

Trial Chamber II hands down its Decision on the subpoena issue: the subpoena duces tecum issued to Croatia and its Defence Minister in January 1997 must be complied with by 18 August 1997.

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TRIAL CHAMBER II HANDS DOWN ITS DECISION ON THE SUBPOENA ISSUE : THE SUBPOENA DUCES TECUM ISSUED TO CROATIA AND ITS DEFENCE MINISTER IN JANUARY 1997 MUST BE COMPLIED WITH BY 18 AUGUST 1997

The Tribunal has both inherent and express powers to issue a *subpoena duces tecum*

States and their officials are under obligation to comply with a *subpoena duces tecum*

On Friday 18 July 1997, Trial Chamber II, composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Elizabeth Odio Benito and Judge Saad Saood Jan, handed down its **Decision on the Objection of the Republic of Croatia to the Issuance of a *Subpoena Duces Tecum***.

These *subpoenae duces tecum* directed Croatia and its Defence Minister to turn over to the Office of the Prosecutor 13 specified categories of documents believed to be of evidentiary value in relation to the Blaskic case.(see PR 156)

The *subpoenae duces tecum* were suspended on 20 February by Judge Kirk McDonald who later convened the Trial Chamber for a hearing (held on 16 and 17 April 1997) to discuss "important questions of principle" with the Parties :

1. the power of a Judge or a Trial Chamber of the International Tribunal to issue a *subpoena duces tecum* to a sovereign State;
2. the power of a Judge or a Trial Chamber to make a request or issue a *subpoena duces tecum* to a high government official of a State;
3. the appropriate remedies to be taken if there is non-compliance with a *subpoena duces tecum* or request issued by a Judge or a Trial Chamber.

In its **Decision**, the Trial Chamber addresses two issues:

- a. the basis of the authority and power of the International Tribunal to issue compulsory orders to States as well as individuals, including high government officials, and ;**
- b. the duty to comply with such orders.**

The question of the **appropriate remedies** to be taken in case of non-compliance is not discussed as the Trial Chamber deemed that "...that issue is not yet ripe for consideration."

I. THE BASIS OF THE AUTHORITY AND POWER OF THE TRIBUNAL TO ISSUE COMPULSORY ORDERS TO STATES AND INDIVIDUALS

Issuance of a *subpoena duces tecum* to States

After reviewing the mechanisms which lead to the creation of the International Tribunal, the Trial Chamber felt that: "*The extent of the powers that the Security Council can, intended to and, in fact, did confer upon this special subsidiary organ [the Tribunal] is relevant...*" to the present Decision.

While recognizing that the functions entrusted to a subsidiary organ cannot exceed the competence

and functions of the Organisation itself, the Trial Chamber held that: "As (...) a subsidiary organ, the International Tribunal is a creature of its parent body, but it must be possessed of a large degree of independence in order to constitute a truly separate institution and, in order to be able to properly fulfil its judicial mandate, free from political considerations."

Citing the arguments of the Prosecution and the Defence, decisions of other international tribunals as well as the Appeals Chamber in the Tadic jurisdiction decision, the Trial Chamber held that it had the inherent power to issue a subpoena duces tecum. It concluded that "the power of the International Tribunal to issue a subpoena duces tecum to a State may (...) be implied if it is necessary in order to fulfil its fundamental purposes and to achieve its effective functioning".

Furthermore, the Trial Chamber found that it had express power to issue a subpoena duces tecum. It examined Croatia's contention that the competence of the International Tribunal, in Article 1 of the Statute, does not extend to States and, therefore to issue a subpoena duces tecum to a State would break with accepted international law norms and constitute an illegitimate extension of the Tribunal's mandate. In order to address this question, the Trial Chamber examined the relevant provisions of the Tribunal (Articles 15, 18, 19 and 29 of the Statute and Rule 54 of the Rules of Procedure and Evidence), and decided that : "By addressing an order to a State,

the International Tribunal is not seeking to extend its competence beyond that laid down in the Statute. It is not attributing criminal responsibility to the State, but merely exercising its necessary incidental judicial functions in the fulfilment of its purpose."

With regard to Croatia's argument that the power to issue subpoenas is a feature limited to common law legal systems, the Trial Chamber held that : "Regardless of the specific differences in the consequences of non-compliance with subpoenas in common law systems, the Rules [of Evidence and Procedure] are designed to capture the essence of the term - that is, the essential power to compel the attendance of witnesses and the production of evidence. It is this essence that the Trial Chamber has found characterising several domestic legal systems from both the common and civil law traditions".

Issuance of a subpoena duces tecum to Government officials

Croatia contended that government officials are not the proper subjects of orders from the International Tribunal and all communications must go through Croatia's office for co-operation with the Tribunal. The Trial Chamber found to the contrary and held that : "Although it is a general principle of international law that it is for the State to determine how it will fulfil its international obligations, a State cannot impose conditions of form on the fulfilment of these obligations by enacting national legislation which results in derogation thereof. This principle is of the utmost importance where the obligation imposed on States arises by virtue of a Chapter VII resolution."

II. DUTY TO COMPLY WITH ORDERS OF THE TRIBUNAL

Having found that the Tribunal has the power to issue subpoenas to States and Government officials, the Tribunal then examined the closely related question of the scope of the duty, if any, of States and individuals to comply with such orders.

A State's obligation to comply

The Trial Chamber examined Croatia's argument that the term "co-operate" in the Statute means that the relationship between States and the Tribunal with regard to any requested action must be mutually agreed upon by both and as such it is only required to recognise and implement the Tribunal's requests for assistance and to ensure that orders addressed to individuals within its jurisdiction are executed.

In deciding on this issue, the Trial Chamber examined the Secretary-General's report, the United Nations Security Council resolutions 827 and 1031 and concluded that : "...the intent of the Security Council was for States not only to give effect to orders of the International Tribunal but also to be bound to comply fully with such orders.(...) As there is a duty to comply with requests for assistance, so there is a duty to comply with

International Tribunal orders, as they have the same legally binding effect. Given that a subpoena

duces tecum is an order, just as any other issued by the Trial Chamber, States are bound to comply fully with these as well."

On the issue of sovereign immunity, the Trial Chamber also found that by voluntarily exercising their sovereignty in joining the United Nations, Croatia and Bosnia and Herzegovina obligated themselves, "...to comply with the International Tribunal as a Chapter VII enforcement measure..." .

An official's duty to comply

The Trial Chamber found that a State official has a corresponding duty to comply with a *subpoena duces tecum* addressed to him in his official capacity. However, the Trial Chamber distinguished between a failure to comply based on the official's unwillingness to comply (in which case it is incumbent on the State to sanction him accordingly) and an official's inability to comply pursuant to an order from the State not to comply.

The latter situation was deemed to be the more complex one and the Trial Chamber held that while it is incumbent upon an individual acting in an official capacity to comply with orders of the Tribunal - including *subpoena duces tecum* - such individual's inability to comply pursuant to a State instruction may be taken into consideration by a Trial Chamber. Nevertheless, the official is still required to appear before the International Tribunal if so ordered.

The Chamber concluded that although an individual State official may be specifically named in an order in his official capacity "... the ultimate responsibility is shared with the State, which is also required to comply or compel compliance."

The next matter addressed by the Trial Chamber concerns the question of national security which was raised by Croatia. Croatia argued that the protection of its national security constitutes a privilege which relieves it of any obligation to comply with the *subpoena duces tecum*.

The Trial Chamber held that a State may not be exonerated from producing evidence requested by the International Tribunal on a blanket assertion that its security is at stake. According to the Chamber, the onus lies on the State to prove its objection. It must be "... specific in its refusal to comply with an order of the International Tribunal..." and the Trial Chamber stated that it is the refusal itself that the International Tribunal is called upon to assess.

In camera and *ex parte* hearings may be held for the purpose of determining the validity of the assertions of the particular State.

In assessing the merits of an objection from a State based on national security, the Trial Chamber held that, the Tribunal must consider two fundamental interest :

- the interest in upholding the national security interest of a State, and the interest in gaining access to the evidence critical to the prosecution or defence in cases relating to serious violations of international humanitarian law.

III. THE DISPOSITION

For the foregoing reasons, the Trial Chamber decided to :

1. **Reinstate** the *Subpoena Duces Tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and Croatian Defence Minister Mr. Gojko [usak and;
2. **Order** the Republic of Croatia and Mr. [usak to comply with the *Subpoena Duces Tecum* within 30 days of the Decision or to appear before the International Tribunal to explain the reasons for non-compliance.

Please find appended the summing up of the Decision by the Trial Chamber.

The Decision may be obtained from the Press Office upon request and is available on the ICTY's

III. SUMMING UP

In conclusion, a Judge or Trial Chamber of the International Tribunal has the authority and power to issue orders to States and individuals, including high government officials, for the production of documents required for the preparation or conduct of a trial. Moreover, these orders may properly be termed *subpoenae duces tecum* and, as such, there is a clear obligation on both States and their officials to comply fully with their terms. Any objection to an order for the production of documents, including a claim that a State's national security interests could be threatened by disclosure, does not automatically excuse the State or individual from compliance. Rather, such claims must first be assessed by the relevant Trial Chamber.

Regarding the role of the International Court of Justice, Judge Mohamed Shahabuddeen has recognised that

the Court should always take care to satisfy itself of its authority to act. It is equally appropriate, however, for the Court to be mindful of the risk of wishing to be so very certain of its powers as to be astute to discover overly refined reasons for not exercising those which it may fairly be thought to have.

Mindful of this warning, the Trial Chamber has considered the arguments raised by the parties and the *amicus curiae* in a manner intended to give effect to the nature and purposes of the International Tribunal.

In rendering this Decision, the Trial Chamber has exercised its power to interpret the Statute and Rules in accordance with the proper meaning of their terms and considering their object and purpose. Due to the unique nature of the International Tribunal, there is no international analogue to provide direct precedent. Therefore, resort to recognized procedures of other international courts and tribunals and national courts in both common and civil law systems was necessary to ascertain general principles of law which comport with the nature and purposes of the International Tribunal.

This process necessarily raises concerns regarding judicial interpretive powers, some of which relate to the perceived predominance of the State in international law. Despite this State-centric view, the International Tribunal is a judicial institution which, by its very nature, advances the development of international criminal procedure. Moreover, the International Tribunal should not be frustrated by a restrictive approach which is inapplicable to an institution established as an enforcement measure by the Security Council pursuant to Chapter VII of the United Nations Charter. Therefore, when interpreting the Statute and Rules, it should adopt an approach which is appropriate for such a pioneering institution.

The International Tribunal was established to aid in the restoration and maintenance of peace in the former Yugoslavia. As a criminal court, its primary obligation is to provide a fair and expeditious trial and to guarantee the rights of the accused. This adjudicatory process strengthens the rule of law, a fundamental principle shared by all members of the international community. If effective, this may contribute to reconciliation, which is a precondition for lasting peace. Thus, the Trial Chamber cannot endorse the contention that States and government officials have no obligation to comply with orders of the International Tribunal.