

INTERNATIONAL COURT AND PRIVATE CITIZEN

Alexander Zahar*

The protection of individuals' rights, often necessary against their own states, may sometimes also be necessary against international organizations. This is a particularly delicate matter where the international organization is meant to represent international law and justice. Drawing on the experience of the International Criminal Tribunal for the former Yugoslavia, the author argues that the operations of the International Criminal Court will inevitably have a direct and significant impact on the treatment of individuals in countries that are not able or willing to stand up for their citizens' rights and interests under state laws or international law. The interface of the ICC with the ordinary state national is generally not regulated by the ICC's statute and rules (just as it is not by the ICTY's) and, in the absence of regular and effective state protections, constitutes a lawless frontier at which the court is potentially all-powerful and the individual is at its mercy. The strong state/weak state divide (along with that of citizens enjoying correspondingly strong/weak legal protections) offers the ICC opportunities for evidence-gathering, but also risks damage to the Court's moral standing and reputation for justice. The author concludes that the ICC needs to institute, at the very least, a policy that foresees such situations and aims to maintain a balance of rights and interests in the relationship of international court and private citizen.

Velibor Ostojić was not happy to hear from me when I telephoned him from the ICTY at his home one morning in March 2006. The former Bosnian-Serb Minister of Information made his feelings plain by slamming down the receiver before I had finished introducing myself. I rang

*Griffith Law School, Australia.

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his number a few more times in the course of the week, and as no one answered, I sent a request to the Serbian war crimes investigation unit in Belgrade to dispatch a police officer to Ostojić, whom I knew to be living in a village south of the city. The essence of the message to be conveyed on my behalf was that while presently Ostojić was not in any trouble with the Hague Tribunal, if he persisted in not answering his telephone he would be. Some weeks later I met with Ostojić at the ICTY field office in Belgrade. He had taken the day off work at the primary school where he taught history and had traveled to the city by bus. At the field office he was on tenterhooks; but he was polite and cooperative, and by lunchtime I had recorded his statement about certain events in Bosnia in 1992 and we parted cordially.

The Bosnian civil war started in April 1992. During that year Ostojić was the Bosnian-Serb propaganda chief. In this ministerial post he had dealings with Momčilo Krajišnik, the Speaker of the Legislative Assembly of the Bosnian Serbs. In 2006, when I made contact with Ostojić, Krajišnik was on trial at the ICTY. Krajišnik's judges had asked me to secure Ostojić as a witness in the trial—and to begin by obtaining his statement. They subsequently asked me to repeat the exercise with Bogdan Subotić, the former Bosnian-Serb Minister of Defense. For reasons we could not fathom, neither the prosecution nor the defense intended to call these witnesses. When General Subotić answered my call and realized who I was, he too hung up. He was still living in Bosnia, in a village closer to Belgrade than to the Bosnian capital, Sarajevo. When finally he realized that the least eventful path for him would be to come out of retirement and speak to me about his association with Krajišnik in 1992, he got in his car and drove the six hours to the Belgrade field office.¹ The international tribunal might be a rarefied object, but from their ivory tower in The Hague the ICTY judges can have a call placed direct to the phone in your living room.

Ramush Haradinaj is a Kosovar resistance hero. In 1998, armed with antiquated weapons smuggled into Kosovo from Albania, Haradinaj and his peasant army fought President Slobodan Milošević's troops in Kosovo, which at the time was still a province of Serbia. Haradinaj seems almost

1. Prosecutor v. Krajišnik, Case No. IT-00-39-PT, Trial Chamber Judgement, ¶¶ 1204, 1255–1257 (Sept. 27, 2006); and, in the same case, Trial Chamber Decision on the Finalized Procedure on Calling and Examining Chamber Witnesses (Apr. 24, 2006).

recklessly brave in rising up against Milošević's far superior military machine, and it is this, rather than any notable battlefield victory, that made him a hero of Kosovo's ethnic Albanians. By early 1999, the Kosovo Liberation Army, in which Haradinaj was a senior commander, had been almost wiped out by the Serbs. Then, in March of that year, a NATO bombing campaign against Serbia forced Milošević to withdraw his army from Kosovo. Unfortunately for Haradinaj, bullet-ridden remains of several dozen ethnic Serb civilians found in the vicinity of his village formed the basis of an ICTY indictment against him for war crimes. He surrendered to the international tribunal for a trial that became notorious on account of the unwillingness of prosecution witnesses to testify against the defendant. Who, after all, in his right mind, would willingly be associated with the prosecution of a leader of Kosovo's liberation? Certainly not any witness of Albanian ethnicity still resident in what by then had become the U.N.-administered quasi-independent state of Kosovo.

In the Haradinaj trial, thirty-four prosecution witnesses had their identity concealed from the public.² The judges issued eighteen subpoenas for prosecution witnesses who had refused summonses to testify even with their identity concealed. These witnesses were warned that a refusal to comply with the subpoena would trigger criminal proceedings against them for contempt of court. If convicted of contempt, they were liable to a sentence of imprisonment of up to seven years, a fine of up to 100,000 euros, or both.³ Several of the eighteen witnesses nevertheless continued to refuse to cooperate with the tribunal. Four cases are of particular interest. Avni Krasniqi and Sadri Selca were ethnic Albanians living in Kosovo. In 2007, the year of Haradinaj's trial, Kosovo had not yet declared its independence. It was being governed by the U.N. Interim Administration Mission in Kosovo (UNMIK) and the so-called self-governing institutions of the future that UNMIK had begat and to which it was gradually ceding control. Krasniqi and Selca, following their refusal to comply with the ICTY's subpoenas, were indicted for contempt of court. The Hague judges issued arrest warrants to accompany the indictments. The two accused were promptly arrested by UNMIK police and transferred, without the intervention of any local judicial process, to the Netherlands where

2. For this and some of the facts below, see Prosecutor v. Haradinaj et al., Case No. IT-04-84-PT, Trial Chamber Judgment, ¶¶ 22–28 (Apr. 3, 2008).

3. ICTY R.P. & Evid. 77(G) (Nov. 4, 2008), available at <http://www.icty.org/sid/136>.

they were detained at the ICTY's prison facilities. This dislocation, and a night in jail, were apparently enough to convince them to relent and to give testimony in the case. Two other wanted witnesses, Shefqet Kabashi and Naser Lika, also ethnic Albanians, had made their way to North America. They were in the process of applying for permanent residence in the United States and Canada, respectively. The ICTY indictment for contempt and the accompanying arrest warrant for Kabashi made no impression at all on the U.S. authorities. They would not transfer him. The ICTY and the United States have concluded a "surrender" agreement. It does not mention contempt of court as a ground of surrender.⁴ This, it may be supposed, was an important though not a decisive factor in the refusal, because experience has shown that even where the international tribunal's request for surrender is within the terms of the agreement with the United States, the accused can challenge the requested extradition in the courts.⁵ In 1996, the International Criminal Tribunal for Rwanda sought Elizaphan Ntakirutimana's transfer from Texas to the ICTR's base in Arusha, Tanzania, on charges of genocide. It took almost four years for the accused to exhaust his options in the U.S. courts and to be transferred to the ICTR.⁶ The ICTY's request for Kabashi was legally more fraught because

4. Agreement on Surrender of Persons Between the Government of the United States of America and the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, Oct. 5, 1994, 1911 U.N.T.S. 224. Available from http://untreaty.un.org/untf/120001_144071/15/2/00012030.pdf. Further on this agreement, see Jorge A. F. Godinho, *The Surrender Agreements Between the US and the ICTY and ICTR: A Critical View*, 1 J. Int'l Crim. Just. 502 (2003); and Robert Kushen, *The Surrender Agreements Between the US and the ICTY and ICTR: The American View*, 1 J. Int'l Crim. Just. 517 (2003).

5. Robert Kushen, who was one of the negotiators of the US/ICTY surrender agreement, mentions (*supra* note 4, at 517–18) the United States' insistence on "a judicial procedure in order to fulfil its obligations, even though such a procedure could theoretically result in the failure to fulfil the obligation to surrender. The necessity of this procedure is grounded in the US Constitution, and, under US law and practice, such a constitutional requirement can never be superseded or modified by an international legal obligation." The United Kingdom provides a comparably high level of protection to its residents, as seen in its implementing legislation: *The United Nations (International Tribunal) (Former Yugoslavia) Order*, 1996, S.I. 1996/716 (U.K.).

6. *Ntakirutimana v. Reno*, 184 F.3d 419 (1999) (U.S. Court of Appeals, Fifth Circuit); and *Prosecutor v. E. and G. Ntakirutimana*, Case Nos. ICTR-96-10-T & ICTR-96-17-T, Trial Chamber Judgment, ¶ 17 (Feb. 21, 2003). In the former decision, a passage (at 431) from the opinion of the dissenting judge, DeMoss, expresses the haughty attitude of mighty

it was not even within the surrender agreement. The United States offered to facilitate the taking of Kabashi's testimony on U.S. soil, but Kabashi refused to do even that. He did not testify in the Haradinaj trial. To this day he is wanted at the ICTY for contempt of court.⁷ The ICTY judges, expecting similar treatment from Canada, did not issue an arrest warrant for Naser Lika. They thus avoided the embarrassment of seeing another of their orders shrivel up against the shield of a powerful and legally advanced state. Assisted by the Canadians, the judges tried to coax Lika into cooperating. But he, too, never testified in the Haradinaj case.

The traditional independence of states—their right not to suffer interference in their internal affairs, their right to exercise jurisdiction over their permanent population—is not a principle that the establishment of the ICTY or the ICC was meant to disturb. In the case of the ICTY, which was imposed on the world by the U.N. Security Council, states were obliged to make certain after-the-fact adjustments, where necessary, to enable the tribunal to operate. If they did not, they risked having the tribunal's judges report them to the Security Council for noncooperation.⁸ State concessions to the ICC were, of course, treaty-based and voluntary. In relation to both judicial institutions, the independence of states remained, in theory, intact. The standing of state nationals vis-à-vis the new international organs was also, in principle, unaffected, except insofar as the individual was suspected of an ICTY or ICC statutory crime. This exception was no departure from contemporary conceptions of the individual in international law. Two factors may be mentioned in elucidation. In recent times it has become widely accepted⁹ that the ordinary citizen can have direct access—where it is provided for—to an international court or tribunal for the purpose of resolving a complaint against the person's state of residence for an alleged violation of human rights. Obviously in such a case the individual's standing before the international organ cannot be

states towards the ad hoc international tribunals: “[The U.S. Attorney-General] stakes her case on the validity and enforceability of a warrant issued by the United Nations International Criminal Tribunal for Rwanda, which is a nonsovereign entity created by the United Nations Security Council, purporting to ‘DIRECT’ the officials of our sovereign nation to surrender the accused.”

7. See http://www.icty.org/case/contempt_kabashi/27 (last visited Feb. 12, 2009).

8. The noncooperation procedure, which amounts to reporting the state to the U.N. Security Council, is in rule 7 *bis* of the ICTY rules.

9. Malcolm N. Shaw, *International Law* 258–59 (6th ed. 2008).

mediated by the state against which she is bringing the complaint. The person must be considered to have the standing in her own right. A slightly older though largely parallel development in international law has had the contrasting effect of exposing the individual to direct prosecution by international judicial institutions for serious international crimes. These two very particular and contained developments have not in any way cast the citizen adrift in international law. In particular, the compelled transfer of a person to a foreign jurisdiction pursuant to an indictment for contempt of court—not to mention a more serious crime—remains a state concern of considerable gravity. Transfer is a kind of extradition, and extradition, being a relatively extreme measure, is prohibited by some states (e.g., some European states in relation to their nationals), or allowed only in relation to very serious crimes committed abroad, and, in any case—where it is allowed either restrictively or more generally—as a rule it is scrutinized by the courts and is challengeable by the accused, and may even, after all this, preserve for the state executive a discretion to refuse the request. In theory, the individual remains tightly linked to the state. It is the source of her rights, including her international-law rights (for which the state is the conduit). The state serves to protect the individual from the world at large (“the State . . . assumes the defence of its citizens by means of protection as against other States”¹⁰) and to provide her with an avenue for claims against foreign states. At its most abstract and idealized, the concept of nationality is, in the ICJ’s famous statement, “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”¹¹ The state realizes and reifies personal protections that would otherwise remain merely notional. Kabashi and Lika experienced the benevolent muscle of states of this kind—that is, of the United States and Canada—even though they were not nationals of those states. Of course, not all states are equally successful guardians of their citizens’ rights and freedoms. Krasniqi and Selca, as citizens (or rather denizens) of the rump Yugoslavia, had a most attenuated experience of citizenship, because, to start with, their national state was no longer effective in the province of Kosovo. We can extrapolate from Ostojić’s case—the Bosnian Serb who left Bosnia to settle in Serbia—that even if Serbia had retained

10. *Nottebohm case (Liech. v. Guat.)*, 1955 I.C.J. 4, 23.

11. *Id.*

control of Kosovo, the relief it would have offered the individual in the position of Krasniqi or Selca from interference by the international tribunal would have been minimal at best. In the real world, then, some states will approximate the ideal relationship with the members of their resident population. But these are not the states that the ICTY or the ICC primarily deal with, or are likely to have to deal with in the future.

As a form of communication between an international court and a private citizen, the subpoenaing of Krasniqi and Selca was different, of course, from putting a telephone call through to Ostojić or Subotić at home. The latter seems procedurally amorphous, invasive, less subject to scrutiny. But the tribunal's overall approach in places like Kosovo, Bosnia, and Serbia—places with nonexistent, weak, or compliant governments—reflects the same core attitude. Had Ostojić not cooperated with the tribunal, he too would have been subpoenaed.¹² Serbia is under sustained political and economic pressure to cooperate with the tribunal, and Bosnia, as a kind of protectorate of the West, has prioritized cooperation with the West above the advancement of citizen rights. Had Subotić resisted, he would certainly have been transferred to the Netherlands within forty-eight hours of the issuance of a tribunal warrant for his arrest.¹³ The exposure of these two individuals to the tribunal's power transcended the formality of a subpoena; it was not engendered by the subpoena. As for the practice of informal direct contact with witnesses, the ICTY prosecutor's investigators in the field repeatedly telephoned or visited Krasniqi and Selca and other reluctant prosecution witnesses, applying for subpoenas only when witness refusal had become adamant. These situations are all characterized by elements of unmediated contact between the supranational organ and the state national; and insofar as Serbia's police had to be enlisted to convey my message to Ostojić, or the trial chamber had no practical alternative but to have its subpoenas served on Kosovar witnesses by agents of UNMIK, these situations do also contain elements of "state" mediation. Yet the direct, unchecked relationship of the tribunal to the

12. In fact, Ostojić was subpoenaed anyway, but at his own request: Prosecutor v. Krajišnik, Case No. IT-00-39-PT, Trial Chamber Judgment, ¶ 1257 (Sept. 27, 2006).

13. Branko Đerić, the former Prime Minister of the Bosnian-Serb Republic, was another trial chamber witness who at first refused to cooperate. He was very nearly transferred to the ICTY in handcuffs, although he changed his mind when the police squad arrived at his house. *Krajišnik* at ¶ 1256.

individual in what we might call the Balkan cases is both more dominant and more decisive than in the North American cases of Kabashi and Lika. Certainly, the degree of personal exposure to the power, or assumed power, of an international court depends on where you live. In Serbia or Kosovo you have to answer the phone. In America you don't.

The ICTY statute and the ICTY rules of procedure and evidence did not explicitly confer upon me, or upon the judges on whose behalf I acted, the power to make direct contact with, and place demands on, the ordinary citizens of any state. It goes without saying, then, that these instruments also did not impose upon us an obligation to ensure that any legal protections provided for under national laws were honored in the course of such contact. It is also true, though, that the statute and rules did not *prohibit* such a direct approach. Overall, in the texts, there is ambiguity. Consider, for example, the broad rule 54 of the ICTY rules ("At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial"). This rule is remarkable not only as a bold act of judicial self-aggrandizement,¹⁴ but for begging the question about the limits of its application. While in form the rule appears to confer a power upon the judges, one must already know what the limits of the judicial power at the international tribunal are in theory or in practice to know when one is entitled to rely upon the rule. On its face, the rule does not compel coordination with, or deference to, state authorities. It does not exclude the circumvention of state authorities, nor does it exclude direct action in relation to individuals.¹⁵ I once had to prepare a judicial order authorizing a raid by UNMIK police and ICTY investigators on a ministerial building in Kosovo for the purpose of seizing evidence. The order was pursuant to rule 54. I remember thinking that we would never be

14. At the ICTY, the judges make and approve the rules of procedure and evidence without the supervision or consent of any other authority, such as the U.N. Security Council or the General Assembly.

15. In *The Problem of Obtaining Evidence for International Criminal Courts*, 22 Hum. Rts. Q. 404 (2000), Jacob Katz Cogan writes: "When international criminal courts seek such cooperation, prosecutors and investigators must depend on states to provide them with evidence or access to evidence." In fact, the tribunal experience has been that, through the subpoena and contempt powers, judges have tried to essentially bypass states to get at the evidence, or have ordered rather than requested their assistance.

issuing such an order to raid governmental offices located in, say, Switzerland, or, for that matter, Croatia or Serbia. However, in Kosovo, we could get away with it; and rule 54 provided plausible cover in the event of any protest—if, that is, one were prepared to overlook the circularity of the provision and the fact that it was judge-made.

Consider another example of systemic ambiguity. According to a literal reading of the tribunal's statute, the victims and witnesses section of the ICTY is not obliged to work through state authorities, although in regular practice it does. VWS staff are to "provide counselling and support for [victims and witnesses], in particular in cases of rape and sexual assault."¹⁶ In reality, the individual in this category is provided with a whole lot more: travel planning, transport, payment of expenses, mental and physical health assessment and care, and general advice and support, both over the telephone from The Hague and through direct contact with VWS field staff. More power to them, one might say. At the ICTR, the staff of the equivalent section are even more forthright, indeed swashbuckling, in their relations with victims, witnesses, and states. The security situation in Africa is worse, so, when in the field, the former police officers among VWS's staff are armed with pistols. Transport between Arusha and certain African states is nonexistent, too indirect, or unsafe, so the VWS flies in and out on U.N. airplanes. Some areas, such as the Eastern Congo, are not always under effective state administration, which has necessitated unconventional entry/exit procedures. Many witnesses, especially defense witnesses, are still living in refugee camps outside Rwanda—in such cases, ICTR officers first have to extract the witness from the camp, then return him to the same camp, decisions that the refugee-witness does not always agree with.¹⁷ Add to this that neither Rwanda nor certain other African countries can always be relied on to see to the welfare of victims and witnesses—so the VWS dutifully has improvised on their territories as necessary. To remark that such practices are unique and unprecedented in international relations is merely to acknowledge the extraordinary and experimental nature of the ad hoc tribunals.

16. ICTY R.P. & Evid. 34(A)(ii).

17. For example, in the ICTR's *Ntakirutimana* case, defense witnesses with pseudonyms 5 and 22 refused to return to the refugee camp from where they were taken. They were handcuffed and returned there against their will (Prosecutor v. E. and G. Ntakirutimana, Case Nos. ICTR-96-10-T & ICTR-96-17-T, Defence Closing Brief, 263–64 (July 22, 2002)).

The ICTY statute's general clause on state cooperation and judicial assistance is in article 29:

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.

When a reluctant witness is indicted for contempt of court, as a way of having the person transferred under arrest to the ICTY, he is not, of course, being accused of any serious violation of international humanitarian law, and so article 29 does not apply. States are not obliged by article 29(1) to cooperate.¹⁸ The offense of contempt of court is not a statutory crime at the tribunal but was inserted by the judges into the tribunal's rules.¹⁹ Observers have been taken aback by this use of the rules.²⁰ An amendment to the statute by the Security Council would have been more appropriate, but the practice at the ICTY has been for the judges to make or expand the substantive or procedural law without seeking the parental institution's approval. The judges' line has been that the contempt power is inherent to courts²¹—and so they let the matter rest; yet who is to say what is inherent to a narrowly mandated and unprecedented tribunal uneasily occupying borrowed space alongside sovereign states. To ensure state cooperation in relation to the contempt power, the ICTY judges created rule 77 *bis* (E), which asserts that where an arrest warrant is issued against

18. Michael Bohlander, *International Criminal Tribunals and Their Power to Punish Contempt and False Testimony*, 12 *Crim. L.F.* 91, 107 (2001).

19. ICTY R.P. & Evid. 77.

20. Silvia D'Ascoli, *Sentencing Contempt of Court in International Criminal Justice: An Unforeseen Problem Concerning Sentencing and Penalties*, 5 *J. Int'l Crim. Just.* 735 (2007), at 737; Bohlander, *supra* note 18, at 92 and 111–12 (“criminal law has always been one of the most jealously guarded domains of state sovereignty. It would therefore be highly unlikely that any state would easily confer criminal powers over its own citizens to an international entity it cannot control”).

21. I return to this point below.

an alleged contemnor, “A State or authority to whom such a warrant is addressed, in accordance with Article 29 of the Statute, shall act promptly and with all due diligence to ensure proper and effective execution thereof.” This wording was chosen despite the fact that, as we have just seen, article 29 does not cover minor offenses. It is an example of carelessness—or perhaps it is a kind of bluff. Certainly it is indicative of the tribunal’s ad hoc approach to the question of state cooperation. Another astonishing use of the rules by the ICTY judges is rule 58, on national extradition provisions: “The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused *or of a witness* to the Tribunal which may exist under the national law or extradition treaties of the State concerned.” This rule assumes a judicial or legislative power over states which is remarkably imperious and invasive, and which lacks a basis in the ICTY statute. The history of the ICTY can plausibly be written as an incessant expansion of judicial power.²² Powerful states have not been notably disturbed by the unregulated operation of the ad hoc tribunals, probably because each tribunal has focused on a single third-world country, and on a single, now concluded, and almost forgotten, conflict, and is thus contained within a narrow political and cultural framework whose significance is fading into history. For their own part, the tribunals believe that their work is changing international law, and is thereby having a universal impact far into the future. The legacy of the ICTY is thus an important and complex question, for it cannot be assumed that states will accept as universally valid all of the changes that the tribunals purport to have effected in international law. Yet their time of reckoning lies in the future. Currently, only in conscience and in practice are the judges periodically checked, and in practice only when they come up against a strong state, as they did in the case of Kabashi. Faced with rule 58, the U.S. authorities did not blink. What the ICTY would have characterized as a “legal impediment” (rule 58) to the transfer of a witness, the United States saw as a constitutional right of the individual to due process.

To what extent does ICTY jurisprudence touch on the aforementioned matters? The widely discussed *Croatia subpoena* decision of the ICTY

22. Alexander Zahar & Göran Sluiter, *International Criminal Law: A Critical Introduction* (2008).

Appeals Chamber in the *Blaškić* case concerned the validity of a subpoena issued by a bench of trial judges to the Defense Minister of the Republic of Croatia. The Appeals Chamber held that the tribunal was not empowered to issue binding orders under threat of penalty to states or to state officials.²³ This was the main conclusion, but in related remarks, the Appeals Chamber discussed the tribunal's power to issue such orders to individuals acting in their private capacity:

The spirit and purpose of the Statute, as well as the aforementioned provisions [articles 18(2)²⁴ and 19(2)²⁵], 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.²⁶

This observation does not settle the question of whether the ICTY's so-called incidental or ancillary jurisdiction over individuals must, in international law, be mediated by the authorities of the state concerned. On this, the Appeals Chamber said:

a distinction should be drawn between the former belligerent States or Entities of ex-Yugoslavia and third States. . . . [I]n the case of [the first-mentioned group of] States, to go through the official channels for identifying, summoning and interviewing witnesses, or to conduct on-site investigations, might jeopardise investigations by the Prosecutor or defence counsel. [Their obligation to cooperate] requires them to allow the Prosecutor and the defence to fulfil their tasks free from any possible impediment or hindrance.²⁷

23. Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, ¶¶ 25–45 (Oct. 29, 1997).

24. “The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.”

25. “Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.”

26. *Blaškić* at ¶ 48.

27. *Id.*, ¶ 53.

The reasoning is fallacious, for the Security Council undoubtedly envisaged that a noncooperating state would be dealt with, in one way or another, through a report to the Security Council, rather than by the judges or the prosecutor (or, for that matter, the defense teams, whose members are not ICTY employees) maneuvering behind the back of states to pursue their objectives, or pursuing their objectives in the full view of a noncooperating state on the footing that the state is prevented from intervening. And while, as I have noted, the ICTY statute is at times ambiguous about whether direct action in relation to state nationals is allowed, there is, actually, nothing in the statute to suggest, *pace* the Appeals Chamber, a discrimination between two kinds of state, one to be deferred to in all circumstances because the state is impartial, the other to be circumvented where necessary because it is untrustworthy.

The Appeals Chamber made a second assertion: that one is not entitled to infer from the fact of the existence in some states of legislation implementing cooperation procedures with the ICTY that any order or request of the tribunal must be addressed to “a specific central body of the country.”²⁸ To reason along those lines, wrote the Appeals Chamber, is to overlook the tribunal’s “primacy” under the statute and its “vertical status” in its relationship with states. Moreover, it continued, there exists “a well-known principle of international law . . . prevent[ing] States from shielding behind their national law in order to evade international obligations.”²⁹ However, with respect to the first point, the primacy mentioned in article 9(2) of the ICTY statute is over “national courts”, in cases where there is concurrent jurisdiction; it is not primacy over national law, whatever that means. With respect to the second point, the question is not whether national law may be used to evade international obligations (surely it may not), but what can be done, lawfully, when a state passes a law that is designed, or is utilized, to achieve evasion of that kind. The “well-known principle of international law” does not enlighten us as to the legality of circumventing the state through direct action; nor does it help us make a choice between direct action and merely reporting the state to the Security Council. And as for contemnors and the overlapping class of reluctant witnesses, it begs the question to insist that states are under an “international obligation” to transfer them (for it presumes that tribunal

28. *Id.*, ¶ 54.

29. *Id.*, ¶ 54.

judges can generate new international obligations). Thus the Appeals Chamber's secondary conclusion in the *Croatia subpoena* decision—that “the International Tribunal may enter directly into contact with a private individual . . . when the authorities of the State or Entity concerned, having been requested to comply with an order of the International Tribunal, prevent the International Tribunal from fulfilling its functions”³⁰—finds no basis whatsoever in the decision. The overall effect of the Appeals Chamber's decision is, remarkably, to add protective layers to the state of official and to strip protective layers from the man in the street.

The trial judges in the *Croatia subpoena* case had said in their decision granting the subpoena: “[T]he International Tribunal should be deemed to have those powers which, although not expressly conferred, arise by necessary implication as being essential to the performance of its duties.”³¹ This assertion requires extensive qualification. It was refuted, as a premise from which to deduce judicial powers, by the Appeals Chamber's decision forbidding the subpoena. The trial judges had not given proper weight, the higher court said, to the sovereignty of states and to the immunities of state officials. The premise thus comes with a list of exceptions. Among them, we may assume, are powers that improperly interfere with the rights and interests of state nationals under municipal and international law. In a decision on contempt of court in the *Tadić* case, the Appeals Chamber, after acknowledging that there is no mention in the ICTY statute of a power to deal with contempt, said that the tribunal possesses “an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by [the] Statute is not frustrated and that its basic judicial functions are safeguarded. [It] must therefore possess the inherent power to deal with conduct which interferes with its administration of justice.”³² This pronouncement has the same form as the one above, and suffers from the same circularity; for, as I indicated earlier, one must know what exceptions it is subject to in a world of sovereign states and personal constitutional protections in order to discern its import. It turns out, for example, that the ICTY does not, as a matter of

30. *Id.*, ¶ 55.

31. *Blaškić*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, ¶ 24 (July 18, 1997).

32. *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, ¶ 13 (Jan. 31, 2000).

fact, have the “inherent power” to have Shefqet Kabashi arrested on U.S. soil and extradited to the tribunal to answer contempt-of-court charges. This points to the larger question of whether an international tribunal established by the Security Council may condemn and punish a citizen of a state for a nonstatutory offense where there has been no prior consent by a state for its nationals to be thus treated. If the principle of the independence of states remains intact, Chapter VII action by the Security Council must be interpreted narrowly—and so the answer to the last question arguably is no.³³

The second paragraph of article 29 of the ICTY statute, reproduced above, lists certain actions for which the tribunal may demand the assistance of states, although as I noted already, neither this article nor the statute as a whole is clear about whether these actions may not be undertaken *except* in cooperation with states.³⁴ Article 15 of the statute directs the judges to adopt “rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, *the protection of victims and witnesses* and other appropriate matters.” It is an intriguing suggestion that article 15 impliedly confers a power upon the judges to protect victims and witnesses even against the authorities of the states in which they are resident, and if necessary to bypass those authorities and to form direct links with private individuals or organizations, along the

33. Article 25 of the U.N. Charter (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”) does not change the primacy of the municipal legal order for the state’s citizen.

34. ICTY rules fall roughly into three groups: (i) those reflecting an assumption that the tribunal will work through the state and use the rule 7 *bis* procedure (report to Security Council) in the event of noncooperation: rules 8–11 (request for deferral), 13 (*non bis in idem*), 40 (urgent state assistance), 59 (failure to execute a warrant or transfer order), and 61 (procedure in case of failure to execute a warrant); (ii) those reflecting an assumption that the tribunal will work through the state, without specific reference to the rule 7 *bis* procedure in the event of noncooperation: rules 11 *bis* (transfer of case to another jurisdiction), 40 *bis* (transfer and provisional detention), 54 *bis* (orders directed to states for the production of documents), 56 (cooperation of states), 57 (procedure after arrest), 60 (advertisement of indictment), 61 (procedure in case of failure to execute a warrant), 65 (provisional release), 90 *bis* (transfer of a detained witness), 103 (place of imprisonment), and 105 (restitution of property); and (iii) those in which an assumption that the tribunal will work through the state is notably lacking: rules 59 *bis* (transmission of arrest warrants), 71 (depositions), 75 (measures for the protection of victims and witnesses), 77 (contempt of the tribunal), and 81 *bis* (proceedings by videoconference link).

lines of the de facto mode of operation of the ICTR's unit for victims and witnesses, described earlier. However, article 22 of the ICTY statute ("Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity") suggests a narrower set of powers, and the ICTY rules also interpret this power narrowly.³⁵ In the case of the ICTY prosecutor, by contrast, the statute could reasonably be taken, on its face, to grant this office unmediated access to individuals. Article 18(2) provides that "[t]he Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned." The last sentence allows for an optional approach to state involvement. Similarly, ICTY rule 39 provides that, in summoning and questioning witnesses, collecting evidence, conducting on-site investigations, and undertaking other investigative procedures, the prosecutor "may . . . seek . . . the assistance of any State authority concerned," just as it may seek the assistance of, for example, Interpol. The prosecutor here is given the discretion to decide the most appropriate approach in the circumstances. Perhaps this is meant to provide for the contingency of state noncooperation. Or perhaps the discretion is intended to cover only those cases where a state no longer exists, or is no longer effective, as in the case of a U.N.-administered, or rebel-controlled, territory. The latter interpretation finds some support in ICTY rule 55(G), which is part of a provision on the execution of arrest warrants: "When an arrest warrant issued by the Tribunal is executed by the authorities of a State, *or an appropriate authority or international body*, a member of the Office of the Prosecutor may be present as from the time of the arrest."

The dysfunctional-state contingency (as we might call it) is made much more explicit in the ICC statute, which is a point I return to below.

As with the ICTY texts, the ICC statute and rules give several indications that matters will proceed via state cooperation but that such cooperation is not always required. In some respects the ICC statute is more deferential to states than the statute of the ICTY, and maybe that is to be expected.³⁶ But the ICC statute also contains many provisions where state

35. ICTY R.P. & Evid. 75(B).

36. For example, articles 17–19 and 51. Article 58, on warrants and summons, is not clear about the state as an intermediary; however, article 59 makes clear that this is all to take

cooperation could have been, but is not, specified as necessary.³⁷ These and other provisions may be described as ambiguous on the question.³⁸ Article 88 obliges state parties to legislate procedures for the cooperation required in Part 9 of the statute. This covers arrest and surrender, as well as article 93, which calls on the state parties to comply with requests by the court to provide assistance in relation to investigations or prosecutions, and, in particular, the identification and whereabouts of persons, the taking of evidence including testimony under oath, the service of documents, the facilitation of the voluntary appearance of persons as witnesses, the temporary transfer

place under the mechanisms of the custodial state. As discussed further in the main text, offenses “against the administration of justice” presume state collaboration, indeed delegation to states; thus article 70(2), “The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.” See also article 70(4), which assumes that these prosecutions will be done by the state, as well as rules 162–169 of the ICC rules.

37. A possible direct relationship with victims and witnesses is present in articles 19(3) and 68(1), and see also ICC rules 86–93. States rate only one mention, as optional collaborators. Clearly a “victim” in the ICC system is offered a platform for direct participation—one might say that a victim is given standing before the ICC, just like the accused. In the Victims and Witnesses Unit provision there is no mention of states: articles 43(6) and 68(4), and see also rules 16–19 (where consultation with states is optional). There is no assumption that the prosecutor will investigate only through state assistance: articles 53–55. Judges may obtain evidence themselves, not necessarily through a state: article 64(6) (“In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: . . . (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute; . . . (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.”).

38. Article 87 (requests for cooperation: general provisions) is ambiguous as to whether the court can go behind the back of a state and get what it requires directly. Article 87(7) seems to imply that the solution is to *report* the state party: “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.” Article 54(2) provides, ambiguously in relation to cooperation: “The Prosecutor may: (a) Collect and examine evidence; (b) Request the presence of and question persons being investigated, victims and witnesses; (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person.”

of persons, the examination of places or sites, the execution of searches and seizures, the protection of victims and witnesses, the preservation of evidence, etc. Article 99 provides that requests will be processed in accordance with national laws, except “where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed”; in which case “the Prosecutor may execute such request directly on the territory of a State”—although even here “all possible consultations” with the requested state party are expected.

We may observe at this point that the ICC will not be able to use its contempt power (which at the ICC goes by a different name) to secure the cooperation of witnesses in quite the same way as the ICTY. Schabas has noted that “[n]othing in the Statute provides for compellability of witnesses, for example by issuance of subpoenae or similar orders to appear before the Court. Witnesses are to appear voluntarily.”³⁹ There are two problems with the concept of “voluntary” in this context. One is that it means no more than the absence of a formal instrument of compulsion, such as a subpoena—it does not mean the absence of compulsion. There is no requirement to test for voluntariness once the witness is before the ICC in The Hague. The other problem is that while the ICC may not subpoena witnesses itself, it may arrange to have them subpoenaed locally by their state authorities. Under Australian law, for example, the ICC prosecutor may request state assistance in connection with “the taking of evidence, including testimony on oath” in Australia, which is in addition to “facilitating the voluntary appearance of persons (other than prisoners) before the ICC.”⁴⁰ For the former procedure, the Attorney-General of Australia must be satisfied only that the request relates to an investigation being conducted by the ICC prosecutor, or a proceeding before the ICC, and that there are reasonable grounds for believing that the evidence can be taken in Australia.⁴¹ Refusal to testify may lead to contempt-of-court proceedings against the person under the applicable Australian state or

39. William A. Schabas, *An Introduction to the International Criminal Court* 127 (2001).

40. Commonwealth of Australia, *International Criminal Court Act, 2002*, §§ 7, 73.

41. *Id.*, § 64.

territory law.⁴² In this roundabout way, then, a witness of interest to the ICC is no less compellable than one wanted at the ICTY, if the state in which the witness is located has chosen to cooperate with the ICC in a way comparable to Australia's.

In relation to the problem facing international judicial institutions on how to handle matters in territories with weak or ineffective or collapsed administrations, and unlike the ICTY statute, the ICC, in article 57(3) of its statute, specifically provides for the dysfunctional-state contingency:

In addition to its other functions under this Statute, the Pre-Trial Chamber may: . . . (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.⁴³

This acknowledges the prospect of operations at an unsurveyed frontier of international law and raises the question of what will be the ICC's frontier mentality. It brings us also to another remarkable difference with the ICTY statute, which is ICC article 54(1)(b). It states that the prosecutor shall "Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender . . . and health." This requirement will need to be extensively elaborated, in the rules or another appropriately binding document, if it is to guide ICC staff during operations in "frontier" cases.

I believe it is appropriate to clarify that one can hardly blame Avni Krasniqi or Sadri Selca for not wanting to testify in the Haradinaj case. The ICTY wanted their testimony, but all it could offer in exchange to allay the witnesses' fear, and to protect them, was a pseudonym and testimony in closed session (although, of course, in view of the accused). These

42. *Id.*, § 69.

43. The same contingency is canvassed earlier, in ICC statute article 17(3) ("In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings").

“protective measures” do not guarantee anonymity for the witness, and in a small place like Kosovo where almost everyone was following the trial of the nation’s hero, the participating witnesses were well known. (Which is why Krasniqi and Selca, once they were arrested and transferred, decided to testify in public.) Fear for the personal safety of oneself and one’s family is the issue of greatest concern to witnesses at the ICTY and ICTR, and undoubtedly the same will be true at the ICC. This is because the majority of witnesses are taken from, and returned to, relatively lawless places. They have legitimate concerns about their own and their family’s personal safety. A supportive and effective national system would offer remedies against the ICTY (it would also offer security for its citizens). But in the absence of such a state, who will there be, in cases of unmediated contact between the international court and the private citizen, to represent the citizen’s most fundamental concerns, let alone any more abstruse constitutional due-process rights? And even in the presence of a functional state, the question at its broadest is not whether an international tribunal, in interfering with the private citizen, works through a state authority, but whether that authority is intent on upholding the substantive and due-process rights of the individual as they exist in the municipal law or in international law. For if the authority is but a puppet of the tribunal, or so compliant that it would allow any manner of interference—UNMIK and Bosnia, respectively—the tribunal in effect is acting directly on the individual.

We know from the case of Rwanda that international criminal justice does not work so well when the international tribunal must deal with what is, in effect, a dictatorship of victors, and we know from the Haradinaj case that a country engulfed in liberation fever will cooperate only grudgingly with a trial of its new leaders. There is, in practice, not much difference between the two cases. If the ad hoc tribunals are experiments in what is feasible in international criminal justice, the ICTR’s experience, as a whole, and the trial of Haradinaj, in particular, have taught us about the system’s outer limits. They have also taught us that an international court will rapidly assume powers over individuals, other than the accused, that are not always mediated or moderated by the laws of the subject’s state but that leave the individual exposed to the whims of the supranational body. The ad hoc tribunals upon their establishment were given the barest sketch of their powers and were allowed to fill in the gaps as they went along. We might imagine a spectrum of institutions of ill-defined powers.

At one end lie the U.N.'s ad hoc tribunals. Their powers are the most ill-defined. At the other end lies the ICC, a much more heavily regulated and accountable court, but one which nevertheless does not have all of its powers mapped out. While the ad hoc tribunals must rely on the cooperation of domestic legal systems to achieve their aims, they also have significant powers to pressure domestic systems into cooperating. With sufficient pressure, and a sufficiently weak or eager or compliant domestic legal system, due-process protections that are nominally in place are circumvented. Croatia's and Serbia's admission to the EU was made conditional on cooperation with the ICTY. This was a campaign led by the ICTY prosecutor. The pressure tends to persuade states to assign powers to the tribunal that it does not have by explicit design. The ICC will operate in the same world of individuals unequally exposed to its powers (assigned or assumed), and unless it adopts a compensatory policy of some kind, it is likely to follow the ICTY's path of least resistance—of being deferential to the strong and of taking advantage of the weak. Due to its unlimited life span and near-worldwide reach, the ICC will experience a more complex set of permutations than the ICTY or the ICTR. It will need to carry out investigations and obtain evidence from party states and non-party states, from cooperating and noncooperating states, from weak states and strong states, from territories that are unadministered, ineffectively administered, fought over by competing factions, administered by the U.N., etc. One element that all these situations have in common is that the ordinary person in these surroundings is only as strong as her state—if it exists—is prepared to acknowledge. If the ICC proceeds to take these individuals as it finds them, and views them merely as, for example, sources of information that are more or less easily exploitable depending on their situation, an unfavorable view of the ICC is bound to emerge over time from the ad hocness of its practice and from its exploitation of the less fortunate. This risk can be minimized through the formulation of, at the very least, an ICC policy of general application that seeks, first, to place citizens of the world on as much as possible an equal footing (*inter se*) when the Court comes to have dealings with them, and, second, to make ICC decisions affecting them reasonably challengeable by them.⁴⁴

44. The author wishes to thank Sarah Nouwen for her comments on an earlier version of this paper.