Investigating Powers of the International Criminal Tribunal for the Former Yugoslavia vis-à-vis States and High Government Officials

Amicus Curiae Brief Submitted by the Max Planck Institute for Comparative Public Law and International Law to the International Criminal Tribunal for the Former Yugoslavia in the Case of

The Prosecutor v. Tihomir Blaskic

by Jochen Abr. Frowein/ G. Nolte/ Karin Oellers-Frahm/ A. Zimmermann

CONTENTS

III. Limits of the power of the Tribunal to issue orders against a State

1. General Remarks
2. Protection of confidential information
   a) Statements by States
   b) Analysis of national legislation implementing the duty to cooperate with the Tribunal
   c) Analysis of similar provisions contained in other international instruments
   d) National law
   e) Conclusion
3. Specificity of request
   a) Analysis of the Statute
b) National laws on criminal procedure
   c) Analysis of similar provisions contained in other international instruments
   d) Conclusion

IV. May orders against a State be issued in the form of a "*subpoena duces tecum*"?

1. Use of the term "subpoena" as a form of sanction in itself
2. Implied assertion by the Tribunal of a power to punish a State for contempt?

C. What are the appropriate remedies to be taken if there is non-compliance *by a sovereign State* of a "*subpoena duces tecum*" or request issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

I. Analysis of Art. 29 of the Statute and of the Rules of Procedure

1. Art. 29 of the Statute
2. Rules of Procedure
3. Contempt power as implied power of the Tribunal?

II. Analysis of similar provisions contained in other international instruments

1. International Court of Justice
2. Court of Justice of the European Communities
3. European Commission and European Court of Human Rights
4. Iran-U.S. Claims Tribunal

5. ILC Draft Statute for an International Criminal Court and work of the Preparatory Committee on the Establishment of an International Criminal Court
6. Conclusion

III. Remedies by other bodies than the International Criminal Tribunal

IV. Conclusion: The power of a judge or a Trial Chamber to issue a "*subpoena duces tecum*" against a sovereign State

D. Power of a judge or Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia to issue a "*subpoena duces tecum*" to a high government official

I. Power of the tribunal to issue binding orders to individuals generally

1. Analysis of Art. 29 of the Statute
2. Analysis of national legislation implementing the duty to cooperate with the Tribunal
3. Analysis of similar provisions contained in other international instruments

II. May the Tribunal issue a "*subpoena duces tecum*" to high government officials?

E. What are the appropriate remedies to be taken if there is non-compliance by an individual, including a high government official, of a "*subpoena duces tecum*" issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

I. Analysis of Art. 29 of the Statute and of the Rules of Procedure

II. Legal basis of the contempt rule

III. National cooperation laws

IV. Analysis of similar provisions contained in other international instruments

V. Sanctions against high government officials for non-compliance with an order

F. Final Conclusion

A. Introduction

The brief hereby submitted to the Tribunal will discuss the following issues:

a) Is a judge or Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia competent to issue a "*subpoena duces tecum*" to a sovereign state and, if so, what are the possible limits of that competence?

b) What are the appropriate remedies to be taken if there is non-compliance *by a sovereign State* with a "*subpoena duces tecum*" or request issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

c) Does a judge or Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia also have the power to issue a "*subpoena duces tecum*" to a high government official?

d) What are the appropriate remedies to be taken if there is non-compliance *by an individual* including a high government official with a "*subpoena duces tecum*" issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

B. Power of a judge or Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia to issue a "*subpoena duces tecum*" to a sovereign state

Before addressing the issue whether a judge or Trial Chamber may issue a "*subpoena duces tecum*" to a sovereign State it is necessary to clarify the term "*subpoena duces tecum*".

I. Preliminary clarification: meaning of the term "*subpoena duces tecum*"

The term "*subpoena duces tecum*" is mentioned neither in the Statute of the International Tribunal[1] nor in the text of Security Council Resolution 827[2]. Rule 54 of the Rules of Procedure and Evidence of the International Tribunal[3], however, provides in its English version that "a judge or Trial Chamber may issue such orders, summonses, *subpoenas* and warrants as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

---

1 S/257U4, 3 May 1993 and Corrigendum S/25704/Corr.1, 30 July 1993.

2 S/RES/827 (1993), 25 May 1993.

3 IT/32/Rev.6, 6 October 1995.

1. "*Subpoena duces tecum*" as a form of court order

In common law jurisdictions the term "*subpoena duces tecum*" is used for a court order commanding the production of documents[4]. Together with *subpoena ad testificandum* (a court order to enforce the attendance of a witness[5]) it is also officially called *subpoena*[6]. Art. 29 para. 2 of the Statute only empowers the Tribunal to issue "requests for assistance" and "orders". Since the Tribunal derives its powers only from the Statute the question must be raised whether Art. 29 para. 2 encompasses a power of the Tribunal to issue, on the basis of its Rules of Procedure, an order in the form of a "*subpoena duces tecum*".

2. "*Subpoena*" as implying a threat of sanction?

In common law jurisdictions it is a characteristic of a "*subpoena*" that non-compliance with its terms can be sanctioned as a contempt of court[7]. Since the International Tribunal is *prima facie* not authorized to impose any penalties on States for non-compliance[8] with legally binding requests by the Tribunal, it must be verified whether the issuance of a "*subpoena duces tecum*" is *ultra vires*. Two reasons suggest that the "*subpoenas*" in question go beyond a mere "request for assistance" or "order" in the sense of Art. 29 para. 2 of the Statute of the Tribunal:

---

4 Halsbury's Laws of England, 4th ed. 1976, vol. 17, "Evidence", para. 250; American Jurisprudence 2d ed. 1981, "Witnesses", § 14.

5 Halsbury's Laws of England, 4th ed. 1976, vol. 17, "Evidence", para. 244; American Jurisprudence 2d ed. 1981, "Witnesses", § 9.

6 Rules of the Supreme Court, (England) 1965, Order 38, sect. 14 (1); Federal Rules of Criminal Procedure, Rule 17 (a) and (c), USCA Title 18 Appendix; Corpus Juris Secundum, vol. 47, "Witnesses", § 20; *see* also Annotation, Availability under Uniform Act to Secure the Attendance of Witnesses from without a State in criminal proceedings of subpoena duces tecum, 7 ALR4th 836, at 838, where reference is made to American case law according to which "since a subpoena duces tecum and a subpoena ad testificandum are so similar in nature and so fundamental to the gathering of evidence, there is little reason to distinguish between them. Thus ... the failure of the Act to explicitly provide for a subpoena duces tecum did not necessarily indicate that such a subpoena could not be issued"

7 Federal Rules of Criminal Procedure, Rule 17 (g) USCA Title 18 Appendix; Halsbury's Laws of England, 4th ed. 1976, vol. 17, "Evidence", para. 262.

8 V Morris/M. P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, 1995, vol. 1, 313; For a detailed analysis *see* below C I. and III.

- It is well established in States of the common law tradition that the power to punish contempt of court does not depend on a specific legislative enactment[9] but is considered to derive from an inherent power of the courts. This is demonstrated by the fact that the "Suggestions made by the Government of the United States for the Rules of Procedure" assume that the International Tribunal possesses essentially similar inherent powers[10]. It is therefore not excluded that the Tribunal regards non-compliance with "*subpoenas*" directed against a State to be a ground for its exercise of such an "inherent" contempt power beyond what has been expressly spelled out in the Rules of Procedure.
- "*Subpoena*" is a latin term which, translated literally, means "under (threat of) punishment". Thus, at least terminologically, the expression "*subpoena*" is a rather coercive form of "request for assistance" or "order". Lawyers from common law jurisdictions may not sense this as clearly due to their familiarity with the term "*subpoena*" as a term of art. In an international setting, in particular among sovereign States, however, terminology is often not merely regarded as form but is taken to affect substance. It is therefore possible that the use of the term "*subpoena*" against a State is a penalty (whose imposition would be reserved to the Security Council)[11].

On the other hand, three other reasons militate against the assumption that the judge, by issuing the "*subpoenas*" in question, imposed or threatened to impose a penalty on Bosnia-Herzegovina and Croatia in case of non-compliance:

- By adopting Rule 77 of its Rules of Evidence, the Tribunal has provided itself with a limited power to punish contempt. Rule 77, however, only applies to "witnesses" or other "persons". It therefore seems excluded that the Judge, by issuing a "*subpoena*" against the State of Croatia, implicitly asserted a power of the Tribunal to impose a penalty on a State for non-compliance.
- The *subpoenas* in question do not contain a reference to a possible sanction to be imposed *by the Tribunal* in case of an eventual non-compliance. This conforms to the practice in common law jurisdictions. In those countries, a writ of *subpoena* must not itself specify a possible sanction for non-compliance[12] and must not even contain a reference to the possible exercise of the contempt power of the court[13].

---

9 Halsbury's Laws of England, 4th ed. 1974, "Contempt", para. 87; Corpus Juris Secundum, vol. 17, "Contempt", § 2.

10 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 521 ("inherent power of the court to punish contempt").

11 *See* below C. III.

12 *See* Rules of the Supreme Court, (England) 1965, Appendix A (Forms) nos. 28-30.

13 *See* Rules of the Supreme Court, (England) 1965, Appendix A (Forms) nos. 28-30; Corpus Juris Secundum, vol. 47, "Witnesses", § 21.

- Under French law, the equally authentic term "*assignation*", where used in a contemporary criminal law context, does not imply that the witness or expert who refuses to appear before the court may be punished by the same court for his or her non-appearance but only "by law" ("par la loi")[14].

Given this ambiguity it appears reasonable that, before addressing the question whether a judge or a Trial Chamber may issue a decision in the form of a "*subpoena duces tecum*" to a sovereign State, (III.) to first determine whether or to what extent a judge or a Trial Chamber may take a decision to impose a legally binding specific obligation on a sovereign State (II.).

II. The power of the Tribunal to take decisions imposing legally binding specific obligations on a sovereign State

Regardless of the exact meaning of the term "*subpoena*", such a decision can go no further than the power of the Tribunal under Art. 29 of the Statute to impose legally binding specific obligations on a sovereign State.

1. Duty of States to comply with orders taken by a single judge before the commencement of trial proceedings

Art. 29 para. 2 of the Statute only provides for a duty of States to comply with requests for assistance or orders issued by a Trial Chamber. It does not explicitly mention requests or orders issued by a single judge. This does not mean, however, that States have no duty to comply with requests or orders of a single judge. Art. 19 of the Statute not only gives a single judge the power to issue orders but also speaks of him or her as "the judge of the Trial Chamber". It thereby indicates that the judge, when exercising his or her powers under Art. 19, is acting on behalf of the Trial Chamber. There is no

---

[14] Cf. Art. 280 of the French Code of Military Procedure:
"L'assignation à temoin doit en outre porter mention que la non-comparition, le refus de témoigner et le faux témoignage sont punis par la loi et que faute par le temoin de se conformer à l'assignation à lui délivré, il pourra être contraint par la force publique et condamné"
The most common use of the term *assignation* in French law can be found in Art. 54 and 55 of the French Code of Civil Procedure according to which "assignation" is defined as "l'acte d'huissier par lequel le demandeur cite son adversaire à comparaitre devant le juge". The (general) French Code of Criminal Procedure does not use the term *assignation* but rather refers to *citation*, *see* Art. 550 and 551 of the French Code of Criminal Procedure.

reason why States should have a lesser duty to comply with orders of a single judge. There is also no reason why the general duty to cooperate "with the International Tribunal" under Art. 29 para. 1 of the Statute should not apply to decisions of the judge under Art. 19 of the Statute. It can neither be assumed that the Statute intended to attribute different legal effects to the same term "order" depending on the issuing organ since the collection of evidence before the commencement of the trial is as important as during the proceedings. Therefore, the specific duty of States to comply with requests and orders of a Trial Chamber under Art. 29 para. 2 also applies to decisions taken by a single judge on the basis of Art. 19 of the Statute.

2. The power to issue "orders" to sovereign States

The "*subpoenas*" in question are addressed to States and they "direct" one of their officials "to ensure compliance" with its terms. By asserting a power "to direct" the judge *prima facie* appears to go beyond a mere "request for assistance" but to issue an "order". This raises the question whether the Tribunal may issue "orders" to sovereign States or whether it is limited to directing "requests for assistance" to States.

a) Analysis of Art. 29 of the Statute

On its face, Art. 29 para. 2 of the Statute of the Tribunal clearly authorizes the Tribunal to issue not only "requests for assistance" but also "orders" with which "States shall comply".

aa) Report of the Secretary-General

Doubts as to whether "orders" may indeed be addressed to States arise, however, from the comment in the Secretary-General's report according to which, in addition to "ensure compliance" with requests of assistance, States shall (only) "give effect" to orders issued by the Trial Chambers[15]. The expression "give effect" suggests that such an order, as a general rule, is not addressed to the State itself but that the State is only lending its powers to make it effective. Art. 29 can therefore be interpreted in a way that the Tribunal may only demand the necessary cooperation of States by way of "requests for assistance" and that its "orders" can only be addressed to natural or legal persons other than States. States would then only have the task of "giving effect" to such orders.

---

15 S/25704, 3 May 1993 and Corrigendum S/25704/Corr.l, 30 July 1993, para. 125.

bb) Traditional Forms of International Legal Cooperation

Such an interpretation would conform to the practice of States in the field of international legal cooperation. In numerous treaties on legal cooperation States have established duties to cooperate. A specific duty to deliver persons or documents, however, arises only upon "requests (for assistance)" and not upon "orders"[16].

cc) Drafts and Proposals for the Statute

There are also clear indications that many States and experts participating in the drafting of the Statute expected the cooperation between States and the International Tribunal to conform to the traditional forms of international legal assistance. Thus, for example, the Proposal of the CSCE-Rapporteurs for an International War Crimes Tribunal for the Former Yugoslavia expressly provided that "in general it should suffice to apply the system of legal assistance and co-operation which is applied between States today"[17]. Along the same line most other drafts and proposals for the Statute use the term "assistance" when describing the form of the envisaged cooperation by States[18]. With respect to "orders" issued by the Tribunal those Drafts and Proposals only envisaged indirect obligations by States to "enforce"[19] or to "execute"[20] them or "to arrange compliance with the order or warrant"[21]. They did not explicitly refer to States being obliged to "comply" with "orders".

dd) "Orders" to States

There are, however, also arguments to the effect that the Tribunal may not only "request" States to cooperate but that it may also issue "orders" to them. Art. 19 para. 2 of the Statute speaks of "orders (...) for the surrender or transfer of persons". Such orders can only be directed to States. Similarly, in his report, the Secretary-General speaks of certain "orders issued by the Trial Chambers" which, by their very nature, can only be addressed to States, such as "warrants for surrender or transfer

---

16 *See* e.g. Art. 1 (1) of the European Convention on Mutual Assistance in Criminal Matters, reprinted in: European Inter-State Co-operation in Criminal Matters - Collection of Texts (Müller/Rappard/Bassiouni eds), vol. 1, Dordrecht 1987 (looseleaf), chap. 1, 1.

17 Proposal for an International War Crimes Tribunal for the Former Yugoslavia, by Rapporteurs (Correll-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia, reprinted in Morris/Scharf, *supra* note 8, vol. 2, 262 - 263.

18 Ibid., vol. 2, France, 346; Italy, 378; USA, 454; Amnesty International, 424; Netherlands, 476.

19 Ibid., vol. 2, Organization of the Islamic Conference, 405.

20 Ibid., vol. 2, Russia, 446 f.

21 Ibid., vol. 2, USA, 530.

of persons"[22]. Under municipal law the term "warrant" contains at least an order to the police to arrest the person against whom it is issued[23]. The drafting history of Security Council Resolution 827 demonstrates that States were conscious of the possibility that the Tribunal could also impose "orders" on them. In the debate following the adoption of Security Council Resolution 827 the representative of the United Kingdom said that domestic procedures would be needed "to give effect to the obligations under Art. 29 to comply with a request *or order* concerning the surrender or transfer of an accused to the International Tribunal"[24]. This shows that the power of the Tribunal to issue orders to States was not, in principle, excluded.

ee) The identical legal effect of "requests for assistance" and "orders"

The uncertainty as to whether the Statute confers a general power to the Tribunal to issue orders should not divert attention from the fact that a "request for assistance" gives rise to a legally binding obligation. According to Art. 29 para. 2 of the Statute, States shall "comply" with requests for assistance. This obligation is for all practical purposes indistinguishable from the one created by an "order". Depending on the specificity of the terms of the request[25] the State concerned has virtually no choice but to carry out exactly what is being demanded. This is particularly obvious in cases in which the State is in control of a particular person sought by the Tribunal.
That "requests" possess the same legally binding nature as "orders" should not be surprising. It is well established that "requests" which are extended in the course of ordinary international legal cooperation in criminal matters between States give rise not just to an abstract duty to cooperate. Such requests also give rise to specific duties to surrender a person or to perform other acts, such as the delivery of documents, subject, however, to the conditions laid down in the applicable conventions[26].

22 *Supra* note 15, para 125.

23 *See* e.g. Halsbury's Laws of England, 4th ed. 1979, vol. 29 "Magistrates", para. 329.

24 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 190; emphasis added.

25 For possible exceptions *see* below B. III.3.

26 Thus, in Art. I of the European Convention on Extradition the Contracting Parties "undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting parties are proceeding for an offence ...", reprinted in: European Inter-State Co-operation in Criminal Matters - Collection of Texts (Müller/Rappard/Bassiouni eds), vol. 1, Dordrecht 1987 (looseleaf), chap. 1, 1; even under this Convention, which constitutes the European minimum standard (Geoff Gilbert, Aspects of Extradition Law, 1995, 20-21), it is beyond doubt that a valid request gives rise to an obligation, under international law, of the requested State to surrender the person in question, *see* Jones, Jones on Extradition, 1995, 5-005, 129; Geoff Gilbert, Aspects of Extradition Law, 1995, 8.

The fact that "requests" made under treaties on international legal cooperation have not in practice been called "orders" - despite their giving rise to specific obligations of the requested State - has two explanations. However, neither reason is applicable in the context of the International Tribunal:

- First, being conducted within a framework of cooperation between equals, it would appear inappropriate to call compliance by sovereign States with specific obligations arising from ordinary treaties on mutual legal assistance a compliance with "orders". The cooperation between the Tribunal and States, however, is based on Chapter VII of the United Nations Charter[27].
- Second, treaties on international legal cooperation in criminal matters, in particular extradition treaties, provide for a number of possible grounds to refuse a request and reserve judgment as to whether such grounds are applicable to the requested State[28]. As long as the determination whether the specific obligation envisaged by the treaty has indeed arisen depends to a large extent on the judgment of the requested State, it makes very little sense to use the term "order"[29]. In contrast, the duty of a State to cooperate with the International Tribunal is qualified to a far lesser extent, if at all, by the right of that State to determine in the last resort whether an exception applies to it[30].

ff) Confirmation of the interpretation by the special character of the Tribunal

States may have expected that the Tribunal, as a general rule, would issue orders only with respect to persons while it would deal with States by way of issuing "requests for assistance". This expectation could have been based on two assumptions: First, under general international law, States, as sovereign entities, cannot be "ordered" to comply. Second, the term "order" may appear inappropriate where the demand in question is not specific enough to be immediately self-executing, as, for example, with respect to a request to arrest a suspect whose whereabouts are unknown. A closer inspection, however, reveals that these assumptions are not sufficient to justify a substantial legal distinction between the two terms under the Statute:

---

27 Report of the Secretary-General, *supra* note 15, para. 126.

28 *See* e.g. Art. 3 (1) of the European Convention on Extradition, reprinted in: European Inter-State Co-operation in Criminal Matters - Collection of Texts (Müller/Rappard/Bassiouni eds), vol. I, Dordrecht 1987 (looseleaf), chap. 1, 2.

29 *Mutatis mutandis* Vogler, Auslieferungsrecht und Grundgesetz, 1970, 47-48.

30 For details *see* below B. III. 2.

- Since, according to the Report of the Secretary-General, "an order by a Trial Chamber" has "to be considered to be an enforcement measure under Chapter VII of the Charter of the United Nations"[31], any order by the Tribunal must be taken as having originated from a body which has the power to issue binding specific decisions or "orders" to a sovereign State. In addition, the term "order", even under municipal law, does not always require a high degree of specificity as to how to achieve the result demanded.

- The contemporaneous use in the Statute of the terms "request for assistance" and "order" can be explained by the Security Council blending different systems (or conceptions) to secure the effective functioning of the Tribunal. By using the "request for assistance" in terminology the Security Council sought to endow the Tribunal with the benefits of the traditional means of international legal cooperation. In addition, by giving the Tribunal the power to issue "orders", the Security Council intended to endow the Tribunal with at least some of the usual powers of national criminal courts for the performance of their tasks. Since States can be both addressees of "requests for assistance" under treaties providing for international legal cooperation as well as addressees of court "orders" under municipal laws, it would seem possible that States can be addressees of both "requests for assistance" as well as "orders" emanating from the Tribunal.
- Finally it should be taken into account that the creation of an International Criminal Tribunal on the basis of Chapter VII of the United Nations Charter was a wholly unprecedented step which was effectuated under considerable time pressure. This explains why several countries, in the course of the debate following the adoption of Resolution 827 remarked that a number of questions had not been addressed with sufficient clarity. The representative of Japan, for example, stated that "perhaps more intensive legal studies could have been undertaken on various aspects of the Statute, such as ... measures to establish a bridge with domestic legal systems"[32]. This history alone explains why mutually overlapping concepts came to be incorporated into the Statute.

The preceding analysis of the Statute reveals that the Tribunal does indeed possess the power to issue "orders" against sovereign States at least insofar "as may be required for the conduct of the trial" (Art. 19 para. 2 of the Statute).

---

31 Report of the Secretary-General, *supra* note 15, para. 126.

32 Morris/Scharf, *supra* note 8, vol. 2, 194.

b) Analysis of national legislation implementing the duty to cooperate with the Tribunal

Even if resolutions of the Security Council, such as the one incorporating the statute of the International Criminal Tribunal for the Former Yugoslavia, are not treaties in the sense of the Vienna Convention on the Law of Treaties, subsequent state practice implementing such resolutions is still one of the relevant factors to consider when interpreting such a resolution since the member states of the United Nations are indeed the primary addressees of such resolutions. This is even more true where - as in the present case - national implementation mechanisms form a necessary condition for the resolution to be effective and for the Tribunal to be fully operative. Indeed the Statute of the Tribunal itself presupposes such implementation[33]. Therefore it is relevant how the member states of the United Nations have implemented their obligations under Art. 29 of the Statute[34] and whether they considered that they themselves might be the addressees of court orders.

Most national laws implementing Art. 29 of the Statute do not specifically address the issue whether the Tribunal may issue a legally binding order against a sovereign state. While some cooperation laws contain *general* clauses referring to the obligations of member states to cooperate with the Tribunal under Art. 29 of the Statute[35], only some such statutes contain a *specific* clause, according to which the respective state authorities are also under an international legal obligation deriving from the Statute of the Tribunal to forward files, copies of files or to grant permission to inspect files[36]. Therefore they seem to presuppose that the Tribunal may address an order against a sovereign state. On the other hand, other laws refer only

---

33 *See* in particular Art. 29 of the Statute.

34 As of 1996, 19 member states of the United Nations and Switzerland had enacted specific legislation to cooperate with the International Criminal Tribunal for the Former Yugoslavia.

35 *See* e.g. Art. 2 of the Belgian Law on the Recognition of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and cooperation with these Tribunals (Moniteur Belge of 27 April 1997) referring generally to the obligations under Security Council Resolution 827 (1993) and Art. 1 of the Danish Act on Criminal Proceedings before the International Tribunal for the Prosecution of persons responsible for War Crimes Committed in the Territory of Former Yugoslavia ("in accordance with [...] said Statute and Rules of Procedure and Evidence.")

36 A provision which would entail the obligation to forward government documents is e.g. contained in Sect. 12 para. 1 of the Austrian Federal Law on Cooperation with the International Tribunals, Österreichisches Bundesgesetzblatt 1996, No. 263, 2237 *et seq.*

generally to documents to be provided to the Tribunal and leave it open whether the provision in question solely refers to private documents or whether its scope of application extends to files belonging to state authorities[37]. Under these circumstances, the national cooperation laws cannot be interpreted as expressing a general principle prohibiting "orders" to be directly addressed to sovereign states.

c) Analysis of similar provisions contained in other international instruments

Given the fact that the International Criminal Tribunal for the Former Yugoslavia has been created by a binding Security Council resolution under Chapter VII of the Charter of the United Nations, it is obvious that the Tribunal may have been vested with significantly broader powers than those which are traditionally exercised by international tribunals. Still, for the following reasons, the practice of such courts and tribunals can be of relevance when analysing the competences of the Tribunal.
As a starting point, it is safe to say that the Tribunal, established to enforce a binding Security Council resolution adopted for the maintenance of international peace and security cannot be assumed to be vested with fewer powers than those normally inherent in other international courts and tribunals. However, if the Security Council wanted to depart from limitations normally inherent in the judicial function of international tribunals, there must be some indication of its will to do so.

aa) International Court of Justice

According to Art. 49 of the Statute of the International Court of Justice, the Court may *call upon* the agents ("*demander* aux agents")[38] to produce any document or to supply any explanations. This statutory power of the Court to request the parties to produce evidence is mirrored in the Rules of the Court, which stipulate that the Court may request the parties to call witnesses ("peut *inviter* les parties") or *call for* the production of any other evidence ("demander la production de tous autres moyens de preuve").

bb) Court of Justice of the European Communities

The relevant provisions of the three protocols of the Statute of the Court of

---

37 *See* e.g. Art. 7. para. 2 of the Australian International War Crimes Tribunal Act and the International War Crimes (Consequential Amendments) Act, adopted 24 August 1995 and Sect. 21 of the New Zealand International War Crimes Tribunal Act 1995.

38 Emphasis added.

Justice of the European Coal and Steel Community, the European Community and the European Atomic Energy Community provide that the Court may not only require the parties, their representatives or agents but also the governments of the member states to produce all documents and to supply all information which the Court considers necessary or desirable[39].

cc) European Commission and European Court of Human Rights

Under Art. 28 lit. a of the European Convention on Human Rights, in the event the European Commission of Human Rights accepts a petition referred to it, it shall undertake an investigation and the States concerned shall furnish all necessary facilities for the effective conduct of that investigation. This obligation provides for a formal obligation of the States concerned not to obstruct the work of the Commission and to make all arrangements necessary for an effective investigation. This includes the duty to make all necessary documents available to the Commission[40]. This specific power of the Commission to request evidentiary material from the parties is also enshrined in Art. 53 para. 2 of its Rules of Procedure under which it may invite the parties to submit further evidence and observations[41].
This power of the European Commission of Human Rights has also been - if only indirectly - confirmed by the European Court of Human Rights. When the Commission pointed out in its report in the case of the Republic of Ireland against the United Kingdom that the government of the United Kingdom had not always afforded it the desired assistance, the Court, in its judgment, regretted this attitude and stressed the "fundamental importance of the principle, enshrined in Article 28, sub-paragraph (a) *in fine*, that the Contracting States have a *duty* to cooperate with the Convention institutions"[42].

dd) Iran-U.S. Claims Tribunal

Under Art. 24 para. 3 of the UNCITRAL Rules governing the procedure of

39 See Art. 21 of the Statute of the Court of Justice of the European Community, Art. 24 of the Statute of the Court of Justice of the European Community of Coal and Steel and finally Art. 22 of the Statute of the Court of Justice of EURATOM.

40 In some cases specific documents have been requested by the Commission and States have accordingly produced the requested documents.

41 Similarly, the Inter-American Court of Human Rights may also order a party before it to produce specific documents but lacks the power to compel its orders, *see* T. Buergenthal, Judicial Fact-Finding: Inter-American Human Rights Court, in: R. Lillich (ed.), Fact-Finding before International Tribunals (1992), 261 *et seq.* (266).

42 Ireland v. United Kingdom, Judgment of 18 January 1978, ser. A, No. 25, 60, para. 148 (emphasis added).

the Iran-U.S.-Claims Tribunal, "the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine". The Iran-U.S. Claims Tribunal has on several occasions not only ordered submission of evidence on jurisdictional issues but has also ordered the submission of documentary evidence that it considered necessary to a just determination of the merits of the case[43]. In addition, the *travaux préparatoires* to the UNCITRAL Rules demonstrate that this obligation to produce evidence is not limited to requiring a party to support its own claim or defence with evidence[44] but extends to further documentation.

ee) ILC Draft Statute for an International Criminal Court and work of the Preparatory Committee on the Establishment of an International Criminal Court

The International Law Commission's draft statute for an International Criminal Court[45] contains in its Art. 51 a provision which is similar to Art. 29 of the Statute of the International Tribunal for the Former Yugoslavia by also providing for the cooperation of States in the production of evidence[46]. Unlike the Statute of the International Tribunal for the Former Yugoslavia the ILC draft statute does not, however, mention "orders" to be issued by the Court as one of the forms of requesting assistance from States but instead only generally refers to requests for cooperation and judicial assistance[47].

---

43 *See inter alia* Order of January 15, 1986 in Hoshang Mostofizadeh and Government of the Islamic Republic of Iran, National Iranian Oil Company, Case No. 278, Chamber Two; Order of October 19, 1983 in Konstantine A. Gionoplus and Islamic Republic of Iran, Case No. 314, Chamber One) (ordering *inter alia* the respondent government to file copies of certain financial statements filed with the Ministry of Finance); Order of November 19, 1982 in The Gillette Company et al. and Iran, Case N. 139, Chamber Three (ordering *inter alia*, both parties to submit evidence of amount of alleged royalties due); for further details *see* K. Holtzmann, Fact-Finding by the Iran-United States Claims Tribunal, in: R. Lillich (ed.), Fact-Finding before International Tribunals (1992), 101 *et seq.* (107 note 21).

44 For a detailed description of the drafting history in this regard see S. Baker/ M. Davis, The UNCITRAL Arbitration Rules in Practice (1993), 112- 113.

45 Report of the ILC of its 46th Sess., UN Doc. A/49/355 (1994), 3 *et seq.*

46 Art. 51 para. 2 lit. b) Draft Statute.

47 The original proposal by the ILC working group on a draft statute for an International Criminal Court (YbILC 1993, vol. II/2, 100 *et seq.*) had followed even more closely the model of the Statute of the International Tribunal for the Former Yugoslavia, by including in Art. 58 para. 2 of the draft as it stood at the time both requests for judicial assistance and orders to be issued by the Court, ibid, 127-128.

Thus it might be inferred that Art. 29 of the Statute of the International Tribunal for the Former Yugoslavia is somewhat broader, since otherwise the reference to "orders" in Art. 29 of the Statute would be redundant. However, even under the ILC draft, arguably States would be under a general obligation to respond without undue delay to requests of the future court for cooperation and judicial assistance, including requests for the "production of evidence". Given the structure of the ILC draft statute it can be argued that a request for the "production of evidence" encompasses the production of documents which are in the possession of a State. Otherwise the fact that the ILC draft statute distinguishes between the "production of evidence" as referred to in its Art. 51 and the "seizure of documents or other evidence" (Art. 52 para. 1 lit. (b)), which only refers to documents which are in possession of an individual, could not be explained. The work of the Preparatory Committee on the Establishment of an International Criminal Court[48], has not yet specifically focused on questions of judicial cooperation and mutual legal assistance. Still, certain questions in this context have already been addressed, albeit in a more general way. Thus at one point, when dealing with the different categories of assistance to be provided by the contracting parties to the future statute, some delegations proposed to include in the obligation to produce documents the duty to also produce documents of governmental bodies or records of government[49].

ff) Arbitral tribunals

In some cases arbitral tribunals have indeed been given the authority, either upon their own motion, or at the request of the parties, to call upon the parties themselves, i.e. their ministries of foreign affairs, for the communication to the tribunal of certain specified papers or of all papers relevant to a given case or to the proceedings[50].

This survey demonstrates that international courts and tribunals are normally empowered to issue legally binding requests under which States are under an obligation to produce certain documents. Given the specificity of

---

48 *See* GA Res. 50/46 of 11 December 1995.

49 United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (compilation of proposals), GAOR 51st Sess., Suppl. No. 22A (A/51/22), 252 and 253 note 94.

50 This includes *inter alia* the US-Mexican Claims Commission, the US-Peruvian Mixed Claims Commission, the US-French Mixed Claims Commission and finally the French-Mexican Claims Commission. For details as to the respective tribunals see D. Sandifer, Evidence before International Tribunals (2nd ed., 1975), 157-158. *See* also Art. 21 para. 3 of the Model Draft Rules on Arbitral Procedure adopted by the International Law Commission, YbILC 1958, 14.

the statute and rules of procedure of the given court or tribunal, however, such requests only rarely take the form of "orders" such as in the case of the Iran-U.S. Claims Tribunal.

III. Limits of the power of the Tribunal to issue orders against a State

The fact that a judge or a Trial chamber each has a general power to issue "orders" against a State does not mean that this power is unlimited. The issue of where exactly such possible limits lie has not been explicitly addressed by the questions put by the judge. Since, on the other hand, the judge has asked *amici* to address "any other issue concerning this matter" and since the Government of Croatia, in its "Reply to *subpoena duces tecum* of 10 February 1997 has insisted that "any issued document of the Tribunal (...) must be specific" and that it "reserves the right to observe the interests of its national security when assisting the Tribunal" the undersigned take the liberty of addressing the following issues concerning the limits of the power of the Tribunal to issue orders to sovereign States.

1. General Remarks

The power of the Tribunal to issue orders to sovereign States is neither unlimited nor can it narrow or override the margin given to States to determine how to comply with a "request for assistance" or an "order". National cooperation laws, for example, provide for the possibility of national courts to verify the identity of a suspect before delivering him or her to the Tribunal. Surely the Tribunal could not, by way of an order directed to a State, exclude or restrict this possibility. It is true that States cannot unilaterally, by enacting cooperation statutes, limit the powers of the Tribunal to issue orders. Those statutes, however, can be taken to reflect the consensus of States as to the interpretation of the Statute of the Tribunal[51].

Another possible source for limits placed on the power of the Tribunal to issue orders are general legal principles. Such general principles can be derived both from international human rights standards as well as from a comparative analysis of national laws on criminal procedure. Finally, other international instruments can provide indications as to possible limits of the power of the Tribunal to issue orders.

In the present context two issues arise which concern the limits of the power of the Tribunal to issue orders against States: first, whether the Tribunal has the power to compel States to produce documents which are confidential;

---

[51] *See* above B. II. 2. b.

(*see* 2.); and second, whether the Tribunal must respect any requirements as to the specificity of an order to produce documents (*see* 3.).

2. Protection of confidential information

Neither the Statute nor the Rules of Procedure of the Tribunal address the question whether States have a right to refuse the production of documents or the release of information on the ground of confidentiality. It is therefore necessary to go back to statements of *opinio iuris* by individual States, in particular to their cooperation statutes, as well as to the practice of other international organs.

a) Statements by States

The protection of confidential State information is neither raised in the Secretary-General's report nor was it discussed in the debate in the Security Council following the adoption of Resolution 827. The same is true for the Proposals of States and Organizations for the Statute of the International Tribunal[52]. The issue was only exceptionally raised by the Proposals of States and Organizations for the Rules of Procedures and Evidence of the International Tribunal[53]. The most notable exception is the proposal by the Government of the United States of America which distinguished between the general question of obtaining evidence in the control of the State[54] and the specific question of the disclosure of State national security information[55]. Already as to the general question the United States presupposed a right of a State to withhold information "if a State determines that its domestic law or other essential interest prohibits the production of the evidence sought"[56]. In its proposed rule concerning national security information the United States envisages *in camera* proceedings for the inspection of certain information and a duty of the Tribunal not to disclose information

---

52 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 209-480.

53 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 481-636.

54 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 535: Rule 17.7.: "Production of evidence in the control of a State. Either party may move before the Trial Chamber to issue a request to a State for legal assistance for the purpose of obtaining evidence which is in control of that State. The failure of a State to produce the evidence sought shall not require dismissal of charges or the postponement of proceedings except in extraordinary circumstances".

55 Ibid., vol. 2, 522: Rule 8.2. Disclosure (A) State national security information. State national security information cannot be disclosed to the public without the prior approval and consent of that State.

56 Ibid. vol. 2, 535.

to the public without prior approval and consent of the State concerned[57]. This rule, however, presupposes the general rule that the State has the right in the first place to withhold information under its control.
It appears that the Tribunal has not followed the proposal of the United States to introduce into the Tribunal's Rules of Procedure a rule concerning confidential information "since the States directly involved in the Yugoslav conflict are the ones that would be most likely to invoke such a provision, thereby undermining the effectiveness of the International Tribunal"[58]. This might suggest that the Tribunal is itself of the opinion that States have no right to refuse the production of evidence under its control on the ground of national security or other essential interests. It is, however, also possible that the Tribunal merely did not want to "invite" the invocation of such an excuse by non-cooperative States. In sum, it follows that there are few indications in the statements of States which appear conclusive in one or the other direction.

b) Analysis of national legislation implementing the duty to cooperate with the Tribunals[59]

Several countries have included in their national cooperation laws provisions[60] according to which the disclosure of confidential information is barred. In the case of Australia and New Zealand any such production of documents which would endanger the sovereignty, security or national interest of the State[61] is excluded. The Austrian law provides that any material the disclosure of which would endanger the Austrian national security or other interests protected by

---

57 Ibid. vol. 2, 522; In its commentary to this provision the United States remarked: "Information provided to the International Tribunal by a State, which the State believes necessary to protect as a matter of national security, *ordre public* or other essential interest, may initially be reviewed by the Trial Chamber in closed proceedings or *in camera*. If the Trial Chamber determines the information is relevant, it should notify the State of the action it intends to take which may result in disclosure of the information to the accused or the public, ibid., 523.

58 Morris/Scharf, ibid., vol. 1, 194.

59 As to the relevance of national laws implementing the obligation to cooperate with the International Criminal Tribunal for the Former Yugoslavia under Art. 29 of its statute *see* 2. b above B. II.

60 Furthermore some other laws contain general references to the respective acts providing for legal assistance to other states in criminal matters (*see* e.g. Sect. 6 of the Finnish Act on the jurisdiction of the International Tribunal for the prosecution of persons responsible for crimes committed in the territory of the former Yugoslavia and on legal assistance to the International Tribunal), which normally also contain similar limitations.

61 *See* Sect. 26 (3) of the 1995 Australian International War Crimes Tribunals Act and Sect. 57 lit. (a) of the New Zealand War Crimes Tribunal Act of 1995, respectively.

special security provisions[62] shall as a general rule not be forwarded to the Tribunal. Austria has, however, in its cooperation law provided for a special procedure under which it would, prior to any refusal to cooperate with the Tribunal, seek an assurance by the Tribunal that such confidential information, if transmitted, would be kept secret[63].
The fact that some States have thought it necessary to include in their legislation national security exceptions while other countries provide that any assistance should only take place in accordance with their respective municipial law[64] demonstrates that States have taken the view that the competence of the Tribunal with respect to the inspection of State documents is implicitly limited by considerations of essential state interests.

c) Analysis of similar provisions contained in other international instruments

The question whether issues of national security can limit the power of international tribunals to request evidence has come up frequently in proceedings before international organs. During the proceedings of the United States-German Mixed Claims Commission in the so-called Sabotage cases[65], the German Agent requested leave to inspect certain files of the U.S. Department of Justice. The Umpire denied the request by stating that it is "obvious that the Commission has no power to call on either government to produce from its confidential files what, for reasons of state, it considers to be detrimental to its interests to produce"[66]. However, before announcing the decision, the umpire stated that he had been able to look through the files himself and verify whether the files under consideration were indeed of the character claimed by the United States government[67]. Thus, *de facto*, the independent member of the tribunal was not denied access to the confidential documents under consideration.
In the *Corfu Channel* case before the International Court of Justice the United Kingdom relied on reasons of naval secrecy in order not to produce

---

62 *See* Sect. 12 para. 2 and 3 of the Austrian Federal Law on Cooperation with the International Tribunals.

63 Ibid.

64 *See* e.g. Art. 9 of the Belgium "Loi relative à la reconnaissance du Tribunal international pour l'ex-Yougoslavie et du Tribunal international pour le Rwanda, et la coopération avec ces tribunaux", Moniteur Belge 1996, 10260.

65 For details *see* D. Sandifer, Evidence before International Tribunals (lst ed., 1939), 265-267.

66 Text of the statement of the umpire to be found in Sandifer, ibid.

67 Transcript of meeting of the Commission, 24 May, 1938, vol. XI, 32; to be also found in Sandifer, *supra* note 50, 266-267.

certain documents the Court had requested[68] without being challenged on that ground by the Court's decision.

As to the practice of the European Court of Justice mention may be made of a case involving documents originating from the government of Rwanda[69], where the Court of Justice acknowledged the legitimate interest of the Commission to maintain the confidentiality of these communications. Furthermore, in case 110/75[70] the defendant had initially refused to comply with a request issued by the Court to produce a certain document on the ground that it was confidential but later relented. In an earlier case[71], in which the intervener refused to produce a document on the ground that it was confidential, the Court took note of this hesitation and did not order production but instead rejected the intervener's arguments for lack of proof.

There is also extensive practice by international administrative tribunals which have significantly limited the possibility of international organizations to withhold documents for reasons of confidentiality. In particular, there have been several cases decided by the Administrative Tribunal of the International Labour Organization, ordering the organization to make confidential files available only to the tribunal without communicating the information to the applicant[72]. In the *Ballo* case[73] the tribunal took cognizance of such documents *in camera* and, after having noted that the documents were indeed of a confidential character, decided not to transmit the documents to the applicant but instead informed him of the conclusions it had drawn from them[74]. In the *McIntire* case, decided by the same administrative tribunal, the respondent had refused to disclose a letter asserting that its content was confidential and because it came from the government of a sovereign state and that its production would therefore violate

---

68 ICJ Rep. 1949, 32.

69 *Spie-Batignolles v. Commission* (1990), ECR I-197, order of 16 December 1987, para. 16-17; for an analysis *see* K. Lasok, The European Court of Justice - Practice and Procedure (2nd. Ed. 1994), 384.

70 *Mills v. European Investment Bank*, (1976) ECR 1613 *et seq.*

71 Joined cases 42 and 49/59, *SNUPAT v. High Authority* (1961) ECR 53 *et seq.* (85).

72 For a survey of such decisions *see* C. Amerasinghe, Problems of Evidence before International Administrative Tribunals, in: R. Lillich (ed.), Fact-Finding before International Tribunals (1992), 205 *et seq.* (214 *et seq.*) .

73 ILOAT Judgment No. 191 (UNESCO); for details *see* Amerasinghe, *supra* note 72, 214-215.

74 Similar decisions were rendered by the Administrative Tribunal of the International Labour Organization in *Molina*, ILOAT Judgment No. 440 (1980) (WHO); *Ali Khan*, ILOAT Judgment No. 556 (1983) (ILO), as well as by the World Bank Administrative Tribunal in *Jassal*, Order (1990), WBAT Rep. 1990; for details as to the respective decisions *see* Amerasinghe, *supra* note 72, 215-217.

diplomatic usage[75]. Notwithstanding, the tribunal still found that withholding the information would prejudice the legally protected interests of the complainant and of justice[76].

Finally, as to the ILC Draft Statute for an International Criminal Court and the work of the Preparatory Committee on the Establishment of an International Criminal Court, while the ILC draft does not address the possible limits as to the obligation of judicial assistance, the very same question whether national security interests should constitute a valid exception was discussed amid controversy[77] during the preliminary work of the Preparatory Committee on the Establishment of an International Criminal Court without any conclusive result having yet been reached.

d) National laws

The indications in favour of a privilege for confidential information which derives from the national cooperation laws and from the practice of other international tribunals are confirmed by the rules of domestic law in several countries. In the United States, for example, the Supreme Court has recognized a privilege for "military matters" whose assertion by the government the courts cannot or will not review[78]. In the United Kingdom, the House of Lords,

---

75 Amerasinghe, *supra* note 72, 218.

76 Ibid.

77 *See* United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), GAOR 51st Sess., Suppl. No. 22A (A/51/22), 69-70. For a detailed proposal in this regard *see* United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (compilation of proposals), GAOR 51st Sess., Suppl. No. 22A (A/51/22), 255.

78 "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of military security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone in chambers." United States v. Reynolds, 345 U.S. 1 at 10 (1952); approvingly quoted in United States v. Nixon, 418 U.S. 683 at 711; in the Nixon case the Supreme Court may even have extended this privilege when it said that "absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by the production of such material for in camera inspection with all the protection that a district court will be obliged to provide."

although it has considerably narrowed the traditionally wide "Crown privilege", has not gone so far as to question the privilege of the executive to determine that certain particular documents (as opposed to whole classes of documents) should not be divulged[79]. Under sect. 96 of the German Law on Criminal Procedure a criminal court may not order the production of documents if the highest governmental authority of either the Federal Republic itself or of one of its constituent States declares that the disclosure of the document would seriously endanger its interests[80]. It appears that similar rules exist in other States as well.

e) Conclusion

It appears not only from national legislation but also from international practice that States take the existence of a State secrets privilege for granted. It therefore cannot be assumed that the Security Council, when enacting the Statute of the International Tribunal, intended to subject all State documents to disclosure no matter what their security importance may be. Therefore the most important question in this context is whether and, if so, how far a State that invokes the privilege must substantiate that the documents ordered released actually raise significant security issues. It would seem that the divulgence of files from a Ministry of Defence which relate to specific activities of certain army units which have taken place more than three years before the order was issued cannot, as a general rule, be regarded as affecting national security interests. It is, however, not excluded, that these files indeed contain sensitive information related to the communications structure, logistics or material of a particular army. Should the issue arise, conflicting positions might be brought into harmony by way of an *in camera* inspection by the judge or a Trial Chamber.

3. Specificity of request

Given the wide range of documents the Government of Croatia is ordered

---

79 "However wide the power of the court may be held to be, cases would be very rare in which it could be proper to question the view of the responsible Minister that it would be contrary to the public interest to make public the contents of a particular document", Conway v. Rimmer (1968) All E.R. 874, at 882; this decision was confirmed in Burmah Oil v. Bank of England (1979) 2 All E.R. 461, at 468: "Now I can understand that privilege in regard to high questions of state policy, such as those dealing with foreign affairs or the defence or the security of the realm. But I do not think it should extend to commercial transactions (...)", per Lord Denning, M.R.

80 There is no such limit to the powers of the German Constitutional court, however, *see* Sect. 26 para. 2 of the Federal Law on the German Constitutional Court under which the Court itself can by a two-thirds majority decide *not* to request documents relating to the security of the Federal Republic of Germany.

to produce, the question arises whether another limitation on the power of the Tribunal to issue orders consists in a requirement to specifically designate the documents sought and to substantiate their relevance for the proceeding.

a) Analysis of the Statute

Neither the Statute nor the Rules of Procedure of the Tribunal addresses the question whether the Tribunal must conform to any requirements to specifically designate those documents which it orders States to produce. Art. 19 para. 2 of the Statute, however, gives the judge the power to issue only such orders as may be "required" for the conduct of the trial. What this means was neither raised in the Secretary-General's report nor was it discussed in the debate in the Security Council following the adoption of Resolution 827. The same is true for the Proposals of States and Organizations for the Statute of the International Tribunal[81]. That the whole issue was practically not debated, however, is not surprising given the fact that it was not even clearly established that the Tribunal would have a power to issue such "orders" to States. In addition, if it is correct to assume that States have a right to withhold information in their possession on grounds of national security or "essential interest" the question of a requirement of specificity becomes to a considerable extent moot. On the other hand, the object and purpose of the establishment of the International Tribunal militate in favour of a broad power to order the production of documents if this is necessary for its effective functioning.

b) National laws on criminal procedure

Important indications for possible inherent limits of the power of the Tribunal to order the production of documents which are under the control of a State are provided by national legal systems. Since the designation of the order in question ("*subpoena duces tecum*") is taken from countries of the common law tradition, the rules applicable to such orders as they exist in those States are particularly instructive here. In those countries it is well established that

> it is not the object of the writ to require the production of books and papers merely for the party's inspection, and the *subpoena* is not to be used as a bill of discovery. The writ may not be issued for a mere "fishing"-expedition. A plaintiff is not entitled to have brought in a mass of books and papers in order that he may search them through to gather evidence[82].

---

81 Reprinted in: Morris/Scharf, *supra* note 8, vol. 2, 209-480.

82 American Jurisprudence, 2d ed. 1981, "Witnesses", § 14.

c) Analysis of similar provisions contained in other international instruments

Those international courts and tribunals which have exercised their power to order parties to produce documents have also limited their requests with respect to the broadness of their requests. In this context one might refer, *inter alia,* to the practice of the Iran-U.S. Claims Tribunal, which - while exercising its power to ask for the production of documents under Art. 24 para. 3 of the UNCITRAL Rules[83] - was generally reluctant to order production of documents if the requesting party could not describe the desired documents specifically, or if the requesting party did not satisfy the tribunal that it had taken all possible steps to locate the documents itself[84]. But even in those cases where the requesting party could satisfy these conditions the Iran-U.S. Claims Tribunal still exercised its discretion to deny any request it did not consider to be justified[85]. Thus it might be said that the standard applied by the Iran-U.S. Claims Tribunal is significantly narrower than the "all relevant information" standard usually employed by U.S. federal courts in municipal litigation[86].

As to the practice of the European Court of Justice, orders for the production of documents have sometimes been framed in rather broad terms. In Cases T-160 and T-161/89[87], the defendant was ordered to produce all documents relating to the act in question[88]. However, in Case C-201/86[89] it was held that the Court will not order the production by a party of documents drawn up by third parties[90]. In particular, the Court held that the Commission could not be required to disclose official correspondence in its possession emanating from Rwandan authorities.

---

83 For details *see* above B. II. 2. c. dd.

84 *See* Baker/ Davis, *supra* note 44, 113 and e.g. Order of 6 October 1983 in MCA Inc. v. Iran, case No. 768 (denying production request where documents were not specified and alternative efforts at locating them not explained).

85 *See* e.g. *PepsiCo Inc. v. Iran,* 13 Iran-U.S. C.T.R. 3, 16-17 (1986), where the court based its denial on the fact that it believed that it could arrive at its conclusions without referring to the requested documents.

86 Baker/ Davis, *supra* note 44, 113.

87 *Kalavross v. Court of Justice,* (1990) ECR II-871, para. 14-15.

88 *See* also Art. 23 of the Statute of the Court of Justice of the European Community of Coal and Steel under which, in a situation where proceedings are instituted against a decision of one of the institutions of the Community, that institution shall transmit to the Court all the documents *relating to the case before the Court* (emphasis added).

89 *Spie-Batignolles v. Commission* (1990), ECR I-197, order of 16 December 1987, para. 16-17.

90 For a detailed analysis of this decision *see* Lasok, *supra* note 69, 386.

d) Conclusion

Both national laws and international practice strongly militate in favour of a requirement that the order must specifically designate the documents sought by the Tribunal and that the Prosecutor may not use the powers of the Tribunal to conduct "fishing expeditions". Since the undersigned only have limited access to the files of the case giving rise to the questions of the Judge, they are not in a position to give a definite assessment whether any of the demands at issue are too broad under this principle. On their face, however, and unless they are supported by more specific grounds which can be derived from other documents, the demands contained in VI., X. and XI. of the "*subpoena duces tecum*" against Croatia of 15 January 1997 appear to be unusually comprehensive.

IV. May orders against a State be issued in the form of a "*subpoena duces tecum*"?

It has been shown that the Tribunal has the general power, subject to certain limitations, to issue orders against a State. To designate orders against States for the production of documents "*subpoena duces tecum*", however, raises the two concerns mentioned in the introduction[91], i.e. first whether the term "*subpoena*", because of its punitive literal meaning, should be considered to be a form of sanction which the Tribunal has no power to impose (infra 1.) and, second, whether the use of this term implies the assertion by the Tribunal of a power to punish a State for contempt of court in case of non-compliance with the "*subpoena*" (infra 2.).

1. Use of the term "*subpoena*" as a sanction in itself

It is true that the term "*subpoena*", if taken literally, suggests a power of the Tribunal to declare a State to be liable to punishment for non-compliance. Such an impression can generate considerable additional pressure on the State to comply by putting it into the uncomfortable public position of being officially accused of conduct comparable to that of a "contumaciously" (Rule 77 of the Rules of Procedure) recalcitrant witness. On the other hand, it should be taken into account that the term "*subpoena*" is a term which is routinely used in a large number of States to denote a court order demanding the attendance of witnesses or the production of documents. If the expression as such can give rise to misunderstandings this can be remedied by a clear pronunciation of the Tribunal that the term "*subpoena*" does not, in law, imply or envisage an inappropriate punitive effect.

---

91 See *supra* B.I.2.

2. Implied assertion by the Tribunal of a power to punish a State for contempt?

The issuance of a "*subpoena duces tecum*" raises the additional concern that the Tribunal is thereby implicitly asserting a power to punish a State for contempt in case of non-compliance. In the States of the common law tradition - from which the term *subpoena* is taken - the power to issue a *subpoena* is closely linked to the power of a court to punish addressees in case of non-compliance for contempt of court[92]. Whether the Tribunal actually has any power of its own to impose sanctions upon a sovereign State for non-compliance with one of its orders is, however, addressed by the second question. A final answer to the first question cannot, therefore, be given without responding to the second question.

C. What are the appropriate remedies to be taken if there is non-compliance *by a sovereign State* of a "*subpoena duces tecum*" or request issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

I. Analysis of Art. 29 of the Statute and of the Rules of Procedure

1. Art. 29 of the Statute

The wording of Art. 29 of the Statute does not contain any indication as to the consequences of non-compliance with a request or order of the Tribunal. It only states an obligation to comply without providing for possible sanctions in case of failure to do so. Therefore, it is necessary to consider the origin of the obligation of States to cooperate and provide assistance to the Tribunal, which is rooted in the fact that the Tribunal was established by a decision of the Security Council under Chapter VII. Such a decision creates a binding obligation for all States according to Art. 2 para. 5 and Art. 25 of the Charter. This has been explicitly reiterated by the Secretary General in his report[93].

92 *See* above B.I.

93 Secretary-General's Report, paras. 125 and 126:
"As pointed out ..., the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial. In this connection, an order by the Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations".

The fact that the obligation to cooperate results from a decision of the Security Council under Chapter VII may be interpreted in the way that it is only the Security Council itself which has to decide on the consequences to be drawn from any non-compliance[94].

2. Rules of Procedure and Evidence

The Rules of Procedure of the Tribunal do not contain any provision concerning non-compliance with a request or an order of the Tribunal issued under Rule 54 to a State concerning the production of documents. Even where the Rules contain a provision concerning failure to execute an order of the Tribunal, such as in the case of a warrant or a transfer order, the only action the Tribunal may take is to notify the Security Council of the non-compliance[95]. It may be inferred from this provision that the same is true in case of a failure to produce documents according to a decision of a judge or Trial Chamber ordering such production. The wording in para. 126 of the Secretary General's report, which might at first glance exclude such a solution, is not decisive in this regard because it only comments upon the draft articles of the Statute.

On the other hand, several reasons can be put forward why requests for a transfer and for the production of documents should be treated alike: in the first place, Art. 29 of the Statute itself does not make any distinction between transfer orders and other orders. Secondly, the Rules do not qualify orders for the production of documents in any specific way, and thirdly and most importantly, all the draft rules prepared by different bodies and organs were unanimous in presupposing the competence of the Security Council to take appropriate measures whenever a State does not comply with a request for assistance or an order for cooperation.

The most explicit treatment of this item may be found in the comment on the United States' Draft Rules of Procedure and Evidence put forward by the American Bar Association[96], which explicitly stresses that the Rules omit to provide the International Tribunal with similar powers of notification [to the Security Council] in other situations [than warrant or transfer order] in which the failure of States to cooperate could be a problem. The primary relevant areas are deferral by States to International Tribunal proceedings (Rule 4.2) and production of evidence (Rule 17). (...) a new rule could be added, permitting the Tribunal to notify the Security Council upon failure of a State to cooperate.[97]

---

94 *See* in this regard also Morris/Scharf, *supra* note 8, vol. 2, 311 *et seq.*

95 Rule 59 B, which reflects paragraph 126 of the report of the Secretary General.

96 Doc. IT/INF.6/REV. 2, 18 January 1994, in Morris/Scharf, op. cit.note 8, vol. 2, 585 *et seq.*, 593 s.

From the foregoing it may therefore be inferred that whenever a State fails to comply with its obligation to cooperate it is the Security Council alone and not the Tribunal which is called upon to react.

It has to be considered, however, whether the Tribunal cannot exercise some kind of "indirect sanction" in case of non-production of evidence by taking into consideration non-compliance when taking its decision. As will be demonstrated below[98], not only the International Court of Justice but also other international courts and tribunals have been confronted with the question whether to draw any consequences from the non-compliance with requests for bringing evidence in taking their decision. Nevertheless, none of these tribunals seems to have considered themselves to be invested with the power to do more than to "take notice" of a State's refusal to cooperate. Only the European Court of Justice[99] has stated that it could eventually "draw certain conclusions" from a state's refusal to produce the requested documents, but even in this case it seems rather unlikely that the conclusions to be drawn might have a "punitive" character.

In this respect, the International Court of Justice has been very clear in the Nicaragua case, where it stated that even the non-participation of a party, here the United States, did in fact not relieve it from respecting the equality of the parties and "to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant state are well-founded in fact and in law"[100]. The Court drew attention to the disadvantages

---

97 Cf. also the French Proposal for the establishment of an International Criminal Tribunal to adjudicate the crimes committed in the former Yugoslavia, Doc. S/25266, 10 February 1993, in Morris/Scharf, *supra* note 8, vol. 2, 327, where it is stated that:
"the Statute of the Tribunal should contain a provision whereby States would be obliged to extend cooperation, in particular that of their judicial investigation services (...) However, there is probably no reason for this provision to be very detailed, especially if the Tribunal is to be established by a Security Council resolution adopted within the framework of Chapter VII of the Charter, Article 48 of which makes it an obligation for the Members of the United Nations to take 'the action required to carry out the decisions of the Security Council for the maintenance of international peace and security'".

98 *See* below C. II.

99 *See* below C. II. 2.

100 Art. 53 of the Statute of the Court provides:
"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

caused by the non-appearance of the respondent State[101] which made it impossible for the Court to take its decision on the basis of fully satisfactory evidence. It could however only evaluate the material before it and thus take a decision which perhaps would have led to a different outcome if the United States had participated in the proceedings[102]. On the other hand, the Court did not accept that there could be any advantage for the appearing state beyond that resulting necessarily from the non-participation of the other State. Even the strongest form of failure to cooperate, namely non-appearance, may thus not lead to any kind of punitive consequences. This finding, which fully conforms to the function of the Court to do justice is valid irrespective of the disputed question whether non-appearance as such amounts to a violation of an international obligation.

Given the special situation of criminal proceedings, it is clear that for an international criminal tribunal any punitive attitude with regard to non-cooperating States would be even more unacceptable. In addition, a State which fails to comply with an order of the Tribunal is not a party to the case and is as such completely indifferent as to the outcome of the procedure. Finally, the principle of fair trial and the principle of presumption of innocence bar the Tribunal from drawing any negative conclusion from the non-production of evidence by a State, although, on the other hand, the principles just mentioned may require the production of evidence in favour of the accused in order to allow the Tribunal to reach a fair decision. Thus, in relation to a State, the Tribunal has no power to take any sanction in order to reach compliance with a decision but may only notify the Security Council.

3. Contempt power as implied power of the Tribunal?

The examination of the Statute and Rules of the Tribunal as well as those of several other international tribunals has shown that none of them has been explicitly granted the power to enforce their requests or orders against a State. Even more, none of these international tribunals has the power to enforce its final judgments. This task has been left either to a third organ, such as the Security Council in the case of the International Court of Justice, or - as in the case of the International Criminal Tribunal for the Former Yugoslavia - to States which declare their readiness in this respect, or to the parties of an arbitration themselves.

Notwithstanding these findings it has to be asked whether such a power could be regarded as implied in the powers of a criminal court or tribunal. At first, the above considerations seem to militate clearly against the finding of such an implied power. It may be argued, however, that a criminal court or tribunal can only fulfil its

---

[101] Military and Paramilitary Activities in and against Nicaragua, Judgment on the Merits, ICJ Reports 1986, 42.

[102] Ibid., 23 *et seq.* and especially 49.

function if it disposes of all necessary evidence, and that it therefore must have the means to enforce its orders. Thus it might appear that the tribunal must have the contempt power also *vis-à-vis* States in order to function effectively.
The question of contempt power of the International Tribunal for the Former Yugoslavia has not been addressed in the Statute itself. The Rules, however, contain in Rule 77 an explicit provision on contempt of the Tribunal. Under this Rule, the Tribunal has the power to impose a fine or a term of imprisonment to "a witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber". Lit. c) of the same Rule provides for the same sanction for "any person who attempts to interfere with or intimidate a witness". The wording of this Rule is clearly addressed only to natural persons.
Still one has to ask whether there are any indications to make this Rule also applicable to States.
The guidance given in the draft rules elaborated by several States does not support the applicability of contempt power also to States but militates rather in the opposite sense. Those drafts which explicitly mention contempt of court at the same time provide for special consequences in case of non-compliance by a State. The Draft of the United States of America, for example, provides for "Contempt" in its Rule 6.4 and contains a special Rule 14.6 for failure of States to assist the Tribunal[103]. In case of non-assistance by States to produce evidence in the control of the State, the American Draft only provides in Rule 17.7 that "the failure of a State to produce evidence sought shall not require dismissal of charges or the postponement of the proceedings except in extraordinary circumstances"[104], The Memorandum of Amnesty International on Questions of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia[105] urges the Security Council to take "the steps necessary to ensure that national authorities are obliged actively to cooperate with the Tribunal".

II. Analysis of similar provisions contained in other international instruments

1. International Court of Justice

The International Court of Justice has not been granted the power to compel the attendance of witnesses and production of documents[106]. It can only,

---

103 Draft of the United States, in Morris/Scharf, *supra* note 8, vol.2, 520 and 531.

104 *See* Doc. IT/14, 17 November 1993, in Morris/Scharf, *supra* note 8, vol. 2, 509 *et seq.*,535.

105 Doc. SC/CO/PG/PO, in Morris/Scharf, *supra* note 8, vol. 2, 409 *et seq.*

106 See in this regard the statement by Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, vol. 2 (1986), 576, where he states that this lack of enforcement power "is true of international tribunals in general".

as provided by Article 49 of the Statute of the ICJ "take formal note of any refusal" or failure in this respect[107]. In the *Corfu Channel* case, the Court applied this provision and requested the United Kingdom to produce certain documents. Those documents were however not produced, the agent for the United Kingdom pleading reasons of secrecy. In addition, the United Kingdom witnesses declined to answer questions relating to them. The Court did not even see itself in a position to draw any specific conclusions from these refusals, which differed from those to which the actual events gave rise[108]. Furthermore, it is worth noting that even in the case of judgments of the International Court of Justice, the Court is not empowered to enforce its own decision; instead under Art. 94 para. 2 of the Charter of the United Nations, solely the Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

2. Court of Justice of the European Communities

In the case of orders requesting the production of documents, the statute of the European Court of Justice provides that the Court may only take formal note of a member state's refusal to produce such documents and eventually draw certain conclusions from it, however no provision is made for an eventual enforcement[109]. Furthermore, the Rules of the Court contain a specific provision for the enforcement in the member States of a measure adopted by the Court in the event that a witness fails to appear[110]. No such provisions exist, however, in the case of an order requiring the supply of information or the production of documents. Hence it may be inferred that such an order is unenforceable[111].

---

[107] Similarly, the Rules of Court also contain no provision empowering the Court to take further steps in case of non-cooperation by States. This became evident in the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), where the Court stressed repeatedly that, even in the case of a default procedure under Art. 53 of the Statute, which constitutes the extreme case of a failure to cooperate, the equality of the parties had to be respected and that it was the Court's duty to satisfy itself that the claims are well founded both in fact and in law, ICJ Rep. 1986, 22.

[108] ICJ Rep. 1949, 1 *et seq.* (32).

[109] This, however, is presumably only the case where the refusal emanates from someone who is a party to the proceedings, Lasok, *supra* note 69, 387. For an example of where such a conclusion was drawn *see* Case T-25/90 *Schönherr v. Economic and Social Committee* (1992) ECR II-63, para. 30-31.

[110] *See* Art. 48 para. 4 of the Rules of Court of the European Communities and Art. 69 para. 4 of the Rules of Court of the Court of First Instance.

[111] K. Lasok, *supra* note 69, 384.

The non-enforceability of requests for the production of documents is further confirmed by the wording of the treaties itself. First, all treaties only refer to "judgments" of the Court and thereby *ipso facto* exclude "orders" to be similarly executed[112]. Furthermore, Art. 192 expressly excludes the enforceability of judgments rendered against member States. Finally, the EC-Treaty and the EURATOM-treaty had to be formally amended in 1993 to provide for a specific procedure under which the Court of Justice was granted the power to determine, upon request by the Commission, that a member state has failed to comply with a judgment of the Court of Justice[113].

3. European Commission and European Court of Human Rights

The practice of the European Commission of Human Rights demonstrates that the Commission is not in a position to enforce the obligation of contracting parties to the European Convention on Human Rights to cooperate with the organs set up under the convention (Art. 28 para. lit. a) ECHR). When the respondent in the inter-state procedure Cyprus v. Turkey refused to permit the taking of evidence in the northern part of Cyprus the Commission could only formally submit a report on the failure of Turkey to comply with its obligations under Art. 2(a) of the Convention to the Committee of Ministers of the Council of Europe[114].

4. Iran-U.S. Claims Tribunal

Both the wording of the relevant provision of the UNCITRAL rules governing the procedure of the Tribunal and the practice of the Iran-U.S. Claims Tribunal itself demonstrate that the Iran-U.S. Claims Tribunal does not believe it is in a position to enforce an order to produce certain documents by a, "*subpoena duces tecum*". Indeed, under Art. 28 para. 3 of those rules, the arbitral tribunal may only "if one of the parties, duly invited to produce evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, (...) make the award on the evidence before it." Thus, the sole sanction available for the Iran-U.S. Claims Tribunal is to take judicial

---

112 *See* Art. 187 in conjunction with Art. 192 EC-Treaty, Art. 159 in conjunction with Art. 164 EURATOM-treaty and Art. 44 in conjunction with Art. 92 ECSC-Treaty.

113 *See* Art. 171 para. 2 EC-Treaty and Art. 143 para. 2 EURATOM-Treaty.

114 Appl. 6780/74 et al. Report of 10 July 1976, 21 -24; for details *see* J. A. Frowein, Fact-Finding by the European Commission of Human Rights, in: R. Lillich (ed.), Fact-Finding before International Tribunals (1992), 237 *et seq.* (238).

notice of any failure to produce evidence and take this fact into account when rendering its award[115].

5. ILC Draft Statute for an International Criminal Court and work of the Preparatory Committee on the Establishment of an International Criminal Court

The ILC Draft Statute for an International Criminal Court does not grant the Court nor its organs any specific power to enforce their own requests for judicial assistance or orders.
As to the work of the Preparatory Committee on the Establishment of an International Criminal Court, while some delegations expressed general reservations as to the role of the Security Council others clearly favoured a provision under which the Court could bring to the attention of the Security Council any failure by a State to discharge its duty to cooperate. Other States, however, would have rather envisaged the Court itself to be in a position to consider failures to comply with requests made by the Court and render appropriate decisions[116].

6. Conclusion

The analysis of other instruments establishing international courts or tribunals confirm the view that international tribunals do not possess - unless specifically granted such power - the competence to enforce their own judgments or orders. This is underlined by the fact that a formal amendment of the EC-Treaty was needed to grant the Court of the European Communities the power to impose fines against non-compliant member States (Art. 171 para. 2 EC-treaty).

---

115 *See* e.g. *ITT Indus Inc. v. Iran*, 2 Iran-U.S. C.T.R. 348 *et seq.* (355) (1983) (Concurring op. of Judge Aldrich) and *INA Corp. v. Iran*, 8 Iran-U.S. C.T.R. 373 *et seq.* (377, 382) (1985), where the tribunal invoked the lack of supporting documentation in assessing the evidentiary weight of a given document.

116 United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), GAOR 51st Sess., Suppl. No. 22A (A/51/22), 72.
It should be noted that arbitral tribunals normally lack the power to enforce their own judgments or indeed take appropriate remedies if there is non-compliance with a legally binding decision which they have issued. As to an exception explicitly provided for in a *compromis see* J. L. Simpson/ H. Fox, International Arbitration, Law and Practice, 1959, 265.

III. Remedies by other bodies than the International Criminal Tribunal

It follows from the above examination that remedies in case of non-compliance by a sovereign State with a binding order of the Tribunal do not lie with the Tribunal, which has no power to take any sanction against a State. In case of non-compliance the Tribunal can accordingly notify the Security Council. This result is confirmed by the drafting history of the Rules[117], which follow the Secretary-General's report in providing only for notification to the Security Council in case of non-cooperation by a State because the obligation to cooperate flows from the establishment of the Tribunal under Chapter VII of the Charter.

IV. Conclusion: The power of a judge or a Trial Chamber to issue a "*subpoena duces tecum*" against a sovereign State

In sum, the considerations relating to the first two questions allow the following conclusions:

1. The Tribunal has the power to issue binding orders against States.

2. The Tribunal also has the power to impose sanctions against individuals for non-compliance with its orders which is derived from an inherent contempt power.

3. The Tribunal does not, however, have the power to impose any sanctions against a State which does not comply with its binding orders.

These conclusions, in turn, suggest the following answer to the question whether a judge or a Trial Chamber has the power to issue a "*subpoena duces tecum*" against a sovereign State:
To the extent a "*subpoena duces tecum*" is merely a court order requiring the production of documents, it can be issued against individuals as well as against States. As such, it possesses binding force for both.
Furthermore, the Tribunal has the power to impose sanctions for non-compliance with such an order on the basis of its inherent contempt power which, however, only extends to sanctions against individuals. There is little doubt that the contempt power, in principle, includes the possibility of imposing sanctions against individuals who do not comply with orders of the Tribunal. This is confirmed by the fact that no State has

---

[117] Cf. *supra* C 1. and 2.

objected to the inclusion by the Tribunal, in Rule 77 of its Rules of Procedure, of a power to impose fines against persons for contempt. Whether the Tribunal must amend its Rules of Procedure in order to be able to impose contempt sanctions against individuals for not complying with a "*subpoena duces tecum*" remains an open question which, however, need not be answered in this context. No matter how this question is answered, the inherent contempt power of the Tribunal is limited by the rule that the Tribunal has no power to impose sanctions against a State which does not comply with binding orders, including "*subpoenas duces tecum*". International practice shows that a power of an international tribunal to impose sanctions against a State cannot simply be derived from its inherent powers but requires an explicit authorization or at least a clear indication in a treaty or in another constitutive instrument such as a resolution of the Security Council. This is exemplified in particular by the introduction into the EC-Treaty of an express provision to establish a power of the European Court of Justice to impose fines on non-compliant States[118].

Therefore, the only remaining problem is whether it makes any sense to use the term "*subpoena duces tecum*" for a court order whose non-compliance cannot be sanctioned by the Tribunal on the basis of its inherent contempt power. As originally understood in the common law systems the term *subpoena* appears to be intimately connected to the power of the issuing court to impose sanctions for non-compliance. If this is a necessary connection it would follow that the use of the term by the Tribunal for orders commanding States to produce documents would be inappropriate and that the exercise of a "power of *subpoena*" would ultimately be *ultra vires*.

Since, however, the power to issue a *subpoena* and the power to impose sanctions for their non-compliance is not, in common law countries, necessarily given to one and same organ[119], the use of the term "*subpoena duces tecum*" by the Tribunal is admissible if it is understood to refer to the power of the Security Council to impose sanctions against a State for non-compliance with an order of the Tribunal. In this sense the use of the term *subpoena* for an order against a sovereign State appears indeed appropriate. For these reasons and under these conditions a judge or a Trial Chamber may issue a "*subpoena duces tecum*" against a sovereign State.

---

[118] *See* above C II. 2.

[119] *See* e.g. Thomas F. Gardner, Excerpt from Government Investigative Weapons, in: Parallel Grand Jury and Administrative Agency Investigations (Kaplan/Friedman/Bennett/Trainor eds.), Chicago 1981, 75 ff.

D. Power of a judge or Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia to issue a "*subpoena duces tecum*" to a high government official

I. Power of a judge or Trial Chamber to issue binding orders to individuals generally

A power of a judge or Trial Chamber to issue a "*subpoena duces tecum*" to a high government official can only exist if the Tribunal has the power to issue binding orders to individuals generally.

1. Analysis of the Statute

On its face, Art. 29 of the Statute of the Tribunal only speaks about obligations of States to cooperate or to comply with requests for assistance and orders. Some of the requests or orders referred to in Art. 29 para. 2, however, are those which, under systems of municipal criminal law, would be directed to individuals. This may not necessarily be so in the explicitly mentioned case of an arrest warrant which is usually directed not to the individual concerned but to the competent police officers[120]. In his report, however, the Secretary-General also speaks of the duty of States to "give effect" to "any other orders necessary for the conduct of the trial"[121]. Such an order under municipal law would include what is called in common law jurisdiction a "summons", i.e. an order to an individual to appear before the court[122]. Such orders directed to individuals are typical and necessary means under municipal law for conduct of a trial. The same is true for the system under the Statute. Under Art. 18 para. 2 of the Statute the Prosecutor has the right to directly address himself or herself to suspects, witnesses and victims and to question them. Art. 19 para. 2 gives the judge the power to issue orders "as may be required for the conduct of the trial". If the prosecutor possesses the power to direct himself or herself directly to individuals and since the Tribunal has essentially only a supportive function for the Prosecutor in the pre-trial phase, it would be anomalous if the Tribunal should not also be able to address itself directly to individuals.

---

120 *See* e.g. Halsbury's Laws of England, 4th ed. 1979, vol 29, "Magistrate's Courts, para 329 referring e.g. to Statutory Instruments 1978, no. 146, 309.

121 Para. 125

122 Halsbury's Laws of England, 4th ed. 1979,vol 29, "Magistrate's Courts,para 322.

2. Analysis of national legislation implementing the duty to cooperate with the Tribunal

Both the structure and the text of a large number of national cooperation laws strengthen the view that the Tribunal may on its own behalf summon individuals to appear before the court. Thus, for example, the Austrian cooperation law expressly provides that, while communications with the Tribunal should as a matter of principle pass through the Ministry of Foreign Affairs, the Tribunal might still under Sect. 11 forward summons and other documents to persons in Austria directly by mail. This presupposes that the Tribunal indeed possesses the power under its statute and rules to directly issue such orders to individuals. Furthermore, sect. 11 para. 2 establishes that a witness is under a legal duty to follow a summons directly addressed to him or her. Similarly, Art. 23 of the Swiss regulation on the cooperation with the International Criminal Tribunal for the Former Yugoslavia also acknowledges that the procedural decisions of the tribunal may be directly mailed to the addressee domiciled in Switzerland.
Sect. 8 of the Finnish cooperation law[123] similarly 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"[124]. This again implies that the Tribunal may issue such binding orders to individuals.
Sect. 4 para. 2 of the German law regulating cooperation with the International Tribunal for the former Yugoslavia stipulates that "should the Tribunal ask for[125] 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's prosecutor's office." This formula indicates that the Tribunal may directly summon individuals. Similarly the Spanish legislation[126] provides that "persons summoned to appear before the International Tribunal as witnesses

---

[123] Act on the Jurisdiction of the International Tribunal for the Prosecution of Persons responsible for Crimes Committed in the Territory of the Former Yugoslavia and on Legal Assistance to the International Tribunal of 5 January 1994.

[124] Emphasis added.

[125] The German original uses the term "verlangen" which seems to imply a legal obligation to obey such a request.

[126] For the wording of the Spanish Act 15/1994 of 1 June 1994 on Cooperation with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia *see* GA Doc. A/49/278 of 27 July 1994.

or experts shall be under the same obligation to appear as that provided for in Spanish law." The relevant part of the Italian law providing for the cooperation with the Tribunal[127] explicitly states that "summons and other services of process requested by the International Tribunal shall be transmitted to the national Italian authorities".

Under the legal regime prevailing in the Netherlands there is a clear indication that it was the view of the Dutch legislature that the International Tribunal for the Former Yugoslavia has been granted under its Statute the power to issue *subpoenas* to witnesses and similarly situated persons, since Sect. 7 para. 2 of the Dutch cooperation law[128] refers to persons "being transferred to the Netherlands by the authorities of a foreign state as witnesses or experts *in the excecution of a subpoena issued by the Tribunal Law*"[129].

The Swedish Act relating to the Establishment of an International Tribunal for Trial of Crimes Committed in former Yugoslavia similarly acknowledges the power of the Tribunal to directly summon witnesses to be questioned since it regulates in its Sect. 15 certain procedural issues relating to such persons.

Finally, Sect. 9 para. 1 and 19 para. 1 of the British United Nations (International Tribunal) (Former Yugoslavia) Order 1996[130] provides not only for the service of process of a summons or other process requiring a person to appear before the Tribunal for the purpose of giving evidence or assisting an investigation issued by said tribunal, but also states that the Tribunal may indeed issue an order for the attendance before the Tribunal to be executed by the British authorities[131].

Against this background it is safe to say that state practice - as enshrined in the respective national implementation laws - does indeed presuppose and confirm that the International Criminal Tribunal for the Former

---

127 Art. 10 of the Provisions on Co-operation with the International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Decree-Law No. 544 of 28 December 1993.

128 Provisions relating to the establishment of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, bill of 9 March 1994 as amended.

129 *See* also Sect. 10 para. 1 of the same law which again refers to "witnesses or experts (...) who come to the Netherlands in response to a summons or *subpoena issued by the Tribunal*". (emphasis added).

130 Statutory Instruments 1996, no. 716.

131 But *see* also Sect. 30 para. (2) of the New Zealand 1995 International War Crimes Tribunal Act, under which the Attorney General may only assist in the making of arrangements to facilitate the attendance of a person other than an offender at a hearing of the Tribunal if *inter alia* that person has freely consented to giving evidence or assisting in the foreign country where the Tribunal is located.

Yugoslavia possesses the power under Art. 29 of its statute to directly address individuals by way of orders.

3. Analysis of similar provisions contained in other international instruments

While the Inter-American Court of Human Rights, according to Art. 35 of its Rules[132], may summon witnesses, no reference is made to requiring an individual to produce certain documents. In any case, where a witness or any other person, even when duly summoned, fails to appear or refuses to give evidence, the only sanction provided for in the Rules of Court is to inform the State to whose jurisdiction such witness or other person is subject[133]. Arbitral tribunals may generally only obtain further evidence by calling upon the parties to provide them with such evidence but may not as a matter of principle directly order possible witnesses to appear before it. However in some instances even *ad hoc* tribunals, e.g. the Franco-Haitian Arbitral Tribunal of 1923, were granted the power to communicate directly with employees of the respective Government[134]. Similarly, the International Boundary Commission between the United States and Mexico, as established by the Boundary Convention of March 1, 1889 and the International Joint Commission between the United States and Canada established by a treaty of January 11, 1909 were both explicitly granted the power to compel witnesses to appear before the Commission[135] or to even issue *subpoenas*[136]. In *The I'm Alone case*[137] both, the Canadian and the U.S. government passed national laws empowering international tribunals

---

132 Text to be found *inter alia* in K. Oellers-Frahm/ N. Wühler, Dispute Settlement in Public International Law - Texts and Materials (1984), 313 *et seq.* (320-321).

133 Art. 39 para. 1 of the Rules of Court.

134 For details *see* D. Sandifer, Evidence before International Tribunals (2nd ed. 1975), 158. Similarly the Spanish Treaty Claims Commission established in 1901 could also summon its own witnesses.

135 Art. VII of the Boundary Convention of 1889 stipulated that the Commission should "have the power to summon any witnesses whose testimony it may think proper to take" and that "in case of the refusal of a witness to appear, he shall be compelled to do so, and to this end the commission may make use of the same means that are used by the Courts of the respective countries to compel the attendance of witnesses (...)"

136 Art. XII of the treaty of January 11, 1909 stipulated *inter alia*, that the parties agree "to adopt such legislation as may be appropriate (...) to provide for the issue of *subpoenas* for compelling the attendance of witnesses, in proceedings before the Commission." Both the United States and Canada adopted such laws, *see* C. Anderson, Production of evidence by *subpoena* before international tribunals, Am. J. Int. L. 1933, 498 *et seq.* (498-499).

137 For details *see* P. Seidel, The I'm Alone, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, inst. 2 (1981), 133-134.

and commissions to which they are a party "to require by *subpoena* the attendance and the testimony of witnesses and the production of documentary evidence relating to any matter pending before it"[138]. Under this authority, one of the members of the Commission issued a number of *subpoenas*, including a *subpoena duces tecum*, and a writ of *habeas corpus*[139].

In cases where no such clear authority has been granted, however, there seems to be a reluctance of international tribunals to enforce on their own orders calling witnesses and issuing *subpoenas* against individuals. In that respect one might refer to a decision of the U.S.-German Mixed Claims Commission which decided that, given the lack of an express authorization in the underlying Agreement of 10 August 1922 between Germany and the United States, it may not issue *subpoenas* to witnesses[140].

II. May the Tribunal issue a binding order to high government officials?

It has been shown that the Tribunal may issue orders to States as well as to individuals generally. This suggests that these powers, if combined, also include the power to issue orders to high government officials acting in their official capacity. This may appear particularly obvious to lawyers coming from a common law background. Since, under the old common law, *subpoenas (duces tecum)* could not be addressed to corporations but only to natural persons it has become the rule in common law systems that such court orders are regularly addressed to the officer who is responsible for the documents sought[141].

In States of the civil law tradition, however, the separate legal personality of the State as well as that of private corporations are taken into account more fully by the Courts. In those States court orders for the production of documents which belong to the State or a corporation are addressed to the State or corporation itself "as represented by its responsible agents". Responsible agents in this sense, however, are not considered to be those officers who are merely responsible for the keeping of the records under the internal rules of the corporation (as seems to be the case in States following the common law tradition)[142] but only those who are duly appointed

---

138 Act of July 3, 1930, 46 Stat. 1005; as to the Canadian legislation *see* Statutes of Canada 1934, 24-25 George V, Ch. 37, 455.

139 D. Sandifer, Evidence before International Tribunals (2nd ed., 1975), 295-298.

140 Mixed Claims Comm. U.S. and Germany, Administrative Decisions and Opinions from 1 October, 1926 to 31 December, 1932, 996, reproduced in RIAA, vol. VIII, 102-103.

141 Annotation, Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 ALR2d 884 f.

142 Ibid. 884 ff.

to represent the corporation in court proceedings or generally for the purpose of outside dealings. Therefore, courts in civil law countries would direct an order to produce certain documents from the Ministry of Defence to "the State as represented by the Minister of Defence" and not to the Minister of Defence individually.

This conceptual difference between major legal systems does not, however, call into question the power of the Tribunal to issue orders to high government officials in their official capacity. It appears that this difference raises more a question of form than of substance. It is beyond dispute that courts in common law countries cannot compel an official to testify or produce documents in his or her official capacity if this violates the internal rules of the ministry or department. Thus it is recognized in the United States that the power of an inferior official to submit documents under his or her control for the purpose of court proceedings can be made subject to approval of the head of the department[143]. This means that the principle of centralized control over the issuance of documents to courts is as valid as in civil law countries. In addition, it is recognized in the United States that a court may not even compel the highest responsible official, such as a head of a governmental department to testify or to produce official documents if a statute provides to the contrary[144]. This means that a court order to a (high) government official in a common law country has for all practical purposes the same legal effect as a court order to "the State as represented by a (high) government official" in a civil law country. It therefore appears to be a mere question of the proper designation of an order rather than a question of substance whether an order to produce state documentation is directed to the State as such or to its proper legal representative. Thus, there seems to be no reason why orders of the Tribunal which may be issued to States and individuals alike cannot be issued to the proper representatives of the State individually. This possibility, however, cannot dispense with the general limits of the Tribunal to issue orders against a State[145].

---

[143] Note, Discovery of Government Documents and the Official Information Privilege, Columbia Law Review 76 (1976), 142-174 (145 *et seq.* and 156 *et seq.*)

[144] Ibid., 143.

[145] *See* above B. III.

E. What are the appropriate remedies to be taken if there is non-compliance by an individual, including a high government official, of a "*subpoena duces tecum*" or request issued by a judge or a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia?

I. Analysis of Art. 29 of the Statute and of the Rules of Procedure

As has been shown above[146] the wording of Art. 29 does not contain any indication as to the consequences of non-compliance with a request or order of the Tribunal, neither concerning States nor concerning individuals. While Art. 29 is not explicit in this context, the Rules of the Tribunal are clear in so far as they provide for enforcement measures to be taken by the Tribunal if during the proceedings before the trial chamber a witness fails contumaciously to answer a question[147]. This provision reflects a power typical of any criminal tribunal which is known as contempt of court in the common law systems but also exists in a similar form in civil law systems. The preparatory works for the Rules of the Tribunal leave no room for doubt that such a power of the Tribunal was regarded as self-evident. Especially the drafts from common law experts are clear in this regard. The suggestions made by the Government of the United States explicitly state in the commentary to its proposed Art. 6.4, which reads "Contempt of court may be punished by any Chamber of the International Tribunal", that this rule

> recognizes the inherent power of the court to punish contempt. The need to maintain the authority and dignity of and respect for the Chambers of the International Tribunal and their decrees requires that Chambers have the authority to punish contempt. (...) Given the limited subject matter jurisdiction of the International Tribunal, the contempt power is the only mechanism available to ensure the freedom of proceedings from perjury, witness tampering or intimidation and other offences which affect the integrity of the proceedings[148].

II. Legal basis of the contempt rule

Although the Statute is silent as to the question of contempt of Court, the adoption in the Rules of an explicit provision for contempt of court may be interpreted

---

146 *See* above C.I.

147 Cf. Rule 77.

148 Doc. IT/14, 17 November 1993, in Morris/Scharf, *supra* note 8, vol. 2, 509 et seq, 521

in the sense of a general acceptance of this power, if not as an inherent power of criminal tribunals as has been argued by the United States in their Draft Rules[149].
In order to answer the question whether the contempt power of the International Tribunal provided for in the Rules is within the framework of the Statute, three aspects have to be considered:
First, the Rules were adopted without any protest against the contempt power of the Tribunal so conceived. Accordingly, general acceptance of this power may be presumed.
Second, the power to adopt rules of procedure and evidence was transferred to the Tribunal itself by Art. 15 of the Statute. This provision may be interpreted to mean that the Tribunal was free to adopt those rules which are normally required in order to fulfil the functions of a criminal court. Since some form of contempt power exists within any national legal system it is legitimate to provide the International Tribunal with a such a power.
Third, the contempt power of the Tribunal may be regarded as the expression of an implied power which therefore need not be spelled out explicitly in the Statute. In this context it may be argued that the functions of an international criminal tribunal face the same problems, even in an intensified manner, as do national criminal courts, and that its dependence on depositions of witnesses is equally strong. If criminal tribunals are not empowered to compel witnesses they might become unable to fulfil their functions. For these reasons it may be admitted that contempt powers against individuals are inherent in the functions of a criminal tribunal, be it a national one or an international one.
Thus, not only the power of the Tribunal to issue binding orders against individuals but also the power to sanction non-compliance with those orders by the individuals addressed, is not subject to any serious doubt. Neither the establishment of the Tribunal as a measure taken under Chapter VII of the Charter nor the limits to its powers arising out of its special establishment militate against this result. However, these inherent contempt powers are also not unlimited.

III. National cooperation laws

The view that the Tribunal may itself impose sanctions against individuals can be further confirmed by the respective national cooperation laws. Art. 9 para. 2 of the cooperation law of Belgium[150], in its part on legal assistance stipulates *inter alia*, that "la demande du Procureur ou de l'ordonnance du *Tribunal qui porte sur une mesure de contrainte*[151] est exécutée par le juge

---

[149] Ibid.
[150] Moniteur Belge of 27 April 1994, 1 0260 *et seq.*
[151] Emphasis added.

d'instruction (...)". This formula presupposes that the Tribunal itself has the power to punish for contempt of court, such measures then being executed by the Belgium authorities.
Similarly Sect. 4 para. 1 of the Danish cooperation law states that the Danish Minister of Justice may enforce "any sentence etc. imposed by the Tribunal (...)", thus implying that the Tribunal might not only impose sentences as sanctions but that it may also impose other forms of sanctions, such as fines for contempt.
Sect. 4 para. 2 of the German cooperation law provides that the appearance of individuals may be enforced by the same judicial means as if the summons were issued by a German court or a German prosecutor's office. The law seems to take the view that the Tribunal may impose sanctions itself, which in turn would be executed as if the fine had been ordered by a German court.
The Italian cooperation law[152] establishes that where a witness fails to appear before the Tribunal, he or she might be coerced to do so by the Italian authorities by being accompanied before the Tribunal against his or her will, *if the Tribunal so requests*. The Tribunal itself may order that an unwilling witness be taken into custody and the national Italian authority has no other alternative but to follow such a request.
Similarly, Sect. 6 of the Dutch cooperation law also envisages the possibility, upon request by the Tribunal, of enforcing a summons issued by the Tribunal to bring a person who is unwilling to appear as witness or expert. Again, it is the Tribunal itself and not the national authority which renders the decision that such an enforcement measure should be taken.
Finally, under Sect. 9 para 2 of the British United Nations (International Tribunal) (Former Yugoslavia) Order 1996[153], if a person summoned by the Tribunal to appear before it fails to do so, the United Kingdom shall, if so requested by the Tribunal, have him or her arrested. Here again, it is envisaged that the Tribunal orders an enforcement measure itself.

IV. Analysis of similar provisions contained in other international instruments

As has already been mentioned[154], international courts and tribunals are generally not empowered to enforce their orders or decisions. In particular, the power to compel the attendance of witnesses is rarely provided for. Nevertheless, there are some arbitration agreements which provide for the enforcement of the attendance of witnesses[155]. In addition, the Court of

---

152 Art. 10 para. 7.
153 Statutory Instruments 1996 No. 716.
154 Cf. above C. I and II.
155 *See* D. V. Sandifer, Evidence before International Tribunals, 1939, 208 *et seq.*

Justice of the European Communities, according to its Statute and Rules of Procedure, may impose pecuniary penalties[156]. The Tribunal of the East African Common Market was also empowered to compel attendance of witnesses and disposes of the same powers in this regard as those granted to a superior court in the contracting State where it is sitting at the relevant time[157]. While the majority of international courts and tribunals do not contain any comparable provision, the European Court on Human Rights has at least provided for a right of the Registrar, on being so required by the President, to inform the Contracting Party to whose jurisdiction the recalcitrant witness is subject of the non-appearance or refusal to give evidence of the person duly summoned[158].

V. Sanctions against high government officials for non-compliance with an order

While the Tribunal may generally sanction non-compliance by individuals with its orders on the basis of its inherent contempt power, the same is not necessarily true when such orders are directed against (high) government officials in their official capacity. On the one hand, the Tribunal may impose a fine on recalcitrant witnesses[159] on the basis of its inherent contempt power and Rule 77 of its Rules of Procedure. On the other hand it is equally clear that the Tribunal may not impose a sanction against a State for not complying with one of its orders or requests[160]. For two reasons, the second rule must also apply in the case of (high) government officials not complying with an order to testify or to produce documents in their official capacity:
- First, if the Tribunal could sanction an official in such a situation for a contempt of court it could thereby circumvent its lack of power to impose sanctions against a State for non-compliance. To sanction one of its officials for not acting properly on behalf of the State is to put unacceptable indirect pressure on the State to comply. Similarly, there exists a rule in the United States that the principle of immunity of the United States from suit without its consent cannot be evaded or circumvented by bringing an action nominally against a federal officer or department, when the United States is the party vitally interested[161].

---

156 Art. 24 of the Statute of the Court, Art. 48 of the Rules of Court.
157 Art. 17 of the Statute and Art. 13 of the Rules.
158 Art. 45 of the Rules of Court.
159 *See* above C. I. 3 and E. I.
160 *See* above C. I.
161 AmJur 2d, vol. 77, "United States", § 113

- Second, it would seem to be fundamentally unfair to hold an individual responsible for not complying with an order which is in essence directed to the State and which it cannot fulfil without having to reckon with personal consequences. This is particularly clear where the (high) government official would be violating a national law or governmental regulation if he or she would comply with an order of the Tribunal. The same is true when it must be expected that compliance with the order would be regarded as a violation of a political duty to seek a consensus within the government and that the consequence of non-compliance would be his or her expulsion or dismissal from office.

F. Final conclusions

In view of the foregoing reasons, we conclude that the Tribunal may under Art. 19 and 29 para. 2 of its Statute, as a matter of principle, adopt legally binding orders even against a sovereign state, including orders for the production of documents.

This power is, however, not unlimited. The Tribunal must strike a balance between this power and the legitimate interests of such a requested state not to be forced to reveal information essential for its national security or of a similar confidential nature. Furthermore the Tribunal must demonstrate that the request issued clearly relates to the case pending before it and that the order circumscribes the documents sought as narrowly as possible.

An order for the production of documents may even take the form of a "*subpoena duces tecum*". This is subject to our conclusion, however, that the Tribunal does not purport, by adopting such a *subpoena,* to possess any inherent competence whatsoever to punish the requested state where such state fails to comply with the request. The Tribunal must avoid creating any impression that the adoption of such a "*subpoena duces tecum*" implies that the Tribunal considers that it possesses an inherent contempt power to sanction a State's failure to produce requested documents.

The Tribunal may, however, inform the Security Council of any failure to comply with such an order. The Security Council may then, acting under Chapter VII of the Charter of the United Nations, take appropriate action.

Likewise, the Tribunal is also empowered to issue binding orders directly to individuals. Under the Statute of the Tribunal and its Rules of Procedure and Evidence, such an order may also be adopted in the form of a "*subpoena duces tecum*" and may also be generally addressed to high government officials. Whenever such a request is directed to a high government official in his or her official capacity, however, the Tribunal must not circumvent the above-mentioned limits concerning requests for the production of secret information and overbroad requests.

Furthermore, since the Tribunal may not itself enforce a State's obligation to produce documents under a "*subpoena*" addressed against that State, neither may it use its contempt powers against a high government official in order to enforce a duty that it could not directly enforce against its home State.

These legal conclusions notwithstanding the undersigned feel that it is appropriate to address the following point: The answers to the questions which the judge has put to *amici* show that dangers result from the use by an international tribunal of legal terms taken from certain domestic legal systems which, in those systems, may imply consequences which are not easily recognizable by those States or persons which are not familiar with them. As an international judicial organ, the International Tribunal also has to be sensitive to the perspective of those, including States, who are subject to its jurisdiction and who have a legitimate interest not only to know as precisely as possible what is being demanded of them but also to be treated in a way which reflects a recognition of their respective position under international law. It therefore seems advisable that the Tribunal, in its dealings with States, take into account that formalities play a particularly important role vis-à-vis sovereign States which occupy a special position in international law. This does not exclude that the Tribunal may, in substance, pursue its demands with all necessary clarity and perseverance.

Respectfully submitted

Heidelberg, 4 April 1997