The ICTY’s Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents

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In international criminal law, the effectiveness of the prosecution of international crimes depends on access to evidence which is seemingly governed by consistent and efficient rules, especially those of evidence. However, international courts appear devoid of any substantive power of inquiry. Paradoxically, although the creation of the International Criminal Tribunal for the former Yugoslavia1 arose from the international community’s consideration that elements proving that international crimes had been committed existed, the Tribunal has not been vested with an efficient enforcement power to compel the production of evidence.

This article focuses particular attention to two of the instruments contained in Rule 54 of the Rules of Procedure and Evidence2 of the ICTY: binding orders and the subpoena.3 Rule 54 enumerates the different instruments the Judges could wield to obtain relevant evidence. The term subpoena was added in January 1995, during the 5th plenary session of the ICTY, to “improve the clar-
ity, consistency and completeness of the rules”. The expression ‘sub poena’ does not appear in the French version of Rule 54 of the RPE, but is instead reproduced through the phrase ‘ordonnances de production ou de comparution forcées’. The French term includes the adjective ‘forcés’; it does not, however, endow the orders with the threatening scope of the subpoena. This terminological difference arises from the ignorance, in the civil law tradition, of the ‘subpoena’ which “carries with it the threat of sanction”, unlike in the common law tradition, where the subpoena is taken to constitute a judicial order which demands that its addressee either should appear before the Court – subpoena ad testificandum – or bring relevant evidence – subpoena duces tecum –, under threat of penalty.

When the French and the English versions of the RPE differ, Rule 7 provides that the version to be preferred is that which most reflects the spirit of the Statute and the RPE. Within this framework, there are two conflicting theories: should the term ‘subpoena’ be understood in its traditional meaning as an order wherein penalties may be brought for non-compliance therewith? Or should a neutral meaning be adopted as ‘binding order’, which “does not necessarily imply the assertion of a power to imprison or fine”. This debate crystallised

5 The French version of Rule 54 of the RPE holds that “[à] la demande d’une des parties ou d’office un juge ou une Chambre de première instance peut délivrer les ordonnances, citations à comparaître, ordonnances de production ou de comparution forcées, mandats et ordres de transfert nécessaires aux fins de l’enquête, de la préparation ou de la conduite du procès” [emphasis added].
6 This phrase replaced the original term “assignation”, at the alteration of the RPE, on July 27th, 1997 (i.e. eight days after the decision of the Trial Chamber in the Blaškić case), in order to mirror the binding nature of this procedural order. This is worth noting that the Judges of the ICTR saw no point in changing Rule 54 of their Rules which is the counterpart of Rule 54 of the ICTY Rules. Therefore, the word “assignation” still figures in the French version of Rule 54 of the ICTR Rules.
8 The subpoena ad testificandum may be defined as being “a writ directed to a person commanding him, under penalty, to appear and give evidence”, Mozley and Whiteley’s Law Dictionary, 11th ed. by E.R. Hardy IVany, Rutterworths, 1993.
9 The subpoena duces tecum may be defined as being “a writ directed to a person, requiring him not only to give evidence, but to bring with him such deeds or writings as the party who issues the subpoena may think material for his purpose”, ibidem.