

The Subpoena Hearing

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In the two-day public hearing (April 16-17) on the power of the Tribunal to issue a subpoena duces tecum to sovereign states and high government officials, the former case was energetically argued by the representatives of the Republic of Croatia.

According to them, such a subpoena (which demands, under threat of punishment, the turnover of evidentiary material and the appearance as witnesses before the court of government officials) "has no legal grounds," and besides it is "unnecessary" and "damaging".

Croatia draws the conclusion about the non-existence of "legal grounds" from the Security Council document which established the Tribunal, above all from Resolution 827 (May 25, 1993) and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

In Croatia's view, "if the Security Council had had in mind, while drafting the Statute of the Tribunal, the possibility of issuing subpoenas duces tecum to states or government officials, it would have stipulated the sanctions to be taken in the case of non-execution of such an order." Croatia's interpretation of the powers outlined in the Security Council documents is emphatically restrictive: everything that is not explicitly permitted is forbidden!

Further, such orders are "unnecessary", because Croatia and all the other countries have a clear obligation to cooperate with the Tribunal and to obey its orders, which Croatia "does in full measure"-as Croatian representatives asserted, unblushing, before the Tribunal. Finally, orders under threat of a penalty are, according to Croatia "damaging" because they "infringe sovereignty", "increase resistance to cooperation" and create a "dangerous precedent" which will have a negative impact on the development of international law, and on the chances of the creation of a permanent international criminal court.

Replying to this last argument of Croatia, Chief Prosecutor Louise Arbour, for whom this was a debut in the courtroom, remarked that the international legal order would be much more seriously threatened if it were to be demonstrated that this ad hoc Tribunal was not only incapable of accomplishing its mission, but that it was also in danger of coming to incorrect conclusions about facts because of the whims of certain states who were refusing access to evidentiary material.

In order to protect it from this danger, the Security Council has, according to the Prosecution, "vested the ICTY with the full plenitude of powers necessary for the effective performance of its functions as an ad hoc international criminal jurisdiction."

According to the Prosecutor, "it is part of the inherent powers of judicial organs to require the production of evidence . . . since such powers are necessary and essential for the effective administration of justice." Under the Statute (articles 29.2b and 19.2) and Rules of Procedure (Rule 54) the ICTY "has express powers to issue subpoenae duces tecum."

Moreover, according to the Prosecution, "there is a corresponding obligation on States to comply with such orders," based on the fact that the Tribunal was established pursuant to Chapter VII of the UN Charter, and on Security Council resolution 927 establishing the Tribunal in which "the obligation of states to cooperate with ICTY is expressed . . . in the strongest and broadest possible terms."

In addition to those general obligations of all states, "there exists a special obligation on the part of states comprising the former Yugoslavia to comply with the requests or orders of a Trial Chamber," based particularly on the Dayton peace agreement.

Regarding the appropriate remedies to be taken in the case of non-compliance with a subpoena, the Prosecution asserts, based on its "inherent power to control its own proceedings" as well as on Rule 77, that "the ICTY can make a finding of contempt and impose necessary sanctions in order to enforce its own orders and ensure the effective administration of justice."

As far as states are concerned, the Prosecution is forced to admit that it has no sanctions over them other than "to record a state's failure to comply," and "to notify the Security Council that such state is in non-compliance with its obligation under the Statute."

A state's immunity from punishment, however, cannot be extended to its officials who have failed to comply with orders from the Tribunal. In the latter case, the Prosecution holds, "Rule 77 is applicable." This

rule (Contempt of the Tribunal) relates to "a witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber," but Chief Prosecutor Arbour considers that it would be "absurd for it not to apply also to witnesses who refuse to appear before the Tribunal."

That, according to her, "would mean that witnesses who have turned up and who have refused to answer a question . . . are taking a greater risk than those who have refused orders to appear before the Tribunal." Thinking aloud, presiding Judge Gabrielle Kirk McDonald wondered if officials who refused to hand over material evidence and to appear before the Tribunal could be accused of "concealing, or helping to conceal, evidence of war crimes."

She also wondered if it was fair to punish an official whose government had forbidden him to comply with the orders by furnishing the documents requested, to which Arbour replied: "If he appeared and said that his government would not let him . . . the Tribunal probably would not penalise him, because it would not be contempt of court."

The other ex-Yugoslav participants in the hearing sided with these two basic positions. The representative of the government of Bosnia and Herzegovina completely supported the positions and arguments of the prosecution, while the Zagreb lawyer representing Ante Jelavic, the defence minister of the Bosnia-Croat Federation, sided completely with the position of (her own) Croatian government.

The defence of General Tihomir Blaskic (in connection with whose case the controversial subpoenas had been issued to the Croatian and Bosnian governments and their defence ministers) expressed no opinion on the substance of the debate. It contented itself with stressing that whatever the decision of the Trial Chamber on the power of the Tribunal, the same power would have to hold for the defence and for the prosecution.

A dozen leading European and American experts in international law, acting in the capacity of "amicus curiae" made their own particular contribution to the debate by submitting briefs on the theme of the powers of the Tribunal. In the main, they all agreed that the Security Council documents about the powers of the Tribunal must be interpreted in terms of the efficacy principle. "International law rests on a principle of efficacy," said Professor Ruth Wedgwood of Yale Law School.

According to her, and many other experts, "it would have been meaningless to create an international tribunal, without the power to command the production of necessary evidence," which is "the sine qua non of making the law effective." All the experts also referred to the existence of a general obligation of all states fully to cooperate in the investigation and prosecution of war crimes, and that Tribunal orders are legally binding, regardless of the form in which they are given.

Some of the experts, however, expressed doubt not so much about the legal basis, as about the desirability and practicability of a subpoena, given that the Tribunal lacks an essential element of such an order—the capability to penalise a state. Divergent opinions were also expressed about the possibility of calling or, in particularly, penalising, state officials who fail to comply with orders from the Tribunal.

Without expressing an opinion on the substance of the debate, the judges of Trial Chamber II nevertheless several times expressed their frustration with the current attitudes of sovereign states towards the Tribunal. At one point, Judge McDonald wondered aloud, "can we allow one, two or three states to lead us by the nose, thus refusing to submit documents required for trial, when the defendant has already spent 12 months in detention?"

The defendant referred to is General Tihomir Blaskic, accused of crimes in the Lasva valley, and the states refusing to furnish the evidence required for his trial are Croatia and Bosnia, or more precisely, the Croat part of the federation.

The answer to Judge McDonald's question, the decision of Trial Chamber II on the power of the Tribunal, is expected in about two months time.

Location: Balkans
Croatia
Bosnia and
Herzegovina

Focus: International Criminal Tribunal for the former
Yugoslavia

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