The Powers of the United Nations International Criminal Tribunals

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I. Introduction

The establishment of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda is the first time that the Security Council has established international criminal tribunals as UN subsidiary organs.[1]

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1 The author worked previously with the Office of the Prosecutor, International Criminal Tribunal for the former Yugoslavia. However, any views expressed are solely those of the author and are not necessarily those of the Office of the Prosecutor or the United Nations. The author would like to express the utmost gratitude to his former doctoral supervisor Judge (formerly Professor) Rosalyn Higgins of the International Court of Justice for her continuing guidance, advice, and encouragement and for her valuable comments on an earlier version of this article. He would also like to express his great appreciation to Professor Maurice Mendelson and Mr. William Fenrick for their very helpful comments on an earlier version of this article. — The establishment of the Tribunals also marked a watershed in the development of international criminal law. See more generally on the Tribunals: P. Akhavan, "The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond", *HRQ* 18 (1996), 259 et seq.; M. Bergsmo, "International Criminal Tribunal for the Former Yugoslavia: Recent Developments", *HRLJ* 15 (1994), 405 et seq.; C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 1996; C. Cisse, "The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison", *Transnat'lL. & Contemp.Probs.* 7 (1996), 103 et seq.; E. David, "Le Tribunal international pénal pour l'ex-Yugoslavie", *RBDI* 25 (1992), 565 et seq.; R. Dixon, "New Developments in the International Criminal Tribunal for the Former Yugoslavia: Prominent Leaders In-

This article will discuss the scope of the powers of these Tribunals as judicial bodies established by the Security Council under Chapter VII of the Charter.[2] There is analysis, by way of example, of the power of the Tribunal to compel testimony from individuals, in general, and staff members of the United Nations and its Specialized Agencies, in particular. The analysis that follows in this article will often restrict itself to a discussion of the powers of the International Criminal Tribunal for the former Yugoslavia. However the analysis applies *mutatis mutandis* to the case of the International Criminal Tribunal for Rwanda, since their legal bases and powers are in many cases identical and in all cases analogous.

In order to examine fully the nature and scope of these powers it is necessary to consult several sources. Accordingly, there is consideration of the case-law of the Tribunals; discussion of the wider law of the United Nations — in particular the law relating to UN subsidiary organs —; and examination of certain general principles of international law — e.g., the principle of the functional immunity of United Nations officials.

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dicted and Jurisdiction Established", *LJIL* 8 (1995), 449 et seq.; W. Fenrick, "Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia", *Duke J. Comp. & Int'l L.* 6 (1995), 103 et seq., and W. Fenrick, "International Humanitarian Law and Criminal Trials", *Transnat'l L. & Contemp. Probs.* 7 (1997), 24 et seq.; H. Fox, "The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal", *ICLQ* 46 (1997), 434 et seq.; C. Greenwood, "International Humanitarian Law and the *Tadic* case", *EJIL* 7 (1996), 265 et seq., and C. Greenwood "The International Tribunal for Former Yugoslavia", *Int'l Aff.* 69 (1993), 641 et seq.; R. Lee, "The Rwanda Tribunal", *LJIL* 9 (1996), 37 et seq., and R. Lee, "Symposium: Should There be an International Tribunal for Crimes against Humanity?", *Pace Int'l L. Rev.* 6 (1994), 93 et seq.; T. Meron, "War Crimes in Yugoslavia and the Development of International Law", *AJIL* 88 (1994), 78 et seq.; V. Morris and R. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia,* 1994; J. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *AJIL* 87 (1993), 638 et seq.; D. Shraga and R. Zacklin, "The International Criminal Tribunal for the Former Yugoslavia", *EJIL* 3 (1992), 360 et seq.; P. Szasz, "The Proposed War Crimes Tribunal for ex-Yugoslavia", *N. Y. U. J. Int'l L. & Pol.* 25 (1994), 405 et seq.; and C. Warbrick, "Co-operation with the International Criminal Tribunal for Yugoslavia", *ICLQ* 45 (1996), 947 et seq.

2 See, for example, below under notes 14 and 38.

II. The Establishment of the International Criminal Tribunals as UN Subsidiary Organs and the Powers of these Organs

The International Criminal Tribunals are UN subsidiary organs established by the Security Council to exercise judicial functions which the Council itself does not possess the competence to exercise.[3] The Security Council does not possess the competence to determine individual cases of criminal liability. As such, the Council has not delegated to the Tribunals the performance of its own functions but rather those powers that are necessary for the exercise of their designated judicial functions. The exercise of these functions by the Tribunals does not detract, however, from the legal position, that as UN subsidiary organs they are an integral part of the United Nations.[4] The Council has established the Tribunals as a measure that is necessary for the restoration and maintenance of international peace and security.[5] The lawfulness of the establishment of these Tribunals as a Chapter VII measure has been dealt with elsewhere.[6] For our current purposes, however, this Chapter VII basis is of importance to determining the nature and scope of the powers with which the Tribunals have been entrusted. An issue of central concern to our enquiry in respect of the powers of the Tribunals is the scope of their delegated mandate. In

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3 See D. Sarooshi, "The Legal Framework Governing United Nations Subsidary Organs", *BYIL* 67 (1996), 413 (428).

4 *Ibid.*, 414. The judicial nature or independence of the International Tribunals can in no way affect their consideration as an integral part of the United Nations Organization. In this context we note that the ICJ also exercises judicial functions although it is of course a UN principal organ: see Article 92 of the Charter.

5 As the Appeal's Chamber of the International Criminal Tribunal found in the *Tadic* Case: "The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of the maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia." (*Tadic* Case, Case No. IT-94-1-AR72 (2 Oct. 1995), *ILM* 35 (1996), 32 at para. 38.) Moreover, as the Secretary-General in his report to the Security Council on the establishment of the Tribunal states: "the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII ... Such a decision would constitute a measure to maintain or restore international peace ... (the establishment of the Tribunal would be justifiable) in terms of the object and purpose of the decision (to maintain or restore international peace)". (Doc.S/25704, 7).

6 Sarooshi, see note 3, 422 et seq.

other words, what are the powers that the Council has delegated to the Tribunals in order to enable them to perform their designated judicial functions. The delegated mandate of the Tribunals has been stipulated by the Security Council in their respective statutes. Accordingly, the content of the powers, express or implied,[7] that the Tribunals can exercise is determined by reference to their statutes. This is not, however, the only source of powers of the Tribunals. They also possess certain inherent powers by virtue of their status as judicial bodies.[8]

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7 The doctrine of implied powers is well accepted under international law. It was recognized in express terms by the ICJ as early as 1949 in the *Reparation for Injuries Suffered in the Service of the United Nations* Case where the Court stated: "Under international law the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. ... the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implicit in its constituent documents and developed in practice." (ICJ Reports 1949, 174 et seq. (180,182)).
This doctrine has been applied by the ICJ in several subsequent cases. For example, in the *Effect of Awards of Compensation Made by the UN Administrative Tribunal* Case the ICJ held that the General Assembly could validly establish an administrative tribunal in the absence of an express power to do so since the capacity to do this arose "by necessary intendment" out of the Charter. (ICJ Reports 1954, 47 et seq., (56–57)). The Court found that the exercise of this implied power was necessary for the effective attainment by the General Assembly of one of its purposes: the regulation of Staff Relations. (*ibid.*, 61.) The test to determine if an international organization possesses an implied power under international law is whether the exercise of the power is necessary for the attainment by the organization of its object and purpose as specified in its constituent instrument. See also the *Competence of the General Assembly for the Admission of a State to the United Nations* Case, ICJ Reports 1950, 4 et seq.; the *Judgments of the Administrative Tribunal of the International Labour Organization* Case, ICJ Reports 1956, 77 et seq., (91 et seq.); the *Certain Expenses of the United Nations* Case, ICJ Reports 1962, 151 et seq.; the *Namibia* Case, ICJ Reports 1971, 16 et seq.; and the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Case, Advisory Opinion, 8 July 1996 General List No. 93, 12–13 (not yet published in ICJ Reports). See also A. Campbell, "The Limits of the Powers of International Organizations", *ICLQ* 32 (1983), 523 et seq.; and D. Ciobanu, *Preliminary Objections to the Jurisdiction of the United Nations Principal Organs*, 1973.

8 See note 25 and corresponding text.

Concerning the delegated mandate of the Tribunals, an important preliminary issue that arises is what kinds of power can the Security Council delegate to the Tribunals as UN subsidiary organs. In particular, can the Security Council delegate to the Tribunals a power of binding decision?

There are two aspects to a delegation by a principal organ of a power of binding decision to its subsidiary. These depend on whom the decision by the subsidiary organ, in our case the International Tribunals, is intended to bind. In the first scenario the decision may bind the principal organ and other UN organs; while the second concerns a decision that binds UN Member States.

It is correct as a general proposition that a principal organ can delegate a power of binding decision to its subsidiary such that decisions of the subsidiary bind the principal. The ICJ in the *Administrative Tribunal* Case expressly rejected the argument that a principal organ establishing a subordinate or subsidiary organ is inherently incapable of giving this organ the competence to make decisions that bind its creator.[9] The Court in this case stated that the test to determine whether the decisions of a subsidiary organ bind the principal depends on the intention of the principal when establishing the subsidiary.[10] This may be indicated by, in the case of judicial bodies, the use of particular words — such as "tribunal", "judgment", and "competence to pass judgment upon applications" — by the principal organ when establishing the subsidiary.[11]

Applying this test to the International Tribunals, it has been explained elsewhere that the Tribunals were established as independent judicial bodies pronouncing final judgments without external review of their decisions within the limited field of their functions.[12] This degree of independence prevents the Security Council from reviewing individual decisions of the Tribunals.[13] If this were not the case then the Council

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9 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954, 47 et seq. (61 et seq.).

10 *Ibid.*

11 *Ibid.*

12 Sarooshi, see note 3, 452–454. Article 25 of the Statute of the Tribunal does provide for the possibility of appellate proceedings *within* the International Tribunal. In fact, the Appeals Chamber of the Tribunal found in the *Tadic* Case that: "This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal." (*Tadic* Case, see note 5, para. 4.)

13 As the Trial Chamber in the *Blaskic Subpoena* Case stated: "As a subsidiary organ of a judicial nature, it cannot be overemphasized that a fundamental prerequisite for its fair and effective functioning is its capacity to

would in effect be exercising judicial functions in specific cases.[14] This does not mean, however, that the Security Council could not change a statute

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act autonomously. The Security Council does not perform judicial functions, although it has the authority to establish a judicial body. This serves to illustrate that a subsidiary organ is not an integral part of its creator but rather a satellite of it, complete and of independent character." (*Prosecutor v. Tihomir Blaskic, Decision on the Objection of the Republic of Croatia to the issuance of subpoena duces tecum*, IT-95-14-PT, 18 July 1997, at p. 11.) Moreover, Alvarez has stated: "As the Tribunal's decisions issued to date suggest, in at least some of these instances the body is 'subsidiary' in name only and can render final judgments that even the Council is not authorized to disturb — and that in turn can disturb the Council by suggesting limits on its powers." (J. Alvarez, "Judging the Security Council", *AJIL* 90 (1996), 1 et seq. (11)). However, this situation is *sui generis* since the Council is delegating powers to a subsidiary organ to exercise functions which it cannot itself exercise. The position may very well be different with respect to a delegation by the Council of its own powers and functions under Chapter VII to a UN subsidiary organ, where this is lawful.

14 To prevent this from occurring, the Secretary-General stated in his report dealing with the establishment of the Tribunal for the former Yugoslavia: "that it [the Tribunal] should perform its functions independently of political considerations and not be subject to the authority or control of the Council with regard to the performance of its judicial functions". (Doc. S/25704 and Add. 1 of 3 May 1993). Similarly, in the case of the Rwanda Tribunal the Secretary-General stated: "The International Tribunal for Rwanda is a subsidiary organ of the Security Council ... . As such, it is dependent in administrative and financial matters on various United Nations organs; as a judicial body, however, it is independent of any one particular State or group of States, including its parent body, the Security Council." (Doc. S/1995/134, para. 8). This position was adopted by the Council when it adopted the Secretary-General's report in S/RES/827 (1993) of 25 May 1993. As such, the Security Council is bound by decisions of the Tribunals and cannot reject a decision on any grounds, including peace and security. That is, the Council could not make a finding that a decision of a Tribunal constitutes a threat to international peace and security since it has already delegated to the Tribunals a power of binding decision in respect of individual criminal liability as a measure to restore international peace and security. There is precedent for this type of approach. In the *Effect of Awards* Case, the ICJ found that the General Assembly could not itself overturn a decision of that Tribunal in a particular case since it did not itself possess judicial functions and moreover the Assembly had in any case delegated a power of binding decision to the Tribunal. (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* Case, ICJ Reports 1954, 47 et seq. (61

at any time and thus change the scope of a Tribunal's delegated mandate. This competence of the Council is part of the authority and control that a principal organ possesses over its subsidiary. The point here of course is that the exercise of such a competence cannot affect individual cases already determined by the Tribunal.

But this lack of competence of the Council to intervene in decisions of the Tribunal extends beyond the case of a final judgment of an individual's criminal responsibility to include the broad range of judicial powers that the Tribunals possess the competence to exercise. The Council does not possess the competence to decide that the Tribunals as judicial bodies do not *ipso facto* possess certain inherent powers.[15] The latter question is a judicial determination — e.g., the power of *compétence de la compétence* of a judicial institution[16] — and as such is beyond the competence of the Council which does not itself possess the judicial functions which the Tribunals exercise.

To summarise, the Council has delegated to the Tribunals a power of binding decision in respect of their judicial functions. That is, the Council could not act as a review body and change decisions of the Tribunals that are an exercise of their judicial functions. In addition to the determination of criminal liability of individuals, this includes the exercise by the Tribunals of powers that they consider to be "inherent judicial powers".

The second issue which arises in the context of a delegation of a power of binding decision is whether the Security Council can delegate its power to bind Member States under Article 25 and Chapter VII to its subsidiary organs. It is generally accepted that the Council can, under Article 25 and Chapter VII, decide to impose a binding obligation on Member States.[17] The separate issue of the competence of the Security Council to delegate this power of binding decision to its subsidiary organs flows from the general competence of the Council to delegate its powers.[18] The condition

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et seq.)).

15 On these inherent judicial powers, see note 25 and corresponding text.

16 See further on this concept of *compétence de la compétence*, the *Tadic* jurisdiction decision, see note 5; and B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, 1953, 275–301.

17 See the following commentaries to Article 25: J. Delbrück, "On Art. 25", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 1994, 407 et seq.; and J.-P. Cot and A. Pellet (eds), *La Charte des Nations Unies*, 1991, 471 et seq.

18 The Security Council possesses a general competence to delegate its powers to certain entities. This competence is not, however, provided for in express terms by the Charter. The primary source of this general competence is the law of international institutions. It is a general principle

that would need to be fulfilled, however, is that the Council must decide that such a measure is necessary for the maintenance of international peace and security. In other words, the Council would have to decide, using its powers under Chapter VII, that the delegation of the power to a subsidiary organ to bind Member States was a measure that is necessary for the maintenance of international peace and security.

It seems clear that if the Security Council delegates its power to issue binding decisions against States, under Article 25 and Chapter VII, to a subsidiary organ — if it can do so — then decisions of the subsidiary may bind UN Member States. Such decisions are in effect decisions of the Security Council for the purposes of Article 25, and as such are legally binding on Member States.[19] Even if this were not the case, subsequent Security Council confirmation or adoption of a decision of a subsidiary organ is sufficient to make the decision in effect one of the Council's itself, and as such binding on Member States.[20] It is, moreover, the case, as

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under the law of international institutions that a principal organ of an international organization possesses a general competence to delegate certain of its powers to those entities which are part of the organization. The existence of such a general competence as part of the corpus of the law of international institutions was affirmed in the case of *Meroni v. High Authority*, where the European Court of Justice found that the High Authority could delegate certain of its powers under the Treaty of Rome even where the Treaty did not expressly provide for such a delegation. (Case 10/56, (1958) *ECR* 51 et seq.) Moreover, the Council possessing a general competence to delegate its Chapter VII powers is in accord with the object and purpose of Chapter VII: the object and purpose being that the Council should be able to take such action as it deems necessary to maintain or restore international peace and security. (This is an expression of the more general point made earlier by Kirk who in 1946 stated: "The general principle ... which runs consistently throughout the Charter, was that the Council should have the greatest possible flexibility in handling a situation which menaced the peace of the world." (G. Kirk, "The Enforcement of Security", *Yale L.J.* 55 (1946), 1081 et seq. (1088)).

19 Accordingly, M. Hilf states: "Subsidiary organs may be empowered to perform the functions of the SC (Security Council) even to the extent that this may have external consequences. Article 25 obliges member States to accept and execute the decisions of the Security Council. These include the decisions of subsidiary organs to the extent that they confine themselves to the scope of functions transferred by the SC." (M. Hilf, "On Art. 29", Mn. 30, in: Simma, see note 17, 486).

20 The ICJ accepted this general approach in the *Certain Expenses* Case when it found that the Security Council had adopted the decisions of the Secretary-General as its own by its "record of reiterated consideration,

explained further below, that such decisions also bind international organizations.[21]

The Council delegated its power to issue decisions that bind States to the International Criminal Tribunals. The power of the Tribunals to make decisions that bind States is in the area of providing cooperation and judicial assistance to the Tribunals. As the Appeals Chamber held in the *Blaskic Subpoena* Case:

> "the obligation [on States] to lend cooperation and judicial assistance to the International Tribunal ... is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be 'ordered' either by other States or by international bodies)."[22]

In other words, the Council has decided that the delegation of a power to the Tribunal to impose binding obligations on Member States in respect of certain matters constitutes a measure that is necessary to maintain or restore international peace. These matters are specified in article 29 para. 2 which provides:

> "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;[23]

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confirmation, approval and ratification ... of the actions of the Secretary-General" (*Certain Expenses* Case, ICJ Reports 1962, 151 et seq. (305).

21 See Section III. (3).

22 *Prosecutor v. Tihomir Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, IT-95-14-AR108 *bis*, para. 26. The Appeals Chamber found that this obligation could be accepted by States that were not Members of the United Nations by means of express acceptance of the obligation in writing: see *ibid.*

23 The Appeals Chamber has, however, stated that there is a limitation on this power: that an order for the production of documents must be specific in nature and should not simply identify broad categories of

(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal."

The legal effect of these binding obligations that the Tribunal may impose on States in a particular case is that it activates the provisions of Article 103 of the Charter which provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The effect of Article 103 is clear: that any obligation on a Member State under the Charter prevails over a conflicting treaty obligation of that State.[24] The point is, for our present purposes, that the Tribunal has the power to impose such binding obligations on Member States with the consequence, by virtue of Article 103, that this obligation will prevail over these States other treaty obligations.

The other source of powers for the International Tribunals derives from the concept of the "inherent powers" of a judicial tribunal.[25] The Appeals Chamber in the *Blaskic Subpoena* Case stated that it prefers to speak of "inherent powers" with regard to those functions of the Tribunal which are judicial in nature and not expressly provided for in the Statute, rather than of "implied powers".[26] The Appeals Chamber referred to the statement by the ICJ in the *Nuclear Tests* Case where the Court found that it

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documents: *Blaskic Subpoena* Case, see note 22, para. 32. See also the excellent review of authorities in this area by the *Amicus Curiae* Brief submitted by the Max Planck Institute for Comparative Public Law and International Law in the *Blaskic Subpoena* Case before the Appeals Chamber, IT-95-14-PT, (prepared by J.A. Frowein, G. Nolte, K. Oellers-Frahm, and A. Zimmermann), 374–377.

24 See as an example of how this article operates, the *Lockerbie* Case, Provisional Measures Phase, ICJ Reports 1992, 3 et seq. See further on Article 103 of the Charter: Cot and Pellet, see note 17, 1381; and R.Bernhardt, "On Art. 103", in: Simma, see note 17, 1116 et seq.

25 This inherent judicial power is different from the concept of inherent powers that international organizations in general are said to possess: see F. Seyersted, *United Nations Forces*, 1966, 133–134; M. Ramo-Montaldo, "International Legal Personality and Implied Powers of International Organisations", *BYIL* 44 (1970), 111 et seq., (143, 154); and N. White, *The Law of International Organisations*, 1996, 131–133.

26 *Blaskic Subpoena* Case, see note 22, para. 27.

> "possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and, on the other, to provide for the orderly settlement of all matters in dispute. ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[27]

It was accordingly on this basis that the Appeals Chamber had earlier found in the *Tadic Jurisdiction* Case that it has the competence to determine its own jurisdiction and that this was part of the inherent power of any judicial tribunal. The Court observed: "it is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents ... although this is often done."[28]

The Appeals Chamber when finding that the Tribunals have the "inherent power" to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules, explained further what it considers this concept to mean:

> "The power to make this judicial finding is an inherent power: the International Tribunal must possess the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction. This inherent power inures to the benefit of the International Tribunal in order that its basic judicial function may be fully discharged and its judicial role safeguarded."[29]

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27 *Nuclear Tests* Case, ICJ Reports 1974, 253 et seq., para. 23, as cited in the *Blaskic Subpoena* Case, see note 22, para. 27. Moreover, the *Amicus Curiae* Brief of the Max Planck Institute in the *Blaskic Subpoena* Case states that "it is safe to say that the Tribunal, established to enforce a binding Security Council resolution adopted for the maintenance of international peace and security can not be assumed to be vested with fewer powers than those normally inherent in other international courts and tribunals." (*Amicus Curiae* Brief, see note 23, 363).

28 *Tadic* Case, see note 5, para. 18.

29 *Blaskic Subpoena* Case, see note 22, para. 33. The Appeals Chamber was clear in placing the power to decide that a State had failed to comply with the Statute of Rules squarely within the scope of the Tribunal's "inherent judicial powers" when it stated: "(w)hen faced with an allegation of non-compliance with an order or request issued under Article 29, a Judge, a Trial Chamber or the President must be satisfied that the State has clearly

The application of the concept of "inherent powers" as discussed by the ICJ does not, however, apply as directly as may at first seem to the case of the International Criminal Tribunals. The reason for this derives from the differing basis and nature of jurisdiction of the ICJ from that of the International Criminal Tribunals. The ICJ has jurisdiction in a contentious case when the States that are party to a dispute consent to the Court hearing the case.[30] While in the case of the International Criminal Tribunals they were established by, and derive their basis of jurisdiction from, Security Council resolutions. The Tribunals are not as such dependant on the consent of States to exercise their powers and functions in a case which will result in a decision that binds States.[31] Moreover, the nature of the jurisdiction of the two judicial institutions differ. The Tribunal is a criminal Court that possesses jurisdiction over individuals while the ICJ exercises

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failed to comply with the order or request. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and *a fortiori* from that undertaken by a political or quasi-political body. ... By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinises the behaviour of a certain State in order to establish formally whether or not that State has breached its international obligation to cooperate with the International Tribunal". (*Blaskic Subpoena* Case, see note 22, para. 35).

30 See Article 36 paras 1 and 2 of the Statute of the ICJ. See further: I. Brownlie, *Principles of Public International Law*, 1990, 721–730; Sh. Ro-senne, *The World Court: What it is and how it works*, 1995, 81–111; and L. Fisler-Damrosch, (ed.), *The International Court of Justice at a Crossroad*, 1987, 3 et seq. This basis of jurisdiction may be the same as in the case of the future Permanent International Criminal Court since this Court's jurisdiction may also be based on the consent of the State concerned: see article 22 of the International Law Commission's Draft Articles on the Establishment of a Permanent International Criminal Court, *Report of the International Law Commission on the work of its forty-sixth session*, 1 September 1994, Doc. A/49/355. See also the proceedings of the Ad Hoc Committee of the General Assembly on the Establishment of an International Criminal Court, Doc.A/AC.244/1, 8.

31 This does not of course ignore the fact that the International Tribunal may discharge its functions only if it can count on the *bona fide* assistance and cooperation of sovereign States. It is on this basis that the Appeals Chamber in the *Blaskic Subpoena* Case stated: "It is ... 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 Trial Chamber to have recourse to the mandatory action provided for in Article 29." (*Blaskic Subpoena* Case, see note 22, para. 31).

its contentious jurisdiction in respect of disputes between States. Even though elements of the judicial process will be the same, the differing nature of their jurisdictions must have some effect on what kinds of "inherent powers" each Court will be competent to exercise.

It was, in fact, this differing basis of jurisdiction that led the Appeals Chamber itself in the *Blaskic Subpoena* Case to state:

> "[t]he Prosecutor has submitted that Article 29 expressly grants the International Tribunal 'ancillary jurisdiction over States'. However, care must be taken when using the term 'jurisdiction' for two different sets of actions by the International Tribunal. As stated above, the primary jurisdiction of the International Tribunal, namely its power to exercise judicial functions, relates to natural persons only. The International Tribunal can prosecute and try those persons who are allegedly responsible for the crimes defined in Articles 2 to 5 of the Statute. With regard to States affected by Article 29, the International Tribunal does not, of course, exercise the same judicial functions; it only possesses the power to issue binding orders or requests. To avoid any confusion in terminology that would also result in a conceptual confusion, when considering Article 29 it is probably more accurate simply to speak of the International Tribunal's ancillary (or incidental) mandatory powers *vis-à-vis* States."[32]

The Appeals Chamber thus based the Tribunal's power to issue binding orders to States on article 29 of the statute, in terms of a delegation of power from the Council, rather than some form of an "inherent power" of a judicial Tribunal. Put differently, the Tribunal, not having a jurisdiction over States, could not found the power to issue binding orders to States on its inherent judicial powers. Similarly, the Appeals Chamber found that the Tribunal did not have the inherent judicial power to subpoena a State[33] or its officials[34] whereas they did have the power to subpoena an individual by virtue of this source of power.[35] It thus seems clear that the Appeals

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32 *Ibid.*, para. 28.

33 *Blaskic Subpoena* Case, see note 22, para. 25. See also the *Amicus Curiae* Brief submitted by the Max Planck Institute, see note 23, 382.

34 *Blaskic Subpoena* Case, see note 22, para. 38.

35 The Appeals Chamber in the *Blaskic Subpoena* Case stated with respect to the remedies for non-compliance by an individual with a subpoena or order issued by a Judge or Trial Chamber: "(t)he remedies available to the International Tribunal range from a general power to hold individuals in contempt of the International Tribunal (utilising the inherent contempt power rightly mentioned by the Trial Chamber) to the specific contempt

Chamber itself has recognized that the nature of the Tribunal's jurisdiction, not including a jurisdiction over States, itself leads to necessary limits on what powers the Tribunal may exercise, even as a judicial institution. This does not, of course, mean that the Tribunal as a judicial institution does not possess certain inherent judicial powers, such as the *compétence de la compétence*, but that the scope of powers that may be said to be "inherent" differ according to the basis of jurisdiction of the judicial institution in question.[36]

To summarise, the differing basis of jurisdiction of the International Criminal Tribunals from that of the ICJ is of practical importance. It means that a Tribunal cannot render decisions that bind States that are not within the express or implied scope of article 29 of its Statute: such decisions cannot be said to lie within the "inherent judicial powers" of the Tribunal and as such must find their basis in a delegation of power from the Council.

III. The Power of the Tribunals to Compel Testimony From Officials of the United Nations or its Specialized Agencies

The question whether staff of the United Nations or its Specialized Agencies can be compelled to testify in a case before the International Tribunals is a controversial issue. When one recalls the long-standing emphasis placed by the United Nations on asserting immunity for its officials from any form of legal process together with the reality that the United Nations and its Specialized Agencies which were operating in

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power provided for in Rule 77." (*Blaskic Subpoena* Case, see note 22, para. 59) For the relevant section of the Trial Chamber's decision on this issue, see note 13, para. 62. See also the *Amicus Curiae* Brief submitted by the Max Planck Institute in the *Blaskic Subpoena* Case, see note 23, 386, 395.

36 This is a different limitation from that where a certain power cannot be said to lie at all within the scope of the judicial function and as such is not an "inherent judicial power" at all. The Appeals Chamber in the *Blaskic Subpoena* Case used the concept of "inherent judicial powers" in this way to limit the scope of the Tribunal's powers when it found, correctly, that the International Tribunals do not possess any power to take enforcement measures against a State. It stated: "(h)ad the drafters of the Statutes intended to vest the International Tribunal with such a power, they would have expressly provided for it. In the case of an international judicial body, this is not a power that can be regarded as inherent in its functions." (*Blaskic Subpoena* Case, see note 22, para. 25).

Rwanda and the former Yugoslavia relied on their independence and perceived neutrality by the parties to the conflict to operate effectively, then one may begin to understand the possible policy objections that may be raised to UN staff members testifying before the Tribunals. These policy considerations are not, however, the subject of our present discussion. This section is limited to analysis of the legal considerations relating to the question whether the Tribunals possess such a power of compellability. These are fourfold.

First, it must be determined whether a Tribunal can issue binding orders to individuals to appear before it and give evidence[37] since the power of a Tribunal to require testimony from staff members of international organizations depends on a Tribunal being able to compel testimony, more generally, from individuals. The second issue is concerned with the applicability of the international law of privileges and immunities of UN officials to cases before a Tribunal and whether this would exempt such officials from having to provide testimony. Third, there is separate consideration of the position of officials of the UN Specialized Agencies, since they are not as such members of the Secretariat. Finally, there is discussion of alternative means of ensuring that officials of the United Nations or it's Specialized Agencies give evidence in a case before the Tribunal.

1. The Power of the International Criminal Tribunal for the former Yugoslavia to Compel Testimony from an Individual

The source of the Tribunal's power to order an individual to appear before it and provide testimony is article 19 para. 2 of the Statute[38] which states: "[a] judge may ... issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial."[39] A Judge of the Tribunal thus has the power

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37 In common law jurisdictions, such a court order to enforce the attendance of a witness is called *subpoena ad testificandum*: see "Evidence", in: *Halsbury's Laws of England*, 4th edition, 1976, Vol. 17, para. 244; and "Witnesses", in: *American Jurisprudence*, 2nd edition, 1981, para. 9.

38 This is referring specifically to the case of the Tribunal for the former Yugoslavia, although the analysis applies *mutatis mutandis* to the case of the Rwanda Tribunal which has an identical provision in Article 18 para. 2 of its Statute.

39 As the *Amicus Curiae* Brief of the Max Planck Institute contends: "Under Art. 18 para. 2 of the Statute the Prosecutor has the right to directly address himself or herself to suspects, witnesses and victims and to question them. Art. 19 para. 2 gives the judge the power to issue orders

to issue an order to an individual to give testimony if it is deemed necessary for the conduct of a trial.[40] The Appeals Chamber in the *Blaskic Subpoena* Case held that "the spirit of the Statute, as well as the purposes pursued by the Security Council when it established the International Tribunal, demonstrate that a Judge or a Chamber is vested with the authority to summon witnesses, to compel the production of documents etc. ... the International Tribunal's power to issue binding orders to individuals derives ... from the general object and purpose of the Statute, as well as the role the International Tribunal is called upon to play thereunder."[41] In addition to this reason for the existence of the power, the notion of the "inherent power" of a judicial institution may also be used here to support the Tribunal, as a judicial Tribunal exercising a criminal jurisdiction, possessing such a power. The power to require the production of evidence or testimony is of particular importance to a criminal jurisdiction, since the compellability of evidence is often essential to a judicial determination of individual criminal liability. In fact, the power of a Court to order the production of evidence or testimony from an individual is recognized in

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as may be required for the conduct of the trial. If the prosecutor possesses the power to direct himself or herself directly to individuals and since the Tribunal has essentially only a supportive function for the Prosecutor in the pre-trial phase, it would be anomalous if the Tribunal should not also be able to address itself directly to individuals." (*Amicus Curiae* Brief of the Max Planck Institute, see note 23, 388, 389).

40 As the Appeals Chamber in the *Blaskic Subpoena* Case stated: "It is therefore to be assumed that an inherent power to address itself directly to ... individuals inures to the advantage of the International Tribunal. Were it not vested with such a power, the International Tribunal would be unable to guarantee a fair trial to persons accused of atrocities in the former Yugoslavia. ... the International Tribunal may directly summon a witness, or order an individual to hand over evidence or appear before a Judge or Trial Chamber. In other words, the International Tribunal may enter into direct contact with an individual subject to the sovereign authority of a State. The individual, being within the ancillary (or incidental) criminal jurisdiction of the International Tribunal, is duty-bound to comply with its orders, requests and summonses." (*Blaskic Subpoena* Case, see note 22, para. 56). This competence applies, however, only to the courts of the Tribunal. The Prosecutor does not under the Statute possess such a power. Accordingly, for the Prosecutor to compel testimony from a witness it is necessary to obtain an order from the Court to this effect. Concerning the power of a Trial Chamber to order the production of documents, see the decision of the Trial Chamber in the *Blaskic Subpoena* Case, see note 13, 15–16.

41 *Blaskic Subpoena* Case, see note 22, para. 47.

many domestic legal systems.[42] This inherent judicial power of compellability does not apply however to the case of judicial proceedings to resolve inter-State disputes.[43] This is an example of how the notion of "inherent judicial powers" will differ according to the nature of the Court's jurisdiction.[44]

The power of the Tribunal to order individuals to appear before it and provide evidence has been given expression by its Judges in the Rules of Procedure and Evidence of the Tribunal, Rule 98 of which states that "A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance." Such a power has also been encapsulated in Rule 54 of the Tribunal's Rules of Procedure and Evidence which states that a Trial Chamber can "issue such orders, summonses, subpoenas, warrants ... as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial." Moreover, it would seem that the practice of UN Member States in respect of their domestic cooperation laws adds support to the position that the Tribunal may summon individuals directly to appear before a Trial Chamber. The *Amicus Curiae* Brief submitted by the Max Planck Institute for Comparative Public Law and International Law is instructive on this point. The Brief, after a review of the implementing legislation of the United Kingdom, Austria, Finland, Germany, Spain, Sweden, and the

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42 See, for example: Criminal Procedure (Attendance of Witnesses) Act, 1965 of the United Kingdom, Section 2, Schedule 1, paras. 1–2; Federal Rules of Criminal Procedure of the United States, Section 17; Code de procédure pénale of France, Art. 283; Criminal Code of Canada, Sections 698–700; and Ley de Enjuiciamiento Criminal (Code of Criminal Procedure) of Spain, Art. 575 (as cited in Prosecutor's Brief in Support of Subpoena Duces Tecum in: *The Prosecutor v. Tihomir Blaskic*, IT-95-14-T, 1 April 1997, 12.) Regarding the production of documents, see the decision of the Trial Chamber in the *Blaskic Subpoena* Case, see note 13, 17–19. This of course means that the defence may also make a motion to a court of the Tribunal that an order be made that a UN official be compelled to give testimony. This is required by the principle of equality of arms in criminal proceedings. On the case-law before the European Court of Justice concerning the requirement of an equality of arms in criminal proceedings, see, for example, *Feldbrugge v. The Netherlands (A/99)*, *European Human Rights Reports* 8 (1986), 524 at para. 44.

43 For example, the ICJ cannot require testimony or the production of documents from individuals or States: see further: G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1993, Vol. 2, at 576–577; and K. Highet, "Evidence, the Court, and the Nicaragua Case", *AJIL* 81 (1987), 1 et seq. (10).

44 See note 36 and corresponding text.

Netherlands, concludes that "state practice — as enshrined in the respective national implementation laws — does indeed presuppose and confirm that the International Criminal Tribunal for the Former Yugoslavia possesses the power under Art. 29 of its statute to directly address individuals by way of orders."[45] For example, the Brief states, "Sect. 9 para. 1 and 19 para. 1 of the British United Nations (International Tribunal) (Former Yugoslavia) Order 1996[46] provides not only for the service of process of a summons or other process requiring a person to appear before the Tribunal for the purpose of giving evidence ... but also states that the Tribunal may indeed issue an order for the attendance before the Tribunal to be executed by the British authorities".[47] In this regard, the Appeals Chamber also held that orders made by a Tribunal to an individual to appear and testify or to produce documents can, by virtue of article 29, bind a State to take action regarding such an individual if within the State's jurisdiction. They state: "Article 29 also imposes upon States an obligation to take action required by the International Tribunal *vis-à-vis* individuals subject to their jurisdiction."[48] Accordingly, the British United Nations (International Tribunal) (Former Yugoslavia) Order represents an accurate translation of that State's international obligations into its domestic legal order.

However, the Appeals Chamber in the *Blaskic Subpoena* Case was very clear in its decision in imposing a limitation on the powers of the Tribunals in this area when it found that they could not override the long-established principle of "functional immunity" that State officials possess when carrying out their official duties. The Appeals Chamber held that the Tribunal could not address a subpoena to a State official in respect of information or documents that came to be in the possession of the official while carrying out official duties.[49]

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45 *Amicus Curiae* Brief of the Max Planck Institute, see note 23, 391.

46 S.I. 1996 No. 716. For discussion of the legal basis of this Order in Council, see Warbrick, see note 1; and cf. Fox, see note 1.

47 *Amicus Curiae* Brief of the Max Planck Institute, see note 23, 391.

48 *Blaskic Subpoena* Case, see note 22, para. 48.

49 The Appeals Chamber states that it "dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law ... ." (*Blaskic Subpoena* Case, see note 22, para. 38).

To conclude, the Statute and Rules of Procedure and Evidence of the Tribunal provide for the power of the Tribunal to order the appearance and testimony of an individual. This position has been accepted by a number of States and even incorporated into their implementing legislation such that the responsibility of individuals to comply with a decision of the Tribunal has been recognized and may even be enforced by the State. However, the case is different where a person is acting not in their individual capacity but as an agent of a State. Here the Tribunal does not possess the power to subpoena a person in order to force testimony or the production of documents by virtue of the "functional immunity" of the State official. In the case of staff members of the UN and its Specialized Agencies, the question thus arises whether the analogous, and similarly long-established, immunity from legal process for such officials would operate to preclude the Tribunals from compelling them to appear in a case or to provide other, for example documentary, evidence.

2. The Purported Application of the Privileges and Immunities of UN Officials to Cases before the International Criminal Tribunals

The general privileges and immunities of UN officials do not operate to exempt these officials from having to appear before a Trial Chamber pursuant to a decision under Rule 98 of the Rules of Procedure and Evidence. The reason for this is that the privileges and immunities of UN officials was intended to, and does, operate only *vis-à-vis* States. A primary statement of the nature of these privileges and immunities is contained in Article 105 of the Charter which provides:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

Cf. the decision of the Trial Chamber in the *Blaskic* Case which held: "the fact that a person ... is an official of a State does not preclude the issuance of a *subpoena duces tecum* addressed to him or her directly. ... binding orders may be issued by the International Tribunal addressed to both States and individuals and there is, therefore, no reason why a person exercising State functions, who has been identified as the relevant person ... should not similarly be under an obligation to comply with a specific order of which he or she is the subject." (*Blaskic Subpoena* Case, see note 13, 33).

> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."[50]

This clearly is an obligation which rests on States: to guarantee, for our purposes, UN officials such privileges and immunities as are necessary for the carrying out of their duties and functions in connection with their employment in the Organization. This is confirmed by a reading of the 1946 Convention on the Privileges and Immunities of the United Nations, the provisions of which operate only *vis-à-vis* States. For example, in one of the Dispute Settlement provisions of the Convention, Section 30, it provides that "(if) a difference arises between the United Nations on the one hand and a Member (State) on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court."[51] That is, the privileges and immunities are opposable only against States. This is further emphasized by the UN Office of Legal Affairs which has stated: "(T)he expression 'every form of legal process' (which is part of the immunity of UN officials under Section 18 of the 1946 Convention) has been broadly interpreted to include every form of process before national authorities, whether judicial, administrative or executive ...".[52] It is thus clear that the privileges and immunities of the United Nations and its Specialized Agencies is intended to operate externally: that is, *vis-à-vis* States.[53] Accordingly, the privileges and immunities of UN staff officials cannot apply *vis-à-vis* different UN organs that are an integral part of the Organization. This is of great significance to the International Criminal Tribunals, since as UN subsidiary organs they are not entities separate from the United Nations Organization.[54] Once a UN subsidiary organ is

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50 See further on Article 105 the commentaries, M.Gerster, "On Art.105" in: Simma, see note 17, 1137 et seq.; and Cot and Pellet, see note 17, 1397 et seq.

51 This provision was invoked in the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* Case, ICJ Reports 1989, 14–17, at paras. 28–36, albeit that the Court did not found its jurisdiction in article 30 of the Convention on the Privileges and Immunities of the United Nations.

52 *UNJYB* 1983, 213.

53 See also P. Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Analysis of Their Legal Status and Immunities*, 1994, 98–109.

54 See also note 4 and corresponding text.

lawfully established by a UN principal organ it becomes a part of the United Nations as a whole and not just a subsidiary organ of the particular principal organ: it becomes an integral part of the Organization.[55] As a result, UN subsidiary organs themselves enjoy, significantly, privileges and immunities under the 1946 Convention on the Privileges and Immunities of the United Nations. Accordingly, the UN Legal Counsel has consistently found the 1946 Convention on the Privileges and Immunities of the United Nations applicable to UN subsidiary organs.[56] This application of privileges and immunities to subsidiary organs has been given expression in the case of, for example, the International Tribunal for the former Yugoslavia in article 30 para. 3 of its Statute which states, in general terms, that the staff of the Tribunal "... enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention (the 1946 Convention on the Privileges and Immunities of the United Nations)". But an argument that would seek to allow UN officials to invoke their right to immunity from legal process under Section 18 para. a of the 1946 Convention in the case of the Tribunal, itself an organ of the UN and which itself enjoys immunity and privileges, is untenable. The Tribunal as a UN subsidiary organ is part of the UN Organization and as such it has no distinct international legal personality. That is, its powers and functions are not independent of the UN and, accordingly, we note that these derive from its Statute which was adopted by the Security Council.

This position is, moreover, confirmed when it is recalled that the object and purpose of the privileges and immunities granted to the United Nations is to ensure the independence of the Organization from the influence of any of its Members. Accordingly, the principles in the Convention on Privileges and Immunities cannot apply even by analogy in the case of the International Tribunals since there is no interest of ensuring the independence of the Organization from the influence of States or other external entities that possess international legal personality.

As a consequence of this approach it is contended that a Trial Chamber has the power to require persons who are UN officials, even senior officials, or members of a UN subsidiary organ to appear before it and give evidence. In the case of the Tribunals for the former Yugoslavia and Rwanda this is significant since UN subsidiary organs include UN peace-

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55 In the discussion on the current Article 7 para. 2 of the Charter at the San Francisco Conference, the article of the Charter which gives UN principal organs a general authority to establish subsidiary organs, this argument was made by the representative of the Netherlands in the Co-ordination Committee: 30 May Mtg. 8, UN Doc. WD 60, CO/29 Vol.17, 37.

56 See, for example, *UNJYB* 1978, 186.

keeping and observation forces whose members were often witnesses to alleged crimes.

The Appeals Chamber in the *Blaskic Subpoena* Case has affirmed this approach in the context of military personnel that are part of the UN authorised operations in Bosnia by stating that the mandate of these forces and the Tribunal are the same and thus they must testify if required to do so by a Tribunal. The Appeals Chamber states that the application of immunity:

> "... differs for a State official (e.g. a general) who acts as a member of an international peace-keeping or peace-enforcement force such as UNPROFOR, IFOR or SFOR (from the case of a State official who acts on behalf of their government). Even if he witnesses the commission or the planning of a crime in a monitoring capacity, while performing his official functions, he should be treated by the International Tribunal *qua* an individual. Such an officer is present in the former Yugoslavia as a member of an international armed force responsible for maintaining or enforcing peace and not *qua* a member of the military structure of his own country. His mandate stems from the same source as that of the International Tribunal, i.e., a resolution of the Security Council, and therefore he must testify, subject to the appropriate requirements set out in the Rules."[57]

Accordingly, the matter of privileges and immunities of UN officials *vis-à-vis* the Tribunal becomes irrelevant since it is not possible for officials of the Organization to invoke privileges and immunities against another part of the same Organization which in fact also enjoys the same privileges and immunities.[58]

3. The Position of Officials of UN Specialized Agencies

There is a distinction which needs to be made between UN officials and officials of a UN Specialized Agency. UN officials are part of the Secretariat, a principal organ of the United Nations under Article 7 para.1 of the Charter. However, a Specialized Agency is established by a separate

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57 *Blaskic Subpoena* Case, see note 22, para. 50.

58 If this were not the case, the untenable position would arise that the staff members and documents of the International Tribunals would need to receive an authorisation from the UN Secretary-General before they could give testimony — or in the case of documents, before being tendered in evidence — in a case before a Tribunal.

intergovernmental agreement concluded by States and as such its officials are not members of the Secretariat. United Nations Specialized Agencies are not, moreover, UN subsidiary organs.[59]

The separate legal basis of Specialized Agencies has not, however, prevented the Security Council from requiring these Agencies to carry out certain measures. The case where the Security Council is acting under Chapter VII of the Charter allows it to impose binding obligations on Specialized Agencies.[60] The legal basis for such a contention derives from the approach that the nature and scope of the enforcement powers conferred upon the Security Council by Chapter VII of the UN Charter are such that when the Council requires action, or as the case may be inaction, by States, this in turn imposes the same obligation on UN organizations composed of States which possess international legal personality and which operate on the international plane. As a legal opinion of the Secretariat of UNIDO states:

> "As far as UNIDO is concerned, it is in accordance with its Constitution a subject of international law. As such — and as an international organization of the United Nations system — it has to comply with decisions of the Security Council that are binding on all states, including UNIDO's Member States, even if the resolution does not specifically address international organizations."[61]

The Security Council can be said to possess such a power of binding decision since it is necessary for the effective attainment by the Council of its primary objective of maintaining and restoring international peace.[62] This approach has been reflected in practice. For example, when expanding the scope of economic sanctions already imposed against Iraq in response to its invasion of Kuwait, the Security Council in S/RES/670 (1990) of 25 September 1990, acting under Chapter VII, stated that "the United Nations Organization, the specialized agencies and other international or-

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59 Sarooshi, see note 3, 433.

60 Cf. H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989", *BYIL* 67 (1996), 1 et seq., (62).

61 Memorandum by the Secretariat of UNIDO dated 29 August 1990, *UNJYB* 1990, 311–312. Thus, in the context of S/RES/661 (1990) of 6 August 1990 which imposed an arms embargo against Iraq, the legal opinion went on to state: "It follows that UNIDO may not undertake any activity in furtherance of the activities banned by the Security Council or request others to commit such activities." *(Ibid.)*.

62 On the doctrine of implied powers of an international organisation under international law, see note 7.

ganizations in the United Nations system are *required* to take such measures as may be necessary to give effect to the terms of resolution 661 (1990) and this resolution."[63]

To summarise, Chapter VII decisions by the Security Council can be said to bind UN Specialized Agencies.

A cogent argument can thus be made that decisions of the Tribunal under article 29 of its Statute, as a Chapter VII-type measure, also bind UN Specialized Agencies. The legal basis for the imposition by the Tribunal of such an obligation derives from the fact that the Tribunal was set up as a subsidiary organ by decision of the Security Council under Chapter VII, and, as explained above, this process of establishment means that orders of the Tribunal attain the quality of a binding decision.[64] Accordingly, a decision of a Trial Chamber requiring an official of a Specialized Agency to attend and provide evidence can be said to place an obligation on the Agency concerned to facilitate such a process.

Having regard to the above considerations, Section 19 para. a of the 1947 Convention on the Privileges and Immunities of Specialized Agencies[65] which grants immunity to officials of Specialized Agencies from any form of legal process may be said to have been overruled in the case of the International Tribunals.

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63 Para. 11 (emphasis added). See also, for example, the case of ICAO which is obliged, under the terms of the agreement by which it became a specialized agency, to render "such assistance to the Security Council as that Council may request, including assistance in carrying out decisions for the maintenance or restoration of international peace and security." (Article VII of the Agreement between the United Nations and the International Civil Aviation Organization, UNTS Vol. 8 No. 45).

64 Chapter VII decisions of the Security Council impose a binding obligation on States under Article 25 of the Charter. It is thus arguable that States, even when acting in an International Organization of which they are a Member, are under an obligation to comply with a decision of the Court of the Tribunal. This view is supported by Article 48 para. 2 of the Charter which provides: "Such decisions (by the Security Council acting under Chapter VII) shall be carried out by the Members of the United Nations directly *and through their action in the appropriate international agencies of which they are members.*" Even though this obligation is not imposed on the agencies directly, States must still act in these agencies in a manner consistent with their obligations owed to the Security Council. See also Thirlway, see note 60, 62–63.

65 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, UNTS Vol. 33 No. 521.

4. Alternative Means of Ensuring that Officials of the United Nations or its Specialized Agencies Give Evidence in a Case before a Tribunal

In the case that none of the above contentions are accepted as valid, there are two alternatives to ensure that officials of the United Nations or its Specialized Agencies appear before a Trial Chamber. First, recourse can be had to the Security Council to determine whether the Tribunal has the power to require UN officials to attend and give evidence in a Trial. The reference by a subsidiary organ of a matter to its principal organ, in our case the Security Council, is a recognized process under the law of the United Nations for the clarification of the powers of a subsidiary organ.[66] Second, the Office of the Prosecutor may wish to argue before a Trial Chamber that the Secretary-General's duty under Section 20 of the Convention on the Privileges and Immunities of the United Nations — to waive the immunity of an officer in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations — should be carried out. In respect of this provision, the UN Office of Legal Affairs has stated that "the staff member concerned may not be compelled to appear and indeed should not appear as a witness without specific authorization."[67] The main reason why the Secretary-General should authorize UN officials to testify before a Trial Chamber derives from the nature of the Tribunal as a Chapter VII measure established by the Security Council to assist in the restoration and maintenance of peace in the former Yugoslavia.[68] If the Secretary-General were to refuse to authorize the relevant officials in a particular case, it would represent a dereliction of his duty under Section 20 of the 1946 Convention on Privileges and Immunity. We recall that Section 20 provides: "...The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his

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66 This is implicit in the authority and control that a UN principal organ exercises over its subsidiary: Sarooshi, see note 3, 447.

67 *UNJYB* 1974, 188. The Office of Legal Affairs has stated in a letter to a UN Legal Liaison Officer in Geneva: "The United Nations authorizes officials to appear and to testify on specific matters within their official knowledge provided (1) that there is no reasonable effective alternative to such testimony for the orderly adjudication or prosecution of the case; and (2) that no significant United Nations interest would be adversely affected by the waiver. The authority to waive the immunity and to authorize the testimony has been delegated to the Legal Counsel." (*UNJYB* 1978, 191.)

68 See note 5 and corresponding text.

opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations ...". The issue of confidentiality of material cannot in itself constitute a reason for the withholding of evidence from a Tribunal. The Appeals Chamber in the *Blaskic Subpoena* Case has held, implicitly, that the Tribunals can order Specialized Agencies to make otherwise confidential files available to it for the purposes of their proceedings. The Chamber, in this connection, cited as a precedent the *Ballo v. UNESCO* Case in which it noted that the ILO Administrative Tribunal had ordered UNESCO to make confidential files available to it.[69] The failure of UN officials to appear in particular cases before the Tribunal would not only represent the impeding of justice but would also be acting against one of the main objects and thus interests of the UN: the restoration and maintenance of peace by such measures as the Security Council has deemed necessary.

The content of the duty to make a waiver in the case of UN Specialized Agencies as stipulated in Section 22 of the Convention on the Privileges and Immunities of Specialized Agencies[70] is identical to the corresponding provision relating to the UN Organization. However, in the case of officials of Specialized Agencies any such waiver must be taken by the relevant organ of the Specialized Agency concerned and not by the UN Secretary-General. As the UN Office of Legal Affairs states "(u)nder section 22 of the Convention on the Privileges and Immunities of the Specialized Agencies, the right and the duty to waive the immunity of an official rests with 'each specialized agency'."[71] The entity authorized to waive the immunity of its officials will depend on the constituent treaty of the particular Specialized Agency.[72] Nonetheless, the analysis in respect

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69 ILO Administrative Tribunal, *Ballo v. UNESCO*, Judgment No. 191, 15 May 1972, in the ILO *Official Bulletin*, Vol. LV, Nos 2, 3, and 4, 1972, 224 at 227, as cited in *Blaskic Subpoena* Case, see note 22, at note 95. Moreover, there has been case-law before the Administrative Tribunal of the ILO that has limited significantly the possibility of international organizations being able to withhold documents for reasons of confidentiality: for a survey of such decisions, see: C. Amerasinghe, "Problems of Evidence before International Administrative Tribunals", in: R. Lillich (ed.), *Fact-Finding before International Tribunals*, 1992, 205 et seq., (214 et seq.); and the *Amicus Curiae* Brief of the Max Planck Institute, see note 23, 372–373.

70 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, see note 65.

71 *UNJYB* 1963, 179.

72 The Convention does not specify which organ of a Specialized Agency has the competence to make such a waiver, leaving this instead to each Specialized Agency to decide.

of the UN Secretary-General and the exercise of his discretion applies *mutatis mutandis* to the exercise by the relevant organ of the particular Specialized Agency of its similar discretion.

In conclusion, the Tribunal has the competence to require staff members of the United Nations or its Specialized Agencies to testify before a Trial Chamber. Moreover, Section 18 para. a of the 1946 Convention on the Privileges and Immunities of the United Nations, which states that officials of the United Nations shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity, is not applicable to the case of the Tribunal. Even if one takes the contrary view, the Secretary-General should exercise his discretionary power under Section 20 to authorize UN staff to allow them to testify before a Trial Chamber. This analysis applies, *mutatis mutandis*, to the case of UN Specialized Agencies with the same outcome.

IV. Concluding Remarks

The International Criminal Tribunals for the former Yugoslavia and Rwanda derive their express and implied powers from their respective Statutes which were adopted by the UN Security Council as Chapter VII measures. The special nature of these subsidiary organs as judicial bodies does, moreover, provide them with certain inherent powers which they may also exercise.

The auto-interpretative power by which these Tribunals and their common Appeals Chamber can interpret their Statutes means that the determination of whether the exercise of a particular power is necessary for the attainment of its stipulated objectives and functions and thus whether a Tribunal possesses such an implied power is left to the Courts of a Tribunal. Similarly, the decision whether a particular power is inherent to a judicial institution and is thus a power the Tribunals may exercise is also a determination to be made solely by the Tribunals. As such, a large measure of judicial propriety is required. The assumption of powers by the Tribunals, the exercise of which lies near the outer margin of legality, may lead to pressure being brought to bear on the Security Council to intervene in the work of, or abolish prematurely, the Tribunals.

The Appeals Chamber of the Tribunal has nonetheless in its cases to date exercised judicial caution when interpreting the scope of the powers that the Tribunals possess *vis-à-vis* States. If this approach continues it will do much to assuage the concerns that States may have as to the establishment of, and exercise of powers by, a Permanent International Criminal Court.