International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić

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Abstract: In a world of sovereign states, gathering evidence is one of the major challenges for the new international criminal tribunals. The decision in Prosecutor *v.* Blaškić, by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, shows some of the difficulties. The Tribunal finds it has the power to issue compulsory orders to sovereign states for the production of evidence, although not to issue a subpoena as such. The Tribunal also assumes the power to review a state's national security privilege, a holding that may challenge the more protective provisions of the new Rome treaty for a permanent International Criminal Court. However, the Appeals Chamber's declaration that there is no power to summon particular government officials, even for eyewitness testimony, that document production must be limited, and that its orders cannot be directly enforced, may hobble the Tribunal's capacity to muster the necessary proof at trial.

1. INTRODUCTION

The trial of war crimes in an international tribunal poses problems different from any domestic legal system. Rendering justice, after wartime misconduct, requires that a fact finder be able to establish the difficult truth of past events. Yet in a system of sovereign states, witnesses, documents, and real evidence will often remain outside the immediate control of the tribunal, leaving both the prosecutor and the defense lawyer stripped of the searching power of production that they would enjoy in an ordinary domestic trial.

The crafting of legal obligations on the part of states and individuals to produce evidence to an international court has proved a complicated task. States are often unwilling to submit their citizens to direct international gov-

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ernance, even as witnesses, and all the more so when the witnesses are state officials. When trial evidence concerns military operations, belligerent states involved in the theatre of conflict may feel a political sensitivity in revealing the nature of a defendant's conduct, lest it entail state responsibility, or sully the state's reputation. Since conflicts can recur, states may also claim that the investigation of past military operations will prejudice their future strategic posture. Even third party states, involved as peacekeepers or monitoring the situation for other reasons, may feel the burden of the inquiry – hesitant to disclose sources and methods used to acquire battlefield and headquarters information, reluctant to embarrass friends. The commitment to international justice is tempered in real life by problems of politics and security.

The delicacy of assembling evidence for international trials has been revealed in the dispute in the International Criminal Tribunal for the former Yugoslavia, in the important case of Tihomir Blaškić, a Croatian commander in central Bosnia during the Bosnian war.[1] The Hague court's limited reading of its powers to compel the production of evidence from states initially struck some observers as unduly modest, especially in the context of a court of limited jurisdiction dealing with the former belligerents to the conflict. However, in the light of recent negotiations in Rome for a permanent war crimes tribunal, the *ad hoc* tribunal's assertion of powers may seem surprisingly robust. The success of the *ad hoc* tribunal in negotiating acceptable arrangements with states that have key evidence will affect the future evolution of the Rome court, and the viability of international justice systems.

The modern enforcement of international humanitarian law faces a landscape quite different from Nuremberg. The systematic nature of the Nazi genocide, and Germany's unconditional surrender, simplified the problems of proof faced at Nuremberg, even if the magnitude of the evil was almost unimaginable. Captured Nazi archives provided a documentary outline of the Third Reich's plans, and allied military occupation of Germany allowed the Nuremberg prosecutors direct access to witnesses and evidence.

In situations such as the former Yugoslavia and Rwanda, there is no occupying power. Even where international peacekeepers are present, they cannot replace local civil authorities, and have limited ability to guard witnesses against possible retaliation. Prosecutions may begin in the middle of ongoing conflict, and reaching a ceasefire or peace agreement does not spell

1. *See* Prosecutor *v.* Blaškić, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case. No. IT-95-14-PT, Tr. Ch. II, 18 July 1997, *reversed in part and affirmed in part* in Judgment on the Request of the Republic of Croatia for Review of the Decision of the Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108 *bis*, A. Ch., 2 October 1997.

an end to security hazards on the ground. The belligerents will have little sympathy with the effort to hold their leaders responsible for violations of humanitarian law. And while political sentiment may change over time, wartime nationalist political parties can retain influence long after the fighting stops. International war crimes prosecutors will be hard put to rely on the belligerents for the faithful collection of evidence and eyewitness testimony, especially without coercive measures.

These problems are brought home in the recent experience of the International Criminal Tribunal for the former Yugoslavia. The *ad hoc* tribunal was created by the United Nations Security Council in 1993, invoking Chapter VII of the UN Charter,[2] while the armed conflict in Bosnia and Herzegovina was ongoing. In November 1995, the Tribunal indicted several defendants for taking part in ethnic cleansing in the Lasva Valley in the midst of the Bosnian war, and among them was Colonel Tihomir Blaškić, who held the position of regional military commander for the "Croatian Defense Council of Herceg-Bosna", an internationally unrecognized Bosnian Croat entity operating inside the Republic of Bosnia and Herzegovina.[3] Blaškić surrendered to the Tribunal in April 1996, and was permitted to remain under house arrest in The Hague.

The evidentiary problems of the Blaškić case have turned on the legal theories at trial. The charges against Colonel Blaškić involve the doctrine of command responsibility – the premise in the law of war that a commander is duty-bound to maintain discipline and prevent his soldiers from running amok. For effective observance of humanitarian law, it is not sufficient to place liability on the foot soldier. The system of restraint in wartime also depends on the role of a superior officer in controlling his troops, and using his position in the chain of command to prevent and punish wanton acts. Under command responsibility, an officer is criminally liable for *declining to restrain* his troops where he knows that widespread atrocities are being committed, just as if he had directly ordered the reprehensible acts. The commander also has a duty of inquiry, to monitor what his troops are doing, and cannot avoid responsibility by maintaining a deliberate or reckless ignorance of their misconduct. These parallel duties of inquiry and control allow deterrence at several levels of the military hierarchy, and attempt to meet the distortions of human personality and self-control that sometimes accompany direct involvement in battle.

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2. Security Council Resolution 827 of 25 May 1993, UN Doc. S/RES/827 (1993).
3. *See* Prosecutor *v.* Dario Kordić, Tihofil also known as Tihomir Blaškić, Mario Cerkez, Ivan also known as Ivica Santic, Pero Skopljak, Zlatko Aleksovski, Indictment, Case No. IT-95-14, 10 November 1995; superseded as to defendant Blaškić by Amended Indictment, Prosecutor *v.* Tihomir Blaškić, Case No. IT-95-14-T, 15 November 1996, and by Second Amended Indictment, Case No. IT-95-14-T, 25 April 1997.

Blaškić may not have personally participated in the murders and mayhem committed against Muslim civilians in 1993 in the Lasva campaign area. Rather, Blaškić will bear criminal responsibility equally if he ordered or encouraged his troops to engage in the atrocities,[4] or if he failed to monitor or control their actions, allowing the troops to ravage civilians. [5]

Proof of command responsibility is likely to come from two sources – the testimony of military personnel about a commander's orders and inquiries, and the documentary record of a military operation, including copies of written orders and communications. Either way, the information must come from 'official' sources.

A controversial theory of command responsibility might dispense with the need for any particularized evidence concerning a commander's role in the military campaign. Criminal liability could flow, on an aggressive theory, from the simple fact of a defendant's position in the chain of command and the widespread commission of atrocities by troops under his command. But even if this were an attractive theory – and, to be clear, it is not provided for by the Statute of the International Criminal Tribunal for the former Yugoslavia[6] – the defendant must even then be permitted an affirmative defense, to show that he attempted to monitor his troops' conduct without success, or made reasonable efforts to stop their misconduct. Official sources are thus a potentially important source of exculpatory as well as inculpatory evidence.

In addition, a charge of grave breaches of the 1949 Geneva Conventions[7] requires proof that a conflict was 'international' in the particular sector of fighting. Geneva restricts the universal jurisdiction of grave breaches to international wars and this rule was unchanged in the Security Council resolution creating the International Criminal Tribunal for the former Yugoslavia,

4. In the words of the Second Amended Indictment, *supra* note 3, if he "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution" of the illegal acts.
5. In the words of the Second Amended Indictment, *supra* note 3, if he "knew or had reason to know that subordinates were about to perform illegal acts or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".
6. *See* Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, in the Secretary General's Report on Aspects of Establishing of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S/25704 (3 May 1993), reproduced *in* 32 ILM 1159 (1993).
7. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1950); 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 74 UNTS 85 (1950); 1949 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1950); and 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).

according to the Tribunal's *Tadić* decision.[8] In the case of Blaškić, as an officer of the Defence Council (HVO) of the Croatian Community of Herceg-Bosna, it is Croatia's involvement with the HVO and with the fighting in central Bosnia that would determine the international nature of the conflict for purposes of grave breaches of the Geneva Conventions.[9]

2. THE BLAŠKIĆ SUBPOENAS

On 15 January 1997, the Tribunal Prosecutor in the *Blaškić* case issued trial subpoenas to the government of Croatia, Croatian Defense Minister Gojko Šušak, the government of Bosnia and Herzegovina, and the custodian of records of the central archive of the former Defense Ministry of Herceg-Bosna. The subpoenas *duces tecum* focused broadly on Croatian military operations in Central Bosnia, and came late in the trial process, more than a year after the original *Blaškić* indictment. The subpoena to Croatia called for Blaškić's notes and writings sent to the Croatian Ministry of Defense and to the defense authorities of Herceg-Bosna, communications to Blaškić from those quarters, communications between the Croatian Ministry of Defense and other officials of Herceg-Bosna, records on Croatia's contribution of weapons, supplies, and military units to the Bosnian conflict, and files on any national investigations or prosecutions concerning the 1993 attacks against Muslim civilians in Ahmici and other villages in the Lasva Valley.

The subpoena *duces tecum* issued in the *Blaškić* case to Bosnia and Herzegovina was accepted by the Bosnian government – although Bosnia indicated that it could not assure compliance by the custodian of records of the former Defense Ministry of Herceg-Bosna.[10]

The Republic of Croatia disputed the authority of the International Tribunal to issue the subpoenas *duces tecum,* on several grounds. First, Croatia's stature as a sovereign state, claiming that a state cannot be ordered to

8. *See* Prosecutor *v.* Duško Tadić also known as "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 81; and Prosecutor *v.* Duško Tadić also known as "Dule", Opinion and Judgment, Case No. IT-94-1-AR72, Tr. Ch., 7 May 1997, paras. 559, 560, and 602-608 (Tadić found not guilty on charges of grave breaches of Geneva Conventions because armed forces of Republika Srpska were not, at pertinent date and place, *de facto* organs or agents of the Federal Republic of Yugoslavia).

9. *Cf.* Prosecutor *v.* Duško Tadić, Opinion and Judgment, *supra* note 8, para. 571: "the extent of the application of international humanitarian law from one place to another in the Republic of Bosnia and Herzegovina depends upon the particular character of the conflict with which the Indictment is concerned. This depends in turn on the degree of involvement of the [armed forces] and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) after the withdrawal of the JNA [Yugoslav People's Army] on 19 May 1992".

10. Bosnia and Herzegovina also accepted a subpoena *duces tecum* issued at the request of defendant Blaškić for the production of any exculpatory documents.

perform any particular act by the Tribunal, especially when there may be a "penalty" for non-compliance as suggested by the word "subpoena". Second, state discretion in choosing the means to fulfil international obligations; states are entitled to decide how and through whom to meet requests for disclosure, and thus no order can be addressed to a particular state official such as Croatian Defense Minister Šušak. And third, that Croatia could withhold national security information as it deems proper.

Croatia provided some requested documents, but continued to challenge the authority of the Tribunal to enforce the full subpoena demand. Judge Gabrielle Kirk McDonald of the United States, who issued the subpoenas, referred the matter to the Tribunal's Trial Chamber II, consisting of Judge McDonald, Judge Elizabeth Odio Benito of Costa Rica, and Judge Saad Saood Jan of Pakistan. *Amicus curiae* were invited with the parties to address four questions:[11] whether a subpoena *duces tecum* could be issued to a state, whether it could be issued to a high government official of a state, whether claims of national security privilege must be accepted, and the appropriate remedies in the event of non-compliance.

3. THE TRIAL CHAMBER DECISION

3.1. Binding compulsory orders

In a decision on 18 July 1997,[12] the Trial Chamber placed to one side the distracting controversy over nomenclature. The term "subpoena" is used in the court's own rules,[13] but the Trial Chamber noted that the real dispute centered on the International Tribunal's authority to issue "*binding compulsory orders*, rather than the particular nomenclature used for such orders".[14] Such a power could be granted expressly, or inhere in the authority of the Tribunal by implication.

Judge McDonald found that issuance of "binding compulsory orders" to states for the production of evidence was within the repertory of the Tribunal. Though the court was created by the Security Council as a subordinate organ,[15] yet it

11. The present author appeared as one of the *amicus curiae*.
12. Blaškić Subpoena Trial Chamber Decision, *supra* note 1.
13. *See* Rule 54 of the Rules of Procedure and Evidence, as amended January 1995, in Second Annual Report of the Tribunal, 23 August 1995, and in UN Doc. A/50/365:
"[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".
14. Blaškić Subpoena Trial Chamber Decision, *supra* note 1, para. 14 (emphasis added).
15. *See* UN Charter, Art. 29.

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> must also be possessed of a large degree of independence in order to constitute a truly separate institution and in order to be able to fulfil properly its judicial mandate, free from political considerations.[16]

In a criminal trial, it was "imperative" to have "all the relevant evidence" when making decisions, if only to "guarantee the rights of the accused".[17] Croatia conceded that the Security Council could have granted the Tribunal the power to issue binding orders against states in an authorizing statute – it was a delegable power – and simply disputed whether the Council had done so.[18] An absence of express power to issue orders against states in the Statute of the Tribunal would not determine the matter, Judge McDonald found, since the Tribunal's granted powers must be interpreted to make it an effective institution. A teleological interpretation of the powers of UN organs was, after all, relied on by the International Court of Justice in the *Reparations* case,[19] the *Effects of Awards* case,[20] and the *Certain Expenses* case.[21]

An "inherent power to compel the production of documents necessary for a proper execution of its judicial function" was unavoidable, Judge McDonald concluded.[22] Since the crimes before the Tribunal involved military operations, military records "may constitute vital evidence".[23] In national legal systems, the local courts have the power to compel the production of evidence from third parties, including in the criminal justice systems of France, Germany, Pakistan, Spain, Scotland, Canada, and the United States.[24] Similar power was necessary to the International Tribunal.

The decision did not rest on teleology alone. The Tribunal's Statute, approved by the Security Council, also granted the power to gather evidence by compulsory orders, Judge McDonald held. Article 19 entitles a judge to issue "any [...] orders as may be required for the conduct of the trial", and Article 29 requires that states comply with trial chamber orders.[25] The mandatory nature of these measures was hardly surprising in a Tribunal created under Chapter VII authority. The power to bind states is shown, for exam-

16. Blaškić Subpoena Trial Chamber Decision, *supra* note 1, para. 22.
17. *Id.*, paras. 31 and 32.
18. *Id.*, para. 25.
19. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 171.
20. Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954, 1954 ICJ Rep. 47.
21. Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151.
22. Blaškić Subpoena Trial Chamber Decision, *supra* note 1, para. 41.
23. *Id.*, para. 34.
24. *Id.*, paras. 36-39.
25. Statute of the International Tribunal, *supra* note 6, Art. 9(2): "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to [...] (b) the taking of testimony and the production of evidence".

ple, in the Tribunal's right to require states to defer a national prosecution in favour of the international case.[26] Analogously, the Secretary-General noted in his report on the establishment of the Tribunal that the court's orders for the surrender or transfer of defendants "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations".[27]

The Trial Chamber side-stepped the question of penalties for non-compliance, as premature for decision. There was no necessary connotation of penalty or coercion in the use of the word "subpoena" in the court's rules, Judge McDonald held. The term was used in an international sense, not as a transplant from common law systems; the less foreboding word "*assignation*" is used in the authentic French text. There was, therefore, no threat of punishment by the court in upholding such an order.[28] And a "penalty" could amount to no more than a "note of non-compliance and reference of the matter to the Security Council".[29]

3.2. State officials as addressees

Directing subpoenas to particular government officials was also approved by the Trial Chamber. The Tribunal has the power to issue binding orders both to states and to private individuals. It broke no further barrier to combine the two sorts of addressee, permitting orders to named officials of a state. A state may volunteer a liaison to assist in the production of evidence, but there is no shield for particular government officials from the duty of production, Judge McDonald found. "The International Tribunal must have powers that are both practical and effective", Judge McDonald wrote,

> and, as a criminal institution, this dictates that it seek the most direct route to any evidence which may have a bearing on the finding of guilt or innocence of the accused.[30]

Still, the *Blaškić* Trial Chamber made a considerable concession to a state official's conflict of obligations. An obstructive state may try to forbid an official from complying with the Tribunal's order to turn over documents; an official should be permitted to explain to the Tribunal the reasons for his non-compliance, Judge McDonald held, especially since the Tribunal could

26. *Id.*, Art. 9(2) ("The International Tribunal shall have primacy over national courts").
27. Secretary-General's Report, *supra* note 6, para. 126, *cited in* Blaškić Subpoena Trial Chamber Decision, *supra* note 1, para. 50.
28. Blaskic Subpoena Trial Chamber Decision, *supra* note 1, para. 61.
29. *Id.*, para. 60.
30. *Id.*, para. 69.

not protect him against state retaliation. This followed the principle of *ultra posse nemo tenetur* – that an impossible act cannot be required.[31]

3.3. Overbreadth and national security

Judge McDonald also made clear that any subpoena can be challenged for overbreadth or lack of specificity. Trial subpoenas cannot be used in a "fishing expedition", the Trial Chamber wrote, but must describe admissible or potentially admissible evidence. Croatia's objections on grounds of overbreadth were referred to the separate trial chamber conducting the *Blaškić* trial.[32]

Finally, the Trial Chamber ruled that national security claims by a resistant state do not deserve automatic deference.[33] The state's valid interest in the protection of sensitive information must be weighed against the need for probative evidence. Any blanket exemption for national security information could cripple the enforcement of command responsibility, since the records of military operations lie at the center of proof of a commander's conduct. National security claims must be specific, and can be evaluated by the Tribunal using procedures to minimize the dangers of disclosure, such as redaction of documents and closed proceedings. In the last analysis, Judge MacDonald ruled, the responsibility for weighing the concerns of national security and the effective enforcement of the law of war belongs to the Tribunal itself.[34]

4. THE APPEALS CHAMBER DECISION

4.1. The Appeal by Croatia

The Trial Chamber's approval of the compulsory orders styled as subpoenas, directed to Croatia and Defense Minister Šušak, was not ratified by the Appeals Chamber. Although the *Blaškić* trial had already begun on 24 June 1997, enforcement of the subpoenas was stayed by the Appeals Chamber;[35] after the filing of briefs by the parties, amici, and several governments, the

31. *Id.*, paras. 94-96.
32. *Id.*, paras. 97-106. As of the date of this writing, in September 1998, Croatia's challenges to the scope of the Prosecutor's evidentiary requests still have not been resolved.
33. *Id.*, para. 131.
34. *Id.*, paras. 133 and 148-149.
35. Prosecutor v. Blaškić, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum)* and Scheduling Order, Case No. IT-95-14-AR108 *bis*, A. Ch., 29 July 1997.

Appeals Chamber[36] issued a decision on 29 October 1997 headlined by the Tribunal's press office as "unanimously quash[ing]" the subpoenas issued to Croatia and Defense Minister Šušak.[37] Nonetheless, in a bedrock holding that will prove more important over time, the Appeals Chamber held that "binding orders" could be issued to Croatia,[38] and that there was no absolute national security privilege.

4.2. National security

A state's claims that the disclosure of military documents will prejudice national security cannot be accepted at face value, the Appeals Chamber ruled, but must be substantiated by submitting the documents to the scrutiny of a judge of the Trial Chamber for *in camera* review – a holding that many national governments may resist, despite the ethical standards that surround the international judiciary, for there is often a reluctance to disseminate sensitive information even to a highly regarded official of foreign nationality. Equally ambitious was President Antonio Cassese's ruling, upholding the Trial Chamber, that a tribunal judge must have ultimate responsibility for deciding whether the need for the document in trial is more important than claims of national security – whether the document's relevance is "outweighed, in the appraisal of the Judge, by the need to safeguard legitimate national security concerns".[39] In an ordinary domestic prosecution, the contest between a need for trial evidence and national security concerns is usually resolved by the Executive Branch, in deciding whether to go forward with a prosecution. Cases may be dropped if sensitive national defense information cannot be protected at trial; the prosecution may be required to put on its case without using the evidence, and if the evidence is potentially exculpatory and demanded by the defense, the case may be abandoned altogether if the trial court requires the evidentiary production. But here, the decision to go forward with the case, and the weighing of the equities in-

36. Judge Cassese was joined by Judges Haopei Li of China, Ninian Stephen of Australia, and Lal Chand Vohrah of Malaysia. Judge Adolphus G. Karibi-Whyte of Nigeria filed a separate opinion dissenting only as to the procedure for determining national security claims. *See* note 39, *infra*.
37. ICTY Press Release, CC/PIO/253-E, 29 October 1997: "Subpoena Issue: The Appeals Chamber Unanimously Quashes the Subpoenae Issued to Croatia and its Defence Minister. Prosecutor free to submit a new request for 'a binding order to Croatia alone'."
38. Blaškić Subpoena Appeals Chamber Decision, *supra* note 1. Subpoenas, though expressly provided for in Rule 54 of the Tribunal, could only be issued to individuals acting in a private capacity. *Id.*, para. 21.
39. *Id.*, para. 68. Judge Adolphus Karibi-Whyte dissented on this issue on the ground that the decision on claims of national security had to be taken by the full Trial Chamber, not a single Judge. *See* Prosecutor *v.* Blaškić, Separate Opinion of Judge Adolphus Karibi-Whyte, Case No. IT-95-14-AR 108 *bis*, A. Ch. II, 29 October 1997, para. 14.

volved, are undertaken by an international tribunal over the possibly vehement objection of an affected state.

To be sure, there are some ways of minimizing the conflict between national security and the needs of the trial process. Redaction of parts of a document may be permitted before its use at trial, and proceedings can be conducted *in camera* and subject to a protective order. In the process of weighing the equities between national security and trial, in an "exceptional case" of "one or two particular documents" of great "delica[cy] from the national security point of view", a state may be excused from submitting the documents to the Judge based on generic representations of the reasons for this.[40] But the ultimate decision of whether to require the disclosure of documents for the sake of a fair and effective trial process is given, under Judge Cassese's decision, to the International Tribunal.

The dilemma here is considerable. On the one hand, indulgence of a belligerent state's unsubstantiated claim of national security would permit belligerents to, *de facto*, shield their nationals, defying the Security Council's direction for the international prosecution of serious violations of international humanitarian law. On the other hand, even former belligerents, and certainly "third party" countries, may have a legitimate concern about national security. The Appeals Chamber's reluctance to make any distinction between the belligerents involved in a threat to international peace and security, and third party states, makes the potential dilemma all the more pointed. For example, national intelligence methods that are key to supporting effective military intervention in order to stop a genocidal conflict may be compromised by an unheeding order for disclosure.

Interestingly, the Appeals Chamber does humor one distinction among state actors. Despite the general insistence that all states are equally bound to cooperate with the Tribunal in like measure, with no special duties placed on the former belligerents bound by the Dayton Accord,[41] the Appeals Chamber is willing to credit a particular state's track record of cooperation with the Tribunal in assessing a national security claim.[42] Thus, third party

40. Blaškić Subpoena Appeals Chamber Decision, *supra* note 1, para. 68.
41. *Id.*, para. 29. Compare remarks of A. Cassese, in R. Wedgwood (Ed.), After Dayton: Has the Bosnian Peace Process Worked? (forthcoming) ("the obligation to cooperate with our tribunal [...] was restated and even spelled out in the Dayton Agreement" and "extended to the two entities that previously were not directly bound by it, namely the Federation of Bosnia and Herzegovina and the Republika Srpska".). *See also* Blaškić Subpoena Appeals Chamber Decision, *supra* note 1, para. 26, n. 36: "even if one were to doubt" the status of the Federal Republic of Yugoslavia as a member of the United Nations, because of its suspension from participation in the work of the General Assembly under General Assembly Resolution 47/1, 22 September 1992, "its signing of the Dayton/Paris Accord of 1995 would imply its voluntary acceptance of the obligations flowing from Article 29".
42. "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-a-vis the International Tribunal

states supportive of the Tribunal's prosecutorial efforts may be given broader latitude in protecting national security information, though in theory a tactically adept belligerent could trade off other forms of apparent cooperation in order to shield its own information and thereby, shield its defendants.

The ambitious quality of the Appeals Chamber's ruling may be seen in the contrast to the negotiations in Rome in 1998 for a permanent International Criminal Court (ICC). The preparatory texts leading into Rome – the February 1998 'Zutphen' text[43] and the April 1998 Draft Statute[44] – included several options for state cooperation in providing national security information to the ICC. The most demanding option provided that a state could not ultimately refuse an ICC request for information under any circumstance.[45] A second choice excused production if a state party "confirm[ed]" that disclosure of requested information or evidence would "seriously prejudice" its national security interests.[46] A third choice used the more protective standard of "prejudice" to national security interests.[47] And a fourth option – although it is not clear that this was more than a drafting anomaly – arguably allowed state party refusal of document disclosure where the information "relates to" national security.[48]

In the negotiations at Rome, the United States and other countries argued for the strong protection of national security information. In the Rome treaty's final text, the third option – protecting government information or documents where disclosure would cause "prejudice" to national security interests – was adopted as the standard.[49] The Rome treaty steps away from

(whether it is opposed to the fulfillment 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 Decision, *supra* note 1, para. 68.

43. Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, available at internet site, gopher://gopher.igc.apc.org:70/0/orgs/icc/undocs/zutphen/contents.txt (Zutphen text).
44. Draft Statute for the International Criminal Court, in Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998 (Draft Statute).
45. "A State Party shall not deny a request for assistance from the Court." *See* Zutphen Text, *supra* note 43, Art. 82(55), para. 2, option 1; and Draft Statute, *supra* note 44, Art. 90, para. 2, option 1.
46. *See* Zutphen Text, *supra* note 43, Art. 82(55), para. 2, option 2, subpara. (c); and Draft Statute, *supra* note 44, Art. 71, option 1, and Art. 90, para. 2, option 2, subpara. (c).
47. *See* Draft Statute, *supra* note 44, Art. 71.
48. Zutphen text, *supra* note 43, Art. 82(55), para. 2, option 2, subpara. (c) bis; and Draft Statute, *supra* note 44, Art. 90, para. 2, option 2, subpara. (d).
49. *See* Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF. 183/9, 17 July 1998, Art. 72 (Rome Statute of the International Criminal Court).

the *Blaškić* decision, and holds that the ICC cannot order a state to undertake any act of disclosure of national security information. Though the state is required to conduct appropriate discussions with the Court, the prosecutor, and the defense counsel on how their needs for the information might be reconciled with the state's interest, the application of the national security exception is left ultimately to the good faith of the requested state, with no direct way for the Court to gainsay or second-guess the state's assessment. The ICC can refer a matter to the Rome treaty's Assembly of States Parties or to the Security Council (when a case was referred by the Council) if the ICC "concludes that [...] the requested State is not acting in accordance with its obligations under the Statute [...] specifying the reasons for its conclusion".[50] But the ICC cannot demand to see the national security documents on which to ground an independent assessment of prejudice to national security, nor can the ICC presume to weigh in the balance the relative equities of protecting national security information versus the importance of pursuing a prosecution. If the state's refusal to turn over national security information is made in good faith, that is the end of the matter, and potentially, the end of a case.

The cause of the varied treatment of national security information could be ascribed to the different roles of the two tribunals. The International Criminal Tribunal for the former Yugoslavia has "primacy" over national courts for the trial of war crimes occurring in the former Yugoslavia – national courts must defer to the Yugoslav tribunal's decisions to exercise jurisdiction.[51] The Rome negotiations, in contrast, emphasized complementarity – it is the ICC that must defer to national prosecutions of war crimes, unless the national state is "unwilling or unable genuinely" to carry out the investigation or prosecution.[52] Hence, it could be argued, the ICC will not have a need so urgent for the use of national security information. But the national security privilege can truncate an international prosecution even where the national state has shown itself unwilling or unable to act effectively against the offender. The Rome treaty's national security privilege is potent even where the ICC has met the test of complementarity and is entitled to go forward. Thus, the likelier explanation for the difference is simply

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A textual argument could be made, based on Art. 93(4), that a more protective standard governs requests for direct state disclosure of information as opposed to attempts by a state to intervene and block disclosure of national security information held by third parties. Art. 93(4) provides that "a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which *relates to* its national security". (emphasis added). But contemporaneous accounts by delegates at Rome suggest that the standard of "prejudice" was meant to govern both situations.

50. *Id.*, Art. 72(7.a.ii).
51. *See* Statute of the International Tribunal, Art. 9(2), *supra* note 6.
52. *See* Rome Statute of the International Criminal Court, *supra* note 49, Art. 17.

the negotiating posture of state parties at Rome,[53] and the hope of the Rome conference draftsmen for wide adherence to the ICC. Official documents may be as urgently needed in the ICC as in the Yugoslav tribunal.

Hence, Judge Cassese's ruling in *Blaškić* is all the more interesting as a competitive challenge to the proposed permanent court – holding that in the *ad hoc* tribunal for the former Yugoslavia, national security claims must be reviewed by an international judge who is independently entitled to weigh the trade-off between probative importance and confidentiality. Over time, the judges of the ICC, and the states parties, may be influenced by the *ad hoc* tribunal's practice in seeking documents from official sources. Judge Cassese's suggestion of a limited national security privilege, even as applied to a former belligerent in a bitter ethnic conflict, is a controversial step. If adroitly implemented over time, it will provide an alternative model for international criminal proceedings.

4.3. Enforcement powers

That said, there are parts of the Appeals Chamber ruling that are not so adventuresome, and even call into question the efficacy of the *ad hoc* tribunal as a judicial fact-finding body. First, the Appeals Chamber went out of its way to hold that the Tribunal lacks any direct enforcement powers against states, to obtain the production of evidence, even where the pertinent information or document does not relate to national security. If a state declines to produce evidence pursuant to a binding order, the Tribunal's only recourse is to report the matter to the Security Council.[54] The Tribunal, in the Appeals Chamber's view, cannot even recommend a course of action to the Council.[55] There is little explanation of this result, against a background in which the European Court of Justice is now permitted to sanction states in civil cases.[56] Judge Cassese notes, simply, that

> [h]ad the drafters of the [Tribunal's] Statute intended to vest the International Tribunal with such a power they would have expressly provided for it. In the case

53. *See, e.g.*, Testimony of David J. Scheffer, Ambassador-at-Large for War Crimes Issues, before the US Senate Foreign Relations Committee, 23 July 1998: "Among the objectives we achieved in the statute of the court were the following: [...] Sovereign protection of national security information that might be sought by the court".
54. Blaškić Subpoena Appeals Chamber Decision, *supra* note 1, para 33.
55. *Id.*, para. 36.
56. *See* 1957 Treaty Establishing the European Community as amended by the 1992 Treaty on European Union, reproduced *in* 31 ILM 247 (1992), Art. 171; *cf.* Statute of the European Court of Justice, 298 UNTS 147-156 (1958), Art. 24; *but see* R. Plender (Ed.), European Courts: Practice and Precedents, paras. 11-63 (1997).

> of an international judicial body, this is not a power that can be regarded as inherent in its functions.[57]

The time pressure on the Security Council in creating the Tribunal in 1993 may not warrant such a spare account of the drafters' intention. One can instead read the result as the Appeals Chamber's estimate of what structure would disturb some member countries.[58] The danger, of course, is that this dependency of the Tribunal potentially involves the Security Council in the intimate decisions of the conduct of a trial. Although the Security Council provides the only recourse, under the Tribunal's rules, in the case of a country's failure to arrest or surrender an indicted defendant,[59] the entry of politics into enforcement may be less troubling at the pretrial stage than to have politics shape the availability of inculpatory and exculpatory evidence in the ongoing trial of an individual. The limits of the autonomy of the Tribunal as an independent judicial institution are sharply drawn by this outcome.[60]

One may also wonder why the Appeals Chamber chose to rule out court-imposed penalties at this first stage of the proceeding, before it could be known whether Croatia would comply with any significant part of the Tribunal's orders of production. Judge McDonald held it was premature to decide possible penalties for non-compliance. Judge Cassese replied that the suggested lack of "ripeness" of the issue was an idea peculiar to American

57. Blaškić Subpoena Appeals Chamber Decision, *supra* note 1, para. 25.

58. To be sure, in the Rome Statute, non-compliance with requests for state cooperation is also without remedy except for a referral of the non-compliance to the Assembly of States Parties or, where a matter originated with the Security Council, to the Security Council itself. *See* Rome Statute of the International Criminal Court, *supra* note 49, Art. 87(7). Yet the example of the *Blaškić* decision may have influenced the Rome negotiators.
The Appeals Chamber's doubt that the Security Council might ever delegate enforcement powers to a subordinate body is challenged by Security Council Resolution 1022 of 22 November 1995, UN Doc. S/RES/1022 (1995), suspending economic sanctions against the Federal Republic of Yugoslavia and Republika Srpska (the Bosnian Serb entity), but allowing sanctions reinstatement by the High Representative or the military commander of IFOR if either official "informs the Council via the Secretary-General that [the parties] are failing significantly to meet their obligations under the Peace Agreement." The Council could block the reimposed sanctions only with the concurrence of the Council's five permanent members.

59. *See* Rules 59(B) and 61(E) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc. IT/32, Rev. 13 (1998).

60. *Cf.* Prosecutor *v.* Blaškić, Amicus Curiae Brief submitted by the Netherlands, Case No. IT-95-14-AR108 *bis*, 12 September 1997, para. 17: "[t]he effectiveness of the Tribunal might be impaired if it is always dependent on decisions to be taken by the Security Council in cases where states continue to refuse to cooperate. For this reason the Netherlands believes there is some basis for arguing that the implied powers of the ICTY make it desirable for there to be a provision comparable to Rule 77 [a court-made rule on contempt] which would be applicable to states so that fines or other penalties may be imposed whenever the Tribunal establishes that a state has not fulfilled its obligations. In order to clarify this important issue, the Tribunal might ask the Security Council to give a ruling on the question of whether in carrying out its mandate, the Tribunal is entitled to impose fines or other sanctions on a state when it has established that the state has failed to execute an order or subpoena".

jurisprudence, though judicial prudence is surely not so culturally specific.[61] Under a "tariff" theory of jurisprudence, a disobedient party may wish to know the "cost" of his defiance in advance, but a court wishing to establish its authority does not owe a duty to the recalcitrant to announce in advance the costs and benefits of resistance.

4.4. Act of State Doctrine

The Appeals Chamber's second restriction was to allow states to decide who can testify as a document custodian.[62] A named official cannot be called to appear in court, the Chamber held, because states traditionally have had the right under customary international law to decide how they will go about fulfilling their international obligations, and individual officials are insulated from liability for acts undertaken on behalf of the state. But, as the Appeals Chamber remarks, the major exception to this immunizing rule of "acts of state" has been the law of war and international humanitarian law.[63] It is a fundamental tenet of the modern law of war that state officials cannot take refuge from individual responsibility for clearly illegal acts by invoking a claim of superior orders or state authority. It is surprising, then, that the appeals judges should resurrect a doctrine of "acts of state" when it weakens the very procedures seeking to give teeth to the law of war.

The Tribunal's misstep may result from a misapprehension of the crucial function of a custodian of documents as an evidentiary witness at trial. Documents cannot be assumed to be authentic, accurate, or complete. A custodian of documents is needed to authenticate the documents as genuine, to describe the routine by which they were kept, to describe how they were searched for and retrieved, and to say whether the run of documents is known to be complete. Even in ordinary conditions of peacetime, all custodians are not created equal – the evidentiary weight of the documents may depend on the persuasiveness of the custodian. In the fog of war, with fluid conditions on a military front, the testimony of a custodian of documents is yet more critical – to establish, for instance, whether a set of incoming reports from a field commander is preserved in whole or only in part. Commissioning the former belligerent states in the Yugoslav conflict to pick and choose which officials will be available to testify can undercut the strength of the prosecution's evidence, and imperil a defendant's search for exculpatory evidence.

61. Blaškić Subpoena Appeals Chamber Decision, *supra* note 1, para. 22.
62. *Id.*, paras. 38, 43, and 45.
63. *Id.*, para. 41.

4.5. Eyewitnesses

Also troubling is the Appeals Chamber's intimation that the Tribunal may not call *factual eyewitnesses* who happen to be government officials. Although Croatia's challenge was to subpoenas *duces tecum*, and the Trial Chamber had no occasion to discuss subpoenas *ad testificandum*, the Appeals Chamber went out of its way to address whether testimonial eyewitnesses can be subjected to a subpoena or binding order. An individual acting in a private capacity could be subpoenaed before the Tribunal, the Appeals Chamber said.[64] But a state official could not be summoned, either by subpoena or binding order.[65] And on the crucial question of when a witness has acted in an official capacity, the Appeals Chamber gave the following enigmatic explanation:

> [i]t should be noted that the class of "individuals acting in their private capacity" also includes State agents who, for instance, witnessed a crime *before* they took office, or found or were given evidentiary material of relevance for the prosecution or the defence *prior* to the initiation of their official duties. In this case, the individuals can legitimately be the addressees of a subpoena. Their role in the prosecutorial or judicial proceedings before the International Tribunal is unrelated to their current functions as State officials.[66]

But if the official witnessed an atrocity at first hand *while serving in office*, the result is more equivocal. The Appeals Chamber posed

> the example of a colonel who, in the course of a routine transfer to another combat zone, overhears a general issuing orders aimed at the shelling of civilians or civilian objects. In this case the individual must be deemed to have acted in a private capacity and may therefore be compelled by the International Tribunal to testify as to the events witnessed. By contrast, if the State official, when he witnessed the crime, was actually exercising his functions, i.e., the monitoring of the events was part of his official functions, then he was acting as a State organ and cannot be subpoenaed, as is illustrated by the case where the imaginary colonel overheard the order while on an official inspection mission concerning the behaviour of the belligerents on the battlefield.[67]

It is not clear, from this loosely drafted hypothetical, whether the Appeals Chamber is resting on a distinction between "subpoenas" and "binding orders", but it appears from the heading of the section – *Whether the International Tribunal May Issue Binding Orders to Individuals Acting in Their Private Capacity* – that the colonel tasked to monitor battlefield operations

64. *Id.*, para. 46.
65. *Id.*, paras. 38 and 43.
66. *Id.*, para. 49 (emphasis added).
67. *Id.*, para. 50.

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is to be insulated from any form of compulsory process. This is an extraordinary *bouleversement*, potentially depriving the Tribunal of a critical source of testimony. A constructive reading of the opinion is to dismiss this as unnecessary dictum and superfluous illustration.

4.6. The initial addressee

One may speculate that perhaps the Appeals Chamber was primarily concerned with the *initial addressee* of an order to testify – that a binding order still could be directed to the state in question, requiring the eyewitness testimony of the particular named official. After all, the vital nature of official eyewitness testimony is self-evident. This reading of Judge Cassese's opinion is warranted by his ultimate conclusion that no grave harm should be done to the efficacy of proof.

> In the case of State officials there is no compelling reason warranting a departure from general rules [of international law]. To make use of the powers flowing from Article 29 of the Statute, it is sufficient for the International Tribunal to direct its orders and requests to States.[68]

By contrast, Judge Cassese observes, Croatia's claim of an unbounded national security privilege would shield "documents that might prove of decisive importance to the conduct of trials" and would "be tantamount to undermining the very essence of the International Tribunal's functions".[69]

Nonetheless, the impracticality of the Tribunal's etiquette of address remains. The Appeals Chamber notes later that, at least in contacting private individuals, it "might jeopardise investigations" to go through the governments of former belligerent states or entities, "some authorities of which might be implicated in the commission of these crimes".[70] This would seem equally true in the case of official eyewitnesses who formerly served as officials or employees of the belligerent governments.

Despite the general immunity of international organizations from judicial process, the Tribunal does not extend the umbrella of "public capacity" to members of international peacekeeping forces. If a member of UNPROFOR, IFOR, or SFOR

> 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

68. *Id.*, para. 64.
69. *Id.*, para. 84.
70. *Id.*, para. 53.

> 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.[71]

It is less than clear why the national versus international structure of a military organization should change the availability of an individual eyewitness at trial, unless the Appeals Chamber believes that members of a troop-contributing country have a greater duty of obedience to Security Council decisions than do the soldiers of belligerents.

One promising caveat noted by the Appeals Chamber is that where a state has been required to produce documents for trial and the pertinent official resists doing so, if the state is unable to coerce his compliance, then "it is sound practice to 'downgrade', as it were, the state official to the rank of an individual acting in a private capacity", and subject him to a subpoena and proceedings for contempt.[72]

4.7. Limits to subpoena power

But the Appeals Chamber also limits the *scope* of subpoena power in a fashion that could make prosecutions more difficult. Citing Croatia's stylized complaint against "highly controversial U.S.-style discovery process", the Appeals Chamber requires that any requests must identify "specific documents", rather than "broad categories", must not be "unduly onerous" or "overly taxing" and certainly could not number in the "hundreds of documents".[73] In trying to reconstruct battlefield supervision, these may not be realistic limits.

As a matter of interpretive method, one may question the acrobatics of the "clear statement" rule – why the Appeals Chamber is willing to assume that the drafters of the Tribunal's statute intended to preserve the procedural immunity of state officials from subpoena, while newly compelling the disclosure of national security documents. The Appeals Chamber heralds the "innovative and sweeping obligation laid down in Article 29" with "its undeniable effects on state sovereignty and national security".[74] "Whenever the Statute intends to place a limitation on the International Tribunal's powers, it does so explicitly", the Appeals Chamber offers, adding that

> it would be unwarranted to read into Article 29 limitations or restrictions on the powers of the International Tribunal not expressly envisaged either in Article 29 or in other provisions of the Statute.[75]

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71. *Id.*, para. 50.
72. *Id.*, para. 51.
73. *Id.*, para. 32.
74. *Id.*, para. 64.
75. *Id.*, para. 63.

One wonders why this interpretive principle applies to the national security exception, but not to the subpoena of state officials or the imposition of coercive measures on former belligerents that decline to produce necessary documents.

5. CONCLUSION

The deference toward state sovereignty that is shown in various aspects of the *Blaškić* opinion may strike some observers as misplaced. After all, *Blaškić* concerns the military operations of one of the belligerents in the Bosnian conflict, rather than a third party state, and the Security Council's engagement in attempting to end the conflict under its Chapter VII powers might appear to suggest that ordinary ideas of sovereignty and domestic jurisdiction should be in suspension. But the limits of power asserted by the *ad hoc* tribunal in the *Blaškić* case may simply serve to prove another disputed proposition. It is crucial, in the daily operation of an international criminal tribunal, to be able to enlist the political, diplomatic, and economic support of major powers. Otherwise, the necessary cooperation by governments that have been involved in the conflict will not be forthcoming, including the mustering of proof. Though international tribunals may seek to apply universal standards, the ability to proceed effectively will also depend on supporting alliances of national states, lending their economic, diplomatic, and even military influence to help the court obtain the needed proof. Justice on the ground will be shaped by politics, history, and self-interest, as well as by commitment to principle.