

# Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence\*

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## I. Introduction

The trials of Nuremberg and Tokyo were able to profit from the unconditional surrender of Germany and Japan after full military victory and the occupation of the territories by the allied powers which were also responsible for establishing the war crimes Tribunals. Consequently, these Tribunals had direct access to witnesses, documentary and real evidence. In contrast to that, 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 (hereinafter: the Tribunal) is depending heavily on external cooperation with a view to carrying out investigations, arresting suspects and producing evidence in court.

The Tribunal's practice provides a vivid picture of this dependence. The first years of the Tribunal's existence were dominated by the fear that the entire idea would remain an empty threat due to the absence of arrests and surrender of accused persons. These fears proved unfounded since a number of accused persons have been detained including high ranking politicians such as the Bosnian Serb Krajisnik. Such arrests have partly been carried out with the help of international military forces present in the territory of the former Yugoslavia and these forces have indeed demonstrated a growing commitment to contributing to the Tribunal's work. However, an unknown number of indicted persons including the notorious main culprits are still at large and this constitutes a permanent reminder of the Tribunal's dependence on external cooperation, in particular with the authorities of states.<sup>1</sup>

The same observation applies to investigations by the Office of the Prosecutor. The Tribunal's annual report regularly contains complaints by the Office about a lack of cooperation by states especially regarding on-site investigations.<sup>2</sup> Moreover, as has been demonstrated by a review

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<sup>1</sup> For a discussion of the problem of arrest and surrender of accused persons cf., for instance, P. Gaeta, "Is NATO authorized or obliged to arrest persons indicted by the International Criminal Tribunal for the Former Yugoslavia?", *EJIL* 9 (1998), 174 et seq.; G. Sluiter, "To Cooperate or not to Cooperate?: The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal", *LJIL* 11 (1998), 383 et seq.

<sup>2</sup> This observation fully applies to proceedings concerning atrocities committed in Bosnia-Herzegovina and Croatia, but also in Kosovo before the deployment of KFOR. In particular, the Prosecutor was refused travel documents for an investigative mission to Kosovo in autumn 1998. The situation seems considerably better regarding crimes under the jurisdiction

of domestic legislation implementing the Tribunal's Statute, the right of the Prosecutor to question suspects, victims and witnesses, to collect evidence and to carry out on-site investigations (article 18 para. 2 of the Statute) is not comprehensively honoured. Most states rather rely on the traditional system of judicial assistance afforded from one state to another instead of acknowledging the right of the Prosecutor to act independently.<sup>3</sup>

An important role for the collection of evidence is played by the international security presence of SFOR, for instance by providing assistance in exhumations projects or allowing the Office of the Prosecutor to search its databases (International Police Task Force). Regarding the collection of evidence in Kosovo, the situation is dramatically better due to the presence of KFOR and the cooperation with the United Nations Mission in Kosovo (UNMIK). Security Council Resolution 1244 (1999) of 10 June 1999 specifically demanded full cooperation by all concerned, including the international security presence, with the Tribunal, and the Secretary-General's first report on UNMIK reiterated that position.<sup>4</sup>

This article will concentrate on an analysis of the practice and the rules applying to the cooperation with the Tribunal in the production of evidence in the course of the trials. The powers of the Tribunal with a view to obtaining documents from states have been the subject of a landmark ruling by the Appeals Chamber in the Blaškić Case. Although the ruling originally was concerned with the Tribunal's powers to issue *subpoena duces tecum* it also addressed questions pertaining to the Tribunal's powers to summon witnesses (*subpoena ad testificandum*) be it as private individuals or as public officials. The Judgement also draws on the limitations to the Tribunal's powers and respectively on states' obligations to cooperate, in particular with a view to security concerns. The principles established in the Blaškić Case have been further developed and elaborated in the subsequent practice of the Tribunal and therefore deserve a fresh look. Due to its fundamental importance, the

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of the Tribunal committed in Kosovo since the practical access of the Prosecutor to on-site investigations is guaranteed by KFOR, cf. Cf. 1999 Annual Report of the ICTY, General Assembly, 54th Sess., Docs A/54/187, S/1998/846, para. 134.

<sup>3</sup> G. Hafner, "Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia", in: K. Wellens (ed.), *International Law: Theory and Practice*, 1998, 651 et seq., (666 et seq.).

<sup>4</sup> Cf. 1999 Annual Report of the ICTY, paras 134, 137.

Blaškić *subpoena* decision will provide a starting point for analysis and be reviewed in the light of new developments.

Moreover, new questions have arisen in the practice of the Tribunal regarding the cooperation by other international organisations or organs of the United Nations or the International Committee of the Red Cross. What are the powers of the Tribunal in this respect and how do they have to be related to legitimate concerns of the organisation in question to withhold information in the interest of its own mandate?

## II. State Sources of Evidence

The question of the Tribunal's powers with a view to evidence to be requested from states lay at the heart of a dispute about an order of *subpoena duces tecum* to the Republic of Croatia in the Case of Tihomir Blaškić. On 15 January 1997, pursuant to an *ex parte* request by the Prosecution, Judge McDonald issued *subpoenae duces tecum* to Croatia and its Defence Minister, Mr. Susak.<sup>5</sup> The *subpoena* to Croatia requested for Blaškić's notes and writings sent to the Croatian Minister of Defence and the Ministry of Defence of the Croatian Community Herceg Bosna, all military and other orders, communications and directives somehow attributed to or received by Blaškić, communications between the Croatian Ministry of Defence and representatives of Herceg Bosna, files on national investigations into the attack on and the killing of civilians in Ahmici and other villages in the Lasva Valley, records of the Croatian Ministry of Defence on the provision or supply of military material and personnel to the Bosnian Croat Forces.<sup>6</sup>

The Republic of Croatia contested the Tribunal's power to issue *subpoenas duces tecum* claiming that first, Croatia as a sovereign state cannot be ordered to perform a particular act, in particular not under the threat of sanctions; second, Croatia had discretion in choosing the means with a view to fulfilment of international obligations; and third, Croatia could withhold information on grounds of national security. Although Croatia provided some of the requested documents it chal-

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<sup>5</sup> Another *subpoena* was issued to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herceg Bosna. This order was accepted by the Bosnian government.

<sup>6</sup> See Prosecutor v. Tihomir Blaškić, Decision by Judge McDonald of 15 January 1997.

lenged the authority of the Tribunal to issue the full *subpoena*. The matter was referred to the Tribunal's Trial Chamber II which — after having considered a number of *amicus curiae* briefs<sup>7</sup> — upheld and reinstated the *subpoena duces tecum* on 18 July 1997.<sup>8</sup> The Republic of Croatia then sought review by the Appeals Chamber which on 2 October 1997 reversed in part and affirmed in part<sup>9</sup> the decision of the Trial Chamber again after having discussed a number of briefs by the parties, *amici*, and several governments.<sup>10</sup>

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<sup>7</sup> See, for instance, 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 Blaškić by J.A. Frowein/G. Nolte/K. Oellers-Frahm/A. Zimmermann, *Max Planck UNYB 1* (1997), 349 et seq.

<sup>8</sup> Prosecutor v. Tihomir Blaškić, Decision on the Objection of the Republic of Croatia to the Issuance of *subpoena duces tecum*, Case No. I-95-14-PT, Trial Chamber II, 18 July 1997 (hereinafter: Blaškić *subpoena* Trial Chamber Decision).

<sup>9</sup> Prosecutor v. Tihomir Blaškić, Judgement on the Request of the Republic of Croatia for the Review of the Decision of the Trial Chamber II of 18 July 1997, Appeals Chamber Judgement of 2 October 1997, Case No. IT-95-14-AR108 bis, A (hereinafter: Blaškić *subpoena* Appeals Chamber Judgement). The Judgement has attracted broad attention in the literature, cf. for instance R. Wedgwood, "International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić", *LJIL 11* (1998), 635 et seq.; D. Sarooshi, "The Powers of the United Nations International Criminal Tribunals", *Max Planck UNYB 2* (1998), 141 et seq.; J.A. Carrillo Salcedo, "The inherent powers of the International Criminal Tribunal for the former Yugoslavia to issue "subpoena duces tecum" to a sovereign State", in: R.-J. Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos*, 1999, 269 et seq.; P. Malanczuk, "The International Criminal Tribunal's power to issue subpoena duces tecum", in: E. Denters (ed.), *Reflections on International Law from the Low Countries in Honour of Paul de Waart*, 1998, 260 et seq.

<sup>10</sup> The disposition of the Appeals Chamber expressly quashes the *subpoena* decision: "(...) the Appeals Chamber: (...) (5) Unanimously decides to quash the subpoena duces tecum issued by Judge McDonald and reinstated by Trial Chamber II (...)". However, at the same time, the Appeals Chamber hints at the fact that the Prosecutor may submit a request for a binding order addressed to Croatia alone, cf. Blaškić *subpoena* Appeals Chamber Judgement, III. It therefore seems justified to say that the previous decision of the Trial Chamber was affirmed in part.

To put the whole matter in a nutshell, the Appeals Chamber ruled that the Tribunal is empowered to issue binding orders to states and individuals acting in a private capacity but not to state officials, and that states may not withhold evidence on the claim of national security interests although a Trial Chamber may make arrangements for respecting legitimate and *bona fide* concerns of states. Regarding the sanctions for non-compliance, the Appeals Chamber ruled that orders can be enforced by the threat of penalty only against individuals acting in their private capacity but not against states.

Since then, the Tribunal has the opportunity to address questions of interpretation of the Appeals Chamber's Blaškić *subpoena* Judgement on different occasions. As will be shown it has adopted a rather flexible approach, often favourable to the exigencies of the trial instead of emphasising the viewpoint of national sovereignty.

## 1. Power to Issue Binding Orders to States for the Production of Documents

According to the decision of the Appeals Chamber, the Tribunal has the power to issue binding orders to states under article 29 of the Statute.<sup>11</sup> By virtue of that provision all Member States of the United Nations are under an obligation to lend cooperation and judicial assistance to the Tribunal. This conclusion is based on the clear wording of article 29 of the Statute. The binding force is derived from the provisions of Chapter VII and Article 25 of the United Nations Charter and from Security Council Resolution 827 (1993) of 25 May 1993 adopted pursuant to those provisions.<sup>12</sup>

The power to issue binding orders has been made subject to certain requirements by the Appeals Chamber. In the following paragraphs, these requirements will be reviewed in the light of the Tribunal's more recent practice.

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<sup>11</sup> Member States of the United Nations are directly bound by the Statute, non-Member States may expressly accept in writing the obligation of Article 29 UN Charter, as was done by Switzerland.

<sup>12</sup> Blaškić *subpoena* Appeals Chamber Judgement, paras 26 et seq. In this context, the Appeals Chamber also emphasises that its primacy jurisdiction under article 9 para. 2 of the Statute may not only be exercised *vis-à-vis* the states of the former Yugoslavia but extends to any state, cf. *ibid.*, para. 29.

### a. Requirement to Seek Voluntary Cooperation First

In considering the Prosecutor's contentions on a distinction between cooperative and mandatory compliance with states' obligations under article 29 of the Statute, the Appeals Chamber emphasises that voluntary cooperation should be sought by the prosecution or the defence before applying for a binding order. Although this could be regarded as a procedural precondition for the issuing of a binding order by the Tribunal, it is not clearly formulated as a legal requirement but as a matter of "sound policy" in the Judgement:

"It is therefore to be regarded as sound policy for the Prosecutor, as well as defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29."<sup>13</sup>

The Tribunal's practice since then is not consistent. In some cases, the practice clearly points in the direction of an interpretation as a legal requirement. An application for a binding order to the Republika Srpska for the production of documents was partly rejected by Judge Jorda in the Krstić Case since the Prosecution had not first requested the voluntary production of certain documents.<sup>14</sup> The same reasoning was applied in the case of Delalic and others when the defence requested to issue an order to a government which had not first been addressed for voluntary cooperation.<sup>15</sup>

A factor taken into account by the Tribunal in assessing the requirement to seek voluntary cooperation first is the general performance of the state concerned in cooperating with the Tribunal. This was made clear by the Trial Chamber in a ruling on a request by the defence

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<sup>13</sup> Ibid., para. 31.

<sup>14</sup> Cf. Prosecutor v. Radislav Krstić, Case No. IT-98-33-PT, "Binding Order to the Republika Srpska for the Production of Documents", Judge Jorda, Presiding Judge of Trial Chamber I of 12 March 1999, summary published under <http://www.un.org/icty/Supplement/supp3-e/krstic.htm>

<sup>15</sup> Prosecutor v. Zejnir Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga", Decision on the alternative request for renewed consideration of Delalic's motion for an adjournment until 22 June or request for issue of *subpoenas* to individuals and requests for assistance to the government of Bosnia and Herzegovina, Trial Chamber, Decision of 22 June 1998, para. 52.

for issuing an order to the Government of Bosnia and Herzegovina for assistance in the case of Delalic and others:

“The Government of Bosnia and Herzegovina has officially indicated its willingness and readiness to co-operate with the International Tribunal in the service of process and has in some cases practically demonstrated its willingness to do so. The Motion has not shown any previous efforts made by Counsel to seek assistance from the Government of Bosnia and Herzegovina that has been refused, or that there has been inordinate delay in answering a request already made. The Trial Chamber does not consider it ripe in this circumstance to issue an order to a sovereign Government which is known to be willing to co-operate without such an order.”<sup>16</sup>

This ruling does not take a stance on the consequences of a poor record of cooperation. Two interpretations are possible: one is that in cases of consistently poor cooperation the requirement to seek voluntary cooperation first does not apply; the other is that the negative record of performance would only be taken into account in assessing whether an attempt to obtain documents etc. through voluntary cooperation has failed. In that regard, a clear line has yet to be established.

The second alternative of interpretation suggested above points to another question. If there was an attempt on part of the Prosecutor or defence to obtain documents through voluntary cooperation, criteria are required in order to assess whether the attempt has failed. Such criteria should leave states willing to cooperate voluntarily sufficient time for producing the requested documents. On the other hand, it is essential that states are not allowed to misuse the requirement to seek voluntary cooperation first and protract proceedings by merely paying lip-service to their readiness for cooperation. These considerations obviously underpin the reasoning of Judge Jorda in the Krstić Case when he ordered a binding order for the production of certain documents which had been requested despite the declared willingness of the authorities concerned to deliver them voluntarily. In particular, he took into account the lengthy period of correspondence between the prosecution and the state concerned without tangible results which led to the conclusion that voluntary cooperation had been sought unsuccessfully.<sup>17</sup>

Whereas all the examples referred to above seem to give considerable weight to the view that the requirement to seek voluntary cooperation

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<sup>16</sup> Ibid.

<sup>17</sup> Prosecutor v. Krstić, Binding Order to the Republika Srpska for the Production of Documents of 12 March 1999.



first is mandatory in principle, there are also examples where this criterion has been completely ignored. In particular, in orders to Croatia and to Bosnia and Herzegovina for the production of documents in the Case of Kordić and Čerkez, the question of previous attempts to obtain the documents by voluntary cooperation has not been taken into consideration as one of the “mandatory and cumulative” conditions for a binding order by the Trial Chamber in issuing the orders to both states<sup>18</sup> or the Appeals Chamber when reviewing the order issued to Croatia.<sup>19</sup>

Summing up, the requirement examined here seems to be used in a flexible way. It seems that it is used as a criterion taken into account by the Tribunal when exercising discretion whether or not to issue a binding order rather than as a legal condition. This seems sensible since it is a matter varying from case to case whether asking for voluntary cooperation first increases the chances of obtaining the evidence needed for the conduct of the trial.

#### **b. Right of the Addressee of a Binding Order to be Notified and Heard in Advance?**

A possible requirement for issuing a binding order which was not mentioned in the Blaškić *subpoena* decisions was raised in the Kordić and Čerkez Case. Croatia sought review on the ground that it had not been heard prior to the issuance of the binding order to produce certain documents. The Appeals Chamber agreed that according to the principles of due process a state not party to the proceedings but addressed by an order is entitled to be “heard at a meaningful time and in a meaningful manner” but ruled that the opportunity to seek review of the order by the Appeals Chamber under Rule 108 *bis* was sufficient for that purpose. Stressing that the issuance of a binding order does not constitute a finding of a violation of the addressed state’s obligations under article 29 of the Statute, the Appeals Chamber stated that the *ex parte* nature of the request excluded the claimed right to a prior hearing.

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<sup>18</sup> Prosecutor v. Dario Kordić and Mario Čerkez, Order to the Federation of Bosnia and Herzegovina for the Production of Documents, Trial Chamber Order of 4 February 1999; Order to the Republic of Croatia for the Production of Documents, Trial Chamber Order of 4 February 1999.

<sup>19</sup> Prosecutor v. Dario Kordić and Mario Čerkez, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Appeals Chamber, Decision of 9 September 1999.

However, conditions for submitting a request *ex parte* are set out quite vaguely: it is said that such orders may become necessary “whenever cooperation is found to be inadequate for the purpose of obtaining such documents as are required for the conduct of a trial”.<sup>20</sup>

The decision adds to the impression that the Tribunal exercises broad discretion in issuing orders. Moreover, had the requirement to seek voluntary cooperation first, as has been discussed above, been a strict legal requirement rather than a factor taken into account when exercising discretion, this may have implied the right to a hearing prior to the issuance of an order.

### c. Requirements as to the Content of a Binding Order

The Appeals Chamber enumerated in the *subpoena* Judgement in the Blaškić Case four criteria which must be fulfilled:

the order must

- identify specific documents and not broad categories;
- set out the relevance of such documents to the trial;
- not be unduly onerous; and
- give the state sufficient time for compliance.<sup>21</sup>

A first reading of the requirements as set out in the above mentioned Judgement may have suggested that the power to issue binding orders to states for the production of documents was significantly limited. However, a restrictive interpretation which is protective of state’s interests has been ruled out by the Appeals Chamber in a decision on the request of Croatia for review of a binding order in the Kordić and Čerkez Case.

The most problematic issue is that of specificity of the documents requested. While it is clear — as the Trial Chamber has pointed out — that an order must not be issued for a mere “fishing expedition”<sup>22</sup> it is also evident that it may sometimes be difficult to specify a certain document by providing data such as an exact title, date and author. This problem has been acknowledged by the Appeals Chamber in the Blaškić *subpoena* Judgement by allowing to omit such details if the requesting

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<sup>20</sup> Ibid., para. 17 et seq.

<sup>21</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 32.

<sup>22</sup> Blaškić *subpoena* Trial Chamber Decision, para. 99.

party is acting *bona fide*, has no means of providing them, and provides an identification of specific documents “in some appropriate manner”.<sup>23</sup>

The wording of this requirement in the Appeals Chamber’s Judgement leaves room for interpretation and subsequently has given rise to a dispute over its interpretation. In particular, it was a matter for discussion whether a request can be made for the production of documents which are only identified by category. The Blaškić *subpoena* Judgement could have been read as to restrict the possibilities for requesting documents which are not identified by title, date and author to very exceptional cases: it requires an explanation by the requesting party for the omission and states that documents requested must be limited in number.<sup>24</sup>

However, the Appeals Chamber adopted a teleological interpretation in a review decision in the Kordić and Čerkez Case which emphasises the functioning of the Tribunal rather than the limitations of states’ obligations. According to this decision the purpose of the specificity requirement is to “allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party.”<sup>25</sup> On this basis, the Appeals Chamber concludes that only the use of *broad* categories is prohibited but not the use of categories as such.<sup>26</sup> However, a requested category has to be “defined with sufficient clarity to enable ready identification”.<sup>27</sup> In the absence of criteria of what constitutes the borderline between a “broad category” and a category enabling “ready identification” the decision opens wide discretion for the Tribunal. Moreover, it shifts the burden of identifying the individual documents to the state addressed by the order, whereas the requesting party only has to submit the criteria for identification.

According to the second criterion, the relevance of the requested documents for the trial must be set out in the request. The decision on whether a requested document is indeed relevant or not falls squarely to the discretion of the Trial Chamber according to the Appeals Chamber’s decision in the Kordić and Čerkez Case. The requested state does not

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<sup>23</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 32.

<sup>24</sup> Ibid.

<sup>25</sup> Kordić and Čerkez, Appeals Chamber Decision on Croatia’s request for review of a binding order, para. 38.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., para. 39.

even have *locus standi* to challenge the relevance of the documents by way of appeal against a respective order.<sup>28</sup>

Regarding the question as to what is to be understood by the third requirement that a request not be unduly onerous, the Appeals Chamber's *subpoena* Judgement in the Blaškić Case seemed to indicate that the volume of documents requested was limited by saying that "a party cannot request hundreds of documents".<sup>29</sup> However, in the review decision in the Kordić and Čerkez Case the Appeals Chamber expressly recognised that — contrary to the wording of the Blaškić *subpoena* Judgement — a request involving the production of hundreds of documents was not ruled out by this criterion. The Appeals Chamber underlined that the criterion aims at striking a balance between the need for the Tribunal to obtain the cooperation of states in the collection of evidence and the need to ensure that state's obligations in this respect do not turn out to be "unfairly burdensome".<sup>30</sup> That means that the question is not whether the request implies an onerous task or not but whether the task is *unduly* onerous, "taking into account mainly whether the difficulty of producing the evidence is, not disproportionate to the extent that process is, strictly justified by the exigencies of the trial".<sup>31</sup>

Consequently, the Tribunal has to weigh the burden to be imposed on a state against the potential importance of the evidence for the trial. Given the seriousness of the crimes in question and the potential severity of sentences it is difficult to imagine any situation in which the proportionality test would tilt in favour of relieving the state of its burdens if the evidence may be crucial for proving either the guilt or innocence of the accused. In the case of evidence relevant for the innocence of the accused this is all the more evident in view of the exigencies of the fair trial principle. Moreover, having in mind the requirement to specify the documents by concrete criteria the burden imposed on the state cannot stem from comprehensive and circumstantial research required for the identification of the documents. Therefore, the criterion that the task be not unduly onerous may only come into play where a bigger number of documents with small evidential value has been requested.

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<sup>28</sup> Ibid., para. 40.

<sup>29</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 32.

<sup>30</sup> Kordić and Čerkez, Appeals Chamber Decision on Croatia's request for review of a binding order, para. 41.

<sup>31</sup> Ibid.

Finally, the fourth criterion includes the possibility of deadlines delimiting the time sufficient for compliance with an order. Whether or not to set a deadline was left to the discretion of the Trial Chamber. Before a deadline was set, a hearing of the requested state seemed to be mandatory according to the wording of the Blaškić *subpoena* Judgement.<sup>32</sup> After the Tribunal had ruled out the general requirement of a hearing prior to the issuance of a binding order in the Kordić and Čerkez Case<sup>33</sup> it came as no surprise that it also allowed the setting of a deadline without a prior consultation of the state concerned at least in a case of an *ex parte* request; the state concerned may still submit a request for review (Rule 108 *bis*) in order to obtain an extension of time for compliance.<sup>34</sup>

## 2. State Officials as Addressees

The Appeals Chamber in the Blaškić Case ruled that both under customary international law and its own Statute, the Tribunal is not empowered to issue binding orders to state officials and that therefore it was not possible to address an order directly to the Croatian Minister of Defence. The basic observation underpinning this conclusion is that the Tribunal does not constitute the judicial branch of a state but an international court in a community of sovereign states and therefore does not necessarily possess the same powers as national courts with a view to the organs of their state. Under customary international law, the internal organisation and the designation of individuals acting as state organs is left to the discretion of each state. Exceptions from sovereign equality of all states are limited to infringements of international criminal law.<sup>35</sup> As a result, in fulfilling their obligations under article 29 of the Tribunal's Statute, specified by an order of the Tribunal states have the choice in identifying the personnel responsible for its fulfilment.<sup>36</sup> In principle, this conclusion applies to all kinds of state officials whose

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<sup>32</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 32: "Reasonable and workable deadlines could be set by the Trial Chamber after consulting the requested State."

<sup>33</sup> See above, II.1.b.

<sup>34</sup> Kordić and Čerkez, Appeals Chamber Decision on Croatia's request for review of a binding order, para. 43.

<sup>35</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 41.

<sup>36</sup> *Ibid.*, para. 43.

testimony on their performance of official functions may be required, be they document custodians required for testifying on issues pertaining to the accurateness or completeness of certain documents or be they eyewitnesses.<sup>37</sup>

The Appeals Chamber's approach has been attacked with the argument that the "act of State" rule underpinning this result would not apply in international humanitarian law as is demonstrated by the criminal responsibility of individuals for violations of humanitarian law irrespective of the "act of State" nature of their deeds.<sup>38</sup> However, the conclusion from an individual criminal responsibility for atrocities violating international humanitarian law to the assumption of a responsibility of state officials to testify is not compelling. While there is a rule compelling individual state officials not to commit war crimes there is no such rule compelling individual state officials to testify. It has to be admitted though that to allow states to choose whom they may wish to appoint for testifying on document related issues may have negative practical repercussions on the quality of evidence.<sup>39</sup>

However, even if the Tribunal in principle allows states to choose the person to be sent to the Tribunal as a witness, it must be emphasised that this does not provide states with unlimited discretion. States cannot fulfil their obligations to cooperate with the Tribunal in such cases by sending someone who is incompetent for testifying about the documents in question. The choice can only be limited to such persons who have a certain knowledge about the documents and the way they have been collected and kept. This observation is even more evident if the Tribunal needs a public official as an eyewitness. For instance, in the Appeals Chamber's notorious example of the colonel who upon exercising his monitoring functions overhears a general issuing order infringing international humanitarian law, how should the state ordered to cooperate with the Tribunal through sending a witness for this event fulfil its duties in any other way than by sending the colonel as a witness?

The main problem of the Appeals Chamber's conclusion that no orders may be issued to state officials therefore rather pertains to the question of sanctions for non-compliance. As will be seen, powers to impose sanctions only extend to individuals, not to states.

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<sup>37</sup> Although the category of eyewitnesses was not at issue in the Blaškić Case the Appeals Chamber pronounced itself on it. *Ibid.*, para. 50.

<sup>38</sup> Wedgwood, see note 9, 650.

<sup>39</sup> *Ibid.*

### 3. Sanctions for Non-Compliance

According to the Appeals Chamber in the *subpoena* Judgement in the Blaškić Case, the Tribunal is not vested with any enforcement or sanctionary powers *vis-à-vis* states. The central argument is that the Statute would contain express provisions had the drafters of the Statute intended to vest it with such enforcement powers.<sup>40</sup> An inherent power of the Tribunal to such an end was therefore rejected. The powers of the Tribunals remain limited to establishing whether a state has breached its international obligation to cooperate with the Tribunal and reporting the matter to the Security Council (Rule 7 *bis*) without, however, making any recommendations or suggestions as to possible measures to be adopted.<sup>41</sup>

In its practice, acting through its President, the Tribunal has addressed the Security Council with notifications about non-compliance on several occasions.<sup>42</sup> The Security Council has adopted one resolution specifically dealing with the continued failure to comply with obligations for cooperation on part of the Federal Republic of Yugoslavia.<sup>43</sup> As was reported in an annual report of the Tribunal, neither this nor any of the statements by the President of the Security Council or the Peace Implementation Council acting under the Dayton Agreement have led to any concrete improvement in the performance of the state addressed.

### 4. National Security Exception

Documents or witness statements requested by the Tribunal may impinge on legitimate national security concerns. On the other hand, allowing states to withhold information for national security reasons may open sweeping opportunities for refusing cooperation with the Tribunal. After Croatia had raised national security concerns as a justification for the non-disclosure of documents the question had to be addressed in the Blaškić Case.

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<sup>40</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 25.

<sup>41</sup> *Ibid.*, paras 33–36.

<sup>42</sup> Cf. 1999 Annual Report of the ICTY, paras 90–106.

<sup>43</sup> S/RES/1207 (1998) of 17 November 1998.

The central result of the Appeals Chamber's ruling in its *subpoena* Judgement is that national security concerns in principle may not relieve the state addressed by a binding order of the Tribunal from the obligation for cooperation under article 29 of the Statute. Therefore, documents requested by the Tribunal through a binding order must be submitted in due course. Moreover, the Tribunal will always have the last say whether a document will not be used in the proceedings on grounds of national security.

On the other hand, the Appeals Chamber recognised the possibility of special arrangements in order to deal with legitimate security concerns. Accordingly, a state raising security concerns may submit documents to scrutiny by one judge<sup>44</sup> of the Trial Chamber *in camera* who will then decide whether the documents submitted will be used in the trial proceedings despite the security concerns. The judge in question may return documents to the state if he or she considers them irrelevant to the proceedings or the document's relevance to be "outweighed (...) by the need to safeguard national security concerns".<sup>45</sup> Although this has not been said by the Tribunal, it is clear that the judge will have to take into account the degree of secrecy of the respective information when assessing national security concerns: if certain information is known to a sufficient number of private individuals national security concerns do not apply anymore.<sup>46</sup>

In order to balance the exigencies of the trial with states' interests of national security, the Appeals Chamber hinted at the possibility that states may be allowed to edit parts of other documents in case of legitimate security concerns, for instance, by blacking out certain parts. Such editing requires an explanation by the state in an affidavit.<sup>47</sup>

The Judgement allows for exceptions from the principle that documents have to be submitted to scrutiny for claimed security reasons if

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<sup>44</sup> This possibility is objected to by Judge Karibi-Whyte who argues that the Trial Chamber is the only body vested with jurisdiction and therefore "every issue constitutive of the ultimate decision in the trial of a matter before it must involve the participation of all the members of the Trial Chamber." Blaškić *subpoena* Appeals Chamber Judgement, Separate Opinion of Judge Adolphus G. Karibi-Whyte, para. 14.

<sup>45</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 68.

<sup>46</sup> This was also the line of argument of the European Court of Human Rights when assessing security concerns in the *Spycatcher Case, Observer and Guardian Newspapers v. UK*, Series A 216 (1992), para. 69.

<sup>47</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 68.



the security concerns are highly delicate and at the same time the documents in question are “of scant relevance to the trial proceedings”.<sup>48</sup> In this case, the state may instead submit a signed affidavit by the responsible minister comprising a detailed reasoning for the failure to submit the documents, in particular, with regard to the claimed irrelevance and security concerns. If the judge is not convinced of the validity of the states reasons, a judicial finding of non-compliance may be made by the Trial Chamber.

The possibility to claim that a document is of “scant relevance” to the proceedings introduces an opportunity for states to withhold documents which stands in clear contradiction to the general outline of proceedings. The question whether a document is of relevance to the proceedings or not has already been examined by the Trial Chamber when issuing the order. As has been outlined above, the Appeals Chamber has emphasised in a later case that the question of relevance of documents falls into the full discretion of the Trial Chamber and the state subjected to an order cannot challenge the order on this ground.<sup>49</sup> It is not quite clear whether the national security exemption allowing states to withhold documents of allegedly “scant relevance” would still apply after this clear statement that the sole competence for assessing the relevance of a document rests with the Tribunal. If it still does, the only possible interpretation would be to shift the emphasis of the state’s argument to the delicacy of the documents which then would have to be weighed by the Trial Chamber against the relevance of the respective documents for the trial when deciding on a finding of non-compliance. However, it is clear that it will be difficult for the Trial Chamber to reassess its findings on the relevance of a document when issuing the order without having seen the documents. All these considerations demonstrate that it is very problematic to allow that states may withhold documents under certain circumstances since it deprives the Tribunal of the power to verify the legitimacy of the concerns and to properly balance the interests. Moreover, since the screening procedure suggested in the *Blaškić subpoena* Judgement provides the opportunity to respect state security interests, it is highly doubtful whether it was necessary at all to allow for any possibility for states to withhold documents.

When scrutinising the documents and evaluating the *bona fide* character of the alleged security concerns the judge will take into account

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<sup>48</sup> Ibid.

<sup>49</sup> Kordić and Čerkez, Appeals Chamber Decision on Croatia’s request for review of a binding order, para. 38.

the general performance of the respective state in cooperating with the Tribunal.<sup>50</sup> This remark of the Appeals Chamber suggests that the Tribunal will assess the claims for security concerns made by states with a generally positive record of cooperation more generously than those of a state with a record of reluctance. Such an interpretation could go as far as to enable states to enter into a trade-off on certain acts of clear cooperation in exchange for a respect for alleged security concerns regarding another request.<sup>51</sup>

The character of the deliberations of the Appeals Chamber on proceedings for scrutinising national security claims as practical suggestions rather than binding rules is reflected in the more recent practice of the Trial Chamber in the Blaškić Case. After Croatia had reacted to an order for the production of documents with the claim that it was unable to produce certain documents for national security reasons the Trial Chamber did not insist on the procedure suggested by the Appeals Chamber which would have meant either to screen submitted documents or to decide on the basis of an affidavit. Instead, in accordance with a proposal on part of Croatia, the Trial Chamber ordered that a high-ranking military officer nominated by Croatia be heard as a witness on the reasons for withholding documents on national security grounds in an *ex parte* hearing by the full Trial Chamber. Moreover, it allowed for a qualified representative of Croatia to be present at the hearing and make a statement. The hearing was to be closed to the public at the request of the witness or Croatia's representative.<sup>52</sup>

When in the same case another military officer was allowed by an order to appear as a witness on the security considerations in an *ex parte* hearing, the Trial Chamber specified that the hearing would be closed only on request of the *parties*. As regards the *ex parte* character of the hearing, the Prosecutor was allowed to be present at least until her ar-

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<sup>50</sup> "The degree of *bona fide* cooperation and assistance lent by the relevant State to the International Tribunal, as well as the general attitude of the State *vis-à-vis* the International Tribunal (whether it is opposed to the fulfilment of its functions or instead consistently supports and assists the International Tribunal), are no doubt factors the International Tribunal may wish to take into account throughout the whole process of scrutinising the documents which allegedly raise security concerns." Blaškić *subpoena* Appeals Chamber Judgement, para. 68.

<sup>51</sup> Wedgwood, see note 9, 646.

<sup>52</sup> The Prosecutor v. Tihomir Blaškić, Trial Chamber, Order for a Witness to Appear of 5 November 1998.

guments had been presented and debated. At the request of the witness or Croatia's representative, the Trial Chamber might decide later on to continue the hearing in the absence of the Prosecutor.<sup>53</sup>

It is important to note that these departures from the line suggested in the Appeals Chamber's *subpoena* Judgement leave unfettered the final say of the Tribunal on the use of documents in its proceedings despite national security concerns.

Similar problems may arise if the Tribunal wishes to question a witness on matters impinging on national security concerns. In national systems, the testimony of a witness who is a public official may depend on the express permission by the superior official which possibly may be refused for national security reasons — subject to full judicial scrutiny.<sup>54</sup> On the level of the International Tribunal, the core elements of the Appeals Chamber's Judgement may also be applied to this situation. Therefore, the request for the appearance of a state official as witness in The Hague may not be refused on national security concerns but similar practical provisions may be made in order to assess whether significant national security concerns apply and whether they outweigh the exigencies of the trial.

### III. Private Individuals as Sources of Evidence

The power to issue binding orders including *subpoenas* to individuals acting in their private capacity is founded upon the observation that individuals are "within the ancillary (or incidental) criminal jurisdiction of the International Tribunal". Consequently, individuals are "duty-bound to comply with its orders, requests and summonses."<sup>55</sup> This power has not been put into question in the Blaškić Case and was endorsed by the

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<sup>53</sup> The Prosecutor v. Tihomir Blaškić, Trial Chamber, Second Additional Order for a Witness to Appear of 12 March 1999.

<sup>54</sup> In Germany, for instance, permission for testifying in court may be refused if the testimony would negatively affect the well-being of the federal state or one of the Länder or imperil the fulfilment of public tasks, cf. article 62 para.1 Federal Law on Civil Servants (Bundesbeamtengesetz), BGBl. 1985 I, 479. A refusal of a permission may only be issued by the highest competent authority. This refusal may be challenged in court, cf. U. Battis, *Bundesbeamtengesetz mit Erläuterungen*, 2nd edition, 1997, 513 et seq., (article 62, para. 7).

<sup>55</sup> Cf. Blaškić *subpoena* Appeals Chamber Judgement, para. 56.

Appeals Chamber. The question raised by the Appeals Chamber by way of an *obiter dictum*<sup>56</sup> in the Blaškić *subpoena* Judgement was rather what was to be understood by “acting in private capacity”. As will be shown, the Tribunal adopted a broad interpretation of this term which may, to a certain extent, have aimed at balancing the limitations imposed on the Tribunal due to the interpretations of powers *vis-à-vis* states and their officials while carrying out their duties.

### 1. “Acting in Private Capacity”

The Appeals Chamber made clear that public officials were not generally immune from being summoned by the Tribunal as witnesses but may be compelled to testify about their perceptions in private capacity. It is self-evident that the concept of “private capacity” extends to everything the person in question has observed before he or she took office. The other situation subsumed under the term “acting in private capacity” by the Appeals Chamber is certainly — to say the least — less obvious: according to that interpretation a public official is turned into a private person if he or she perceives anything about another person’s crime while exercising public functions if monitoring the situation was not his official function.<sup>57</sup> Occasional and fortuitous perception of events relevant for proceedings of the Tribunal will therefore only be made by a public official if making such perceptions was exactly his task. Otherwise, he will have perceived the information in his private capacity.

This highly artificial approach leads to the surprising result that most persons witnessing criminal acts within the material jurisdiction of the Tribunal who are not criminally liable themselves will have become a witness in their private capacity. Superiors carrying out monitoring functions who learn something (in their official function) about criminal acts planned or having occurred must intervene or else are to be held responsible according to article 7 para. 3 of the Statute. It is not very likely in any army that a subordinate person is endowed with the task to monitor superiors as it seems to be suggested by the Appeals Chamber. A similar observation applies to ordinary soldiers. If they are involved in the crime they are criminally responsible themselves. If they

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<sup>56</sup> The question before the Appeals Chamber related to *subpoenas duces tecum* but not *subpoenas ad testificandum*.

<sup>57</sup> Cf. Blaškić *subpoena* Appeals Chamber Judgement, para. 50.

overhear orders or happen to see evidence of international crimes, in most possible cases this will only happen on the occasion of carrying out their official function. It will rarely be the function of a soldier to see evidence of atrocities if he is not part of something like an investigation unit. Consequently, ordinary soldiers will normally witness events in their private capacity according to the Tribunal's concept. In contrast, those persons investigating a crime which has occurred, for instance civil or military police, will gather their information in exercise of their official function so that the respective rules for public officials will be applied to them. At the same time, they will not be criminally responsible themselves.

The Appeals Chamber has also extended the concept of "acting in a private capacity" to public officials declining to follow the instructions of their state although that state has agreed to cooperate by submitting the requested documents. He or she may then be subpoenaed to appear in court and, in case of failure to appear in court, subjected to proceedings for contempt of the Tribunal.<sup>58</sup>

Due to this extensive interpretation of the concept of "private capacity" the rules for "public officials" will mainly apply in situations where a non-police public official is requested to testify on background information such as the veracity of documents, the way they have been drawn up, command structures, etc.

## **2. Power to Issue Orders directly to Private Individuals rather than via States**

The Tribunal has emphasised that individuals may be contacted directly in the course of investigations in the former belligerent states or entities of ex-Yugoslavia in order not to hamper the performance of the Tribunal's functions. In all other cases the Tribunal usually has to seek the cooperation of the state concerned; only if the legislation of that state so allows or the state or entity concerned prevents the Tribunal from exercising its functions, individuals may be ordered directly to appear as a witness or to hand over documentary evidence.<sup>59</sup>

With a view to evidence to be used in court, the question arises whether the Tribunal has to seek the cooperation of the Yugoslav

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<sup>58</sup> *Ibid.*, para. 51.

<sup>59</sup> *Ibid.*, para. 53.

authorities in the production of evidence. Kosovo still forms part of the Federal Republic of Yugoslavia although the authorities in Belgrade do not exercise any *de facto* power. As long as the Federal Republic of Yugoslavia fulfils the criterion of preventing the Tribunal from exercising its functions, the Tribunal may issue orders directly to the individuals. If this reasoning ceases to be valid one day, but Yugoslav authorities are still not exercising any power in Kosovo, it would still make no sense to order the appearance of witnesses *via* the Yugoslav State since there would be no chance of enforcement. Therefore it would be appropriate to add another exception to the rule that private individuals have to be summoned before the Tribunal individually in cases where the state does not exercise *de facto* power.

If a subpoenaed individual fails to comply with an order of the Tribunal, in principle the Tribunal should turn to the national authorities to seek enforcement if the resort to national remedies does not prove unworkable.<sup>60</sup> In such cases, the Tribunal may initiate proceedings for contempt of the International Tribunal based on the inherent contempt power in general or as specified with regard to certain particular forms of interference with the administration of justice in Rule 77.

The inherent power of the Tribunal to sanction contempt has existed since its creation and is not dependent on reference being made to it in the Rules of Procedure and Evidence.<sup>61</sup> A clarifying paragraph setting out that nothing in the Rules affects the inherent power of the Tribunal to hold in contempt those who interfere with its administration of justice was only inserted to the Rule 77 in November 1997. However, this amendment was merely of a declaratory character.

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<sup>60</sup> *Ibid.*, para. 58.

<sup>61</sup> *Prosecutor v. Dusko Tadić*, Judgement of allegations of contempt against prior counsel, Milan Vujin, Appeals Chamber of 31 January 2000, para. 28. In this recent Judgement a former defence counsel of the accused Dusko Tadić was sentenced for contempt of the Tribunal with a fine. The severity of the fine was based — among other aspects — on the fact that the respondent's conduct was against the interest of the client. While the counsel was held in contempt for influencing witnesses a similar procedure could be applied to individuals not complying with the Tribunal's orders to appear in court or refusing to testify. Cf. *ibid.*, paras 167, 174.

### 3. National Security Exception

The question arises in how far national security exceptions as outlined above also apply to individuals acting in their private capacity. It is difficult to imagine that a state could submit witness information or documents kept by a purely private individual for the screening procedure as it has been outlined in the Blaškić *Subpoena* Appeals Chamber Judgment. However, it may well be possible that a public official who becomes a witness of relevant incidents or information outside his mandate is asked to provide information impinging on security interests of his state. Would the respective state be allowed to raise its security concerns and have the evidence screened for that purpose by the *in camera* procedure? The question is all the more difficult bearing in mind the possibility that private individuals may be approached directly by the Tribunal in certain cases as has been outlined above.

This situation shows that the broad interpretation of “acting in private capacity” adopted by the Tribunal is not without problems. If the same borderline is adopted regarding the possibility of raising security concerns the result would be that public officials gaining relevant information fortuitously on the occasion of performing their official functions would have to testify on that without any limitations.

This would be an odd result. If one accepts the possibility of raising security concerns the concept must equally apply to all officials who are summoned to appear in court as witnesses irrespective of whether the information was obtained in exercising the official functions or only occasionally and fortuitously when exercising these functions and therefore in private capacity, according to the concept of the Tribunal. Regarding cases where witnesses who are public officials are directly contacted in their private capacity by the Tribunal and ordered to appear as a witness the respective state should be informed of the order early enough to make representations as to security concerns involved. Again the final say on the relevance of the concerns would remain with the Tribunal.

## IV. International Organisations

Almost throughout the conflict in the former Yugoslavia a significant number of people from international organisations were present in the territory of the Federal Yugoslavia and neighbouring states either as members of international peace-keeping forces or as delegates from a

variety of organisations providing humanitarian assistance or carrying out monitoring functions. Due to their field presence members of international peace-keeping forces and delegates of international organisations often have first hand information of potentially high importance for the Tribunal's work. What are the Tribunal's powers with regard to members of international forces and delegates of international organisations? And, can any limitation on the eventual powers be derived from the mandate of the organisation or the kind of know-how used?

## 1. International Military Forces

### a. Power to Issue Binding Orders

After the Appeals Chamber had determined that regarding public officials it had neither the possibility to address individual state officials directly nor the power to impose sanctions on state officials or states for non-compliance with orders of the Tribunal, it narrowed the consequences of this approach by an extensive interpretation of the term "acting in a private capacity" by virtue of which, public officials would be treated by the Tribunal as private individuals under conditions which have been outlined above. This concept was surprisingly extended to members of international peace-keeping or peace-enforcement forces such as UNPROFOR,<sup>62</sup> IFOR, or SFOR. According to an *obiter dictum* in the Appeals Chamber *subpoena* Judgement the members of these forces will always be treated by the Tribunal "*qua* an individual."<sup>63</sup> The Appeals Chamber argued that the personnel of international military missions were not present in the former Yugoslavia as members of the military of the home country but as members of an international armed force on the basis of a resolution of the Security Council. Since their mandate stems from the same source as that of the Tribunal they must testify (*subpoena ad testificandum*).<sup>64</sup>

The argument is flawed. It is not convincing to say that members of armed forces participating in an international mission would act in their private capacity. Military personnel involved in international peace-

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<sup>62</sup> For a detailed analysis of the history of UNPROFOR cf. M. Weller, "Peace-Keeping and Peace-Enforcement in the Republic of Bosnia and Herzegovina", *ZaöRV* 56 (1996), 70 et seq.

<sup>63</sup> Blaškić *subpoena* Appeals Chamber Judgement, para. 50.

<sup>64</sup> *Ibid.*



keeping or peace-enforcement operations will either exercise their functions as public officials of the sending state or as public officials of the United Nations or a regional organisation in charge of the mission.

In so far as peace-keeping personnel would have to be regarded as officials of the UN, the first question is whether the tribunal would be in a position to issue binding orders to other organs of the UN. At first sight, it is not compelling to argue that the Tribunal has the power to order members of international forces to testify since both the Tribunal and the international forces originate from the same source of mandate: why should the identity of the source of mandate grant primacy to the Tribunal over peace-keeping troops? However, it may be argued that the Tribunal has been vested with the mandate to try the international crimes committed in the former Yugoslavia effectively, which was regarded as necessary in the interest of international peace and security. The Security Council has delegated its powers with regard to maintaining or restoring peace and security in this respect to the International Tribunal. The Security Council itself is vested with a power to issue binding orders to other organs or sub-organs of the UN. This power has been delegated implicitly when transferring the power to try international crimes. Therefore, the Tribunal may request the cooperation of any other UN organ or sub-organ including UN forces under UN command which has at its disposal any material or information relevant to the proceedings.

The more complicated question remains, however, whether members of international peace-keeping forces are to be regarded as UN officials for the purposes of the Tribunal or rather as public officials of their home state. In order to regard the members of national contingencies as exercising functions of a UN organ, the contingencies have to be removed from the structures of their home state and integrated into the structures of the UN. Such transfer must be legally founded in the relationship between the UN and the sending states and bear fruit in the outer legal sphere in a way that the UN would be accountable for any acts or omissions on the part of the troops.<sup>65</sup>

The relationship between the sending state and the UN depends among others on factors such as regulations adopted for the working of the peace-keeping troops, treaties concluded between the sending state and the UN, and the national law adopted by the state with a view to providing forces for UN missions. These factors cannot be examined in detail here. The central factor, also with regard to the legal effects *vis-à-*

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<sup>65</sup> M. Bothe, *Streitkräfte internationaler Organisationen*, 1968, 37 et seq.

*vis* other subjects under international law, remains the command structure established for a force. In particular, responsibility for wrongful acts committed by members of a peace-keeping mission is established under international law on part of the UN if supreme power is vested in the organisation.<sup>66</sup> This may vary from one peace-keeping force to the other. Whereas UNPROFOR was explicitly subjected to the authority of the Security Council<sup>67</sup> and the civilian and military heads of the mission were appointed by the UN<sup>68</sup>, IFOR and SFOR consisted of national forces authorised by the Security Council to fulfil the mandate under a unified command.<sup>69</sup> Also regarding KFOR, Member States and in this case additionally “relevant international organisations”, in par-

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<sup>66</sup> Cf. M. Hirsch, *The responsibility of International Organisations Toward Third Parties*, 1995, 66 et seq., who suggests that the exercise of effective control is the criterion for the establishment of which the formal assignment of control is only an indication. This principle was disputed by the British House of Lords in the Nissan Case regarding acts of the UN Force in Cyprus (UNFICYP). The House concluded that “though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty.” Attorney General v. Nissan, *All England Law Reports* 1 (1969), 629 et seq., (649) (per Lord Morris).

<sup>67</sup> S/RES/743 (1992) of 21 February 1992, para. 2.

<sup>68</sup> O. Ramsbotham/T. Woodhouse, *Encyclopedia of International Peacekeeping Operations*, 1999, 278.

<sup>69</sup> S/RES/1031 (1995) of 15 December 1995: “The Security Council (...) 14. Authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish a multinational implementation force (IFOR) under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement”. Regarding SFOR, cf. S/RES/1088 (1996) of 12 December 1996: “The Security Council (...) 18. Authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish for a planned period of 18 months a multinational stabilization force (SFOR) as the legal successor to IFOR under unified command and control in order to fulfil the role specified in Annex 1-A and Annex 2 of the Peace Agreement”.

“Full command” remains with the national contingencies while “operational command” is transferred to the head of the mission, cf. E. Vad, “Auslandseinsätze deutscher Streitkräfte — Erfahrungen bei der Implementierung von Friedensvereinbarungen am Beispiel IFOR/SFOR”, *Humanitäres Völkerrecht* 10 (1997), 74 et seq., (78).

ticular NATO, were authorised to establish an international security presence.<sup>70</sup> Accordingly, without prejudice to a profound analysis of all relevant factors, it seems possible that at least members of UNPROFOR have been present in the former Yugoslavia as officials of the UN.

However, it may be doubted whether the same principles really apply to the position of members of international peace-keeping forces *vis-à-vis* the Tribunal. Since the personnel dispatched to international military operations remains subjected to the command and disciplinary structure of their national contingency and their home forces, they cannot be completely detached from their position as public officials of their home state. The *operational* military command, which is that aspect of command which is usually vested in the UN if any, would not extend to order military personnel of the national contingencies to appear before an international court to testify on what was witnessed in the course of the mission since this is not an aspect of the military operation. Such an order would be up to the home state. Therefore, for the purposes of the International Tribunal the soldiers taking part in an international peace-keeping mission are to be regarded as officials of their home state.

This latter observation does not apply to personnel of a UN military mission which in fact are completely detached from the home state and appointed as UN officials who are paid by and receive orders from the UN. This will usually be the case, if the commander of a force is appointed by the UN as, for instance, the commander of UNPROFOR. As long as the person in question holds this position, orders to appear before the Tribunal would have to go through the UN. If the person's term has expired and he no longer is an official of the UN, for practical reasons, an order to summon him or her before the Tribunal would have

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<sup>70</sup> Cf. S/RES/1244 (1999) of 10 June 1999: "The Security Council (...) 7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below; Annex 2: Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis: (...) 4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees (...)."

to go through the state in which he or she is present since only this state has the means to enforce his appearance before the Tribunal.<sup>71</sup>

## **b. National Security Concerns**

It may be asked whether members of the above mentioned forces may be compelled to testify without any restrictions arising from national security concerns of their home state. As has been argued above, the position as a private individual does not rule out the possibility that a state may raise legitimate security interests against the testimony to be provided by a witness who is or was employed as a public official. However, by linking the private capacity of peace-keepers to a resolution of the Security Council the Appeals Chamber accords to them a special position which does not leave any room for an official capacity linked to the home state and therefore excludes national security concerns.

This result provides a further argument that the approach which has already been criticised is highly problematic. Military personnel serving in peace-keeping forces could well make use of intelligence information provided by services from its home state. It therefore seems quite possible that the home state has an interest in limiting the access to evidence impinging on intelligence information provided to members of its own forces for use in the course of an international military operation. If it is generally acknowledged that security concerns may be raised with regard to the testimony of public officials there is no reason why this privilege should not apply to states which have provided military personnel to UN peace-keeping or peace-enforcement missions.

## **2. UN Organs and Other International Organisations**

### **a. Power to Issue Binding Orders**

As has been discussed above, it may well be argued that a power to issue binding orders to organs or sub-organs of the UN is implied in the

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<sup>71</sup> The Prosecutor v. Tihomir Blaškić, Decision of Trial Chamber I in respect of the Appearance of General Philippe Morillon, Order of 25 March 1999 (summary at <http://www.un.org/icty/Supplement/supp3-e/blaskic.htm>). According to the summary, Morillon was UNPROFOR commander and the order to appear as a witness before the Tribunal was issued through France, not the UN.

mandate accorded to the Tribunal by the Security Council and derived from the Security Council's power to do so. The Tribunal seemed to assume that it is vested with such power when it provisionally declined a defence motion to issue a *subpoena* to the United Nations Secretariat not as a matter of principle but because the defence had not first approached the Secretariat for obtaining the documents in question voluntarily.<sup>72</sup>

This power extends to other UN organs and dependent bodies without an own legal personality such as the UNHCR<sup>73</sup> which are clearly within the hierarchy of the UN. It is doubtful, however, that the power would extend to the Specialized Agencies within the UN System since they have an own legal personality and partly also refuse to acknowledge any superior position of the principal UN institutions. However, Specialized Agencies often have entered into bilateral agreements with the UN pursuant to Article 63 para. 1 of the UN Charter. These bilateral agreements usually contain clauses obliging the agency to render "such assistance to the Security Council as that Council may request including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security."<sup>74</sup> Since the mandate of the Tribunal is derived from the Security Council acting under Chapter VII of the Charter it may be concluded that due to such bilateral agreements Specialized Agencies may be subjected to orders of the Tribunal.

As far as other organisations outside the UN System are concerned, a power of the Tribunal to issue binding orders to them normally cannot be based on the argument of an identical source of mandate. Only if the organisation in question has been authorised to act by a resolution of the Security Council under Chapter VII or VIII, binding orders on part of the Tribunal seem possible. But this observation only applies if the Security Council retains the authority over the mission. This is not the case, for instance, regarding the OSCE mission in Kosovo which has been authorised by the Security Council but apart from that is only acting in a way as may be decided under Chapter VII of the UN Char-

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<sup>72</sup> Prosecutor v. Milan Kovacevic, Decision on defence motion to issue *subpoena* to United Nations Secretariat, Trial Chamber of 1 July 1998.

<sup>73</sup> I. Seidl-Hohenfeldern/G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 6th edition, 1996, 98 (para. 0814a).

<sup>74</sup> Quoted after W. G. Vitzthum, "On Article 2 (6)", in: B. Simma (ed.), *The Charter of the United Nations — A Commentary*, 1994, para. 17.

ter and under the “auspices” but not the “authority” of the UN.<sup>75</sup> However, regarding Kosovo, the Security Council has obliged “all concerned” including the international security presence which consists of contributions by Member States and international organisations to fully cooperate with the Tribunal.<sup>76</sup> It may therefore be argued that if an international organisation has decided to take part in the mission in Kosovo it has subjected itself to the obligation to cooperate with the Tribunal.

More generally, the question arises in how far the Tribunal is empowered to issue binding orders to other international organisations and its employees. However, there is no ranking among international organisations; in turn this would mean that according to the general principle *par in parem non habet imperium* the Tribunal would not have any power to issue orders to other international organisations. Moreover, an analogous application of Article 2 para. 6 of the UN Charter to other international organisations could not provide an argument in favour of a power of the Tribunal to issue binding orders to them since it is already impossible to deduce binding effects from this provision of the Charter in direct application to non-Member States.<sup>77</sup>

Also the fact that the Tribunal derives its powers from a measure adopted by the Security Council under Chapter VII does not lead to the conclusion that it could issue binding orders to other international or-

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<sup>75</sup> Cf. Security Council Resolution 1244 (1999): “The Security Council (...) 10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo; (...)

Annex 2: Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis: (...) 3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.”

<sup>76</sup> Ibid.: “The Security Council (...) 14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia”.

<sup>77</sup> As a treaty the Charter cannot impose legal obligations on non-Member States, cf. Vitzthum, see note 74, 20.

organisations. Although the powers of the Security Council under that Chapter have been accorded an elevated position this only applies to the UN System and does not extend to other international organisations.

In principle, this rule seems to have been acknowledged by the Tribunal when it rejected a motion to issue a *subpoena* to the OSCE<sup>78</sup> on the grounds that the Tribunal has no authority to issue a *subpoena* to an international organisation.<sup>79</sup> This would entail the personnel carrying out the functions of the respective international organisation as well. International organisations have their own legal personality under international law and therefore the employees acting on behalf of the organisation cannot be considered as anything else than officials of that organisation.

Of course, careful differentiation has to be made whether the person in question is really acting on behalf of an international organisation. For instance, the Head of the European Community Monitoring Mission who recently has been summoned as a witness in the Blaškić Case was not acting on behalf of the European Community at the time. The Monitoring Mission had been created on the basis of the intergovernmental cooperation in the European Policy Cooperation which was situated outside the EC institutional framework by the Single European Act. Therefore, the head of mission was acting on behalf of the Member States and remained an official of his home country. It was therefore necessary to issue an order to France for summoning the former head of mission to appear as a witness.<sup>80</sup>

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<sup>78</sup> For a discussion of the problems pertaining to the status of the OSCE as an international organisation, cf. I. Seidl-Hohenveldern, "Internationale Organisationen aufgrund von soft law", in: U. Beyerlin et al. (eds), *Recht zwischen Umbruch und Bewahrung*, 1995, 229.

<sup>79</sup> Prosecutor v. Milan Kovacevic, Decision refusing defence motion for *subpoena*, Trial Chamber of 23 June 1998. It is important to note that the Tribunal has not assumed a power to issue binding orders to non-Member States of the UN. In particular, when it ordered to transmit arrest warrants for Slobodan Milošević and others to Switzerland (Prosecutor v. Slobodan Milošević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić and Vljako Stojilković, Decision on review of indictment and application for consequential orders, Judge Hunt of 24 May 1999, para. 38), it did so based on the voluntary submission on the part of Switzerland to cooperation with the Tribunal.

<sup>80</sup> Prosecutor v. Tihomir Blaškić, Decision of Trial Chamber I in respect of the Appearance of Mr. Jean-Pierre Thébault of 25 March 1999 (summary at <http://www.un.org/icty/Supplement/supp3-e/blaskic.htm>).

Due to the absence of hierarchy between independent international organisations it is therefore not possible for the Tribunal to issue binding orders to international organisations outside the UN System. However, it is clear that an international organisation remains bound indirectly via its Member States. States' obligations imposed under Chapter VII are not limited to implementing Security Council Resolutions on the national level but extend to their position in international organisations. Accordingly, states are obliged to perform their position in international organisations in a way that ensures compliance with orders of the Security Council.

### b. Exemptions from Obligations

In so far as the Tribunal is indeed empowered to issue binding orders to other international organisations or organs of the UN, the question arises whether there may be any exemptions to this rule, similar to national security concerns which may be raised by states. In certain cases, international organisations may have an interest to withhold information requested by the Tribunal either in documentary form or as testimony by an employee or delegate of the organisation. Such concerns may stem from the mandate or from concerns about the security of personnel still present in the former belligerent area.

According to a decision of a Trial Chamber in a similar context, not any sort of interest may be relevant but only legally recognised interests which entitle the organisation to a non-disclosure of information gathered in the fulfilment of its functions. If there was such a rule recognising a legal interest to non-disclosure it would have to be determined whether the interest is absolute or may be weighed against the exigencies of the trial and whether any alternative process may be applied similar to that suggested by the Appeals Chamber in the *Blaškić subpoena* Judgement for screening documents with regard to national security concerns.<sup>81</sup>

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<sup>81</sup> This is the three step procedure proposed by the Trial Chamber in its decision on the request of the ICRC that it may prevent disclosure of information by a former employee. In that case, the three steps were examined to the end, since the ICRC's entitlement to non-disclosure was regarded as being conclusive. Cf. *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić*, Decision on the Prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, Trial Chamber of 27 July 1999, para. 44.



The sub-organisation most likely to dispose of information of great relevance for the trials due to its immense field presence and access to first hand reports from refugees throughout the crisis is the UNHCR. At the same time the High Commissioner is bound by neutrality which is fundamental to the fulfilment of the humanitarian mandate. However, it is not evident that neutrality would require the High Commissioner to withhold information requested by an international court which itself is committed to neutrality and objectivity. The bigger problem would be confidentiality: UNHCR personnel may have received information from refugees and displaced persons on a confidential basis since otherwise they would see their security endangered.<sup>82</sup> According to Rule 70 it is possible to pass information to the Prosecutor on a confidential basis in order to allow for generating new evidence. In this case the Trial Chamber would be prevented from ordering the confidential information to be disclosed (Rule 70 (C)). However, in case of the defence, calling a witness for information which had been given confidentially or the information to be used as proper evidence in the proceedings this Rule does not help. But there is no reason why the Tribunal may not weigh the confidentiality interest in such a case against the exigencies of the trial.

## V. Employees and Delegates of the ICRC

A special position has been accorded to the International Committee of the Red Cross (ICRC). The Tribunal had to decide on a Prosecution Motion under Rule 73 whether a former employee of the ICRC may be called to give evidence on facts that came to his knowledge by virtue of his work for the ICRC as an interpreter.<sup>83</sup> The potential witness had accompanied ICRC delegates during their visits to places of detention and during an exchange of civilians under ICRC supervision. The concrete question was whether under conventional or customary international law there is a recognition that the ICRC has a confidentiality interest

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<sup>82</sup> Cf. F. Hampson, "The International Criminal Tribunal for the Former Yugoslavia and the Reluctant Witness", *ICLQ* 47 (1998), 50 et seq., (67).

<sup>83</sup> Cf. Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić, Decision on the Prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, Trial Chamber of 27 July 1999.

such that it is entitled to non-disclosure of the former employee's testimony.

The Trial Chamber found that the ICRC has both a conventional and a customary right to insist on the non-disclosure of information. It argued that the ICRC has been accorded a unique role with a view to assuring the observance of the minimum humanitarian standards established by the Geneva Conventions and their Protocols. It acknowledged that the right to non-disclosure of information relating to the ICRC's work is necessary for the effective discharge of the Committee's functions. Therefore, a conventional right of the ICRC under the Geneva Conventions to assure non-disclosure of information was established.<sup>84</sup> Moreover, the quasi-universal ratification of the Geneva Conventions was regarded as an expression of the *opinio iuris* of Member States which together with the consistent practice of confidentiality constitutes a rule under customary international law to non-disclosure of information.<sup>85</sup> This right to non-disclosure was regarded as absolute and not open to a balancing with interests of justice.

This result was not undisputed in the Trial Chamber. Judge Hunt argued in his separate opinion that there was no evidence that the protection against disclosure has been accepted by states as absolute with regard to international criminal courts which are supposed to try international crimes including grave breaches of the same Geneva Conventions.<sup>86</sup> Judge Hunt suggests that there should be a balancing of competing public interests according appropriate weight to the Tribunal's task to ensure a fair trial. He refers to two situations in which the ICRC's protection against disclosure may be outweighed by the exigencies of a fair trial subject to the particular circumstances of each case: where the evidence of an employee of the ICRC is vital to establish the innocence of the accused and where it is vital to establish the guilt of the accused in a trial of "transcendental importance".<sup>87</sup>

The problem with this argument, however, is that the sheer possibility of disclosing, in criminal proceedings, information gained in the course of exercising its functions would seriously undermine the rule of

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<sup>84</sup> Ibid., para. 73.

<sup>85</sup> Ibid., para. 74.

<sup>86</sup> Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić, Separate Opinion of Judge David Hunt on Prosecutor's motion for a ruling concerning the testimony of a witness, Trial Chamber Decision of 27 July 1999, para. 23.

<sup>87</sup> Ibid., paras 29 et seq.

confidentiality. The ICRC operates in extremely difficult and sensitive environments and depends on the invitation or acceptance by the state or entity in question in order to carry out inspection visits. It would be much more difficult to obtain such invitations if the possibility was in the air that information gathered could be used in criminal proceedings. Moreover, there can be no doubt that the ICRC will frequently obtain information of potentially high relevance to the prosecution of war crimes. Therefore, it will be difficult to limit the access to ICRC's information to highly important cases.

Regarding the fair trial principle, there may be situations where the ICRC has at its disposal information demonstrating the innocence of the accused. It may be assumed that a disclosure of such information in certain cases would not or only slightly impinge on the confidentiality interest of the state in question. It is possible that under such circumstances the interests of justice weigh more than the confidentiality requirement. But, due to better knowledge of the facts, this can better be judged by the organisation than by the Tribunal. Moreover, it should be subject to a waiver of confidentiality by the state concerned in order not to disrupt the principle of confidentiality and the atmosphere of trust.<sup>88</sup>

## VI. Concluding Remarks

The practice of the International Criminal Tribunal for the Former Yugoslavia has undergone some remarkable readjustments since the adoption of the landmark ruling in the Blaškić *subpoena* Judgement by the Appeals Chamber. Mostly, these readjustments seem to have ruled out the fear that the Tribunal's powers *vis-à-vis* states would be interpreted too restrictively. Instead, the exigencies of the Tribunal's func-

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<sup>88</sup> The argument in favour of non-disclosure of information in the case of the ICRC cannot be transferred to humanitarian NGOs such as Médecins Sans Frontières (MSF) or human rights NGOs although they may be interested in deciding themselves which information to disclose and which not. But even if they had acted on the basis of confidentiality — which usually will not be the case — their position would not be protected by international law. However, in certain cases it may be necessary to take into consideration the position of their clients which may give rise to security concerns and therefore require the adoption of protective measures such as concealing their identity. Cf. Hampson, see note 82, 65, 68. More generally on the position of NGOs see S. Hobe, "Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht", *AVR* 37 (1999), 152 et seq.

tioning and international justice have been emphasised. This observation particularly applies to the requirements for issuing a binding order to states. With regard to certain other aspects such as states' discretion in choosing the officials for testifying before the Tribunal, it has been argued here that the standards outlined in the Blaškić *subpoena* Judgement need some complementary interpretation limiting states' discretion in complying with orders of the Tribunal.

One might speculate as to whether the concept of "public officials acting in a private capacity" which has been interpreted by the Appeals Chamber in the Blaškić *subpoena* Judgement in an extremely broad manner was aimed at limiting the consequences of a strong position accorded to states in other respects. The broad interpretation is artificial and leads to inconsistencies regarding national security concerns of states. Interestingly enough, this approach has been abandoned by a Trial Chamber in a different context: in a decision pertaining to the position of ICRC employees it was emphasised that these persons were only present in the belligerent area due to their function as an employee of the ICRC, had obtained the information in the course of their function, and that therefore they could not be regarded as anything other than an official of the organisation. A distinction whether a certain act is within or beyond the functions assigned to the person in question was not made, in contrast to the concept applied so far to state officials.<sup>89</sup> The same approach should also be adopted *mutatis mutandis* with a view to state officials.

Another area where the broad concept of "acting in private capacity" shows its weakness is the assumption that members of international peace-keeping forces would always have been present in the territory of the former Yugoslavia in their private capacity. The intricate distinction to be drawn is rather whether personnel of peace-keeping troops are to be regarded as public officials of the sending state or of the UN. It is clear that in both cases the Tribunal has the power to issue binding orders. However, since most of the personnel will remain subjected to the disciplinary and command structure of their home state and the operational command possibly vested in the UN will not extend to order appearance before the Tribunal, orders to summon such personnel for tes-

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<sup>89</sup> Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić, Decision on the Prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, Trial Chamber of 27 July 1999, para. 36 et seq.

tifying before the Tribunal will usually have to be issued to the home state.

Also personnel of international organisations present for humanitarian or civilian purposes is of potentially high relevance as a source of evidence. Whereas the Tribunal has the power to address other organs and sub-organs of the UN with binding orders, it is only possible to issue binding orders to independent international organisations if the international organisation in question has subjected itself to the power of the Tribunal. If this is the case, exemptions from an obligation to cooperate with the Tribunal may be deduced from the mandate of the organisation in question. However, similar to national security concerns, such exemptions can only apply to a very limited extent and only after a careful weighing of interests by the Tribunal. Only in the case of the ICRC, can a general exemption from testifying before the Tribunal be acknowledged due to the special position accorded to the ICRC under international law.

Throughout its practice the Tribunal has demonstrated its openness towards particular concerns of subjects under international law which may give rise to limitations of the Tribunal's powers. It remains one of the fundamental challenges to secure cooperation with the Tribunal by showing respect for such concerns without hindering the exercise of the Tribunal's functions. This seems all the more important given the absence of enforcement powers on the part of the Tribunal and the Security Council's reluctance to adopt more forceful measures to compel states to fulfil their obligations to cooperate unequivocally with the Tribunal.