

VIEW FROM THE HAGUE

COOPERATION IS A BILATERAL PROCESS

When the topic of cooperation with the International Criminal Tribunal for the former Yugoslavia comes up, it is not uncommon for government officials to talk vaguely about how cooperation with the Tribunal must be "two-way" rather than "simply a transfer of the accused and requested documents." Whereas they are entirely correct in their belief that cooperation can be a "two-way" process, there seems to be a fundamental misunderstanding regarding the difference between cooperation and fulfillment of obligations.

There are many areas in which the Tribunal and the Serbian government can and do cooperate to mutual benefit. One such is sharing of evidence. For example, the Office of the Prosecutor assisted Serbian prosecutors investigating war crimes in relation to the Ovčara case, in which the Serbian Special Prosecutor for War Crimes recently issued an indictment. The Tribunal Prosecution also assisted Serbian prosecutors investigating other crimes under domestic jurisdiction, in particular the alleged financial misdeeds of Slobodan Milosevic and other members of his regime. In fact, the Prosecutor's office offered to assist Serbia and Montenegro in returning some 56 million USD frozen in Cyprus bank accounts. For its part, Serbia and Montenegro is also free to provide the Office of the Prosecutor with evidence of crimes under the Tribunal's jurisdiction.

The Tribunal and the Serbian government can also cooperate on legal and technical issues relating to the Serbian judiciary's efforts to try local war crimes domestically. The Tribunal has accumulated a great deal of knowledge and experience on various issues such as witness protection and court room management, including complex legal concepts such as command responsibility, for example. The Tribunal considers sharing this knowledge and experience with Serbian judicial officials to be central to its mandate.

However, there are certain areas in which such two-way cooperation is not possible by the virtue of the issues themselves. Article 29 of the ICTY Statute obliges all UN member States including Serbia and Montenegro to cooperate with the Tribunal. This cooperation includes the arrest and transfer to Tribunal custody all ICTY accused who are located on its territory, without exception and without delay.

Serbia and Montenegro is similarly obligated to respond to the Office of the Prosecutor's requests for assistance for documentation, access to crime scenes and access to witnesses. Domestic legal impediments, such as a military official's duty under Serbian law to protect state, military and official secrets, cannot be used as an excuse for failure to respond positively. All UN member states, and not just Serbia and Montenegro, are required to adjust their domestic legislation if necessary in order to permit fulfilling Tribunal requests and many have done so. Serbia and Montenegro has also established procedures by which it can fulfill the Prosecution's requests for documents that are classified as state, military or official secrets, and to release Tribunal witnesses from the obligation to protect such secrets.

When the Tribunal's Office of the Prosecutor requests access to documents or witnesses and a State believes that such access may compromise national security, that State is entitled to apply to the court for protective measures. Such a situation occurred recently in the Milošević case when the Trial Chamber granted the United States government's application for protective measures relating to the testimony of former NATO Supreme Commander Europe Wesley Clark. In the past, Serbia and Montenegro has also applied for and been granted protective measures in relation to certain requests for documents related to the Milošević case. In other cases before the

Tribunal, various States often make such requests confidentially and *ex parte*, that is, without informing either the accused or the prosecution and, in each case, the Trial Chamber will rule accordingly. The rulings can be appealed and the Appeals Chambers' decision on the matter will be final.

But let it be clear, a state's entitlement to apply to the court for protective measures is not a question of cooperation. It is a legal process which is designed to balance two very important interests: the obligation of states to provide important evidence to the court and a state's need to protect information or sources which may compromise national security. The court considers each request on its merits, and is not guided by political considerations. States cannot barter or horse-trade away their obligations due to short-term political goals.

The obligation to respect the Tribunal's requests and orders is an obligation that applies to *all* member states of the United Nations, and not solely those states over which the Tribunal has direct jurisdiction. The ICTY expects the same of Serbia and Montenegro as it does of other States.

In many ways, the Tribunal's requests and orders are no different than those of any local court or prosecutor. For example, in the national system, if a court orders the police to arrest an accused, the police must respect that order. Under local laws, refusing to comply with such an order would be considered aiding a fugitive. It is the same in international law. That is why the recent statements of the Serbian Minister of Internal Affairs in which he repeatedly stated that he will not arrest Tribunal indictee Sreten Lukić are in direct contravention of international law, the international obligations of Serbia and Montenegro, and, perhaps, pertinently - in direct contravention of domestic legislation.

Outreach Programme

outreach@icty.org