to be examined without a proof is one which counsel has to take. Though without a proof, counsel may have some reliable basis for anticipating the general direction of the witness's testimony, and may feel obliged by his duty to his client to proceed without doing violence to his obligation to act skilfully and with loyalty in the discharge of his responsibilities as counsel.

34. In *Rutaganda,*[8] the witness was called by the ICTR Appeals Chamber *proprio motu*, but it was really the appellant who was interested in his evidence; and so the fact that his counsel proceeded by way of cross-examination and not by way of examination-in-chief was not important to the question whether the taking of a proof is an essential prerequisite to counsel's ability to lead the witness in evidence. Clearly, counsel in that case did not have a proof of what the witness was going to say. Nevertheless, I cannot see that that circumstance inhibited him from putting forward a vigorous cross-examination of the witness.

35. Consequently, I am not persuaded that any need to take a proof from the two potential witnesses by itself provides justification for issuing subpoenas requiring them to attend the proposed defence interview for the purpose of giving details, in the nature of a proof, to the defence. The defence already has written statements from the witnesses, having been furnished with them by the prosecution. It is material contained in those statements on which the defence is fundamentally relying in its existing Rule 115 motion. So, there is a basis on which the defence can request subpoenas requiring those witnesses to testify on the relevant point before the Appeals Chamber. And such subpoenas are what the defence originally requested. A subpoena requiring the witnesses, under threat of criminal penalties, first to attend a defence interview for the purpose of giving details of the material referred to in their existing statements is another matter.

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[7] See also the European Convention on Mutual Assistance in Criminal Matters, 20 April 1959, and the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, 17 March 1978.
[8] ICTR-96-3-A, of 26 May 2003, paras. 467ff.

36. One possible argument comes from Article 18(2) of the Statute, which gives power to the Prosecutor to "question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations". Why should not the Tribunal have power to authorise the defence to question witnesses? Equality of arms comes to mind. The answer is that the provision was only vesting the Prosecutor, a creature of statute, with a competence to question witnesses that the accused, as an individual, would have without the need for statutory authorisation. Besides, that right is implied by Article 21(4) of the Statute which gives to an accused "the following minimum guarantees, in full equality - ... (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". The real issue is therefore not whether the defence has a right to question a potential witness but whether a potential witness is obliged to submit to questioning. It does not appear to me that the Tribunal has power to require a witness to submit to questioning by either side outside of a hearing in the Tribunal – including a hearing by depositions.

37. This conclusion applies also to the alternative course mentioned by the Appeals Chamber in paragraph 12 of its decision, under which the Appeals Chamber would subpoena the witness to appear before it but only, so it seems to me, for the purpose of his being interviewed "in private" by the defence after the judge who issued the order has explained to him the importance of his cooperation to assist in producing a just result. The net effect of the subpoena is to require the witness to submit to the defence interview "in private"; meanwhile, he needs to be "released by the Tribunal". That is only an indirect method of accomplishing the substance of the matter. It may not always be correct to say that what cannot be done directly cannot be done indirectly,[9] but I think that this is the case here.

38. It may be said, however, that the overriding interests of justice and the search for truth require the Tribunal to assist the appellant in his investigations by issuing subpoenas to the two potential witnesses to attend the defence interview in Bosnia under threat of penal sanctions. With respect, I do not see that.

39. The appellant has been convicted. He proposes to challenge his conviction by presenting additional evidence. The burden is on him to produce that evidence; it is not the mission of the Appeals Chamber to find the evidence for him. There is either such evidence or there is not. If there is none, his case on the point ends. If there is, he is expected to be in possession of it before moving the Appeals Chamber.

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[9] See *Re Ontario Judicature Act 1924* [1924] 3 D.L.R. 433 at 444, Hodgins, J.A., dissenting.

40. *Blackstone's Criminal Practice 2003*, para. D24.18, says that "a statement from the proposed witness (whether taken as a deposition by an examiner[10] or served by the appellant) should always be available to the court from an early stage, and will no doubt assist it at the hearing in deciding whether to receive oral evidence from the witness". By way of example, reference may be made to Rule 3(1)(d) of the Criminal Appeal Rules 1968 (U.K.), under which the applicant should give notice of his request that the Court of Appeal should receive evidence. He is to do so in a form 6, which has a box stating: "The witness can now give the following evidence (which was not given at the trial)". The practical situation is illustrated by *R. v. James*, 2000 Crim. L.R. 571, in which, to cite the summary given in the report, it was held that –

> where fresh evidence was tendered from a witness who was said not to have been available at the trial, it was essential that an affidavit should be sworn by the defendant's solicitor describing the circumstances in which the witness came forward to make the statement and the circumstances in which the statement was made.

As I understand it, that is to be done at the beginning of the proceedings. So an appellant who is seeking to overturn his conviction through additional evidence should have that evidence when he is making application to have it admitted. I think that is the principle.

41. The interests of justice would empower the Appeals Chamber to make a binding order requiring the State concerned to remove any obstructions that disable the defence from interviewing any witness that wishes to come forward. But I am not able to see how the interests of justice empower the Appeals Chamber to take the further step of issuing a subpoena to the witness "requiring" him to attend a defence interview and to give information to the defence under threat of criminal penalties. The idea of the interests of justice is a valuable one, but it needs to work on recognisable principles. Otherwise, there is mystery. As Edmund Burke said, speaking "of human laws, ... where mystery begins, justice ends".

[10] This is really an extended court proceeding; it does not visualise the issuance of a subpoena to a potential witness to attend a defence interview.

42. My doubts should have been dispelled by any reference in today's decision to any clear instance in domestic or international jurisprudence in which a court issued a subpoena to a potential witness requiring him to attend a defence interview under the criminal sanctions threatened by such an instrument. I am not satisfied that there is any such instance.

43. That being so, it appears to me that the correct solution in this case is to strike a balance between the public interest in securing information needed for a criminal trial and the public interest in the right to privacy. The granting of the amended motions can only mean that the potential witnesses are required under threat of criminal penalties - as distinguished from being enabled by the removal of possible impediments - both to attend a defence interview at a location within Bosnia and to answer questions put there by the defence. In my opinion, that involves movement by the Appeals Chamber from facilitating to compelling. That movement disturbs the correct balance between the two important public interests referred to. Beyond the line fixed by that balance, an invasion of the right to privacy occurs. I believe that today's decision represents such an invasion. That is the source of my respectful dissent.

Done in both English and French, the English text being authentic.

Mohamed Shahabuddeen

Dated this 1st day of July 2003
At The Hague
The Netherlands