

Trial Chamber II Subpoena Decision

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ICTY

The Tribunal asserts its right under international law to issue a subpoena against a sovereign state.

The six-month-long subpoena drama between Zagreb and The Hague was resolved on July 18. In its Decision on the Objection of the Republic of Croatia to the Issuance of a Subpoena *Duces Tecum*, Trial Chamber II ruled that the Tribunal has both inherent and express powers to issue such subpoenas and that states and their officials are under obligation to comply with them.

With this ruling, the Trial Chamber reinstated the subpoena issued on January 15 by Judge McDonald to the Republic of Croatia and Croatian Defence Minister Gojko Susak and ordered the Republic of Croatia and Susak to comply with the subpoena or appear before the Tribunal to explain the reasons for non-compliance.

The "subpoena drama" started after Judge McDonald, asked by the prosecutor, issued a writ to Susak and the Zagreb government asking for certain documents as evidence in the case of Gen. Tihomir Blaskic of the Bosnian Croat Army. Croatia contested the right of the Tribunal to communicate with sovereign states and their officials by writs issued under the threat of sanction. Judge McDonald then suspended the writ and scheduled a public debate on the rights of the Tribunal in dealing with sovereign states. Some 15 leading international law experts took part in the debate on April 16-17.

The Croatian representatives suggested a restrictive interpretation of the powers of the Tribunal, arguing that "everything that is not explicitly permitted is therefore forbidden." The prosecution and overwhelming majority of the experts, however, called for a "dynamic interpretation" which would "allow for all the measures to be taken to help fulfilling the mission of the Tribunal . . . provided they are not in contravention of the UN Charter."

After reviewing the relevant arguments including the mechanisms that lead to the Tribunal's creation and the decisions of other international tribunals, Trial Chamber II concluded that it had the inherent power to issue a subpoena, and that that power "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, deciding 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 the 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 "the Rules 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 Chamber has found characterising several domestic legal systems from both common and civil law traditions."

The Trial Chamber examined Croatia's argument that the term "co-operate" in the Statute means that the relationship between States and the Tribunal must be "mutually agreed upon by both." In deciding on this issue, the Chamber examined the Secretary-General's report, the Security Council resolutions 827 and 1031 and concluded that "the intent of the Security Council was for States not only to give effect to the orders of the 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 is an order, just as any other issued by the Trial Chamber, States are bound to comply with these as well."

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

Regarding an official's duty to comply, the Trial Chamber distinguished between a failure to comply based on the official's unwillingness (in which case it is incumbent to the State to sanction him accordingly) and an official's inability to comply following to an order from the State. Such inability to comply following a State instruction may be taken into consideration by a Trial Chamber, but, nevertheless, "the official is still required to appear before the Tribunal if so ordered."

Finally, the Trial Chamber addressed the question of national security raised by Croatia. The Trial Chamber held that a State may not be exonerated from producing evidence requested by the 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. In assessing the merits of an objection based on national security, the Tribunal will consider two fundamental interests: (1) the interest in upholding the national security interest of a State, and (2) the interest in gaining access to the evidence critical to the prosecution or defence in cases relating to serious violations of international humanitarian law.

Location: Croatia

Focus: International Criminal Tribunal for the former Yugoslavia

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