REVUE BELGE DE DROIT INTERNATIONAL
1997/2 — Éditions BRUYLANT, Bruxelles

# CURRENT DEVELOPMENTS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

BY

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## INTRODUCTION

Established in 1993, the International Criminal Tribunal for the Former Yugoslavia (« Tribunal ») has seen a dramatic increase in its judicial activity in 1997 and 1998. From one accused brought under its custody in The Hague three years ago, five trials are actually on their way. Convinced that the Tribunal needed additional judges to try without delay the large number of accused awaiting trial, the Security Council decided in May 1998 to establish a third Trial Chamber and amended articles 11, 12 and 13 of the Tribunal's Statute accordingly (1).

Because of the impressive number of decisions and rulings rendered by the Tribunal's Trial and Appeals Chambers on procedural and substantitve issues of international law, the jurisprudence of the Tribunal will not be considered on a case by case basis. Instead, it will be analysed on the basis of the main questions of law that have been addressed by the Tribunal's Chambers.

The review of the Tribunal's jurisprudence will begin as of 1 January 1997 and will be updated periodically (2). The first article on the Tribunal covers three main issues : the Tribunal's subject matter jurisdiction ; the elements of certain crimes within the Tribunal's jurisdiction ; and the Tri-

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The views expressed herein are those of the authors in their personal capacities and do not necessarily represent those of any organizations with which they are or were affiliated.

(1) UN Doc. S/RES/1166 (13 May 1998).

(2) For an examination of the decisions rendered by the International Criminal Tribunal for the Former Yugoslavia ( the « Tribunal ») from 1994 to 1996, as well as a discussion on the procedural framework of the Tribunal, *see* Faiza PATEL KING and Anne-Marie LA ROSA, « The Jurisprudence of the Yugoslavia Tribunal : 1994-1996 », 8 *Eur. J. Int'l L.* 123 (1997). Also, a version of this review will appear on the *European Journal of International Law's web site* (http ://| www.ejil.org).

bunal's authority to order states and individuals to provide evidence. These issues were addressed at length in two cases : *Prosecutor v. Tadic* and *Prosecutor v. Blaskic*.

## I. — Subject matter jurisdiction

Issues relating to its subject matter jurisdiction have haunted the Tribunal from its early days. Article 1 of the Tribunal's Statute confers upon it the power to prosecute persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991 (3). The Tribunal has jurisdiction over four particular categories of crimes : grave breaches of the 1949 Geneva Conventions (Article 2 of its Statute) ; violations of the laws or customs of war (Article 3 of its Statute) ; genocide (Article 4 of its Statute) ; and crimes against humanity (Article 5 of its Statute). The scope of Articles 1, 2, 3 and 5 was addressed at length in the decision of the Tribunal's Appeals Chamber in *Prosecutor v. Tadic* (4) (the « *Tadic Jurisdiction Decision* »). These issues were further developed in the final judgement of Trial Chamber II in that case (5) (the « *Tadic Judgment* »).

### A. — *Article 1. Existence of armed conflict and nexus with acts of the accused*

Under the *Tadic Jurisdiction Decision*, for the Tribunal to assert jurisdiction at all it is necessary that two conditions be met : « first that an armed conflict existed at all relevant times in the territory... and, secondly, that the acts of the accused were committed within the context of that armed conflict. » (6)

An « armed conflict » exists when there is « resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. » (7) In the *Tadic Judgment* the Trial Chamber found that the conflict in Bosnia (including the inter-state conflict between Bosnia and Yugoslavia and the

(3) Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 (adopted 25 May 1993), reprinted in *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991 : Basic Documents*, Sales No. E/F/.95.III.P.1 (« ICTY Statute »).

(4) *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, reg. pg. n$^{os}$ 6491-6413 (2 Oct. 1995) (« *Tadic Jurisdiction Decision* »). This decision is examined in detail in King and La Rosa, *supra* note 2, at 144-146.

(5) *Tadic*, Case No. IT-94-1-T, *Opinion and Judgment*, reg. pg. n$^{os}$ 17687-17338 (7 May 1997) (« *Tadic Judgment* »).

(6) *Id.* at § 560.

(7) *Tadic Jurisdiction Decision* at § 70.

fighting between the Bosnian government and the insurgent Bosnian Serb forces) was of sufficient scope and intensity to constitute an armed conflict (8).

For the exercise of the Tribunal's competence, it is necessary also to establish that each of the acts alleged in the indictment was « closely related » to the hostilities. The *Tadic* Trial Chamber explained this requirement as follows :

> It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred,... nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict ; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law (9).

In *Tadic*, the defendant was accused of acts performed in the course of the take-over of certain areas of Bosnia by the Bosnian Serb forces and actions taken in the camps run by them. Both sets of acts were related to the nature of the conflict as an ethnic war and the strategic aim of creating an exclusively Serbian state. They were therefore found to be directly connected with the conflict (10).

### B. — *Article 2. Grave breaches*

One of the most controversial aspects of the *Tadic Judgment* is its treatment of the requirements for the application of the grave breaches regime embodied in Article 2 of the Tribunal's Statute (11). In the *Tadic Jurisdiction Decision*, the Appeals Chamber held that, in order for the Tribunal to have jurisdiction under Article 2, the alleged offences must have been committed within the context of an international armed conflict and against persons or property protected by the relevant Geneva Convention. The Appeals Chamber implicitly refused to characterise the conflict in the former Yugoslavia as a whole, noting that it had both internal and international aspects. It thus left it to the trial chambers to decide, in each case, the character of the conflict (12).

(8) The Trial Chamber left the question of the applicability of the law of international armed conflict for its discussion of grave breaches. See *infra* text accompanying notes 11-22.

(9) *Tadic Jurisdiction Decision* at § 573 (citation omitted).

(10) *Id.* at § 574.

(11) See, e.g., Theodor MERON, « Classification of Armed Conflict in the Former Yugoslavia : Nicaragua's Fallout », 92 *Am. J. Int'l L.* 236 (1998).

(12) *Tadic Judgment* at § 583.

The *Tadic* Trial Chamber did not, however, directly consider the issue of whether the conflict in the former Yugoslavia was international. It began its consideration of the applicability of Article 2 by examining whether the defendant's alleged crimes were committed against « protected persons » under Geneva Convention IV, i.e., whether the alleged victims were civilians who were « in the hands of a Party to a conflict or Occupying Power of which they are not nationals. » (13)

In the context of the *Tadic* case, this requirement meant that the Prosecutor would have to demonstrate that the victims, who were nationals of Bosnia, were in the hands of Yugoslavia. The problem was that Yugoslavia had formally withdrawn its army (the JNA) from the territory of Bosnia prior to the commission of the defendant's activities. From that time on, the fighting in Bosnia was carried on by the armed forces of the Bosnian Serbs who — although they claimed to be acting for the newly proclaimed state of *Republika Srpska* — were Bosnian nationals.

Thus, the critical question considered by the Trial Chamber was whether the acts of the forces of the *Republika Srpska* could be imputed to Yugoslavia so that the latter could be considered « a Party to [the] conflict or Occupying Power ». The Chamber found that, under customary international law (supported by Article 29 of Geneva Convention IV and the Commentary thereto), the acts of one actor could be imputed to another (14).

The Trial Chamber utilized the test for imputability set out in the judgment of the International Court of Justice (« ICJ ») in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) (Merits) (15). The essence of this test, according to the majority of the Chamber, was two faceted : the Bosnian Serb forces had to be dependent on Yugoslavia and the latter had to exercise effective control over the forces. The second aspect was particularly emphasized by the majority, which held that it was not sufficient to show merely that the Bosnian Serbs were dependent on the Yugoslav army. « It must also be shown that [Yugoslavia] exercised the potential for control inherent in that relationship of dependency or that the [Bosnian Serb force] had otherwise placed itself under the control of the Government of [Yugoslavia]. » (16)

The majority of the Chamber found that such a relationship had not been demonstrated.

> [W]hile it can be said that [Yugoslavia], through the dependence of the [Bosnian Serb forces] on the supply of *matériel* by the [Yugoslav army], had

(13) *Id.* at § 578 (quoting Geneva Convention IV).

(14) *Id.* at § 584.

(15) 1986 I.C.J. 14. The *Nicaragua* test for imputability was previously applied by the Tribunal in the context of a Rule 61 proceeding. See *Prosecutor v. Rajic*, Case No. IT-95-12-R61, *Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*, reg. pg. n$^{os}$ 1423-1392 (13 Sept. 1996).

(16) *Tadic Judgment* at § 588.

> the capability to exercise great influence and perhaps even control over the [Bosnian Serb forces], there is no evidence on which this Trial Chamber can conclude that [Yugoslavia] and the [Yugoslav army] ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the [Bosnian Serb forces], or to influence those operations beyond that which would have flowed naturally from the coordination of military objectives at the highest levels (17).

In sum, the Chamber held that for Article 2 to apply to the case, the Prosecutor was required to show that the victims of the defendant's alleged crimes were protected persons — i.e., were in the hands of a country of which they were not nationals. Since the Bosnian victims were imprisoned in camps run by the Bosnian Serb army (who were also Bosnian nationals), the Prosecutor had to show that the latter were effectively controlled by an external power, in this case, Yugoslavia. The Prosecutor failed to do so. Accordingly, the majority held that the grave breaches regime embodied in Article 2 of the Tribunal's Statute did not apply to the case.

The Trial Chamber's presiding judge disagreed vehemently with this conclusion. In her separate and dissenting opinion Judge McDonald argued that the Prosecutor had met the extraordinarily high « effective control » standard set by the majority and that, in any event, a showing of effective control was not necessary to meet the *Nicaragua* test of dependency and control. In the alternative she argued that, if effective control was required by the *Nicaragua* case, that requirement was inappropriate for the case before the Chamber.

With respect to the issue whether the Yugoslav army exercised control over the Bosnian Serb forces, Judge McDonald concluded that the latter were simply the Yugoslav army with a new name. Since the change in the armies involved in the fighting was « in name only », in her view the Yugoslav army could clearly be regarded as effectively controlling the putative Bosnian Serb forces (18).

Judge McDonald also believed that the effective control test established by the majority was based on a misreading of the ICJ's judgment in the *Nicaragua* case. She read *Nicaragua* as establishing two separate potential bases of liability : general agency and specific instructions to carry out violations of international humanitarian law. In Judge McDonald's view, it was only for the latter basis of liability that the ICJ required effective control. She concluded that the majority's incorporation of the standard of effective control into the first potential basis for liability (general agency) was incorrect (19).

(17) *Id.* at § 605.

(18) *Tadic*, Case No. IT-94-1-T, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, reg. pg. n$^{os}$ 17381-17363, at § 5 (7 May 1997).

(19) *Id.* at § 25.

The third alternative argument made by Judge McDonald was that if the standard of proof required by *Nicaragua* for a determination of general agency was effective control, that standard should be limited to the facts of *Nicaragua* and that such degree of proof was not required in the case before the Tribunal. In support of this argument, Judge McDonald relied on the differences between the *Nicaragua* and *Tadic* cases. In the former, the ICJ was faced with an allegation of state responsibility for the acts of individuals. This type of responsibility would logically « hinge » on effective control (20). The *Tadic* case, on the other hand, required a showing of imputability « *solely* for the purpose of identifying the occupying power. » (21) Judge McDonald also relied heavily on the differences between the relationship of Yugoslavia and the Bosnian Serb forces at issue in *Tadic* and the relationship of the United States and the *contras* that was at issue in *Nicaragua*. In her view, Yugoslavia was responsible for « the very establishment and continued existence » of the Bosnian Serb forces. In such circumstances, Judge McDonald concluded, « [t]he inapplicability of the *Nicaragua* standard of effective control is patent ; it was neither designed for these factual circumstances nor is it an appropriate consideration. » (22)

### C. — *Article 3. Laws and customs of war*

Article 3 of the Tribunal's Statute covers the laws and customs of war, « being that body of customary international humanitarian law not covered by Articles 2, 4 or 5 of the Statute. » (23) In order for the Chamber to determine that a particular law or custom of war is covered by Article 3, four conditions must be met :

(1) the violation must constitute an infringement of a rule of international humanitarian law ;
(2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met ;
(3) the violation must be « serious », that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim... ; and
(4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule (24).

In *Tadic* the defendant was charged with violations of common Article 3 to the Geneva Conventions. The Appeals Chamber had held that this body of law was covered by Article 3 of the Tribunal's Statute. Furthermore, it

(20) *Id.* at § 32.
(21) *Id.* at § 27.
(22) *Id.* at § 32.
(23) *Tadic Judgment* at § 609.
(24) *Id.* at § 610 (quoting *Tadic Jurisdiction Decision*).

had concluded that common Article 3 satisfied the first two requirements listed above, as well as the last. With respect to the third requirement, the Trial Chamber found that the prohibitions of common Article 3 (i.e, murder, taking hostages, outrages upon personal dignity, judgment and sentencing without trial by a regularly constituted court providing fair trial guarantees) were sufficiently serious to satisfy the third criteria enunciated by the Appeals Chamber.

The Chamber then turned to the conditions embodied in common Article 3 for its application. The acts alleged must « (i) [be] committed within the context of an armed conflict ; (ii) have a close connection to the armed conflict ; and (iii) [be] committed against persons taking no active part in hostilities. » (25) Since the Chamber had already found the existence of the first two conditions, it focused on whether the victims in the *Tadic* case were « persons taking no active part in hostilities. » The Chamber asked « whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. » (26) It concluded that all of the defendant's alleged victims were either civilians or had been placed *hors de combat* by detention and therefore enjoyed the protection of common Article 3.

### D. — *Article 5. Crimes against humanity*

The prohibition on crimes against humanity as contained in Article 5 of the Statute applies when such crimes are « committed in armed conflict » and « directed against any civilian population. » The Trial Chamber explained these requirements as follows :

> [F]irst, « when committed in armed conflict » necessitates the existence of an armed conflict and a nexus between the act and the conflict. Secondly, « directed against any civilian population » is interpreted to include a broad definition of the term « civilian ». It furthermore requires that the acts be undertaken on a widespread or systematic basis and in furtherance of a policy... [A]ll relevant acts must be undertaken on discriminatory grounds. Finally, the perpetrator must have knowledge of the wider context in which his act occurs (27).

The condition that the crime be « committed in armed conflict » was interpreted by the Chamber to mean that « the act occurred in the course or duration of an armed conflict. » (28) This seems at first glance to be almost identical to the general requirement for the Tribunal's exercise of

(25) *Id.* at § 614.
(26) *Id.* at § 615.
(27) *Id.* at § 626.
(28) *Id.* at § 633.

jurisdiction (29). However, the Chamber added two caveats : the act had to be linked geographically to the armed conflict and it must not be unrelated to the conflict, i.e. must not be done for purely personal motives of the perpetrator.

Turning to the requirement that the crime be « directed against any civilian population », the Chamber found that this condition encompassed several elements.

First, the Chamber examined the meaning of the term « civilian ». Reviewing a wide range of sources — from the definitions of the term contained in the Geneva Conventions to the decision of the French Cour de Cassation in the *Barbie* case — the Chamber settled on a wide definition of the term. It concluded that « the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity. » (30)

The Chamber then analyzed the term « population. » It found that the « population » element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity (31).

The emphasis on the collective nature of the crime is also reflected in the requirement that the acts must occur on a widespread or systematic basis. The Chamber clarified that these requirements were alternative rather than cumulative. It was enough that the acts were widespread, i.e. committed on a large scale, or that they were systematic, i.e., committed pursuant to a preconceived plan or policy.

On the issue of whether a discriminatory intent is required for acts to constitute crimes against humanity, the Chamber found that such an intent was not required by customary international law. Nonetheless, the Chamber felt itself bound to incorporate such a requirement because it was included in the Report of the Secretary-General that accompanied the Tribunal's Statute and several members of the Security Council had, in the course of adopting the Statute, stated their understanding that Article 5 covered acts performed on a discriminatory basis (32).

The Chamber recognized that for an act to constitute a crime against humanity under its Statute it must be part of a deliberate policy to target a civilian population. The Chamber emphasized, however, that

> such a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic

(29) See *supra* text accompanying notes 6-10.
(30) *Tadic Judgment* at § 643.
(31) *Id.* at § 644.
(32) *Id.* at § 653.

> basis that demonstrates a policy to commit those acts, whether formalized or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of a policy (33).

The final general requirement for crimes against humanity relates to the appropriate level of intent. The Trial Chamber noted that it was the context of a criminal act that transformed an ordinary war crime into a crime against humanity. Therefore, « in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his act occurs. » The second aspect of the intent requirement was aimed at addressing the « weekend Rambo » problem, i.e., the act could not be committed for purely personal reasons unrelated to the armed conflict. While personal motives could be present, they could not be the sole motivation for the act. The Chamber concluded :

> [I]f the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity (34).

In the *Tadic* case, the general requirements for the applicability of Article 5 described above were fulfilled : an armed conflict existed in the territory at the relevant time ; an aspect of this conflict was a policy to commit inhumane acts against the civilian population of the territory ; and inhumane acts were committed in furtherance of this policy and pursuant to a recognisable plan. Accordingly, the Chamber found that it had subject matter jurisdiction over the charges of crimes against humanity.

### E. — *Summary*

The Trial Chamber's judgment in *Tadic* is currently under appeal. It can be expected that the Appeals Chamber — which is authorized to review the Trial Chamber's legal and factual findings — will address the Trial Chamber's application of the subject matter jurisdiction test enunciated in the *Tadic Jurisdiction Decision*. The Tribunal's final word on the conditions for the applicability of the grave breaches regime will undoubtedly be of particular interest to international legal scholars.

(33) *Id.* The Chamber also clarified that, although at the time of World War II the « policy » underpinning crimes against humanity had to be that of a state, the law had developed so that the concept of crimes against humanity covered also those committed « on behalf of entities exercising *de facto* control over a particular territory but without international recognition or formal status of a *de jure* State, or by a terrorist group or organization. » *Id.* at § 654.

(34) *Id.* at § 659.

## II. — Elements of the crimes

In examining the Tribunal's subject matter jurisdiction, both the *Tadic Jurisdiction Decision* and the *Tadic Judgment* addressed the general elements of the categories of crimes listed in Articles 2, 3 and 5. Several specific crimes are listed within each of these articles. As discussed below, the elements of these specifie crimes can sometimes present complex questions.

### A. — *Cruel treatment*

Cruel treatment is prohibited by common Article 3 of the Geneva Conventions. The prohibition is a law or custom of war covered by Article 3 of the Tribunal's Statute.

What types of acts constitute cruel treatment ? In answering this question, the *Tadic* Trial Chamber was guided by Protocol II to the Geneva Conventions, which listed as examples of cruel treatment : « torture, mutilation or any form of corporal punishment » (35). For an act to constitute cruel treatment, the perpetrator had to intend to inflict suffering and to do violence to the victim. Alternatively, the perpetrator could be guilty of aiding and abetting if he gave intentional, direct and substantial assistance for the common purpose of inflicting physical suffering.

In the *Tadic* case, the Chamber found that beatings and forced removals of civilians from their homes constituted cruel treatment. It found, however, that the defendant's participation in the calling out of civilians when it was not accompanied by beatings or other mistreatment did not by itself constitute cruel treatment under Article 3 (36).

### B. — *Inhumane acts*

Article 5 prohibits, as crimes against humanity, several specific acts such as murder, torture etc. In addition, it contains a blanket prohibition on « other inhumane acts. » The latter category covers acts that are similar in gravity to those specifically listed in Article 5 and which cause « injury to a human being in terms of physical or mental integrity, health or human dignity. » (37).

Essentially, the category of inhumane acts appears to be the crimes against humanity equivalent of cruel treatment. In the *Tadic* case, the

(35) *Id.* at § 725 (quoting Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, Article 4).

(36) *Id.* at §§ 764, 765.

(37) *Id.* at § 729 (quoting the International Law Commission's Draft Code, commentary, at 103).

same beatings, acts of violence and forced removals of civilians from their homes that were found to constitute cruel treatment were also found to constitute inhumane acts. As in the case of cruel treatment, the defendant's participation in the calling out of civilians did not *per se* constitute an inhumane act under Article 5 (38).

### C. — *Persecution*

In the *Tadic* case the Prosecutor alleged that the defendant was guilty of crimes against humanity for his persecution of civilians. The parties and the Trial Chamber agreed that the elements of persecution were as follows :

> (1) the accused committed a specified act or omission against the victim ; and (2) the specified act or omission was intended by the accused to harass, cause suffering, or otherwise discriminate against the victim based on political, racial or religious grounds (39).

What types of acts or omissions could constitute persecution ? The *Tadic* Trial Chamber found that, in order to constitute persecution, the act or omission must « infringe[] on the enjoyment of a basic or fundamental right. » (40) The Chamber accepted the Prosecutor's view (which was not fundamentally challenged by the defence) that crimes enumerated in other parts of the Statute could constitute persecutory acts under Article 5 of the Tribunal's Statute. However, because « discriminatory intent is required for all crimes against humanity, » the Chamber concluded that « acts that are found to be crimes against humanity under other heads of Article 5 will not be included in the consideration of persecution as a separate offence under Article 5(h) of the Statute. »

Persecution could also take forms other than the crimes listed in the Tribunal's Statute « so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present. » (41) A « physical element » was not necessary for persecution. Discriminatory acts of an economic or judicial nature also could constitute persecution.

The requirement of discriminatory intent for persecution is the same as the general intent required for crimes against humanity (i.e, the perpetrator must intend to discriminate on political, racial or religious grounds). The Chamber clarified, however, that any one of these grounds was « in and of itself [] a sufficient basis for persecution. » (42)

In *Tadic*, the defendant was charged with four murders constituting persecution under Article 5. The Prosecutor alleged that the defendant had

(38) *Id.* at §§ 764, 765.
(39) *Id.* at § 698.
(40) *Id.* at § 695.
(41) *Id.* at § 706.
(42) *Id.* at § 713.

killed two muslim policemen by « slitting their throats and stabbing each one several times. » (43) There was eyewitness testimony of this incident, which the Chamber accepted as establishing that the defendant had committed murders constituting persecution under Article 5. Tadic was also charged with killing two elderly people near a cemetery. However, the Prosecutor did not introduce any proof of such killings, thus Tadic was found not guilty of them (44).

### D. — *Murder*

Tadic was charged with several murders under Article 3. In addition to the murders charged as persecution discussed in the previous section, he was charged with several murders as « murder » under Article 5.

The Trial Chamber did not separate out the « elements » of the charge of murder, perhaps because it considered that these elements were widely known. The Chamber dismissed the murder charges under Articles 3 and 5 for lack of evidence. Basically, the Chamber found that the Prosecutor had not, for any of these murders, sufficiently proved a causal link between the acts of the defendant and the deaths of the victims.

For example, the indictment against Tadic (45) alleged that he participated in the beatings of certain prisoners who subsequently died as a result of their injuries. The Chamber accepted that the defendant had participated in the beatings of the prisoners, but did not believe that the Prosecutor had sufficiently proved that the prisoners had in fact died as a result of the beatings. It took cognisance of the fact that

> during the conflict there were widespread beatings and killings and indifferent, careless and even callous treatment of the dead... Since these were not times of normalcy, it is inappropriate to apply rules of some national systems that require the production of a body as proof of death. However, there must be evidence to link injuries received to a resulting death (46).

Similarly, the indictment charged that Tadic, along with a group of armed Serbs, had called out civilians from their homes, had murdered some of these persons in front of their homes and had beaten the others and taken them away (47). The Trial Chamber found that the accused was part of the group that forcibly removed several men from their homes and had participated in beating them. After the departure of the group of armed men, five men were found dead in the village. The Chamber did not find

(43) *Id.* at § 393.
(44) *Id.* at § 388.
(45) Indictment (amended), *Prosecutor v. Tadic*, Case No. IT-94-1-T, reg. pg. n[os] 7570-7562, at § 6 (14 Dec. 1995) (« *Tadic Indictment* »).
(46) *Tadic Judgment* at § 240.
(47) *Tadic Indictment* at § 12.

the accused guilty of these murders because nothing was known as to who shot them or in what circumstances (48).

### E. — *Summary*

It is to be hoped that the Appeals Chamber's review of the *Tadic Judgment* will provide further clarity as to the elements of the more nebulous crimes within the Tribunal's jurisdiction — e.g., cruel treatment and inhumane treatment. In addition, one would expect that the Appeals Chamber would comment on the Trial Chamber's fairly strict application of the causation requirement with respect to the murder charges against Tadic.

## III. — The Tribunal's authority to order States and Individuals to Provide Evidence

The issue of the Tribunal's authority vis-à-vis third parties was starkly raised in the *Blaskic* case. The case required the Tribunal to decide on the extent of its power to issue binding orders, such as subpoenas, to states and individuals, including high government officials.

### A. — *Procedural background*

The indictment against Blaskic accused him of, *inter alia*, the persecution of Bosnian Muslim civilians on political, racial, or religious grounds, unlawful attacks on civilians and civilian objects, wilful killing and causing serious physical and mental injury to civilians, the destruction and plunder of property, the destruction of institutions dedicated to religion or education and the inhumane treatment of Bosnian Muslim detainees (49). The indictment alleged that Blaskic was a high level commander in the armed forces of the Croatian Defence Council (HVO) and commanded its forces in central Bosnia. The issue of Blaskic's command responsibility for acts committed by his subordinates (50) lay at the core of the case. Military documents were highly relevant to establishing or disproving the chain of command, the degree of control exercised by Blaskic over the troops and the extent to which he was cognisant of the actions undertaken by his subordinates.

(48) *Tadic Judgment* at § 373.

(49) For a description of earlier proceedings in this case, see King and La Rosa, *supra* note 2, at 155-160.

(50) See ICTY Statute, Art. 7(3).

In order to obtain such documents which are usually in possession of states, the Prosecutor requested the issuance of subpoenas (51). On 15 January 1997, after an *ex parte* hearing, Judge McDonald issued a subpoena to Croatia and its defence minister (52). The subpoena directed Croatia to ensure compliance with the order and requested its defence minister to provide, by 14 February 1997, 13 specified categories of evidence relating to the *Blaskic* case (53). A similar subpoena was addressed the same day to Bosnia and to the Custodian of the records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of Herceg Bosna (the « Custodian of the Central Archive ») (54). Both subpoenas specified that, in case of non-compliance, representatives of the persons subpoenaed were to appear before Judge McDonald.

The Croatian government challenged the subpoenas issued by Judge McDonald. It argued that under its Statute, the Tribunal was only empowered to make requests for assistance. Such requests could only be directed to a state and not to a « specifically named high government official » (55). With regard to the subpoena itself, Croatia contended that pursuant to its Statute and Rules of Procedure and Evidence, the Tribunal did not have the authority to issue subpoenas to sovereign states (56). Although it refused to comply with a subpoena, Croatia reiterated its readiness to cooperate informally with the Tribunal.

In contrast to Croatia, Bosnia indicated that it would take steps to comply with the subpoenas directed to it ; representatives of Bosnia appeared before Judge McDonald at a hearing held in February 1997.

However, neither Croatia nor Bosnia actually produced the documents sought by the Prosecutor. In February and March 1997, hearings were held

(51) The Prosecutor relied on Rule 54 of the Tribunal's Rules of Procedure and Evidence, which provides that « [a]t the request of either party... a Judge... may issue such... subpoenas... as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. » Rules of Procedure and Evidence, UN Doc. IT/32/Rev.13 (9 & 10 July 1998).

(52) *Prosecutor v. Blaskic*, Case No. IT-94-15-T, *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3161-3056 (14 Jan. 1997).

(53) The scope of the subpoena was extremely broad. The Prosecutor requested the production of 13 categories of documents, ranging from Blaskic's personal notes, telephone records, and minutes of meetings to military orders, records reflecting the provision or supply of military weapons, ammunition, communications equipment, medical supplies, logistical supplies and personnel by Croatia to the Bosnian Croats. *Id.*

(54) Blaskic, Case No. IT-95-14-T, *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3069-3063 (15 Jan. 1997).

(55) *Blaskic*, Case No. IT-95-14-T, Reply to *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3263-3261 (13 Feb. 1997).

(56) Croatia further argued that any documents requested by the Tribunal had to be related to the proceedings and had to be properly specified. In its view, the subpoenas addressed to Croatia and its Defence Minister were overly broad because they listed a number of documents which did not exist or were not related at all to *Blaskic* case. *Id.*

in this regard and Judge McDonald issued several additional orders (57). Moreover, on 7 March 1997, counsel for the accused filed a motion for the issuance of a subpoena to Bosnia compelling the production of exculpatory documents (58). On that same day, Judge McDonald directed the Prosecutor, Bosnia, the successor of the Custodian of the Central Archive, Croatia and its defence minister to brief the Tribunal on the following issues :

(1) the power of a Judge or Trial Chamber of the Tribunal to issue a *subpoena duces tecum* to a sovereign state ;
(2) the power of a Judge or Trial Chamber of the Tribunal 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 was non-compliance of a *subpoena duces tecum* or request issued by a Judge or a Trial Chamber of the Tribunal and,
(4) any other issue concerning this matter (59).

A hearing was scheduled and, because of the significance of the issues to be addressed, Judge McDonald ordered that the matter be heard by the full Trial Chamber II comprised of herself as Presiding Judge and Judges Odio Benito and Jan. She also invited requests for leave to submit *amicus curiae* briefs on the above-mentioned issues.

### B. — *The Trial Chamber's decision*

The Trial Chamber's decision affirmed the Tribunal's authority to issue subpoenas to states and high government officials. The particular subpoenas challenged — i.e., those against Croatia and its defence minister — were reinstated (60).

(57) See, e.g., *Blaskic*, Case No. IT-95-14-T, Order of a Judge to Ensure Compliance with a *Subpoena*, reg. pg. n$^{os}$ 3285-3283 (14 Feb. 1997) ; Order of a Judge to Ensure Compliance with a *Subpoena*, reg. pg. n$^{os}$ 3282-3280 (14 Feb. 1997) ; Order of a Judge to Ensure Compliance with a *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3310-3307 (20 Feb. 1997) ; Order of a Judge to Ensure Compliance with a *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3358-3353 (28 Feb. 1997) ; Order of a Judge to Ensure Compliance with a *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3416-3414 (7 March 1997).

(58) A hearing on this request was held before Trial Chamber I, which held that the motion should be referred to Trial Chamber II so that the related requests of the defence and the Prosecutor be heard by the same Judge. *Blaskic*, Case No. IT-95-14-PT, Referral to a Judge of the Defence Motion for Issuance of a *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3462-3458 (18 March 1997).

(59) *Blaskic*, Case No. IT-95-14-PT, Order Regarding *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 3413-3411 (7 March 1997). Following its request for the issuance of a subpoena addressed to Bosnia, the defence was also invited to participate in the proceedings.

(60) *Blaskic*, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 6724-6641 (18 July 1997) ( « *Trial Chamber Subpoena Decision* »). After the hearing, but before rendering its decision, the Chamber authorized Croatia and the Prosecutor to submit additional briefs on the following issues : (1) The relevance of denominating a requesting document of the Tribunal addressed to a state

In order to reach its unanimous decision, the Chamber adopted a teleological approach : it considered the arguments raised by the parties and the *amici curiae* in a manner intended to give effect to the nature and purposes of the Tribunal. The Chamber started from the premise that, as an independent international court, the Tribunal needed all the powers necessary to fulfil its fundamental purposes and to achieve its effective functioning (61).

1. *Authority to subpoena states*

Within this framework, the Chamber considered whether the Tribunal had the authority to subpoena states. As an initial matter, the Chamber concluded that the Tribunal had the inherent power to issue a subpoena because such power was necessary for the exercise of its functions as a criminal judicial institution with jurisdiction over individuals charged with serious offences. It was imperative that a trial chamber — charged with ruling on the guilt or innocence of such individuals and imposing the appropriate penalty — had access to all relevant evidence (62). The fact that subpoenaed documents were government documents should not automatically bar their production. In addition, the Trial Chamber considered that the Tribunal, which had concurrent jurisdiction with, and primacy over, national courts, could not have less capacity than national courts to obtain the documents necessary for the adjudication of a case.

The Chamber essentially held that, because it needed evidence for a proper execution of its judicial function, the Tribunal had the authority to oblige states to submit whatever material was required to evaluate a case effectively and fairly. To hold the contrary would prevent the Tribunal from properly redressing serious violations of international humanitarian law, which was its very *raison d'être* (63).

The Trial Chamber further found that the Tribunal's Statute and the Rules of Procedure and Evidence gave it express authority to direct mandatory orders to states (64). For the Trial Chamber, the argument that a state could not be ordered to perform a particular act was simply incorrect. It was a logical corollary of the special nature and functions of

as a subpoena rather than an order compelling the production of documents ; (2) The necessity of issuing a subpoena to a state for the production of documents that were under the control of a government official of that state ; (3) The effect on a state of the determination by the Tribunal that a government official of that state was in contempt ; and (4) The relevant legislation and case law of Costa Rica, Pakistan and United States and any other relevant authorities in regard to the power of a court to hold in contempt a government official. *Blaskic*, Case No. IT-95-14-PT, Order Regarding *Subpoena Duces Tecum*, reg. pg. n$^{os}$ 4867-4866 (1 May 1997).

(61) *Trial Chamber Subpoena Decision* at § 152.

(62) *Id.* at § 30.

(63) *Id.* at § 40.

(64) *Id.* at § 42. In support of this, the Trial Chamber referred to Articles 1, 18, 19 and 29 of the ICTY Statute and to Rule 54 of the Rules of Procedure and Evidence.

the Tribunal that it had the ability to order states to take action falling within its given sphere of competence. An order within the Tribunal's mandate in no way offended state sovereignty (65).

Moreover, in the Chamber's view, a subpoena was the correct vehicle for ordering a state to produce documentary evidence. The Trial Chamber understood a subpoena as being an order compelling the production of documents. In support of its view, the Trial Chamber referred itself to the French version of the Rules of Procedure and Evidence which used the term « assignation » as equivalent to subpoena and observed that this term did not necessarily imply that a penalty would be imposed in case of non-compliance.

In the event that the term subpoena was understood as necessarily implying a penalty, the Trial Chamber believed that — with respect to its orders — penalties such as a finding that a state had failed in its duty to comply with an order or a referral of the matter to the Security Council could be imposed (66). It concluded therefore that states were bound to comply fully with subpoenas and that their immunity had to give way to measures taken by the Security Council pursuant to Chapter VII of the United Nations Charter, i.e., the establishment of the Tribunal.

2. *Authority to subpoena individuals*

As regards individuals, the Trial Chamber found that there was no controversy where the receiving party of the subpoena was an individual (67). It was a necessary exercise of the Tribunal's incidental powers for it to compel an individual to produce information required for an investigation or trial.

The fact that a person identified as being in possession of documents was an official of a state did not, in the Trial Chamber's view, preclude the issuance of a subpoena addressed to him or her personally. Since the Tribunal was a Chapter VII enforcement mechanism as well as a criminal court, it was not required to conform to standard methods of international cooperation, whereby individual officials might not be addressed. For the Chamber,

> [i]t has been established that binding orders may be issued by the International Tribunal addressed to both States and individuals and there is, therefore, no reason why a person exercising State functions, who has been identified as the relevant person for the purposes of the documents required,

(65) *Id.* at § 51.
(66) *Id.* at § 62.
(67) *Id.* at § 65. In support of this conclusion, the Trial Chamber relied on Article 18 (2) of the ICTY Statute as well as on Rules 98 and 105 of the Rules of Procedure and Evidence. It also considered the extent to which the national implementing legislation of various states interpreted the Tribunal's Statute as encompassing such a power.

should not similarly be under an obligation to comply with a specific order of which he or she is the subject (68).

In other words, the Chamber found that its authority to issue binding orders to states included the authority to issue such orders to their officials.

The Trial Chamber rejected the application of the theory of diplomatic privilege according to which officials of foreign governments in a diplomatic capacity usually enjoy immunity in domestic courts from any requirement that they proffer any evidence. It held that the rationale behind this protection, i.e., the « fear of harassment of diplomatic officials, » did not apply to the Tribunal as an international body established by the Security Council.

### 3. *Limits on the Tribunal's subpoena power*

Finally, the Chamber looked at the issue of limits on its subpoena power. It specified that the scope of subpoenas should be limited to what was relevant, necessary, or in some cases, desirable.

The receiving party had the right to challenge the scope of a subpoena. However, a claim that a subpoena was contrary to national security could not encumber the capacity of the Tribunal to carry out its mandate effectively. It would be contrary to the spirit and the language of the Statute and to the nature and purpose of the Tribunal to permit a state to invoke an absolute national security privilege. Such a position would jeopardize the Tribunal's obligation to ensure a fair and expeditious trial and to afford the accused the rights guaranteed by the Statute, of which access to evidence is a *sine qua non* (69). Nonetheless, the Trial Chamber was sensitive to the national security claims of a state ; it would not automatically disregard arguments in this respect. The Trial Chamber took the position that the Tribunal was in a unique position to judge whether a national security claim had been legitimately invoked. In assessing the merits of a national security objection, the Tribunal might consider two fundamental interests : the interest in upholding the national security interests of a state and the interest in gaining access to evidence critical to the prosecution or defence in cases relating to serious violations of international humanitarian law (70).

## C. — *The appeal*

Croatia promptly filed a notice of appeal. The Appeals Chamber rejected Croatia's request to quash the subpoena. It nonetheless suspended the

(68) *Id.* at § 69.
(69) *Id.* at § 132.
(70) *Id.* at § 149.

execution of Trial Chamber II's decision by staying the execution of the subpoena pending the pronouncement of its decision (71).

The Appeals Chamber rendered its decision on the merits on 29 October 1997 (72). It held that the Tribunal did not have the power to issue a subpoena against a state and did not have the authority to impose any penalty on a state in case of non-compliance. It further held that the Tribunal could not subpoena high government officials in their official capacity.

1. *Authority to subpoena states*

In the view of the Appeals Chamber, the Trial Chamber had incorrectly focused on a « domestic analogy » according to which the Tribunal could not have less capacity than national criminal courts to obtain documents necessary for the adjudication of a case. The Appeals Chamber noted that « the transposition onto the international community of legal institutions, constructs or approaches prevailing in national law [might] be source of great confusion and misapprehension. » (73) It held that international courts did not possess, vis-à-vis organs of sovereign states, the same powers that accrue to national courts in respect of these organs. Instead, the Appeals Chamber analyzed the issues in light of the basic structure of the international community and the environment in which the Tribunal operated.

At the outset, the Appeals Chamber specified the meaning of the term subpoena (74). In the opinion of the Appeals Chamber, the term subpoena as used in the Tribunal's Rules should be narrowly construed « as referring only and exclusively to binding orders addressed by the International Tri-

(71) *Blaskic*, Case No. IT-95-14-AR108*bis*, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoena Duces Tecum*) and Scheduling Order, reg. pg. n$^{os}$ 15-8 (29 July 1997). The Appeals Chamber noted that Croatia lacked standing to file such notice since it was not a party to the proceedings against Blaskic. However, recalling that on 24 July 1997, Rule 108*bis* was adopted which enabled states to appeal interlocutory decisions of trial chambers under certain circumstances, the Appeals Chamber deemed it appropriate to consider whether Croatia's application fell under the scope of this Rule. Under the new Rule 108*bis*, Croatia had the right to appeal because it was clearly directly affected by the Trial Chamber's Decision. In addition, the question whether the Tribunal had the power to subpoena states and their high officials was clearly an issue of general importance relating to the Tribunal's competence. Since the Decision under consideration was rendered after the adoption of Rule 108*bis*, the Appeals Chamber verified that the operation of this Rule would not prejudice the rights of the accused. It found that there was no prejudice provided the appeal was heard expeditiously and did not unduly delay the trial proceedings. Accordingly, the Chamber proceeded to hear Croatia's appeal.

(72) *Blaskic*, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, reg. pg. n$^{os}$ 1908-1851 (29 Oct. 1997) (« *Appeals Chamber Subpoena Decision* »).

(73) *Id.* at § 40.

(74) *Id.* at § 20-21.

bunal, under threat of penalty, to individuals acting in their private capacity. » (75)

With regard to states, the Appeals Chamber held that the term subpoena was inappropriate and that only binding orders or requests could be addressed to them. Contrary to the Trial Chamber's findings, the Appeals Chamber found that the Tribunal did not possess any power to take enforcement measures against states. Such a power could not be regarded as inherent in the functions of an international court (76). Under current international law, states could only be the subject of countermeasures taken by other states or of sanctions visited upon them by the organized international community, i.e., the United Nations or other intergovernmental organizations. The Tribunal could only have authority beyond customary international law if it had been expressly granted in the Statute, which was not the case.

On the other hand, binding orders or requests could be addressed to states by the Tribunal ; states had an obligation to lend cooperation and judicial assistance to the Tribunal pursuant to Article 29 of the Statute and paragraph 4 of Security Council resolution 827 (1993). Under customary international law, states, as a matter of principle, could not be « ordered » either by other states or by international bodies. Article 29 expressly granted an exceptional and unique power to the Tribunal to issue orders to sovereign states. The Appeals Chamber emphasized that the obligation set out in Article 29 was an obligation which was incumbent on every Member State of the United Nations vis-à-vis all other Member States, and of a type qualified as *erga omnes* by the ICJ (77).

In case of non-compliance by a state, it was only for the Security Council to impose sanctions, if any, against the recalcitrant state (78). However, the Tribunal was endowed with the inherent power to make a judicial finding concerning a state's failure to observe the provisions of the Statute or the Rules. It also had the power to report this judicial finding to the Security Council, which could in turn request the state to remedy its breach of Article 29 of the Tribunal's Statute.

### 2. *Authority to subpoena individuals*

The Appeals Chamber also diverged from the Trial Chamber in holding that the Tribunal did not have the power to address subpoenas to state officials acting in their official capacity. According to the Appeals Chamber, it was a well-established rule of customary international law that such

(75) *Id.* at § 21.
(76) *Id.* at § 25.
(77) *Id.* at § 26 (citing *Barcelona Traction, Power & Light Co.*, 1970 *I.C.J. Reports*).
(78) *Appeals Chamber Subpoena Decision* at § 33-37.

officials were mere instruments of a state and their official action could only be attributed to the state. They could not be the subject of sanctions or penalties for conduct that was undertaken on behalf of a state. The Appeals Chamber found that under international law state officials enjoyed a so-called « functional immunity » (79). There was no provision in the Statute which departed from this general rule. The Appeals Chamber therefore found that both under general international law and the Statute itself, Judges or Trial Chambers could not address binding orders to state officials.

The Appeals Chamber also considered the issue — which was not raised by either party — whether the Tribunal had the authority to issue binding orders to individuals acting in their private capacity (80). It found that, in creating an international court with jurisdiction over individuals, the Security Council created a relationship different from the horizontal relation which was generally established in traditional inter-state judicial cooperation. It established a « vertical » relationship with individuals, at least as far as the judicial and injunctory powers of the Tribunal were concerned (81). The spirit and purpose of the Statute conferred on the Tribunal an incidental or ancillary jurisdiction over individuals who might be of assistance in its task of dispensing criminal justice.

In cases of non-compliance by individuals, the Tribunal should normally turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual with a subpoena or order. However, in cases where resort to national remedies or sanctions was not workable, the Tribunal had the power to impose penalties for contempt (82).

3. *Limits on the Tribunal's subpoena power*

As regards the content of binding orders addressed to states, the Appeals Chamber upheld the Trial Chamber's view that it was for the appropriate Judge or Trial Chamber to make a preliminary assessment of whether items requested from a state appeared relevant and admissible and were identified with sufficient specificity (83). The Appeals Chamber also specified the compulsory content of such orders and the relevant safeguards (84).

The Appeals Chamber also agreed with the Trial Chamber's conclusions as to the proper treatment of the national security concerns of states (85).

(79) *Id.* at § 38.
(80) *Id.* at § 46-48.
(81) *Id.* at § 47.
(82) *Id.* at § 57-60.
(83) *Id.* at § 33.
(84) *Id.* The order had to : identify specific documents and not broad categories ; set out succinctly the reasons why such documents were deemed relevant to the trial ; not be unduly onerous ; and give the requested state sufficient time for compliance.
(85) *Id.* at § 61-69.

It noted that international precedents showed that states had previously complied with judicial requests for the production of sensitive documents and that the scrutiny of documents in those cases was often undertaken by a judicial body *in camera* (86). Moreover, a plain reading of Article 29 of the Statute did not indicate any exception to the obligation of states to comply with requests and orders of a Trial Chamber. Considering the very nature of the innovative and sweeping obligation laid down in Article 29, and its undeniable effects on state sovereignty and national security, the Appeals Chamber concluded that this provision clearly and deliberately derogated from the customary international rules designed to protect national security of states (87). Finally, the Appeals Chamber noted that allowing national security considerations to prevent the Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the Tribunal.

The Appeals Chamber emphasized that the Tribunal should not be unmindful of legitimate state concerns related to national security. Like the Trial Chamber, the Appeals Chamber believed that the best way of reconciling the Tribunal's authority to obtain from states all documents directly relevant to trial proceedings and the legitimate concerns of states concerning national security would be to hold an *in camera, ex parte* hearing to scrutinize the validity of a state's national security claims. The Appeals Chamber also suggested several methods and procedures to guide this scrutiny, including consideration of the degree of bona fide cooperation and assistance lent by the relevant state to the Tribunal (88).

Based on its view of the nature of a subpoena, the Appeals Chamber quashed the subpoena addressed to Croatia and its Defence Minister. The Appeals Chamber noted however that the Prosecutor was at liberty to submit to the appropriate Chamber a request for a binding order addressed to Croatia alone.

Subsequent to the Appeals Chamber decision, the Trial Chamber issued binding orders requesting both Bosnia and Croatia to produce documents

(86) *Id.* at § 61-62.

(87) *Id.* at § 63-64. The Chamber noted that rules of customary international law prohibited states from interfering with or intruding into the domestic jurisdiction, including national security matters, of other states. This prohibition is reflected in Article 2 §7 of the United Nations Charter, which provides that « [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State... ». The Appeals Chamber observed that as the Statute of the Tribunal was adopted pursuant to Chapter VII as an enforcement measure, it fell within the exception to the impenetrability of the realm of domestic jurisdiction also provided for in Article 2 of the Charter.

(88) The majority of the Appeals Chamber indicated that the relevant documents could be submitted to the scrutiny of one Judge. Judge Karibi-Whyte appended a separate opinion on this question since, in his view, such scrutiny should be undertaken by the whole Trial Chamber : *Blaskic*, Case No. IT-95-14-AR 108*bis*, Separate Opinion of Judge Adolphus G. Karibi-Whyte, reg. pg. n$^{os}$ 1850-1844 (29 Oct. 1997).

(including the exculpatory documents requested from Bosnia by the accused) (89). Croatia requested appellate review of the order directed to it pursuant to Rule 108*bis* on the grounds that it was inconsistent with the Appeals Chamber's decision. The Appeals Chamber suspended execution of this order and referred the matter to Trial Chamber I for arguments (90). The Trial Chamber recently decided that the Prosecutor's request met the level of specificity required by the Appeal's Chamber's decision had been met and ordered Croatia to produce the documents (91).

### E. — *Summary*

The Tribunal now has extensive jurisprudence on its power to order states to produce documents, including a decision on the correct form for such an order, the level of specificity required and an assertion of its authority to decide on national security objections raised by states. Thus far, however, no documents have been forthcoming. It remains to be seen whether the states involved will in fact provide the Tribunal with the benefit of their full cooperation with respect to evidentiary matters and whether they will ever allow the Tribunal to examine their national security objections to the disclosure of evidence.

(89) *Blaskic*, Case No. IT-95-14-T, Decision on the Prosecutor's Request for the Issuance of a Binding Order to Bosnia and Herzegovina for the Production of Documents, reg. pg. n$^{os}$ 4/7464*bis*-1/7464*bis* (17 Dec. 1997) ; Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents, reg. pg. n$^{os}$ not available (30 Jan. 1998) ; Decision on the Prosecutor's Request for the Issuance of a Binding Order to Bosnia and Herzegovina for the Production of Documents, reg. pg. n$^{os}$ 5/7872*bis*-1/7872*bis* (27 Feb. 1998) ; Order to Bosnia and Herzegovina for the Production of Documents, reg. pg. n$^{os}$ 3/8083*bis*-1/8083*bis* (29 April 1998).

(90) *Blaskic*, Case No. IT-95-14-AR 108*bis*, Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for Stay of Trial Chamber's Order of 30 January 1998, reg. pg. n$^{os}$ 2114-2109 (26 Feb. 1998).

(91) *Blaskic*, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents, reg. pg. n$^{os}$ 6/8469*bis*-1/849*bis* (22 July 1998).