INTRODUCTION

The Tribunals have no police force or other coercive means to ensure compliance with their orders. Such a situation is quite unique. One can hardly find a State where the prosecutor is obliged to discharge a weighty burden of proof, but has no corresponding method of securing prompt access to relevant information held by the State in order to discharge that burden. Combined with this lack of adequate enforcement powers, the lack of co-operation from States may render an international prosecutor incapable of proceeding with investigations. It has been emphasised that “the International Tribunal may discharge its functions only if it can count on the *bona fide* assistance and cooperation of sovereign States”\(^1\). The obstacles in access to evidence may significantly hamper Tribunals’ investigations. The *ad hoc* Tribunals are empowered to issue binding orders and requests to States, which are obliged to comply with them. However, in the event of non-compliance with such orders, the Tribunals cannot impose any sanction on the State and have to rely on the UN Security Council to compel State cooperation.

As for individuals, a Chamber has the authority to order them to appear before it as witnesses. It has been emphasised that “the spirit and purpose of the Statute confer on the International Tribunal an incidental or ancillary jurisdiction over individuals other than those whom the International Tribunal may prosecute and try. These are individuals who may be of assistance in the task of dispensing criminal justice entrusted to the International Tribunal.”\(^2\) However, because of the lack of coercive means, the Tribunals have to rely on States in to execute subpoenas in order to secure the attendance of unwilling witnesses.

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BINDING ORDERS TO STATES AND INTERNATIONAL ORGANISATIONS

Binding Orders to States

See also Section State Request for Review

States’ obligation to cooperate

Pursuant to the Statutes of the International Tribunals, States have the obligation to cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law and to comply without undue delay with requests for assistance or orders issued by the Trial Chamber. This obligation extends not only to efforts by the Prosecution to obtain inculpatory evidence, but also efforts by the Defence to obtain exculpatory information. As it was emphasised, the “investigation and prosecution of persons” encompasses not only Prosecution investigations, but the entire trial process, including the right of the accused in Article 20 (4)(e) to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”. Article 28 (2) requires more particularly that States act “without undue delay” to respond to requests for “the taking of testimony and the production of evidence”. All States are obliged by the Security Council resolution 827 to cooperate fully with the ICTY and, pursuant to Article 103 of the Charter of the United Nations, in the event of any conflict between a State’s obligations to NATO and SFOR on the one hand, and their obligations under the Charter on the other, their obligations under the latter prevail.

Binding orders to States generally

The International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign states, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The Tribunal must turn to states if it is effectively to investigate crimes and collect evidence. The drafters of the Statute realistically took account of this in imposing upon all states the obligation

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3 Ibid., para. 26.
6 Prosecutor v. Simić et al., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Case No. IT–95–9–PT, T. Ch. III, 18 October 2000, para. 64.