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The Power of National Courts to Compel the Production of Evidence and its Limits

An „amicus curiae“ brief to the International Criminal Tribunal for the former Yugoslavia

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1. INTRODUCTION

Pursuant to the Appeals Chamber's 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 (29 July 1997, Tihomir Blaskić, Case No. IT-95-14) which invites *amicus curiae* briefs from states, non-governmental organisations and persons (*ibid.*, para. 16), the Max Planck Institute for Foreign and International Criminal Law, Freiburg im Breisgau (Germany), submits the following Brief.

Given the exhaustive debate on the public international law issues involved in this interlocutory proceedings, in particular the impressive presentation and discussion of the corresponding arguments in the briefs of Prof. Frowein, Dr. Nolte, Dr. Oellers-Frahn and Dr. Zimmermann (Max Planck Institute for Comparative Public and International Law – hereinafter MPIPL Brief) and of Prof. Bruno Simma (University of Munich – hereinafter Simma Brief), the following observations will concentrate on the criminal law aspects, in particular the procedural issues involved. There is a need for such a Brief on the criminal procedural issues because the questions under examination do not have precedents either in conventional

1. Professor Dr. Dres. h.c. Albin Eser, M.C.J., Director of the Max Planck Institute; Dr. Kai Ambos, research fellow. The specific country information was provided by Holger Barth (France), Dr. Dr. h.c. Karin Cornils (Denmark), Susanne Hein (Italy), Dr. Barbara Huber (England and Wales), Thomas Richter (China), Dr. Silvia Tellenbach (Turkey), all research fellows at the Institute; Frauke Eickhoff-Pritzel (Netherlands), Emily Silberman (USA), Jan Worschnick (Germany), all research assistants at the Institute; Prof. Enrique Garcia Vitor (Argentina), Dr. Adedeji Adekunle (Nigeria), both former research guests at the Institute. Susan Padman-Reich (research assistant) refined the final English version.
2. The brief was submitted on behalf of the Max Planck Institute for Foreign and International Criminal Law (*Max Planck Institut für ausländisches und internationales Strafrecht*) Freiburg im Breisgau, Germany, to the Appeals Chamber of the ICTY in the case of *The Prosecutor v. Tihomir Blaskić* (IT-95-14-AR 108bis) pursuant to the order inviting *amicus curiae* briefs of 29 July 1997. The decision of the Appeals Chamber, rendered on the 19 October 1997, referred to the brief in paras. 17 and 79. The published version has been revised and, where necessary, modified.
3. *Amicus curiae* means friend of the court and is used in common law jurisdictions to give persons – who have a strong interest in a case, but are not a party to it – the opportunity to file a brief explaining their views on the matter. *Amicus curiae* briefs are commonly filed in civil rights and international human rights cases (cf. Black's Law Dictionary, 6th ed. 1990, p. 82).

or in customary international law. Thus, a convincing solution has to be based on general principles of law within the meaning of Article 38 para. 1 lit. c. ICJ Statute. These principles, in turn, can be inferred from the principles governing major criminal law systems. As is correctly stated in the Simma Brief: 'Since the rules of procedure of other international courts do not cover situations where third parties to a proceeding are obliged to submit documentary evidence, the *only* possible source of inspiration can be found in the diverse national rules of procedures which deal with this issue and *general principles* of international law which can be derived from these national legal orders' (p. 19; emphasis added).

Reference to comparative criminal procedure can be found in various documents relevant to these proceedings. The Trial Chamber II, in its decision of 18 July 1997, found that 'an examination of a number of domestic legal systems reveals that, whatever the particular mechanisms utilized, they do provide for the *production of all relevant evidence*' (*ibid.*, para. 35; emphasis added) by compulsory means (*ibid.*, para. 40; *see also* para. 59). The decision refers, *inter alia*, to the criminal procedures of the United States, England, Scotland, Costa Rica, France and Spain (*ibid.*, paras. 36 ff.). Regarding the question as to what, in evidentiary terms, is required for the conduct of the trial (*cf.* Art. 19 ICTY Statute), the Trial Chamber II also looks at various criminal justice systems (*ibid.*, paras. 98 ff.) and draws the conclusion that 'the power of courts generally to order the production of evidence is *limited* to that which is relevant, necessary, or in some cases, desirable' (*ibid.*, para. 100; *see also* para. 102; emphasis added). Finally, with respect to the question whether a *national security privilege* may (automatically) excuse a witness from producing evidence commanded by a court order, the cursory review of national laws by the Trial Chamber II reveals that 'national security interests may constitute a legitimate limitation ... to disclose or produce information before municipal courts of law' (*ibid.*, para. 126). As to a possible *judicial review*, the Trial Chamber II concludes from a comparative analysis that 'there is a recognition in national laws that administrative decisions on questions of national security may be subject to review by the judiciary, the scope of this review is, in general, subject to the particular circumstances of each case and the interests of a particular state' (*ibid.*, para. 146).

The briefs of the MPIPL and Prof. Simma also refer to domestic criminal procedure and thereby confirm the need for further research into the criminal procedure laws of the major criminal justice systems. With regard to a privilege for confidential information the MPIPL Brief states that it is 'confirmed by the rules of domestic law in several countries' (pp. 24-25). The need for a *specific* request with regard to the presentation of evidence follows, *inter alia*, from the law and practice in the Common law countries prohibiting a *subpoena* to be issued for a mere 'fishing' expedition (*ibid.*, p. 27). The statement in the Simma Brief, that a 'detailed comparative analysis of *subpoena* procedures' was not possible due to the time constraints (p. 19), clearly shows that this expert considers such an analysis necessary.

Against this background and taking into account the conclusions drawn in the documents cited above, in particular the decision of the Trial Chamber II of 18 July 1997, the following questions are to be examined from a comparative perspective:

- Do national courts have the power to compel the production of evidence by
 - (a) forcing a witness to appear and testify (*subpoena ad testificandum*); and
 - (b) bring certain documents with him (*subpoena duces tecum*)? and
- What sanctions, if any, exist to enforce such court orders?

Which limits to this power exist, in particular with regard to national security interests and the official function of a witness (in particular of a defence ministry)?

2. THE POWER OF NATIONAL COURTS TO COMPEL THE PRODUCTION OF EVIDENCE AND ENFORCEMENT MECHANISMS

At this stage of the proceedings, it is clear that the issue is not whether compulsory powers of a criminal court in the sense of a *subpoena* amount to the use of an excessively broad 'US-style, third party discovery device', as held by the Republic of Croatia (Brief on Appeal of 18 August 1997, pp. 43 ff.), but rather whether an International Criminal Tribunal like the ICTY has the power to order a state or an individual, in particular a government official, to produce documents relevant to a trial, not necessarily implying the assertion of a power to imprison and fine (see Decision of the Trial Chamber II, 18 July 1997, paras. 61, 62, 64 and 78; Order of the Appeals Chamber inviting *amicus curiae* briefs, 29 July 1997, para. 16).⁴

Both the common law and the so-called civil law systems provide for wide powers of criminal courts to compel the production of evidence. Although the structural differences between these systems are considerable – in the common law the adversarial structure of proceedings obliges the parties to collect the evidence while in the civil law countries, notwithstanding further differentiation, the collection of evidence is the primary responsibility of the state and its organs (prosecutor and/or judge)⁵ – they contain similar mechanisms to compel the production of evidence.

2.1. Civil Law Systems

The civil law systems contain a wide range of enforcement measures. They range from the use of immediate and direct compulsion and force to the use of indirect means such as using fines and arrests to break the will of a reluctant witness. The latter measures can be compared to a *subpoena* since they threaten the witness with a sanction if he does not comply with a court order. It is controversial, though, if this sanction always amounts to a criminal sanction. Further, in all civil law systems examined the witness who does not appear has to meet the costs which result from his non-appearance.

In **France**, Article 109, para 1, *Code de Procédure Pénal* (CPP) requires the witness who was correctly summoned to appear, to swear and to testify in the pre-trial phase (*instruction*). If the witness refuses to appear, the Prosecutor can request that he is forced to appear and, additionally, the *juge d'instruction* can sentence him to a fine (Art. 109, para. 3 CPP⁶). This sanction can also be imposed on the witness who appears but refuses to testify without a right

4. Cf. also the Prosecutor's Brief of 8 September 1997, paras. 5, 47. See also Simma Brief, pp. 6 ff., MPIPL Brief, p. 42.

5. See for a further threefold distinction W. Perron, 'Rechtsvergleichender Querschnitt', in W. Perron (Ed.), *Die Beweisaufnahme im Strafverfahrensrecht des Auslands*, Freiburg 1995, pp. 560 ff.

6. Article 109, para. 3 CPP. 'Si le témoin ne comparait pas, le juge d'instruction peut, sur les réquisitions du procureur de la République, l'y contraindre par la force publique et le condamner à une amende prévue pour les contraventions de la 5e classe. S'il comparait ultérieurement, il peut toutefois, sur production de ses excuses et justifications, être déchargé de cette peine par le juge d'instruction, après réquisitions du procureur de la République'.

to do so (Art. 109 CPP, para. 4⁷) For the trial phase before the jury, Article 326 CPP provides for a similar mechanism. Again, the witness may be forced to appear (Art. 326, para. 1 CPP⁸); additionally, he may be sentenced to a fine if he does not appear, refuses to swear or to testify (Art. 326, para. 2 CPP⁹). For the trial before the correctional courts (*Tribunaux Correctionnels*) Article 438 CPP refers to Article 109 CPP. In proceedings before a military court a witness can also be sentenced to a fine if he refuses to appear (Art. 230, para. 4 CPP Militaire with Art. 109 CPP).¹⁰ Thus, these rules may be compared to a *subpoena ad testificandum* in a functional sense since the compulsory measures even include the possibility of a judicial sanction which is quite similar to a criminal sanction. As to the production of documentary evidence in the sense of a *subpoena duces tecum*, French criminal procedure does not provide for such a mechanism; however, in the pre-trial phase the *juge d'instruction* can order a party to present certain evidence (Art. 82-1, para. 1. CPP). Further, the *juge d'instruction* has a general power to ask witnesses *de officio* to present certain documents (cf. Art. 81, para. 1 CPP).¹¹ If they do not comply he has no right to sanction them but may use the general compulsory measures (search and seizure) to obtain the relevant documents. This mechanism, albeit not exactly comparable to a *subpoena duces tecum* in a narrow sense, fulfills the same function and, thus, can be described as a *subpoena* in a wider sense, namely in the sense relevant to this appeals proceedings: as a compulsory mechanism to produce evidence (see already para. 6 of this Brief). The sole difference between this mechanism and a *subpoena* in the narrow sense lies in the fact that the latter requires an active participation of the person possessing these documents.

In Germany, a correctly summoned witness who does not appear is confronted with direct and indirect compulsory measures (§ 51 Strafprozeßordnung-StPO). He might suffer indirect pressure by the imposition of a fine or arrest; in a direct sense, the court may order his compulsory attendance (*zwangsweise Vorführung*). If the witness appears but refuses to testify he may be fined or even arrested to compel him to testify (§ 70 StPO). As to documentary evidence, the German law presents the same solution as the French one: the prosecutor (in the pre-trial phase) and the judge (in the trial phase) have the general obligation to clarify all relevant facts (cf § 244 para. 2 StPO) and may refer to the general compulsory measures to obtain relevant documents. If a person refuses to produce relevant evidence which he has in his possession, they can be seized/confiscated (§ 94 para. 2 StPO). A person possessing such evidence is obliged to produce it and surrender it to the prosecution authorities (§ 95 para. 1 StPO); if he refuses to do so, § 70 StPO applies, i.e. he can be compelled by a fine or arrest. The latter case refers to evidence the location of which is unknown and whose recovery, therefore, depends on the co-operation of the person who has it in his possession. In a certain way, the compulsory measures to be enforced against a person reluctant to co-operate

7. Article 109, para. 3 CPP: 'La même peine peut, sur les réquisitions de ce magistrat, être prononcée contre le témoin qui, bien que comparissant, refuse de prêter serment et de faire sa déposition.'
8. Article 326, para. 1. CPP: 'Lorsqu'un témoin cité ne comparait pas, la cour peut, sur réquisitions du ministère public ou même d'office, ordonner que ce témoin soit immédiatement amené par la force publique devant la cour pour y être entendu, ou renvoyer l'affaire à la prochaine session.'
9. Article 326, para. 2 CPP: 'Dans tous les cas, le témoin qui ne comparait pas ou qui refuse soit de prêter serment, soit de faire sa déposition peut, sur réquisitions du ministère public, être condamné par la cour à la peine portée à l'article 109.'
10. This normative construction has been misinterpreted by the MPIPL Brief stating that a *judicial* sanction is excluded (*ibid* p 4).
11. It provides: 'Le juge d'instruction procède, conformément à la loi, à tous les actes d'information qu'il juge utiles à la manifestation de la vérité ...'

resemble very much a *subpoena duces tecum* since the corresponding person is forced to actively participate in the gathering of evidence.

In **Italy**, the new *Codice di Procedura Penale* (CPP) compels a witness to appear before the court and answer all questions truthfully (Art. 198 CPP). If a witness fails to appear, the court may order his compulsory attendance and, additionally, impose a fine on him. The witness may be kept up to 24 hours to ascertain his testimony (Art. 133, para. 132 CPP). As to the production of documentary evidence, Article 256 CPP refers to various persons, including government officials and the defence minister, who by order of a court are obliged to immediately present documents. If such an order is not complied with, the court can order the direct seizure of the documents sought (Art. 256 CPP). Thus, Italian law, like French and German law, knows the *subpoena* in the wider sense, relying in the case of testimonial evidence on indirect enforcement measures and in the case of documentary evidence, as last resort, on a direct seizure.

In **Spain**, the *Ley de Enjuiciamiento Criminal* (LECrim), imposes an obligation on witnesses to appear before the court and to testify under threat of fine (Art. 702, para. 420 LECrim). If the witness insists upon refusing to testify, he may be criminally prosecuted for *desobediencia grave* (Art. 556 *Código Penal*). This offence may be compared to the contempt of court sanction under US procedural law. As to the production of documentary evidence, there exists only the possibility to seize objects which are related to the offence (Arts. 334, 574).

In the **Netherlands**, a witness can be brought by force before the court (Art. 282 Code of Criminal Procedure). According to Article 315, para. 1 the judge can also order the production of certain documents by a witness or an expert witness. The non-compliance with a court order can lead to criminal prosecution according to Article 192 Criminal Code, resulting in a sentence of imprisonment or a fine.

In **Belgium**, a witness is obliged to appear and to testify before the court. If he does not comply with these obligations he may be forced to appear before the court and sentenced to a fine (Arts. 80, 157, 158 Code of Criminal Procedure). The judge directs the trial and has the discretionary power to order the parties and other persons to produce further evidence.

In **Denmark**, witnesses are obliged to appear and to testify before the court. Non-compliance will result in a fine, forced appearance or police arrest until 6 months (§§ 168, 169, 178 Code of Criminal Procedure – *retsplejelov* – rpl.). The same compulsory measures apply to a third person who is obliged to produce certain documents relevant to the proceedings (§§ 299, 178 rpl.).

In **Poland**, the obligation of witnesses to appear and testify can be enforced by a fine to be imposed by the court, their compulsory attendance or a police arrest up to 30 days (Arts. 242, 244 Code of Criminal Procedure). The testimonial obligation corresponds to the duty to surrender relevant evidence. (Art. 244 para. 1). *It is similar to the obligations of expert witnesses and interpreters* (Arts. 242, para. 1 and 244, para. 1). *The duty to surrender evidence can be enforced by the imposition of a fine* (Art. 242, para. 1) and arrest of up to 30 days (Art. 244, para. 2). It cannot, however, be enforced by compulsory attendance since this is not considered a useful measure to obtain relevant evidence. The Polish law also provides for sanctions for a violation of the dignity of the court. However, this norm – comparable to a contempt of court provision – does not apply to the obligations imposed on witnesses.

In **Turkey**, the Code of Criminal Procedure which is based on the German StPO of 1929, forces witnesses who fail to appear without sufficient grounds to appear before the court.

Witnesses can be fined if they do not comply with their obligation to appear and to testify (Art. 46, para. 2). Further evidence shall be seized and confiscated (Art. 86), but – similarly to the German StPO – a person who has such object in his possession is obliged to produce and surrender them to the prosecution authorities (Art. 87). If he does not comply with this obligation, he may be forced by a coercive detention (Art. 87 para. 2) except he has a right not to testify (Art. 87, para. 3). Thus, as in the German case, the compulsory measures resemble very much a *subpoena duces tecum* since the corresponding person is forced to actively participate in the gathering of evidence.

In Argentina, representing other Latin American countries, the judge has wide powers to collect the evidence necessary for the trial. A witness is obliged to appear and to testify truthfully and completely (Art. 240 *Código de Procedimiento Penal de la Nación* – CPPN). If he fails to appear he can be brought by the 'public force' (Arts. 245, 247 with 154). If the witness refused to testify he may be arrested for up to two days and later criminally prosecuted if he persists in refusing (Art. 247; e.g., *desobediencia* according to Art. 243, para. 1 *Código Penal*). The witness has to bring relevant evidence with him and produce it in court. This evidence can be searched and seized (Arts. 224, 231 CPP); the judge can order the production and surrender of objects related to the offence (Art. 232 CPP). If their location is unknown, the person possessing them has to surrender them; otherwise, he can be held criminally liable.

In reviewing the situation in these individual legal systems, one can conclude that the courts in civil law systems had far-reaching powers to compel testimonial evidence or documentary evidence in the possession of a witness or another third person. As far as the available compulsory measures are concerned, one can distinguish between measures with a *direct* or immediate compulsory character and measures with a *indirect* or mediate one. The *direct* compulsory measures do not compel the witness to surrender certain evidence to the court but rather pursue the objective to go directly after it and seize it. Since this implies that the prosecution authorities know the location of the evidence, an *indirect* approach has to be pursued if this is not the case. This consists of certain measures which put pressure on the witness or another person having such evidence in his possession. For this purpose, civil law systems mainly use pecuniary sanctions or arrest. Although these sanctions are normally not considered *criminal* sanctions in the proper sense but rather administrative sanctions (*amende civil*), they fulfill the very function of a *subpoena*: to break the will of a person who is in the possession of relevant evidence for the trial but is reluctant to surrender it.

2.2. Common Law Systems

The situation is quite similar in the common law systems. In the USA, Rule 17 (a, c) of the Federal Rules of Criminal Procedure 1997 empowers federal courts – at the motion of a party to the case – to order witnesses to appear and give testimony (*subpoena ad testificandum*) and to produce documentary evidence and objects (*subpoena duces tecum*). Failure to obey a *subpoena* without adequate excuse may be deemed a contempt of court (Rule 17 g). Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance.¹²

¹² See e.g. *Shillitani v. U.S.*, 384 U.S. 364 (1966).

In England and Wales, the duty of witnesses to attend before court and give evidence goes back to the Criminal Procedure Act 1865, section 1(1). The Criminal Procedure (Attendance of Witnesses) Act 1965, section 2 (1) as amended by the Criminal Procedure and Investigations Act 1996, section 66 (2), provides that the Crown Court may issue a *witness summons* (i.e., a summons requiring the person to whom it is directed to attend before the court and give evidence or produce any document or thing specified in the summons, i.e. *subpoena duces tecum*) where the court is satisfied that (a) the person is likely to give evidence to be material evidence or produce any document or thing likely to be material evidence, and (b) the person will not voluntarily attend as a witness or will not voluntarily produce the document or thing.¹³ The summons is enforced by the compulsory attendance of a witness and possible criminal sanctions. The Act of 1965, section 4 (2) as amended by the Act of 1996, section 65 (2) gives the Court the power to serve on the witness a notice requiring him to attend and if he fails without reasonable ground to issue a warrant to arrest him and bring him before the court. Section 4 (3) provides that a witness may be remanded by the court in custody or bail until such time as the court may appoint for receiving his evidence. According to section 3 (1) a person who, without just excuse,¹⁴ disobeys a witness summons is guilty of *contempt of the court* if he fails to attend. He may be punished summarily by that court with up to three months imprisonment.

In Nigeria, representing the former British colonies of Africa, the situation is almost identical to England and Wales. Section 186, Criminal Procedure Act (CPA), provides for a summons compelling the attendance of the witness and production of evidence. In case of non-compliance, a witness may be arrested and punished for disobedience of the summons under section 191 CPA. The High Court possesses the power to issue a *subpoena ad testificandum* or a *subpoena duces tecum*.

In sum, the common law systems provide for similar compulsory mechanisms as the civil law systems. The difference is a structural one: since proceedings in these systems follow an adversarial or party structure it is, in principle, up to the parties to collect and produce the relevant evidence. This implies that the court first addresses the party and his witnesses to obtain the relevant evidence; it would be incompatible with the character and purpose of an adversarial system if the state through the courts would itself collect the evidence. This, in turn, is a typical pattern of the 'civil law' model, putting more responsibility in the hands of the judge who directs the trial and has himself investigative powers and functions. Consequently, in such a system the judge orders the prosecution authorities, particularly the police, to search for and seize any relevant evidence. Only if they rely on the active participation of a witness or a third person but this person does not want to co-operate, may the judge order measures which put pressure on this person. These different approaches, however, do not change the common feature of both systems with regard to the need of using compulsory measures to obtain all relevant evidence.

China presents a unique case as one of the last countries governed by a communist system. This political difference, however, does not influence in particular the specific question

13. Section 2(3) was amended to the extent that the witness summons may only be issued on an application and not automatically as it used to be. Only in exceptional cases will the Crown Court issue a witness summons of its own motion.

14. The existence of a just excuse will not be lightly inferred. Witnesses are required to submit even in view of very substantial inconvenience in their business and private lives (Blackstone's Criminal Practice, 1996, sect. D 11.35).

under examination. Although the Criminal Procedure Act of 1 July 1979, as amended by the Act of 17 March 1996, does not discuss the issue, Chinese courts have the power to compel testimonial evidence as a consequence of the witnesses' obligation to appear before the judicial authorities (courts and prosecutors) and give evidence (Art. 48 Criminal Procedure Act – CPA). The witnesses have to give full and truthful evidence during trial and shall be criminally responsible if they lie or suppress any evidence (Art. 47, 156 CPA with Arts. 305, 310 Penal Code of 1 July 1979 as amended by Act of 14 March 1997).¹⁵ A *subpoena duces tecum* does not exist. Other compulsory measures, as compulsory attendance, are not provided for either. There is no link between testimonial and, for example, other forms of evidence such as documents.

2.3. Conclusion

The first question as to the power of courts to compel witnesses to appear and produce evidence must be answered in the affirmative. National courts possess wide powers to compel evidence by forcing a witness to appear and testify (*subpoena ad testificandum*) and/or produce certain documents (*subpoena duces tecum*). The fact that civil law systems prefer rather *direct* compulsory mechanisms to obtain relevant evidence, in particular the seizure of evidence, is due to the different structure of the civil law procedure (judicially led, more inquisitorially influenced – *instruktorisch*) on the one hand and the common law (adversarial) procedure on the other hand. It does not mean at all that the civil law systems completely renounce compulsory mechanisms but merely that they prefer a different approach which is appropriate to their procedural structure. This is confirmed by the fact that various civil law systems (*inter alia*, Germany, Netherlands, Denmark, Poland, Turkey and Argentina) know techniques similar to *subpoena duces tecum* imposing a fine or arrest on a witness or a third person who refuses to surrender relevant evidence. Although these measures are not criminal sanctions *stricto sensu*, they fulfill the same function: forcing a reluctant witness or third person to co-operate and surrender relevant evidence in his possession. Further, in some countries (e.g., Spain, Netherlands and Argentina) these administrative sanctions are complemented by criminal offences which hold the 'disobedient' witness criminally responsible.

3. LIMITS TO THE COMPULSORY POWERS OF NATIONAL COURTS

The *subpoena* under examination was directed to the Defence Minister and High Government Officials of the Republic of Croatia. Thus, the question arises whether such persons enjoy privileged treatment as witnesses in national criminal procedures because of their status (*limit ratione personae*) or because of the character of the information they possess (*limit ratione materiae*). Apart from these possible limits, it is without doubt that, as already stated by the Trial Chamber II, the power of courts is generally limited to that evidence which is 'relevant, necessary, or in some cases, desirable' (decision of 18 July 1997, para.

¹⁵ Entered into force 1 October 1997

100). Therefore, the following observations will focus on the limits *ratione personae* and *ratione materiae* mentioned above since they are not yet sufficiently clarified.

3.1. Civil Law Systems

In France, the Prime Minister and other members of government may only appear before a court with the authorization of the Council of Ministers (*Conseil des Ministres*) (Art. 652 CPP). If they do not obtain this authorization, they have to be interrogated by a commissioned judge at their home. The protocol resulting from this interrogation can be read in the trial hearing (Art. 654 CPP). Thus, this privilege does not deny the courts important testimonial evidence. The privileges of these witnesses with regard to certain areas of their official function or tasks, however, are a stronger limitation. In this regard, the privileges regarding *professional* and the *defence secrets* imply the right to refuse to give evidence.¹⁶ Thus, in a case before the *Cour d'appel* of Paris an official of the *Direction de la Surveillance du Territoire* was granted a right to refuse to give evidence as his declaration could have affected the defence secret.¹⁷ The decision whether interests of national defence were really affected was left to the discretion of the Minister of the Interior. It appears, therefore, that the courts accept the assertion of the defence privilege without requiring further substantiation or even interrogation of the competent state authority. Due to the time constraints, it could not be entirely clarified, though, if there exist other judicial remedies, particularly of an administrative nature, against the assertion of a defence privilege.

In Germany, the members of government may not declare or give evidence before a court without previous authorisation of the government itself (§ 6 Bundesministergesetz – MMinG). This authorisation shall only be denied if the declaration will cause harm to the welfare of the Federation or any of the States (§ 7 BMing). Thus, one can speak of a relative prohibition to declare, implying a careful balancing of the interests at stake (interest of a functioning and effective criminal justice versus the national interest to keep certain information secret). On the other hand, official documents may not be disclosed if the superior administrative authority declares that the disclosure would harm the Federation or any of its States (§ 96 StPO: *Sperrverklärung*). This norm excludes the disclosure of certain official documents in the interest of protecting state secrets (*Dienstgeheimnis*) but the court is obliged – within the framework of its obligation to clarify all relevant facts (*Aufklärungspflicht*, § 244 para. 2 StPO) – to take all steps necessary to obtain the relevant documents (*Gegenvorstellung*). The reasons for the non-disclosure must be substantiated since the court must be able to examine whether the refusal can be accepted without violating the rule of law.¹⁸ A simple, unfounded and unsubstantiated administrative declaration blocking the documents (*Sperrverklärung*) is insufficient. If the administrative authority cannot substantiate the reasons for its declaration because of the protection of national secrets, it must also substantiate why these

16 Cf. Jean Dumont, *Juris-Classeur, Procédure pénale. Audition des témoins*, Arts. 101 to 113, Commentaires, 6, 1995, Nos. 76 to 96.

17. *Cour d'appel* de Paris, *Chambre d'accusation*, 27 May 1987, *Dalloz* 1987, *sommaires commentés*, pp. 410 f., with a note by Jean Pradel.

18. Cf. BGHSI 32, 115, 125; see also *Karlsruher Kommentar zur Strafprozeßordnung*, edited by G. Pfeiffer, 3rd ed., München 1993, § 96 marginal note 1.

reasons need to be kept secret.¹⁹ The final decision – possibly after the *Gegenvorstellung* of the court – is taken by the administrative authority. It has to balance carefully and thoroughly if the protection of state secrets require and justify the non-disclosure of documents relevant to a criminal trial.²⁰ Since the competent minister is normally the highest administrative authority, he may order the non-disclosure for himself.²¹

In **Italy**, a member of government must appear before court and his compulsory attendance can be ordered by the court.²² As to his right to refuse to give evidence, a minister may invoke a professional or a state secret. In the former case, the court can investigate if the facts really relate to a professional secret (Arts. 201, para. 2 with 200, para. 2 CPP). If it considers the claim of the Minister to be unfounded, it may order the witness to declare (Art. 202 CPP). Such a judicial control does not exist in the case of a presumed state secret. In this case the court has to inform the Council of Ministers which has to confirm that the declaration of the Minister would concern state secrets. If he does so, the Court has to accept this decision.²³ The same rule applies in the case of the production of documents. In case of assertion of professional privilege, the court possesses full judicial control (Art. 156, para. 2 CPP) while in the case of a state secret the Council of Ministers may confirm such a secret within 60 days. Then the court has to close the proceedings (Art. 256, para. 3 CPP), otherwise he may order the seizure of the documents (Art. 256, para. 4 CPP).

In **Spain**, members of government may issue their declarations in written form (Arts. 703, para. 1 with 412, para. 2 No. 1 LECrim). Public officials, including ministers,²⁴ have a duty to refuse to give evidence on matters affecting official or national secrets (Arts. 707 with 417 No. 2 LECrim). According to Article 4 of Act 9 (5 April 1968), as amended by Act 48 (7 October 1978), the Council of Ministers determines whether a matter is secret or confidential. Since this decision is an administrative act the Supreme Administrative Tribunal is competent to control it if corresponding proceedings are initiated by the parties (*see* Art. 24, para. 1 Constitution). Thus, recently this Tribunal decided upon the qualification of documents as secret.

In the **Netherlands**, there exists only an explicit privilege regarding professional secrets (Art. 218 Code of Criminal Procedure). As far as state secrets are concerned Art. 288 only provides that the court can prevent any question being answered. Thus, it is up to the court to decide if a question might affect state secrets and, therefore, should not be answered.²⁵

In **Denmark**, the superior administrative authority can refuse to consent to a declaration of a public official for reasons of state security and the protection of diplomatic relations (Art. 169 rpl.). The court may not authorise the declaration against the will of the superior administrative authority (Art. 169 rpl. last sentence), but has the right to evaluate whether state security interests are indeed affected.

In **Poland**, Article 244, para. 4 Code of Criminal Procedure referring to Articles 162 and

19. Schafer in Lowe-Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, edited by P. Ries, Berlin/New York 1998, § 96, marginal note 1.

20. BGHS 32, 115, 124.

21. *Karlsruher Kommentar zur Strafprozeßordnung*, op. cit. § 96 marginal note 10.

22. If he is, however, a Member of Parliament it has to lift his parliamentary immunity (Art. 68, para. 1 Constitution).

23. In cases of acts aiming at the throwing of the constitutional order, however, the court may reject the claim of a witness that his declaration concerns state secrets.

24. About the concept of a public official *see* the decision of the *Corte Suprema* of 3 July 1963, 12 June 1973 and 7 February 1974.

25. We are indebted to Prof. M. Keijzer, Driebergen (Netherlands), for this additional information.

163 gives a right to refuse to give evidence because of professional and state secrets. In the former case, the court decides if the right applies in the concrete case; in the latter case it is up to the superior administrative organ to decide. Apart from these rules Polish law does not provide for privileged treatment of ministers or 'high officials'. Due to the time constraints it was not possible to clarify whether there exists some form of judicial control with regard to the assertion of a security privilege.

In **Turkey**, the superior administrative authority can prohibit declaration before a court if the disclosure of these documents would harm the nation. The court can ask the competent ministry to review this decision (Art. 88 Code of Criminal Procedure). Further, administrative proceedings could be initiated since this decision is an administrative act (Art. 125 Constitution).

In **Argentina**, the Defence Minister is allowed to give his declaration in his residence before a commissioned judge (Art. 250 CPPN) but, apart from that, there exists no limitations on his obligation as a witness. With regard to state secrets, public officials are exempted from the obligation to declare (Art. 244, para. 1 CPPN). Yet, the last paragraph of Article 244 gives the judge the right to evaluate whether the facts relied upon by the witness fall within the legally established reasons to abstain from a declaration. This implies that the judge can also evaluate the quality of the state secret.

In **sum**, one can conclude that in civil law countries high officials, including a defence minister, are, in principle, obliged to declare before a court or before a commissioned judge. However, this obligation is limited by the possibility to assert a state or defence privilege in order to abstain from declaring or presenting certain evidence. Although the ultimate decision on this issue lies normally with the executive (the competent ministry, except in the Dutch case), this decision may not be arbitrary and unfounded. The executive has to give reasons to prohibit a declaration or the surrender of a document asserting state privilege. It has to strike a balance between the interests of a fair and efficient administration of justice and the need to protect certain state secrets. Moreover, a total exclusion of a judicial control is hardly compatible with the rule of law and the separation of powers. The courts may at least evaluate or/and investigate whether the reasons given by the executive support the assertion of a state privilege (*see e.g.*, the German, Dutch, Danish and Argentinean laws).

3.2. Common Law Countries

In the **USA**, Rule 17 of the Federal Rules of Criminal Procedure (*see above para. 20*) is not, by its language, limited to ordinary witnesses, and *subpoena* requiring government officials to testify and/or to produce evidence have been upheld. In fact, in 1974 the US Supreme Court refused to quash a *subpoena* that required Richard M. Nixon, then president of the United States, to produce voice recordings of specifically identified conversations with aids and advisors,²⁶ thereby confirming that no one, not even the president of the United States, enjoys absolute immunity from judicial process under all circumstances.²⁷ This obviously applies also to a defence minister.

26. *US v. Nixon*, 418 US 683 (1974). *See also* MPIBL Brief, footnote 78: Trial Chamber II, Decision of 18 July 1997, para. 99 *et al*

27. *US v. Nixon*, 418 US at pp. 706 ff.

However, a valid *subpoena* may not function as an excessive 'third party discovery device', as claimed by the Republic of Croatia (Brief on Appeal of 18 August 1997, pp. 43 ff.), but must be reasonable, relevant and specific. The Supreme Court has interpreted the 'unreasonable or oppressive' standard for a *subpoena duces tecum* in a line of cases and has stated that it requires the party seeking the production of documents to show that the documents are evidentiary, relevant, not otherwise available, necessary for trial, and that the appellation is made in good faith and is not intended as a general 'fishing expedition'.²⁸

Although Rule 17 itself does not explicitly mention privileges, a *subpoena duces tecum* will not be enforced if the witness can show that he or she is immune (*see, supra*, para. 38) or the information is privileged. A court's decision not to enforce a *subpoena* that seeks disclosure of confidential information may be based upon a finding that such a *subpoena* does not satisfy the requirements of Rule 17²⁹ or may be based upon a separate analysis of privileges and immunities.³⁰ The generally recognized evidentiary *privileges* protecting confidential information can be invoked to exempt a witness from compliance with a *subpoena duces tecum*,³¹ and information that might compromise *national security*, damage the military, or harm diplomacy may also be recognized as privileged. The Supreme Court, for example, acknowledged the existence of a privilege protecting sensitive military information in a case involving a motion for discovery under the Federal Rules of Civil Procedure.³² In another case dealing with presidential authority involving foreign policy considerations, although not one involving a *subpoena*, the Supreme Court recognized that the president, both as commander-in-chief and as the nation's organ for foreign affairs, has access to intelligence services 'whose reports are not an ought not to be published to the world' and which may properly be kept secret.³³ Finally, the Supreme Court has recognized a presumptive privilege for the president based on the president's general interest in confidentiality. This privilege is a limited one, however, and is not entitled to a high degree of deference such as would be afforded a claim of military privilege.³⁴ This generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.³⁵

In sum, the president (and by extension any other high ranking government official) does not enjoy an absolute, unqualified privilege that automatically exempts him or her from compliance with a *subpoena*. A high ranking official has no 'generalized interests in confidentiality' that overrides *judicial control* over the evidence in a case. Indeed, if the *subpoena* itself is not flawed, such an official like everyone else, must comply unless the court is convinced that the information sought is in some way privileged. In addition to the generally accepted evidentiary privileges, a privilege may exist if production of the information would

28. *US v. Nixon*, 418 US at 700.

29. *See e.g., In re August, 1993 Regular Grand Jury (Medical Corp. Subpoena II)*, 854 F.Supp. 1392 (1993).

30. *US v. Nixon*, 418 US at 703.

31. *E.g., In re Grand Jury Subpoena called 91R0052-11*, 142 F.R.D. 122 (1992) (attorney-client); *In re August, 1993 Regular Grand Jury (Medical Corp. Subpoena III)*, 854 F.Supp. 1392 (1993) [psychotherapist-patient]. *See generally US v. Nixon* 24, 418 US at 709.

32. *US v. Reynolds*, 345 US 1 (1952). In this case, the plaintiffs, who were suing the United States following the death of relatives in the crash of a military aircraft in 19487, sought the production of Air Force documents that would shed light on the cause of the accident. Their request, which took place during a time of crucial preparation for national defense, was denied.

33. *C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948).

34. *US v. Nixon*, 418 US at 711.

35. *US v. Nixon*, 418 US at 713.

threaten military, diplomatic, or sensitive national security interests, but these privileges must be established on a case-by-case basis and are submitted to judicial control.

In **England and Wales**, there are certain people who are not compellable to give evidence, e.g. the Sovereign of Great Britain, foreign heads of state, diplomatic agents, the administrative and technical staff of diplomatic missions and their families and also officers of international organisations.³⁶ However, there is no such exception as far as a government minister is concerned. He is to be seen as a competent and compellable witness and has no right to refuse to testify on these grounds. Further, a House of Lords decision has confirmed that also ministers of the Crown and government departments are not immune from proceedings for contempt of court.³⁷

As to the substantive limits of the compulsory power to give evidence, the *doctrine of public interest immunity* applies (formerly called 'Crown Privilege'). It refers to the case in which two kinds of public interests clash, namely the public interest in enabling material to be withheld where its disclosure would harm the nation or the public service on the one hand and the public interest in efficient and fair trials on the other hand.³⁸ If the public interest in the non-disclosure prevails, the material concerned is withheld and the evidence is excluded by the court by reason of 'public interest immunity'.³⁹ Where facts are excluded by public interest immunity, not only are the documents which are immediate subject of the exclusion affected, but also secondary evidence of the contents of such documents will not be permitted, including oral evidence.⁴⁰ The final assessment lies with the court, not the executive. In *Conway v. Rimmer* (1968) AC 910, the House of Lords ruled that it was a question of balance to be decided by the courts on a case by case basis and not by the executive. Although the objections by the Crown to the disclosure are to be taken very seriously, the court has the power to inspect the documentary evidence privately and to order its production despite the objections being made.⁴¹ As to documents concerning national security, Lords Reid and Upjohn suggested in *Conway v. Rimmer* that there are certain classes of documents, such as Cabinet papers, Foreign Office dispatches, high-level interdepartmental minutes and documents pertaining to the general administration of the armed forces, which ought not be disclosed whatever their contents might be.⁴² In later decisions, however, the House of Lords made clear,

36. Diplomatic Privileges Act 1964 sect. 2(1), Consular Relations Act 1968 sect. 1(1), International Organisations Acts 1968 and 1981; State Immunity Act 1978; Diplomatic and other Privileges Act 1971 sect. 4.

37. In *M v. Home Office* (1993, 3 All ER 537), the former Secretary of State was found guilty of contempt for not complying with a court order. It was made clear, that although contempt proceedings against a government department or a minister in an official capacity would not be either personal or punitive (as it would not be appropriate to fine or sequester the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), a finding of contempt would demonstrate that a government department had interfered with the administration of justice and an order for costs could be made to underline the significance of the contempt (*ibid.*, at pp. 538 and 566). According to Lord Templeman the proposition might otherwise be established, that the executive obey the law as a matter of grace and not as a matter of necessity (*ibid.*, at p. 541). However, the finding was varied to refer to the Secretary of State for the Home Department, rather than the holder of the office in person. This was in recognition of the fact that his responsibility lay in his official capacity as the head of the department concerned (*ibid.*, at p. 567; AILER Annual Review 1993 p. 106). The House of Lords stated that it would then be for the Parliament to determine the consequences of the finding.

38. Keane, *The Modern Law of Evidence*, London 1994, p. 418.

39. The Criminal Procedure and Investigations Act 1996, sects. 3(6), 7(5), 8(5) and 9(8), even establishes that in a trial the prosecutor must not produce prosecution evidence to the accused to the extent that the court, on application by the prosecutor, concludes it is not in the public interest to disclose it.

40. *Gann v. Gann* (1961) 1 WLR 1469.

41. *Conway v. Rimmer* (1968) AC 910 at p. 953; *R v. Keane* (1994) 1 WLR 746.

42. *Conway v. Rimmer* (1968) AC 910 at pp. 952 and 993 respectively.

that even in the case of documents of a high level of public importance the courts are prepared to evaluate 'class' claims⁴³ and on rare occasions to require their disclosure.⁴⁴ In sum, it is up to the judge to balance the interests involved. Although the court has to take objections of the Crown seriously, the final assessment as to the importance of the disclosure of documents lies with the court and not with the executive.

In Nigeria, there is no general rule of law, statutory or otherwise, which exempts government officials from appearing and declaring before the court. However under the Nigerian Constitution,⁴⁵ the President, Vice-President, Governors and Deputy Governors of the states are in their personal capacities, granted immunity during their tenure from civil and criminal proceedings. This immunity is not available for ministers or other public officials. In practice, *subpoena* or summons addressed to officials of ministerial or comparable status, are complied with through the appearance of the appropriate officer who has personal knowledge of the subject or who has custody of the relevant documents. The courts have generally been satisfied with this practice in so far as the evidence sought can be satisfactorily obtained through the minister's representative.⁴⁶ A person upon whom a *subpoena* is served may however apply to court to set it aside on the ground that it was not obtained in good faith for the purpose of evidence or that it is vague and obtained on frivolous grounds.⁴⁷ Apart from the immunity of the President or that of Governors no other official is granted immunity under Nigerian law from testifying before a court. However, a person summoned to be a witness or to produce documents may, apart from seeking to set aside a *subpoena*, object to admissibility on some specified grounds. Section 218 of Cap. 112 is germane to this issue.⁴⁸ Although it relates expressly to the production of documents, the courts have readily applied the same principle when a person objects to giving oral evidence.

Section 219 referred to in the above text deals with the claim of state privilege.⁴⁹ How-

43. See e.g. *Burmah Oil v. Bank of England* (1980) 1090 per Lord Keith at p. 1134.

44. On the other hand in a case before the Court of Appeal, it was held that once a certificate of a minister of state demonstrated that the disclosure of documentary evidence posed an actual or potential risk to national security, a court should not exercise its right to inspect that evidence (*Balfour v. Foreign and Commonwealth Office* (1994) 1 WLR 681). In a criminal case touching and concerning liberty, however, the weight to be attached to the interest of justice is very great. The judge should exercise his right to balance the conflicting interests in order to prevent a miscarriage of justice (*cf. Keane, op. cit.*, p. 423; Blackstone's *Criminal Practice*, 7th ed., London 1997 section F 9.1.).

45. See section 267(1) of the 1979 Constitution as modified by Constitution (Suspension and Modification) Decree No. 107 of 1993.

46. This is invariably so where only documents are required to be produced.

47. See *Attorney-General (Western Nigeria) v. African Press and Ojewunmu* (1965) 1 ALL.NLR 6.

48. It provides: '(1) A witness subject to the provisions of section 219 summoned to produce a document shall, if it is in his possession or power, bring it to the court, notwithstanding any objection which there may be to its admissibility. The validity of any such objection shall be decided by the court; (2) The court if it sees fit may inspect the document or take other evidence to enable it to determine on its admissibility'.

49. It provides: '(1) The minister, or in respect of matters to which the executive authority of a state extends, the Governor or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence, when, after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest. Any such objection taken before trial shall be by affidavit and any such objection taken at the hearing shall be by certificate produced by a public officer. (2) Any such objection, whether by affidavit sworn by the Minister or by certificate under his hand (or by affidavit sworn by or certificate under the hand of a person nominated by him as aforesaid), shall be conclusive and the court shall not inspect such documents or be informed as to the nature of such oral evidence but shall give effect to such affidavit or certificate.' Section 219 is a codification of the English House of Lords decision in *Duncan v. Cammell Laird* [1942] AC 624. This decision upheld the argument of the Crown that a Minister's claim of privilege was final. However this decision has been overruled in the subsequent case of *Conway v. Rimmer* [1968] 1 ALLER 874 H.L., see above para. 43 of this Brief.

ever, section 219 is not the only provision in Cap. 112 which relates to State or official privilege although it is undoubtedly the most potent. Other provisions like section 166 which prohibit the disclosure of unpublished official records relating to affairs of state have generally not prevented the court from examining the particular document and to see if it falls under the class of privileged documents under the relevant provision. With section 219, however, the courts were initially handicapped by its explicit exclusion from the ambit of section 218 which authorises the court to examine documents the admissibility of which is objected to. None the less since 1970, it has been possible for litigants to challenge a claim of privilege even under section 219 by virtue of the Constitutional provisions on fair hearing.⁵⁰ It should be appreciated that thus far the courts have not said that a claim of state privilege could not be upheld; merely that they were entitled under the Constitution to ascertain the genuineness of the minister's claim. Where a court after examining a document agrees with the minister that it would not be in the public interest to disclose its contents, the court would as a rule, give effect to the minister's claim. In criminal cases however, the Supreme Court pointed out that where there are reasonable grounds for supposing that the exclusion of evidence by such a claim might have prejudiced the accused person in making his defense, the court is bound to say that the prosecution has not provided its case beyond reasonable doubt.⁵¹ However the position under the current Constitution appears to be different. Section 33(13)(b) of the 1979 Constitution⁵² on the surface appears to be identical with the previous provisions such as section 22(3)(b) of the 1963 Constitution.⁵³ Under these newer provisions there no longer exists in Nigeria an *absolute* claim to exclude documents or other evidence on the ground of state privilege. Such a claim must first be established to the satisfaction of the court which for this purpose may examine the document or take other related evidence. If the court is not satisfied that disclosure will be prejudicial to public interest, it is received as evidence in open court; if on the other hand a court is satisfied that disclosure will not be in the public interest, the document or other evidence is admitted *in camera*.⁵⁴

In sum, the common law systems do not give special status to government member or other officials. Although they recognize in principle that national or state security interests

50. In *Apampa v. Balogun* (Suit No. 1/211/65 of 20 October 1970 reported in Aihie and Oluyede, *Cases and Materials on Constitutional Law in Nigeria* 1979 at p. 97), J. Aguda held in respect of a claim to privilege that a court was entitled under the 1963 Constitution to examine the document which is the subject of the privilege. According to the judge the right of a litigant to fair hearing under the Constitution cannot be realised if a minister's decision to exclude evidence from the court is not subject to judicial supervision. He held further that to the extent that section 219 of Cap. 112 was inconsistent with the Constitution, it was void. The rationale of this landmark decision has been replicated in a number of subsequent cases where the courts have also relied on the procedure contemplated in the 1963 Constitution for objections of this nature (see generally *Bakare v. University College Hospital Board of Management* [1972] 2 Univ. of Ife L.R. 391 and *Maja (pm) & sons Ltd v. U.A.C. Nig Ltd* [1971] 1 NMLR 157). The relevant provision, section 22(3) (b) reads: 'If in any proceedings before a court or (such) a Tribunal a minister of the Government of the Federation or a minister of a state certifies that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangement for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.'

51. See *African Press Ltd & Ojewunmu v. Attorney-General (Western Nigeria)* [1965] 1 ALL.NLR 12.

52. Cap. 62 Laws of the Federation of Nigeria (LFN) 1990 as modified by Constitution (Suspension and Modification) Decree No. 107 of 1993.

53. It states that, where in proceedings before a court or tribunal a minister satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall receive evidence of the matter in private and take other steps to prevent the public disclosure of the matter.

54. See M.A. Owoade & M.A. Odujirin, *State Privilege In Nigerian Law, The Evidence Act, the Courts and the Constitution*, 1986 Nig.Current L.Rev. 207 at p. 214.

prohibit the disclosure of certain information to be produced by these witnesses, the assertion of such interests is submitted to strict judicial control. Security interests have to be balanced with the interest in a fair and efficient administration of criminal justice.

In China, a broad exception is provided for the collection of evidence having to do with State secrets (Art. 45, para. 2 Criminal Procedure Act – CPA). In this case, the evidence may not be introduced into the trial. Such evidence is not even allowed to be collected or ascertained in any way. The definition of ‘State secrets’ can be found in the Law for Keeping State Secrets of 5 September 1988 and the Detailed Regulations for Keeping State Secrets (published 25 May 1990). State secrets do not only refer to matters of national defence, but also to political, diplomatic or other important non-official questions. There are three different levels of State secrets. The newly revised CPA considers even the basic level to be sufficient to prohibit the introduction of evidence in criminal proceedings.⁵⁵ It is an obligation of all citizens to keep State secrets. Disobedience can lead to criminal sanctions. From this it is obvious that high officials or even the defence minister are by no means allowed to disclose State secrets.

3.3. Conclusion

The second question as to the limits of the power of courts to compel the production of evidence requires a differentiated answer.

It is beyond doubt that ministers and high government officials are not completely exempted from producing evidence in criminal trials. They may exceptionally possess certain privileges, such as the option of making a written instead of an oral declaration, but they are always required to fulfill their obligations as a witness and produce evidence *in one way or another*.

The really important limits exist with regard to the substance of the evidence these official witnesses may be required produce. This limit *ratione materiae* has already been recognized by the Trial Chamber II, which correctly stated on the basis of a cursory review of national laws that ‘national security interests may constitute a legitimate limitation ... to disclose or produce information before municipal courts of law’ (Decision of 18 July 1997, para. 126; see already above, para. 3).

However, it also clearly follows from the comparative analysis undertaken in this Brief that such a national security privilege may not *automatically* excuse a witness from producing evidence specified in a court order. Rather, the comparative analysis shows that civil and common law systems require some form of *judicial control*. Although this control appears to be more strongly entrenched in the common law systems, it is by no means completely strange to the civil law systems as shown, for example, by the German, Dutch and Argentinean cases.

Thus, the conclusion of the Trial Chamber II that ‘there is a recognition in national laws that administrative decisions on questions of national security may be subject to review by the judiciary, the scope of this review is, in general, subject to the particular circumstances of each case and the interests of a particular state’ (*ibid.*, para. 146; see already above, para. 3) has been confirmed by this Brief. However, the conclusion which may be drawn from this

⁵⁵ Before the amendment of 17 March 1996 the CPA restricted this exemption only beginning with the second level of State secrets.

with regard to the relationship between an international criminal court and a state is another question entirely different (see below para. 50).

4. FINAL CONCLUSIONS

National courts have the power to compel the production of evidence by forcing a witness to appear and testify (*subpoena ad testificandum*) and bring certain documents with him (*subpoena duces tecum* in a wider sense). There are various sanctions to enforce such court orders, ranging from compulsory attendance and pecuniary sanctions to arrest and criminal prosecution. National security interests may impose a legitimate limit on these powers; they do not, however, automatically excuse a witness from producing evidence. Indeed, a comparative analysis shows that some type of judicial control is allowed to ensure a right balance between the national security interest claimed and the just, fair and efficient administration of criminal justice.

On an international level this result permits several conclusions.

First of all, as a *general principle of law* an international criminal court must have compulsory powers to produce evidence. A state that for reasons of national security objects to an order to produce evidence must substantiate its objection and recognise the right of an international criminal court to conduct a judicial evaluation of its position.

Secondly, the comparative analysis clearly shows that national criminal tribunals cannot function efficiently and produce satisfactory sentences without compulsory powers with regard to the gathering of evidence. The same applies to an international criminal tribunal. The Trial Chamber II correctly states that it is imperative 'that a Trial Chamber, which must ultimately make a finding of the guilt or innocence of such individuals and impose an appropriate sentence, has all the relevant evidence before it ...' (Decision of 18 July 1997, para. 31). For that purpose, it depends on the co-operation of states. If these states, contrary to their obligations under the UN-Charter (Art. 25), the Statute of the ICTY and the Dayton Agreement,⁵⁶ refuse to co-operate, the Court needs compulsory powers. It must 'have the authority to oblige States to submit whatever material is necessary to evaluate the case effectively and fairly' (*ibid.*, para. 40).

Thirdly, the national security interests of a state cannot have the same weight before an international criminal court as before its own national criminal courts. An international court has to adjudicate international crimes that are typically committed with the active participation of governments or their high officials and whose clarification requires full access to official records of military operations and/or political plans such as for ethnically motivated cleansings. Without this kind of evidence the International Military Tribunals of Nuremberg and Tokyo and the other war crimes tribunals would never have been able to convict major war criminals of the second world war. Access to this evidence is even more important in a

56. See for the corresponding obligations the special issue of the European Journal of International Law, Vol. 7 (1996) No. 2, in particular the article by Jones, *The Implications of the Peace Agreement for the International Criminal Tribunal for the former Yugoslavia* 7 EJIL 226 (1996). See also ICTY Yearbook 1995, pp. 321 ff. See also Ambos, *Zur Rechtsgrundlage der Festnahme mutmaßlicher Kriegsverbrecher durch die Sfor im ehemaligen Jugoslawien*, 52 *Juristenzeitung* (1997), at pp. 887 to 889.

case in which the question of the defendants command responsibility is the crucial legal issue.⁵⁷

The former conclusions, finally, support the view that the classical concept of public international law as a law between sovereign states that behave as *par inter pares* and do not recognise compulsory measures from international organs, cannot be applied in its entirety to international criminal law, in particular *vis-à-vis* an international criminal court. International law, and especially international *criminal* law, is a law in motion. Since international criminal law is based to a great extent on criminal law (with regard to the rules of individual accountability, the offences and the procedural rules), classical international law has to a certain extent to be adapted to a new reality. Criminal Law is by its very definition coercive. Therefore, international criminal law cannot accept the invocation of principles that would support absolute immunity to compulsory mechanisms that are an inherent part of all criminal justice systems. If it were to do so, international criminal law would lose its sense and its very *raison d'être*. International criminal jurisprudence has to find the right balance between the needs of criminal law and the respect due to the sovereignty of states inherited from classical international law. It should be clear from this analysis that states cannot be permitted to invoke state sovereignty or national security in order to escape the necessary and universally recognized compulsory mechanisms of (international) criminal justice.

57 Cf. the observations of Prof. Wedgwood in her Brief, 11 April 1997, pp. 13 ff., 17 ff.