

Chapter 3

Jurisprudence of international courts on immunity of state officials

3.1 Introduction

This chapter deals with the jurisprudence of international courts on immunity of state officials in relation to international crimes. These courts include International Court of Justice (ICJ), the International Criminal Court (ICC) and International Criminal Tribunals. The practice at national courts is discussed in chapter 5. Regarding international courts, it is generally observed that immunity of state officials is neither a defence nor a mitigating factor in the prosecution and punishment of state officials. This position is widely accepted and upheld by international courts.

However, the controversy on immunity of state officials – and which is the main focus of this chapter – lies in the way state officials are treated by international courts particularly with regards to the question of subpoenas *ad testificandum* and *duces tecum*. In this regard, this chapter addresses the following question: *Does immunity of state officials cover criminal prosecution and subpoenas?* The preceding question relates to how international courts have approached the issue of immunity of state officials in relation to prosecution of international crimes.

The question of immunity of state officials from prosecution for international crimes has been treated differently by international courts. While international criminal law is clear in itself that no state official is immune from prosecution for international crimes, the jurisprudence of international criminal tribunals reveals that there is a disagreement as to the extent of immunity accorded to state officials. In other words, there is no uniform treatment or application of the immunity of state officials before international courts. The problem arises regarding issuance of subpoenas against state officials to testify or produce evidence before international courts. The jurisprudence of international courts indicates that such courts have adopted different positions on the extent and scope of

immunity accorded to state officials. It is not clear whether immunity of state officials extends to cover *subpoenas ad testificandum* and *duces tecum* or only to prosecution for international crimes. The position at international law in this regard is presented here as observed in the jurisprudence of international courts. But, before discussing subpoenas against state officials, it is necessary to indicate briefly, a settled position by international courts on immunity of state officials from prosecution for international crimes

3.2 State officials do not enjoy immunity from prosecution before international courts

Since the Nuremberg and Tokyo Military Tribunals, international courts – including hybrid criminal courts or tribunals – have taken a strong position that in respect of international crimes, immunity of state officials is neither a defence nor a mitigating factor in the prosecution and punishment of individuals respectively. This reflects contemporary developments on the question of immunity of state officials in international law. The Nuremberg Tribunal rejected the defence of immunity for many former German state officials,¹ and so did the Tokyo Tribunal.² Despite their work on prosecution and punishment of state officials responsible for international crimes during World War II, the Tokyo and Nuremberg Tribunals have been criticised as a manifestation of the victor's justice. It was only the powerful that judged the vanquished. The trials before such tribunals were only selective.³

After the Nuremberg and Tokyo Tribunals, new patterns of crimes were committed in different parts of the world. For example, Yugoslavia and Rwanda witnessed genocide, crimes against humanity and war crimes. These events culminated yet in the development of international criminal law. International Criminal Tribunals for the former Yugoslavia and Rwanda became necessary to address impunity. Until the establishment of

¹ Nuremberg Judgment, International Military Tribunal, 1946, reprinted in (1947) 41 *American Journal of International Law* 172, 220-221.

² See, U Kei, (2003) *Beyond the judgment of civilisation: The intellectual legacy of the Japanese war crimes trials, 1946-1949*, 4-6.

³ C Hosoya, 'The Tokyo trial from the perspective of international law' in C Hosoya, N Ando, Y Onuma and RH Minear (eds.) (1986) *The Tokyo war crimes trial*, 29-31; O Yasuaki, 'The Tokyo trial: Between law and politics' in Hosoya *et al*, (1986) 45-52.

international criminal tribunals in 1990s and the judgment of the ICJ in the *Arrest Warrant* case⁴ in 2002, the position regarding immunity of state officials remained the same. State officials charged with international crimes do not benefit from immunity from prosecution before international courts. To date, the position still remains the same. The adoption of the Rome Statute of the International Criminal Court in 1998 indicates that this position will continue to remain the same.

In the *Arrest Warrant* case, the ICJ addressed the issue of immunity of the then Minister for Foreign Affairs of DRC and held that in international law, ‘certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.’⁵ It concluded that, when abroad the Minister for Foreign Affairs enjoys full immunity.⁶ The main position stated by the ICJ upholding customary international law of immunity of state officials is found in paragraph 58 of its judgment. However, the ICJ then specified circumstances where state officials cannot enjoy immunity.⁷ The court said, ‘[s]uch persons enjoy no criminal immunity under international law in their own countries’; they cease to enjoy immunity from foreign jurisdiction if it is waived by their state; immunity ceases to apply after a person ceases to hold office; finally, ‘an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.’⁸ Such international courts include the ICC, International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY).⁹

⁴ *The Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 3.

⁵ *Arrest Warrant* case, para 51. Para 51 of the ICJ Judgment in the *Arrest Warrant* case is somewhat controversial especially if considered against the provisions of international criminal law statutes, particularly art 27 of the Rome Statute of the ICC. At the time of delivering its judgment in this case, the ICJ should have known the existence of art 27 of the Rome Statute of the ICC.

⁶ *Arrest Warrant* case, para 54.

⁷ *Arrest Warrant* case, para 61.

⁸ *Arrest Warrant* case, para 61.

⁹ For a critique on the ICJ Judgment in the *Arrest Warrant* case, see generally, A Cassese, ‘When may senior state officials be tried for international crimes? Some comments on the *Congo v Belgium case*’ (2002) 13(4) *European Journal of International Law* 855; JJ Wouters, ‘The judgment of the International Court of Justice in the *Arrest Warrant* case: Some critical remarks’ (2003) 16 *Leiden Journal of International Law* 265-267; SRS Bedi (2007) *The developments of the human rights law by the judges of the International Court of Justice*, 235; DS Koller ‘Immunities of foreign ministers: Paragraph 61 of the

The *Case Concerning Certain Criminal Proceedings in France (The Republic of Congo v France)* is another case where the ICJ had an opportunity to deal with the question of the immunity of state officials from criminal proceedings. The ICJ observed that the right that Congo had asserted was the right ‘to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.’¹⁰ The ICJ has had yet another opportunity to deal with immunity in the *Case Concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*.¹¹ This case touches on the immunity of a former head of state of Chad, Hissène Habré regarding his extradition from Senegal to Belgium. Senegal argued before the ICJ that the courts in Senegal had ruled that immunity attaching to Habré as former president acted as a barrier for the court to allow his extradition to Belgium where he could face criminal prosecution for torture and other forms of crimes against humanity.¹²

Although the ICJ did not address the issue of immunity directly in its deliberations on the indication of provisional measures, it is expected that the court may consider the question of immunity in its final judgment, or that Senegal may address this issue in its written pleadings scheduled for 11 July 2011.¹³ Should the ICJ not pronounce on the immunity attaching to Habré, one would be tempted to adopt the position already stated by the ICJ in the *Arrest Warrant* case, especially paragraphs 58 and 61 where the court accepted that a former state official may be tried for crimes against humanity before a domestic court of a foreign state, but that, no rule of customary international law removes the immunity of a serving state official.

Yerodia judgment as it pertains to the Security Council and International Criminal Court’ (2004) 20 *American University International Law Review* 7; R Van Alebeek (2008) *The immunity of states and their officials in international criminal law and international human rights law*, 246; WA Schabas (2007) *An introduction to the International Criminal Court*, 3rd edn., 231-232; C Shreur and Swittich, ‘Immunity v accountability: The ICJ’s judgment in the Yerodia case’ (2002) *International Law Forum* 117.

¹⁰ *Certain Criminal Proceedings in France (Congo v France)*, para 28.

¹¹ *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Request for the Indication of Provisional Measures, Order of 28 May 2009, ICJ General List No.144 (hereafter *Belgium v Senegal*).

¹² *Belgium v Senegal*, paras 5, 26 and 35.

¹³ *Belgium v Senegal*, Order of 9 July 2009, ICJ, General List No.144, 1-2.

Apart from the ICJ, other international courts have held that immunity of state officials does not bar criminal prosecution of such officials before international courts. The Pre-Trial Chamber of the ICC had an occasion to pronounce on the immunity of state officials, particularly that of the serving president of Sudan, Omar Hassan Al-Bashir. The Pre-Trial Chamber considered the current position of President Omar Hassan Al Bashir – as head of state – which is not party to the Rome Statute. It held, such position ‘has no effect on the [c]ourt’s jurisdiction...’¹⁴ The Chamber reasoned that, in accordance with the preamble to the Rome Statute,¹⁵ one of the core goals of the Rome Statute is ‘to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished.”’¹⁶ To achieve this goal, the Pre-Trial Chamber of the ICC considered the provisions of article 27 of the Rome Statute.¹⁷ The Chamber exercised jurisdiction over crimes committed in the territory of a state not party to the Rome Statute. The decision would have been otherwise had the Chamber applied article 34 of the Vienna Convention on the Law of Treaties, 1969 – which should have been that since Sudan is not a state party to the Rome Statute, no obligation is imposed on Sudan and its officials.

In the case against Ahmad Harun,¹⁸ the Pre-Trial Chamber of the ICC considered the position of Ahmad Harun as an aggravating factor to issue his warrant of arrest. Ahmad Harun is a current Minister of State for Humanitarian Affairs in the Government of Sudan. The Chamber noted that he is in the ‘inner circle of power’ in Sudan, and ‘holds the actual reins of power and control’ over government assets. The Chamber observed, because of his current position, Ahmad Harun ‘might benefit from a certain guarantee that he will not face justice.’¹⁹ Based on his position, the Pre-Trial Chamber ordered his

¹⁴ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 41.

¹⁵ See, Preamble to the Rome Statute, paras 4 and 5.

¹⁶ *Prosecutor v Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Al Bashir, Case No. ICC-02/05-01/09, Public Reducted Version, Pre-Trial Chamber I, 4 March 2009, 15, para 42.

¹⁷ Para 43.

¹⁸ See, *Prosecutor v Harun and Muhammad Al-Adl-Al-Rahman*, Case No. ICC-02/05-01/07, ‘Decision on the Prosecution Application under Article 58(7) of the Statute’, paras 59, 78-94 and 134-137.

¹⁹ Paras 127 and 128.

arrest. The ICC has not pronounced on immunity of state officials in the case against Jean Pierre-Bemba,²⁰ former Vice-President and Senator of the DRC. However, the decision in the case against Omar Al-Bashir holds strong position of the ICC regarding immunity of state officials charged with international crimes.

International Criminal Tribunals have denied the defence of immunity or official capacity of state officials in relation to international crimes. The ICTY has given its clear position on the question of the immunity of state officials. From the jurisprudence of the ICTY, it is firmly established that immunity of state officials is neither recognised as a defence nor a mitigating factor for the punishment of perpetrators who commit international crimes. The first high profile cases involving a head of state before the ICTY were those against Slobodan Milošević.²¹

Milošević was indicted and prosecuted for charges related to genocide, crimes against humanity and war crimes committed in Kosovo, Bosnia and Herzegovina, and Croatia respectively. In the course of trial, Milošević challenged the ICTY based on the official position or immunity of state official. The Trial Chamber of the ICTY held that article 7(2) of the Statute of the ICTY removed the immunity for Milošević stating that the provision has attained customary international law status. The Chamber also reasoned in line with the practice at the ICTR where Jean Kambanda, former Prime Minister of Rwanda, was prosecuted and sentenced to life imprisonment.²²

In another case, the Trial Chamber of the ICTY stated the position regarding the defence of immunity of state officials. It held categorically that:

Articles 1 and 7 of the Statute [of the ICTY] make it clear that the identity and official status of the perpetrator is irrelevant insofar as it relates to

²⁰ See, 'Application for Warrant of Arrest under Article 51 for Mr. Jean-Pierre Bemba Gombo', The Situation in Central African Republic, *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08, 'Urgent Warrant of Arrest for Jean -Pierre Bemba Gombo' (Under seal), Pre-Trial Chamber III, 23 May 2008.

²¹ *Prosecutor v Milošević*, Case No. IT-02-54-T, Second Amended Indictment "Croatia", 28 July 2004, paras 1-110; *Prosecutor v Milošević*, Case No. IT-02-54-T, Amended Indictment "Bosnia and Herzegovina", 22 November 2002, paras 1-79, and its annexures; *Prosecutor v Milošević*, Case No. IT-02-54-T, Second Amended Indictment "Kosovo", 16 October 2001, paras 1-108, with annexures.

²² *Prosecutor v Milošević*, Decision on Preliminary Motions, Trial Chamber, Decision of 8 November 2001, paras 26-34.

accountability. Neither can obedience nor orders be relied upon as a defence playing a mitigating role only at the sentencing stage. In short, there is no privilege under international criminal law which would shield state representatives or agents from the reach of individual criminal responsibility. On the contrary, acting in an official capacity could constitute an aggravating circumstance when it comes to sentencing, because the official illegitimately used and abused a power which was conferred upon him or her for legitimate purposes.²³

Recently, Radovan Karadžić, former president of the three member presidency of the Serbian Republic of Bosnia and Herzegovina (*Republika Srpska*), who is being tried by the ICTY, raised a defence of immunity. But, the Trial Chamber of ICTY considered that it was ‘well established that any immunity agreement in respect of an accused indicted for genocide, war crimes and/ crimes against humanity before an international tribunal would be invalid under international law.’²⁴ An appeal against the Trial Chamber’s decision rejecting immunity argument was rejected by the Appeals Chamber of the ICTY.²⁵

So, at the ICTY, the defence of immunity of state official is invalid. It can be rightly said therefore, that, international crimes are committed by private individuals as well as state officials, and in reality, the official position does not hold substance in prosecution. Principally, as regards criminal responsibility for international crimes state officials are not different from private individuals. In this regard, the Trial Chamber of the ICTY held that ‘[w]hile crimes against humanity are normally perpetrated by State organs, [that is to say] individuals acting in an official capacity (...), there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a government authority.’²⁶ But, when an international crime is committed by a state official or by an agent of state, individual criminal responsibility does not preclude the

²³ *Prosecutor v Kunarać, Kovać and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 494.

²⁴ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Decision on the Accused’s Holbrooke Agreement Motion*, 8 July 2009, Trial Chamber of ICTY, para 5.

²⁵ *Prosecutor v Karadžić*, Case No.IT-95-5/18-PT, *Appeal of the Decision Concerning Holbrooke Agreement Disclosure*, 28 January 2009, ICTY Appeals Chamber, paras 8-12. See also, *Decision on Appellant Radovan Karadžić’s Appeal Concerning Holbrooke Agreement Disclosure*, ICTY Appeals Chamber, 6 April 2009, para 17.

²⁶ *Prosecutor v Kupreškić, Kupreškić, Vlatko Kupreškić et al*, Case No. IT-95-16-T, Trial Chamber of ICTY, Judgment, 14 January 2000, para 555.

engagement of the state responsibility. In fact, it may lead to state responsibility if the crimes are committed in a widespread or systematic way.²⁷ Hence, state responsibility can bear no relevance to the individual criminal responsibility for international crimes.²⁸

Like the ICTY, the ICTR has also addressed the question of official position of state officials in relation to international crimes. In 1998, the Trial Chamber of the ICTR tried and sentenced Jean Kambanda, a former Prime Minister of Rwanda to life imprisonment for genocide and crimes against humanity. Although Kambanda did not specifically raise the defence of immunity of state officials *per se*, it should be known that his official capacity as Prime Minister during the genocide in Rwanda, served as an aggravating factor in his sentence. This was despite his plea of guilty to all the charges.²⁹ Hence, it can be concluded that at the ICTR, article 6 of the Statute of the ICTR has prevailed and no official capacity is to be regarded or has been regarded as a defence or a mitigating factor in the punishment of individuals who committed international crimes in Rwanda.

With regards to hybrid international courts, the position is the same as those of international courts that no state official is immune from prosecution for international crimes. The Special Court for Sierra Leone (SCSL) has echoed that position in the case against Charles Taylor.³⁰ The Defence Counsel for Charles Taylor filed on 23 July 2003, a motion under protest and without waiving immunity accorded to a head of state requesting the Trial Chamber to quash the indictment and declare null and void the warrant of arrest and order of transfer and detention.³¹ The Motion asserted that Taylor enjoyed immunity from any exercise of the jurisdiction of the SCSL.³²

²⁷ *Prosecutor v Furundžija*, Case No.IT-95-17/1-T, Trial Chamber of ICTY, Judgment, 10 December 1998, para 142 ('Under current international humanitarian law, in addition to individual criminal responsibility, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility').

²⁸ *Prosecutor v Kunarać, Kovać and Vuković*, Case No. IT-96-23 –T and IT-96-23/1-T, Trial Chamber of ICTY, Judgment, 22 February 2001, para 493.

²⁹ *Prosecutor v Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998.

³⁰ *Prosecutor v Taylor*, Case No.SCSL-2003-01-I, Amended Indictment, 16 March 2006, 1-9, paras 1-34, and *Case Summary Accompanying the Amended Indictment*, 10-21, paras 1-48.

³¹ *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, 'Applicant's Motion made under Protest and without waiving of Immunity accorded to a Head of State President Charles Ghankay Taylor requesting that the

Relying on the *Arrest Warrant* case decided by the ICJ, the defence counsel for Charles Taylor, Mr Terence Terry, raised a defence of immunity of state official that ‘as an incumbent Head of State at the time of his indictment, Charles Taylor enjoyed absolute immunity from criminal prosecution’³³ The defence argued further that, ‘[e]xceptions from diplomatic immunities can only derive from other rules of international law such as Security Council resolutions under Chapter VII of the United Nations Charter (“UN Charter”).’³⁴ It was also argued for Taylor that ‘the [i]ndictment against Charles Taylor was invalid due to his personal immunity from criminal prosecution.’³⁵ Furthermore, it was argued that by attempting to serve the warrant of arrest on Taylor, it prevented him from carrying out his essential duties as a head of state of Liberia.³⁶ Consequently, the defence requested the Appeals Chamber to quash the indictment, arrest warrant and all consequential orders and therefore to restrain the service of an indictment and arrest warrant on Taylor.³⁷

The Prosecutor of the SCSL argued in turn that, the motion brought by Taylor was premature and that Taylor could not evade the court processes by refusing to appear before the SCSL and at the same time also use the court processes by filing motion before it. The Prosecutor also distinguished the *Arrest Warrant* case because it concerned ‘immunities of an incumbent head of state from the jurisdiction of the courts of another state’, and therefore, argued that ‘customary international law permits international

Trial Chamber do quash the said approved Indictment of 7th March 2004 of Judge Bankole Thompson and that the aforesaid purported Warrant of Arrest and Order for Transfer and detention of the same date issued by Judge Bankole Thompson of the Special Court for Sierra Leone, and all other consequential and related ORDER(S) granted thereafter by either the said Judge Bankole Thompson or Judge Pierre Boutet on 12th June 2003 against the person of the said President Charles Ghankay Taylor be declared null and void, invalid at their inception and that they be accordingly cancelled, and, or set aside as a matter of Law’, of 23 July 2003. See also, *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, 31 May 2004, Preamble, para 1.

³² *Prosecutor v Taylor*, Case No. SCSL-2003-01-I, *Decision on Immunity from Jurisdiction*, Appeals Chamber, 31 May 2004, para 1.

³³ Para 6(a).

³⁴ Para 6(b).

³⁵ Para 6(d).

³⁶ Para 11(a).

³⁷ Para 8 (a) and (b).

criminal tribunals to indict acting Heads of State and the Special Court is an international court established under international law.³⁸

Also, the Prosecutor argued that the ‘lack of Chapter VII powers does not affect the Special Court’s jurisdiction over heads of State.’ Such reasoning was an analogy to the ICC which the Prosecutor contended, does not have the Chapter VII powers but it explicitly denies immunity of state officials for international crimes.³⁹ The Prosecutor argued that Taylor was indicted in accordance with article 1 of the Statute of the SCSL for the crimes committed in Sierra Leone, and as such, the SCSL had jurisdiction over Taylor.⁴⁰

However, it was then argued for Taylor that, following the decision of ICJ in the *Arrest Warrant* case, there was no doubt that ‘a head of state enjoys immunity from foreign jurisdictions and inviolability.’⁴¹ In this regard, the defence for Taylor equated the SCSL with a foreign national court, which was of course, a wrong assertion. The Appeals Chamber stated clearly that ‘since the Applicant [Charles Taylor] is subject to criminal proceedings before this court, processes issued in the course of, or for the purposes of, such proceedings against the Applicant cannot be vitiated by a claim of personal immunity.’⁴² The Appeals Chamber of SCSL added that as Taylor had ceased to be a president, the immunity *ratione personae* had also ceased to attach to him.⁴³

But, the decision of the Appeals Chamber of the SCSL simply ignored the authority and position stated by the ICJ in paragraph 58 of the *Arrest Warrant* case that a sitting head of state enjoys immunity from jurisdiction from criminal proceedings whilst in office. That was taken by the ICJ to apply even to an arrest warrant, and not necessarily the actual trial in court. Since the ICJ had given the position in 2002 and the Taylor case came into existence after that time (in 2003), one would have reasonably expected the

³⁸ Para 9 (a) - (e).

³⁹ Para 9 (e) - (f).

⁴⁰ Para 10(a) and (b).

⁴¹ Para 12 (a) – (f).

⁴² Para 58.

⁴³ Para 59.

Appeals Chamber of the SCSL to follow the position stated in paragraph 58 of the ICJ judgment in the *Arrest Warrant* case, especially considering the undisputed fact that at the time an arrest warrant against Taylor was issued, Taylor was still a sitting president of Liberia, and as such, and in accordance with the position stated by the ICJ, he enjoyed immunity from being served with such an arrest warrant or being indicted by the Prosecutor of the SCSL.

However, conventional international law which is settled in the field of immunity, does not allow immunity – an exception – to prevail over the duty to prosecute and punish individuals who commit international crimes. In fact, it should be noted that exceptions were also mentioned in paragraph 61 of the *Arrest Warrant* case that could allow Taylor to be tried by the SCSL in the sense that he had ceased to hold office as President of Liberia since August 2003. Hence, there is no doubt that the SCSL was right in proceeding against Taylor.

Apart from the SCSL, other courts such as the Extra-ordinary Chambers in the Courts of Cambodia (ECCC) and the Iraqi Supreme Criminal Tribunal, which have prosecuted senior state officials, have not recognised the defence of immunity of state officials. In the law establishing the ECCC, immunity of state officials is not recognised as a defence. It provides that '[t]he position or rank of any suspect shall not relieve such person of criminal responsibility or mitigate punishment.'⁴⁴

It is apparent that article 29 of the Law on the ECCC envisages that state officials can be prosecuted. The law designates '[s]enior leaders of Democratic Kampuchea and those who were most responsible'⁴⁵ for the international crimes as suspects. On the basis of this law, former leaders of Democratic Kampuchea have been indicted and are currently on trial and none of them has raised the defence of immunity of state officials. Such leaders

⁴⁴ Art 29, Law on the Establishment of Extra-ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea, 27 October 2004, as revised on 23 November 2004, (NS/RKM/1004/006).

⁴⁵ See, art 2, Law on the establishment of the ECCC.

include Khieu Samphan,⁴⁶ who was the head of state, and is prosecuted for crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949. Interestingly, the court considered the role of Khieu Samphan as a head of state, not as a mitigating factor, but as an aggravating factor in ordering his detention for purposes of being tried for international crimes. Chea Nuon,⁴⁷ former acting Prime Minister, is also charged with crimes against humanity and war crimes.⁴⁸ Equally, Ieng Thirith,⁴⁹ a former Minister of Social Action, is prosecuted for crimes against humanity before the ECCC.

In the Iraqi Supreme Criminal Tribunal, during the trial of Saddam Hussein it was argued for Saddam Hussein that, as President of the Republic of Iraq, and head of the Revolutionary Command Council, Saddam Hussein enjoyed immunity from criminal jurisdiction for any act done because such acts were considered acts of a sovereign state, based on article 240 of the Constitution of Iraq of 1970.⁵⁰ But, the court observed that since the crimes charged were crimes against humanity, it was impossible for any one of the defendants to benefit from immunity. The court drew examples from the Nuremberg Trials, article 7(2) of Statute of ICTY, and article 15(3) of the Statute of Iraqi Supreme Criminal Tribunal, 2005, which established that court and held that, since the World War II, immunities that protected former higher ranking officials from prosecution do not apply. Article 15(3) of the Statute of Iraqi Supreme Criminal Tribunal denied Saddam Hussein of immunity he had claimed.

⁴⁶ See, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-2007-ECCC/OCIJ, (Khieu Samphan), *Provisional Detention Order*, 19 November 2007.

⁴⁷ See, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, 1-5, paras 1-6.

⁴⁸ Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, *Provisional Detention Order*, ECCC-OCIJ, 19 September 2007, paras 1 and 2 (listing 'crimes against humanity' namely, murder, torture, imprisonment, persecution, extermination, deportation, forcible transfer, enslavement, and other inhumane acts, and 'war crimes' namely, wilful killing, torture, inhumane acts, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial, unlawful confinement, and unlawful deportation or transfer).

⁴⁹ See, Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Police Custody Decision*, 12 November 2007, p.1-2. See also, Extra-ordinary Chambers in the Courts of Cambodia, Criminal Case File No. 002/14-08-2006, Investigation No. 002/19-09-2007, ECCC-OCIJ, *Provisional Detention Order*, 14 November 2007, p.1-5, paras 1-11.

⁵⁰ *Prosecutor v Saddam Hussein Al-Majid, and Others, Defendants' Preliminary Submission Challenging the Legality of the Special Court*, 21 December 2005, 1-24, paras 1-121.

In conclusion, in the preceding, it is observed that the international courts and international criminal tribunals, including hybrid criminal courts, the defence of immunity or official capacity of state officials is not a defence against prosecution. This is a settled position in international law.

From the preceding examples, it is noted that immunity of state officials is not a defence from prosecution, and is not a ground for mitigating punishment for state officials guilty of international crimes. However, international courts have ignored applications for the issuance of subpoenas *testificandum* and *duces tecum* in respect of the serving state officials. This, in turn, leads to an exploration of a very contentious subject of subpoenas in relation to the question of immunity attaching to serving state officials.

3.3 Subpoenas against state officials before international courts –An unsettled field

There are various ways to ensure appearance of suspects of international crimes or attendance of witnesses before international courts. The Rome Statute lists warrant of arrest and summons to appear before the Pre-Trial Chamber of the ICC as ways to secure attendance of persons before the ICC.⁵¹ The Trial Chamber of the ICC may require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of states.⁵² From the provision of article 64(6) of the Rome Statute, the Trial Chamber of the ICC may seek state cooperation in obtaining evidence and testimony of individuals. This means that, where necessary, state officials, may also be required to cooperate with the ICC or accused persons during the conduct of trial or pre-trial interviews by the Prosecutor or the defence counsel for accused persons.

Voluntary surrender, appearance or attendance of an individual before an international court is another way of securing attendance of persons before international courts. The voluntary appearance is usually done through a summons to appear issued by an

⁵¹ Art 58(1) and (7), Rome Statute.

⁵² Art 64(6), Rome Statute.

international court.⁵³ Voluntary appearance to the court signifies that a suspect or potential witness cooperates with the court, and respects its order requiring him or her to appear before it.

If a person is accused of committing international crimes, he or she may voluntarily appear or surrender before an international court.⁵⁴ For example, in the ICC, three accused persons have surrendered voluntarily. Bahr Idriss Abu Garda, rebel leader in Darfur, Sudan, appeared voluntarily before the Pre-Trial Chamber of the ICC on 18 May 2009 following a summons to appear issued by the Pre-Trial Chamber of the ICC.⁵⁵ On 17 June 2010, two other suspects of war crimes, namely, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, surrendered before Pre-Trial Chamber I of the ICC.⁵⁶ Their voluntary appearance was in compliance with a summons to appear issued by the Pre-Trial Chamber on 27 August 2009⁵⁷ on the ground that there are reasonable grounds to believe that the two suspects are responsible for war crimes committed by attacking peace keepers in Darfur. In the ICTY, some accused persons surrendered voluntarily. For example, General *Tihomir Blaškić* surrendered voluntarily to the ICTY.⁵⁸

If a person voluntarily appears or attends before an international court, he is deemed to have waived his or her immunity conferred upon that person by national and international law. In other words, a person cannot voluntarily appear or attend before an international court and then claim immunity from appearing or attending before such court. The principle of estoppel will work counter any claim to immunity. Equally, any witness who

⁵³ Art 58(7), Rome Statute.

⁵⁴ On voluntary surrender, see Ch 4 of this study, part 4.2, and the three cases cited therein.

⁵⁵ *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Bahr Idriss Abu Garda (Public), 7 May 2009, Pre-Trial Chamber, 1-10.

⁵⁶ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, 17 June 2010, Transcript (ICC-02/05-03/09-T-4-ENG ET WT 17-06-2010 1/27 SZ PT), 1-27.

⁵⁷ *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, paras 1-35; *Prosecutor v Nourain*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, paras 1-20; *Prosecutor v Jamus*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, paras 1-20.

⁵⁸ *Prosecutor v Blaškić*, Case No. IT-95-14-T, Decision of the President on the Motion filed pursuant to Rule 64, 3 April 1996. It is based on the voluntary surrender that the President (Antonio Cassese) granted bail to General Tihomir Blaškić.

voluntarily appears before an international court waives any immunity accorded to him or her. He or she cannot claim immunity after attending before the court. The same goes for the documents submitted to the court.

Regarding the voluntary appearance and issuance of subpoena, Judge Benjamin Mutanga Itoe has given a very useful statement. In principle, witnesses appear to testify on the prompting or at the request of the party seeking to rely on their evidence. The other extreme is where as Judge Benjamin Mutanga Itoe has observed, ‘a witness, as in this case, and in criminal proceedings, has been prompted and invited by the party seeking to rely on his evidence, and he either refuses to appear or testify on his behalf. The course of action that is open to that party is, (...) to apply to the Chamber under Rule 54 of the Rules of Procedure and Evidence, for the issuance of a subpoena to compel him to appear and to testify.’⁵⁹

Hence, if a person fails to attend voluntarily before the court to serve as a witness either for the Prosecutor or the accused (defence), or fails to produce documents to be used as evidence in court, the court may order issuance of subpoena to compel such person to appear and testify or to produce evidence before the court. Any failure to attend or produce evidence will be deemed contempt of court and may render such person to imprisonment or fine.

The focus here is on the coercive legal measures to compel persons, particularly state officials to appear and testify before international courts, or to produce documents or other evidence in such courts. These are called subpoenas to testify or produce evidence in court. In simple language, they are called summons to appear or to produce evidence or documents before international courts. Thus, ‘a subpoena is a due process compelling alternative which the court has recourse to as a last resort, after necessary and traditional

⁵⁹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for the Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone, paras 3-4.

ways of securing a witness have been utilised but in vain.⁶⁰ A subpoena is a compelling and coercive remedy sought by a person which seeks to rely on it. Normally, courts are reluctant to issue this form of remedy, or they issue it very cautiously on extreme cases, perhaps because of its inherent punitive nature if a witness fails to comply with it.

Subpoenas, apart from being governed by the Rules of Procedure and Evidence of international courts as such, they find basis in international human rights law as well, and in the Statutes establishing such international courts. For example, Article 17(4) (e) of the Statute of the SCSL requires that the accused shall be entitled to examine, or have examined the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. This is also echoed in the Separate Concurring Opinion of Judge Benjamin Mutanga Itoe in *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*.⁶¹ International human rights law as said, also allows room for the accused persons to seek resort to subpoenas, by for example, according right to the accused person ‘to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’⁶² The purpose here would seem to be giving right for the accused to fair trial and equality of arms in trial proceedings.

It is in respect of the subpoenas that there is a great controversy in the treatment of state officials, and their immunities regarding prosecution of international crimes. Essentially, a study of the jurisprudence of international courts regarding attendance or appearance of state officials before such courts leads to an investigation on whether the state officials are free from being summoned to appear and testify or produce evidence in such courts.

⁶⁰ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for the Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, former President of the Republic of Sierra Leone, para 13.

⁶¹ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chambers’ Unanimous Written Reasoned Decision on the Motion for Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, para 12.

⁶² See, Art 14(e), International Covenant on Civil and Political Rights, 1966.

To answer this question, one needs to understand whether state officials –whether serving or former –are entitled to immunity from subpoenas issued by international courts. This will then require an examination of whether immunity of state officials is only in respect of prosecution for international crimes before international courts, or it also extends to subpoenas issued by such courts. These are considered below.

Does immunity extend to Subpoenas and other court processes? It remains unclear in international law whether serving state officials are free from arrest warrants issued by international criminal courts or tribunals. But, the trend shows that it is possible even though enforcement of arrest warrants remains a major challenge. Vivid examples are the current incidents whereby the ICC issued warrants of arrest against the serving President of Sudan, Omar Al-Bashir⁶³ and Ahmad Harun, Minister of State for Humanitarian Affairs of Sudan (former Minister of State for the Interior of the Government of Sudan)⁶⁴ for genocide, war crimes and crimes against humanity committed in Darfur, Sudan. Can it be said that President Omar Al-Bashir of Sudan and Ahmad Harun, current Minister of the Government of Sudan have the duty to abide by the warrants of arrest issued against them whilst serving as a President and Minister of Sudan respectively?

Again, doubts still arise as to whether in international law ‘immunity of state officials’ only covers issues of prosecution alone and not those of subpoenas *ad testificandum* and *duces tecum* – whereby a state official may be summoned to appear before an international court as a witness or in order to secure a pre-testimony interview, or produce important documents that can be used as evidence in court.⁶⁵

It may be observed that state officials are inherently unequally treated, and double standards apply to them insofar as international crimes are concerned. At times, a state official is indicted, prosecuted and eventually punished, yet others are left immune. Thus,

⁶³ See, ‘The Situation in Darfur’, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Pre-Trial Chamber I, 4 March 2009, p.1-8.

⁶⁴ See, ‘The Situation in Darfur’, Warrant of Arrest for Ahmad Harun, *Prosecutor v Harun and Muhammad Al Abd-Al-Rahman*, Case No. ICC-02/05-01/07, Pre-Trial Chamber I, 27 April 2007, p. 1-16.

⁶⁵ For more on subpoenas, see generally, A Cassese (2008) *International criminal law*, 2nd revised edn, 313-313. The position stated by Cassese is that heads of state can be subpoenaed to appear or testify, or produce evidence before international criminal courts.

double standards apply to state officials generally. Examples to demonstrate this are discussed below.

Given the nature of ‘official position’ that a state official occupies in the government, being the head of state and some times, a head of the government and Commander –in–Chief of the Armed Forces, it is imperative that there are circumstances in which the state official finds himself or herself in a position to issue orders to his or her subordinates. These circumstances would be relevant. For instance, this would apply at the time of a protracted armed conflict between the government forces and armed groups or rebel forces in a state. In such situation, a head of state may give orders to the Minister for Defence, or Minister for Safety and Security – who, given their positions, could also eventually – issue orders to the Military Commanders or Inspector–General of Police to order their subordinates to protect the state against any attack, and to kill members of the rebel forces or any other party to the armed conflict. Further, it is obvious that state officials may give orders to the military commanders of armed forces to wage war of aggression against another state if there are reasons to believe that a state of war exists between such states.

Suppose in the course of defending the state, or in the course of an armed conflict such military commanders or Police officers commit acts that can be characterized as war crimes or crimes against humanity – crimes that are punishable under international law. If such crimes are committed, and the accused persons would want to invoke the defence of superior orders, and in so doing, they implicate the Ministers and President, by contending that they had received direct orders from the state officials, and that they want such state officials to be summoned to appear before a trial court and testify as witnesses whether they had issued orders or not, then it will be important for the trial court to issue subpoenas against such state officials.

It is in these circumstances where a military commander, who is subordinate to the president for example, may want the court to summon the sitting president to appear before the court with a view to testify as a witness for the accused (in this case a military

commander or one of the Ministers in the government), or being interviewed by the defence in order to help the defence make its case.

It should be known that Chief Samuel Hinga Norman, a Minister for the Interior during the time of war in Sierra Leone, was prosecuted for war crimes and crimes against humanity committed during an armed conflict in Sierra Leone, but he had contended that he was acting under orders from the President of Sierra Leone at that time, Dr. Tejan-Kabbah, and so, he wanted the Trial Chamber of the SCSL to issue a *subpoena ad testificandum* against the then sitting President Tejan-Kabbah, despite his immunity from criminal proceedings as provided under section 48(4) of the Constitution of Sierra Leone, 1991.⁶⁶

The above examples reflect on how delicate the question of immunity may be regarded by courts, basically, whether courts may be free to issue subpoenas against the serving state officials or not. This part will present a discussion on the questions of immunity in relation to subpoenas to the serving state officials. However, it is important to understand the conditions and circumstances under which subpoenas may be issued. The examples here are from the decisions of international criminal tribunals.

3.3.1 Conditions for the issuance of subpoenas

Subpoenas are governed by Rules of Procedure and Evidence as well as Statutes of the international courts. *Rule 54 of the Rules of Procedure and Evidence of the ICTY* and *ICTR* respectively, empowers judges to issue, on request or *proprio motu*, subpoenas which are ‘necessary’ for an investigation or for the preparation or conduct of a trial. Article 64(6) (b) of the Rome Statute empowers the Trial Chamber of the ICC to require the attendance and testimony of witnesses and production of documents and other forms

⁶⁶ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, see the *Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions*, especially paras 57-58, 83-93, and 94-180.

of evidence by obtaining, if necessary, the assistance of states. *Rule 84 of the Internal Rules of the Extra-ordinary Chambers in the Courts of Cambodia* allows witnesses to be called to appear before the Trial Chambers to testify. In the SCSL, *Rule 54 of the SCSL Rules of Procedure and Evidence* gives the SCSL (a Judge or a Trial Chamber) the power to issue ‘such orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.’ Such orders clearly include issuance of a subpoena *ad testificandum* or *duces tecum*.

From the jurisprudence of international criminal tribunals, particularly the ICTY, ICTR and SCSL,⁶⁷ several conditions have to be satisfied before a court can issue *subpoenas ad testificandum* or *duces tecum* against a prospective witness, which, in view of this study, would certainly include sitting state officials. In *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*,⁶⁸ the defence had requested the issuance of Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michael Hourigan in accordance with *Rule 54 of the Rules of Procedure and Evidence of the ICTR*. The defence requested that three persons should appear before the Trial Chamber of the ICTR to give testimony, whereas the request in respect of Mr. Kofi Annan was that he should be compelled to submit to an interview. The Trial Chamber denied the motion to subpoena such officials. It stated the principles that:

The applicant for a subpoena requiring a person to give testimony or submit to an interview must show that three conditions are satisfied: (i) reasonable attempts have been made to obtain the voluntary cooperation of witnesses; (ii) the prospective witness has information which can materially assist the applicant in respect of clearly identified issues relevant to the trial; and (iii) the witness’s testimony must be necessary and appropriate for the conduct and fairness of the trial.⁶⁹

⁶⁷ See for example, *Prosecutor v Sesay, Kallon and Gbao*, Case No.SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Trial Chamber I, 30 June 2008, paras 15-17 and cases cited therein.

⁶⁸ See, *Prosecutor v Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, ‘Request for Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michel Hourigan Pursuant to Rule 54’ of 25 August 2006, Trial Chamber I, Decision of 6 October 2006 (Judge Erik Mõse, Presiding; Jai Ram Reddy; Sergei Alekseevich Egorov, Judges).

⁶⁹ See, *Prosecutors v Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, ‘Request for Subpoenas of Kofi Annan, Iqbal Riza, Shaharyar Khan and Michel Hourigan Pursuant to Rule 54’ of 25 August 2006, Trial

Further, relying on the decision in *Prosecutor v Halilović*, it was held that ‘subpoenas should not be issued lightly’ and that a Chamber must consider ‘not only the usefulness of the information to the applicant but...its overall necessity in ensuring that the trial is informed and fair.’⁷⁰ The Trial Chamber of ICTR went on to refer to the decision rendered by the Appeals Chamber in *Prosecutor v Halilović* that:

The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial. To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or learn about those events, and any statements the witness made to the Prosecution or others in relation to them. The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that compulsive mechanism of the subpoena is not abused. As the Appeals Chamber has emphasized, “Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.”⁷¹

In addition, the ICTR Trial Chamber observed that ‘Chambers have considered factors such as the specificity with which the prospective testimony is identified and whether the information can be obtained other than through the prospective witness.’⁷² Further, it is

Chamber I, Decision of 6 October 2006, para 3; *Prosecutor v Krstić*, Case No.IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber of ICTY, 1 July 2003, para 10; *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006, para 5; *Prosecutor v Karemera et al*, Case No.ICTR-98-44-T, Decision on Defence Motion for Issuance of Subpoena to Witness T, Trial Chamber of ICTR, 8 February 2006, para 4; See also, *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with one of its Officials, Trial Chamber I, 6 October 2006, paras 6 and 9 and accompanying text in fn 7 and 8 of para 6 thereof; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Cooperation of the Government of France, Trial Chamber I, 6 October 2006, para 2.

⁷⁰ See, *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7.

⁷¹ *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the Issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 6; on the same conditions stated, see also, *Prosecutor v Bagosora and Others*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 5; *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J Biot, para 2.

⁷² *Prosecutors v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006, para 6; See also, *Prosecutor v Karemera et al*, Decision on Nzirorera’s *Ex Parte* Motion

generally accepted that, for a subpoena to be issued, there must be a ‘directness of a witness’s observation of events as opposed to being an eye witness to whom a subpoena is sought.’⁷³ However, where a state and witness are willing and cooperative with the court, no subpoena may be issued.

In conclusion, a person requesting a subpoena to be issued must demonstrate the following grounds: such person must show that he or she has exhausted reasonable attempts to obtain the voluntary cooperation of the witness intended to be subpoenaed. The applicant must show ‘legitimate forensic purpose’, that is to say, a reasonable basis for the belief that there is a good chance that the prospective witness will be able to give information which will materially assist the applicant in proving his or her case. Further, the information requested must be convenient to be obtained and helpful for the preparation of the trial. Also, such information to be sought from the prospective witness

for Order for Interview of Defence Witnesses NZ1, NZ2, Trial Chamber of ICTR, 12 July 2006, para 12; *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder, Trial Chamber of ICTY, 9 December 2005, paras 30 and 33, but see also, para 9 referring to *Rule 54bis* of the Rules of Procedure and Evidence of the ICTY.

⁷³ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Ami R Mpungwe, Trial Chamber I, 19 October 2006, para 2 (referring to: ‘*Prosecutor v Kršić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, Appeals Chamber of ICTY, 1 July 2003, para 10; *Prosecutor v Halilović*, Case No.IT-01-48-AR73, Decision on the issuance of Subpoenas, Appeals Chamber of ICTY, 21 June 2004, para 7; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, Trial Chamber, 6 October 2006, para 3; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena, Trial Chamber, 11 September 2006, para 5; *Prosecutor v Karemera et al*, Decision on Defence Motion for Issuance of Subpoena to Witness T, Trial Chamber, 8 February 2006, para 4’); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber of ICTR, 11 September 2006 (General Marcel Gatsinzi, former Chief of Staff of Rwandan Army); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoenas of United Nations Officials, Trial Chamber, 6 October 2006, para 3; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Reconsideration of Denial of Issuance of Subpoena to a United Nations Official, Trial Chamber I, 12 December 2006, paras 2-4; *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination, Trial Chamber of ICTR, 31 August 2006 (eye witness of conduct by soldiers allegedly under the command of the Accused); *Prosecutor v Bagosora et al*, Decision on Request for a Subpoena for Major Jacques Biot, Trial Chamber of ICTR, 14 July 2006 (military observer present in Gisenyi from 6 to 13 April 1994); *Prosecutor v Bagosora et al*, Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311 and DM 24, Trial Chamber of ICTR, 26 April 2005; *Prosecutor v Bagosora et al*, Decision on Defence’s Request for a Subpoena Regarding Mamadou Kane, Trial Chamber of ICTR, 22 October 2004 (political advise to the Special Representative of the Secretary-General in Rwanda from December 1993 until May 1994); *Prosecutor v Bagosora et al*, Decision on Prosecutor’s Request fro a Subpoena Regarding Witness BT, Trial Chamber, 25 August 2004 (witness allegedly overheard statement made by one of the Accused); *Prosecutor v Bagosora et al*, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Republic of Ghana, Trial Chamber, 23 June 2004 (subpoena to sector commander of UNAMIR).

must be of considerable and substantial assistance to a clearly identified issue that is relevant to the trial. And, the applicant must demonstrate a nexus between such information and the case against the accused person.⁷⁴ Sometimes, a subpoena can be issued on the basis that it is the ‘last resort’.⁷⁵

Having stated the above conditions for the issuance of subpoenas, it follows that this study must examine the practice regarding the questions of subpoenas against sitting state officials before international criminal tribunals. This is discussed below.

3.3.2 The ICTY and the question of subpoenas against state officials

The Trial Chamber of the ICTY prosecuted Slobodan Milošević and discussed whether a subpoena *ad testificandum* could be issued against Tony Blair and Gerhard Schröder. On 18 August 2005, the Assigned Counsel for Milošević had filed an *ex parte* application to the Trial Chamber for the testimony and pre-testimony interview of Tony Blair, the Prime Minister of the United Kingdom, and Gerhard Schröder, former Chancellor of the Federal Republic of Germany.⁷⁶ A week later, the Assigned Counsel for Milošević filed another application requesting the Trial Chamber of ICTY to issue a binding order against the Government of the Federal Republic of Germany, to require the Government of Germany to arrange for the Assigned Counsel for Milošević to interview, as with the UK, the

⁷⁴ See for example, *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, paras 57-180; *Prosecutor v Milošević*, Case No. IT-02-54-T, Trial Chamber of the ICTY, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder*, 9 December 2005; *Prosecutor v Halilović*, Case No. IT-01-48-AR73, Appeals Chamber of ICTY, Decision of 21 June 2004.

⁷⁵ *Prosecutor v Milošević*, Case No. IT-02-54-T, Trial Chamber of the ICTY, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder*, 9 December 2005. See also, F Gayner, ‘Subpoenas’ in A Cassese (ed.), (2009) *The Oxford companion to international criminal justice*, 524-525.

⁷⁶ *Prosecutor v Milošević*, Case No. IT-02-54-T, *Request for Binding Order to be Issued to the Government of the United Kingdom for the Cooperation of a Witness pursuant to Rule 54bis*, 18 August 2005, para 19 which requested the Trial Chamber of ICTY to ‘(a) order the Government of the United Kingdom to arrange for the Assigned Counsel and an Associate of the Accused to interview the United Kingdom State Official: the Prime Minister the Right Hon. Mr. Anthony Blair MP; and, (b) order the Government of the United Kingdom to make arrangements with the Assigned Counsel and an Associate for the Accused for the Witness... to give evidence in the defence stage of the trial of Slobodan Milosevic if the Accused decides to call the same as a witness.’

Germany state officials, as witnesses to give evidence at the defence stage in the trial of Milošević. The witnesses were Gerhard Schröder (former Chancellor), Helmut Kohl (former Chancellor), Joschka Fischer (former Minister of Foreign Affairs), Hans-Dietrich Genscher (former Minister of Foreign Affairs), and Klaus Kinkel (former Minister of Foreign Affairs).⁷⁷ Later, on 17 October 2005, the Assigned Counsel for Milošević restricted the witnesses to only two: Tony Blair and Gerhard Schroder, thereby leaving the rest of the German state officials initially named in the list of prospective witnesses as filed to the Trial Chamber.

The Assigned Counsel for Milošević argued that the two individuals (Tony Blair and Gerhard Schröder) possessed information that was necessary for the resolution of specific issues relevant to the Kosovo indictment against Milošević, and therefore, had requested the Trial Chamber to issue a binding order to the governments of the United Kingdom and Germany directing them to provide the witnesses, or a subpoena to Mr Blair and Mr Schröder to compel their attendance at Milošević's trial. The United Kingdom and Germany, through their legal counsel,⁷⁸ argued that calling Mr Blair and Mr Schröder as witnesses served 'no legitimate forensic purpose' and that 'the official capacity of the prospective witnesses entitles them to certain immunities which may prevent the issuance of a subpoena against them.'⁷⁹

The Trial Chamber of ICTY had to determine whether the applications filed by the Assigned Counsel for Milošević in accordance with *Rule 54bis* of the *Rules of Procedure and Evidence of the ICTY* required a subpoena *ad testificandum* to be issued, and whether – the status of the prospective interviewees or witnesses gave them immunity from a subpoena compelling them to attend an interview and, or to testify in a trial before the tribunal. The Chamber determined that the procedure to be followed when a state official

⁷⁷ *Prosecutor v Milošević*, Case No. IT-02-54-T, *Request for Binding Order to be Issued to the Government of the Federal Republic of Germany for the Cooperation of Certain Witnesses pursuant to Rule 54bis*, 26 August 2005, para 17.

⁷⁸ United Kingdom and Germany were represented by Prof Christopher Greenwood, QC, Mr. Chris Whomersley, and Mr. Dominic Raab, and Dr Edmund Duckwitz and Prof Christian Tomuschat respectively.

⁷⁹ *Prosecutor v Milošević*, Case No. IT-02-54-T, 'Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder', Trial Chamber of ICTY, 9 December 2005, para 2.

is required to be interviewed is the subpoena *ad testificandum* ‘addressed to the individual official and not a binding order addressed to the official’s state.’⁸⁰ After setting and examining the conditions for the issuance of subpoena,⁸¹ the Trial Chamber concluded that such requirements were not met, and because the application had failed on merits, no issue of immunity of state officials would arise.⁸² To that extent, the Trial Chamber simply avoided addressing the question of immunity, but rather chose to reject the motions.⁸³ Hence, Tony Blair and Gerhard Schröder were not subpoenaed to appear for an interview by the Assigned Counsel for Milošević.

The Trial Chamber of the ICTY made an important and landmark contribution in the field on *subpoena duces tecum* in *Prosecutor v Blaškić*⁸⁴ in 1997. The position of the ICTY on *subpoena duces tecum* is discussed extensively below. Acting on the request by the Prosecutor, on 15 January 1997, the Trial Chamber II of the ICTY (Judge Gabrielle Kirk McDonald, Presiding) issued *subpoena duces tecum* against the Republic of Croatia and its Defence Minister, Mr. Gojko Susak, and to Bosnia and Herzegovina and the Custodian of the Records of the Central Archive of what was formerly the Ministry of Defence of the Croatian Community of *Herceg Bosna*, respectively, and ordered compliance therewith within thirty days. The requests for the ‘subpoenas were directed to Judge McDonald, who issued them in her role as the Judge confirming the indictment against Tihomir Blaškić.’⁸⁵

In so doing, the Trial Chamber ruled that the ICTY has the authority to issue binding compulsory orders to sovereign states and their officials, and that the Trial Chamber has an inherent power to issue binding and compulsory orders to sovereign states and their officials acting in an official capacity, where the state or official is the object of the order.

⁸⁰ *Prosecutor v Milošević*, Case No. IT-02-54-T, ‘Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder’, Trial Chamber of ICTY, 9 December 2005, para 27.

⁸¹ Paras 34-47.

⁸² Para 67.

⁸³ Para 69 (b) and (c).

⁸⁴ *Prosecutor v Blaškić*, Case No.IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997.

⁸⁵ Paras 1-2.

The Trial Chamber also determined that the Tribunal may issue orders to individual state officials requiring them to take actions within their official capacity.⁸⁶

While declaring ‘its readiness for full cooperation under the terms applicable to all states’, the Government of Croatia challenged the legal power and authority of the ICTY to issue a *subpoena duces tecum* to a sovereign state, and contested the naming of a high government official in a request for assistance pursuant to article 29 of the Statute of the ICTY, claiming that, in its view, such requests are only properly directed to a state.⁸⁷

The Trial Chamber considered its power to issue binding orders to states. Before doing so, it first had to determine the nature and purpose of the International Tribunal (ICTY). The Chamber determined that ‘the Tribunal is an independent international court created under the terms of Chapter VII of the Charter of the United Nations to bring justice, to contribute to the restoration and maintenance of peace in the former Yugoslavia and to deter further violations of international humanitarian law.’ It observed that it was established by the Security Council of the United Nations.⁸⁸ In considering whether the ICTY has inherent powers to issue subpoena *duces tecum* to a state, the Prosecution submitted that the ICTY ‘has implied and inherent powers necessary or essential for the effective performance of its functions.’ It contended that a teleological method of interpretation of the Statute of the ICTY is ‘appropriate and supported by the Appeals Chamber in its *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* in the *Tadić* case and the jurisprudence of other international tribunals.’⁸⁹ The Prosecution also submitted that ‘the international tribunal should be deemed to have these powers which, although not expressly conferred, arise by necessary implication as being essential to the performance of its duties’, and that, ‘the power to require the production

⁸⁶ *Prosecutor v Blaškić*, Case No.IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae duces tecum*, Trial Chamber II, 18 July 1997. See also, *Prosecutor v Tihomir Blaškić*, Case No.IT-95-14-PT, *Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order*, 29 July 1997, Appeals Chamber, para 2 (A)-(F).

⁸⁷ Para 3.

⁸⁸ Para 23.

⁸⁹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997 (Judge McDonald, Presiding; Judges Benito and Jan), para 24, (citing I Brownlie (1990) *Principles of public international law*, 690).

of evidence is part of the inherent powers of a judicial organ, as such powers are necessary and essential for the effective administration of justice.’ Further, it was submitted by the Prosecution that in establishing the tribunal, the Security Council clearly intended that ‘the International Tribunal would effectively discharge the responsibility assigned to it, the principle of effectiveness must govern whenever there arises a question of its competence in a particular area.’⁹⁰

On its part, Croatia argued that the Prosecution sought ‘a form of compulsory process that is unprecedented in international law’ saying the Statute of the ICTY did not provide that. Croatia stated that ‘there would be no violation of international if the word “subpoena” were simply inserted into the Statute.’⁹¹ Relying on the judicial precedents of the ICJ,⁹² the Trial Chamber concluded that ‘the power of the International Tribunal to issue a *subpoena duces tecum* to a state may similarly be implied if it is necessary in order to fulfil its fundamental purposes and to achieve its effective functioning.’⁹³ The Trial Chamber stated further that:

The International Tribunal is primarily, a criminal judicial institution, with jurisdiction over individuals charged with the most serious offences. It is imperative that a Trial Chamber, which must ultimately make a finding of the guilt or innocence of such individuals and impose the appropriate sentence as penalty, has all the relevant evidence before it when making its decisions.⁹⁴

Such reasoning by the Trial Chamber was informed by the decision of the Supreme Court of the United States of America in *United States v Nixon*⁹⁵ in which it was held that:

The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on the full disclosure of all the facts, within the framework of the Rules of

⁹⁰ Para 24.

⁹¹ Para 25.

⁹² See, *Reparations for Injuries Suffered in the Service of the United Nations Case*, 1949 ICJ Reports 171; *Effects of Awards of Compensation made by the United Nations Administrative Tribunal Case*, Advisory Opinion of the ICJ of 13 July 1954, 1954 ICJ Reports 47; *Certain Expenses of the United Nations Case*, 1962 ICJ Reports 151.

⁹³ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 30.

⁹⁴ Para 31.

⁹⁵ *United States v Nixon*, 418 US.683, 709 (Supreme Ct.1974).

Evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence either by the Prosecution or by the Defence.⁹⁶

To found the legal basis for its decision, the Trial Chamber then considered *Rule 20 of the Rules of Procedure and Evidence* of the ICTY which provides, *inter alia*, that it is for the Trial Chamber to ensure that a trial is fair and expeditious. Considering that the Rules were adopted to give effect to the Statute of the ICTY, the Trial Chamber stated that ‘it is reasonable to expect that they should contain provisions intended to secure this particular aim.’ In the Chamber’s view, ‘the use of the words “necessary (...) for the preparation or conduct of the trial” in *Rule 54 of the Rules of Procedure and Evidence* must be interpreted in this light.’ From this, the Chamber concluded:

Hence, an order or subpoena for the production of evidence is appropriate where the fairness of the trial so requires. In addition, if it could not use the method of compulsion, the Trial Chamber would be unable to ensure that the trial proceed expeditiously. Furthermore, Article 21, paragraph 4(e) [of the Statute of the ICTY] provides that the accused shall be entitled “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” If third parties cannot be compelled to produce documents in their possession, the Trial Chamber would be unable to guarantee the rights of the accused.⁹⁷

Regarding compliance with its orders by states, the Trial Chamber stated that it considered, however, that, ‘the duty of States, government officials and individuals to comply with orders from the International Tribunal is the same, regardless of the stage of the proceedings at which the particular order is issued.’⁹⁸ Further, the Trial Chamber emphatically stated that:

The International Tribunal is also an international institution, whose jurisdiction –*ratione materiae*, *ratione temporis* and *ratione loci* –is such that the tangible evidence required for proof of the guilt or innocence of those persons appearing before it will often be in the possession of States. Many of the crimes listed in Articles 2, 3 and 5 of the Statute relate to the conduct of military operations and therefore the records of those

⁹⁶ *United States v Nixon*, 418 US.683, 230-231 (Supreme Ct.1974).

⁹⁷ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 32.

⁹⁸ Para 33.

operations may constitute vital evidence. The fact that these are government documents should not automatically bar their production.⁹⁹

After examining the practice and law in different national jurisdictions¹⁰⁰ as well as the *Reparations case* decided by the ICJ, the Trial Chamber concluded that it has an inherent power to compel the production of documents necessary for a proper execution of its judicial function. It said, '[t]o hold to the contrary would prevent the International Tribunal from effectively redressing serious violations of international humanitarian law, its very *raison d'être*.'¹⁰¹ The Trial Chamber held that '[a] Judge or Trial Chamber must, therefore, have the authority to oblige States to submit whatever material is necessary to evaluate the case effectively and fairly.'¹⁰² It also declared that 'the effective functioning of the International Tribunal requires it to have power to issue binding orders to states for the production of all necessary evidence.

The Chamber observed that the provisions in the Statute and Rules demonstrate that express authority is given to the International Tribunal to direct mandatory orders to States. The authority was sought from articles 1, 15 and 18 of the Statute of the ICTY. Article 18 empowers the Prosecutor to initiate investigations, and to have the power to question witnesses, to collect evidence, and in carrying these functions, the Prosecutor may seek the assistance of the state authorities concerned. More importantly, the Trial Chamber found basis under article 29 of the Statute of the ICTY on cooperation and judicial assistance, to reinforce its position that the Tribunal has the ability to render binding orders, by requiring that states comply with any order issued by a Trial Chamber.

Further, the Chamber held that 'the issuance of *subpoena duces tecum* is expressly authorised in the Rules' and that 'Rule 54 reads: "At the request of either party or *proprio motu*, a Judge or Trial Chamber may issue such orders, summons, *subpoenas*, warrants

⁹⁹ Para 34.

¹⁰⁰ The Trial Chamber examined the practice on subpoenas in various states: The United States of America in *paras* 36-39 (Canada; England; Pakistan; Yugoslavia; France; Costa Rica; Germany and Spain).

¹⁰¹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, Trial Chamber II, 18 July 1997, para 41.

¹⁰² Para 40.

and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.’”¹⁰³

The Trial Chamber observed that the word ‘subpoenas’ was inserted into *Rule 54* in January 1995, when the *Rules* were revised at the Fifth plenary session in order to clarify and ensure completeness of the rules, and consequently, noted that, ‘given that the word ‘subpoenas’ appears beside orders, summonses, warrants and transfer orders, it would seem that *Rule 54* was intended to confer a general power.’¹⁰⁴ The Chamber then observed that ‘there can be no doubt that the Security Council intended that a Judge or Trial Chamber would issue orders to states, should such prove necessary.’ It added that, ‘the very fact there is an express duty upon states to comply with orders of the International Tribunal in Article 29 and in paragraph 4 of resolution 827 confirms that orders to states were envisaged.’¹⁰⁵ In this way, the Tribunal was regarded as a body capable of issuing binding orders to sovereign states.

The Trial Chamber stated that the issuance of a subpoena *duces tecum* is a valid exercise of the authority and power to issue binding orders. It concluded that, ‘the issuance of a subpoena *duces tecum* to a state for the production of government documents is nothing more than an order compelling the production of those documents. The International Tribunal has the inherent power and express to issue such orders. Resort to the mechanism of subpoena is provided for in Rule 54.’¹⁰⁶ The Chamber viewed Rule 54 as effectuating the duty of states and individuals to comply with orders of the International Tribunal.

Further, the Trial Chamber considered whether it had power to issue binding orders directed at government officials. In this regard, it observed, ‘[t]here is no doubt that a Judge or Trial Chamber may address individuals directly in a number of circumstances.

¹⁰³ Paras 45-46 (emphasis in the original).

¹⁰⁴ Para 47.

¹⁰⁵ Para 50.

¹⁰⁶ Para 64.

For example, under Rule 98, a Chamber may summon a witness to appear before it.¹⁰⁷ By virtue of articles 6 and 7 of the Statute of the ICTY, the Tribunal properly ‘has jurisdiction over individuals and it is their criminal responsibility that it is called upon to adjudicate, rather than responsibility of states.’¹⁰⁸ The Chamber observed, ‘it is a necessary exercise of the international Tribunal’s powers for it to compel an individual to produce information required for an investigation or trial.’¹⁰⁹ Importantly, the Trial Chamber held that government officials are not free from the issuance of a *subpoena duces tecum*. The Chamber boldly stated its position that:

In conclusion, the fact that a person identified by the International Tribunal as being in possession of important documents is an official of State does not preclude the issuance of a *subpoena duces tecum* addressed to him or her directly...It has been established that binding orders may be issued by the International Tribunal addressed to both States and individuals and there is, therefore, no reason why a person exercising State functions, who has been identified as the relevant person for the purposes of the documents required, should not similarly be under an obligation to comply with a specific order of which he or she is the subject.¹¹⁰

On the duty to comply with its orders, the Trial Chamber observed that, it has power to issue binding orders, including subpoenas, to states and individuals. The Chamber noted that article 29 of the Statute of the ICTY compels states to abide by the orders of the Trial Chamber.¹¹¹ In this regard, the Chamber observed that ‘sovereign immunity’ is not applicable here¹¹² and cannot preclude the International Tribunal from issuing binding orders to states, and equally, cannot protect states from complying with binding orders of the Tribunal.

With regards to individuals, the Trial Chamber observed that it ‘has power to issue orders to individuals in the execution of its mandate.’ Individuals are bound to comply with orders of the International Tribunal’ as ‘confirmed under Rule 77 of the Rules of Procedure and Evidence which provides for sanctioning of persons who refuse or fail to

¹⁰⁷ Para 65.

¹⁰⁸ Para 66.

¹⁰⁹ Para 66.

¹¹⁰ Para 69.

¹¹¹ Paras 72-73, 78.

¹¹² Paras 79 and 86.

“answer a question relevant to the issue before a Chamber.”¹¹³ Specifically, the Trial Chamber considered the official position of state officials to comply with subpoenas. It noted that:

As States can act only through their officials, a high government official who is subpoenaed in his official capacity to carry out obligations on behalf of a State would not be taking part in the proceedings as a private person but as an agent of the State (...) – the fear of harassment of diplomatic officials – is not valid for an international criminal tribunal established by the Security Council.¹¹⁴

The position stated by the Trial Chamber is that, ‘the *Statute* and *Rules* allow orders to be directly addressed to such officials.’ This is possible under articles 18(2) and article 19(2) of the Statute of the ICTY, as well as *Rules* 39 and 54 of the *Rules of Procedure and Evidence* of the ICTY authorising Judges to issue orders whenever necessary. To emphasise on this duty, the Trial Chamber held that, ‘considering that a State has a duty to comply, a government official to whom a subpoena *duces tecum* is issued in his official capacity has a corresponding duty to comply. Indeed, it would be anomalous to consider that his duty is less than that of the State from which he receives his authority, since a State may only act through its competent officials.’¹¹⁵

After such findings, and considering the role of the tribunal, as well as the need for issuance of *subpoenas duces tecum* and that of compliance by state officials and states with the orders, the Trial Chamber, acting pursuant to *Rule* 54 of the *Rules of Procedure and Evidence* of the ICTY, reinstated the *subpoenas duces tecum* issued on 15 January 1997 by Judge McDonald to the Republic of Croatia and the Croatian Minister Mr Gojko Susak, and ordered Croatia and Mr Susak to comply with the subpoena *duces tecum* within thirty days from the date of the decision on 18 July 1997.

Thus, the Trial Chamber of ICTY stated a great position on *subpoena duces tecum* to high state officials as well as their states in respect of international crimes. This study

¹¹³ Paras 87 and 89.

¹¹⁴ Para 89.

¹¹⁵ Para 91.

aligns with the reasoning and decision stated by the Trial Chamber (Judge Gabrielle Kirk McDonald, Presiding) in this case because the reasoning of the Trial Chamber is more progressive to the development of international law in the field of immunity of state officials and sovereign immunity. In conclusion, the position stated by the Chamber is that high state officials are not immune from *subpoena duces tecum* and must comply with the binding orders of the Trial Chamber or that of a Judge. A state is equally obliged as individuals. The key consideration for the issuance of a *subpoena duces tecum* as emphasised by the Trial Chamber is to allow fair trial for the accused persons.

However, the above position stated by the Trial Chamber, was later subjected to review by the Appeals Chamber, which rendered a less important judgment and indeed created a state of confusion in respect of the question of *subpoena duces tecum* to state officials and binding orders to states. The Appeals Chamber was moved by the Government of Croatia against the decision of the Trial Chamber regarding issuance of *subpoena duces tecum*. That is now discussed below.

On 25 July 1997, the Government of Croatia requested a review by the Appeals Chamber of ICTY of the *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum* rendered on 18 July 1997 by a Trial Chamber of the ICTY comprised of Judges McDonald (presiding), Elizabeth Odio Benito and Saad Saood Jan.¹¹⁶ It also requested the Appeals Chamber to quash the *subpoena duces tecum* issued by the Trial Chamber. Specifically, Croatia requested the Appeals Chamber to review and quash the decision of the Trial Chamber on the following grounds that the Chamber had ‘incorrectly determined that the Tribunal has the inherent power to issue binding and compulsory orders to sovereign States and their officials acting in an official capacity, when the State or official is the object of the order’; and that ‘[t]he Trial Chamber has incorrectly determined that the Tribunal may issue orders to individual State officials requiring them to take actions within their official capacity.’¹¹⁷

¹¹⁶ Para 1.

¹¹⁷ Para 2 (A)-(F).

From the above, Croatia challenged the legal power and authority of the International Tribunal to issue this compulsory order to states and high government officials. In this regard, Croatia challenged the power of a Judge or Trial Chamber of the ICTY to issue a *subpoena duces tecum* in general, and in particular, to a state; and the power of a Judge or Trial Chamber of the ICTY to issue a *subpoena duces tecum* to high government officials of a state; and the appropriate remedy to be taken if there is non-compliance with such *subpoenae duces tecum*.¹¹⁸

The Appeals Chamber determined that the review was admissible under *Rule 108bis of the Rules of Procedure and Evidence* of the ICTY on the grounds that Croatia was ‘directly affected by a decision of the Trial Chamber which holds that both Croatia and high officials of Croatia may be ordered to produce documents, in particular military records, before the Tribunal’ and that the issue whether ‘the Tribunal indeed has power to subpoena States and high officials of States is clearly an issue “of general importance relating to the powers of the Tribunal”, indeed it relates to the Tribunal’s very competence.’¹¹⁹

The Appeals Chamber did not find it necessary to quash the *subpoena duces tecum* addressed to Croatia and to Croatian Defence Minister, Mr Gojko Susak. Instead, it stayed the execution of the *subpoena duces tecum* pending the judgment of that appeal.¹²⁰ So, the Appeals Chamber granted the request by Croatia to review the Decision of the Trial Chamber of 18 July 1997, and suspended the execution of the *subpoena duces tecum* issued to Croatia and its Defence Minister.

In its judgment on the request by Croatia for review of the decision of Trial Chamber II of 18 July 1997, the Appeals Chamber rendered a judgment that detracted from the developments on the issuance of *subpoena duces tecum* to state officials. Its judgment is

¹¹⁸ See, *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para 1.

¹¹⁹ *Prosecutor v Blaškić*, Case No. IT-95-14-PT, *Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order*, 29 July 1997, Appeals Chamber, paras 12-14.

¹²⁰ Para 15.

a surprising one, and is considered here. The first part of the judgment of the Appeals Chamber in the *Blaškić* case defines the term ‘subpoena.’

The Appeals Chamber asked whether the term ‘subpoena’ should be understood to mean an injunction accompanied by a threat of penalty in case of non-compliance, or whether it should follow the views propounded by the Prosecution before the Trial Chamber, and which was upheld by the Trial Chamber. In other words, whether the Appeals Chamber should regard subpoena as considered and taken by the Trial Chamber. It observed that the Trial Chamber had held that the word subpoena should be given neutral meaning of a ‘binding order’.¹²¹ It reached a conclusion that the term subpoena should be given a narrow interpretation and be construed as only referring to ‘binding orders addressed by the International Tribunal, under threat of penalty, to individuals acting in their private capacity.’¹²²

This study respectfully disagrees with the view taken by the Appeals Chamber (Judge Antonio Cassese, Presiding) in *Blaškić* case because, subpoenas can be issued, as rightly held by the Trial Chamber, against state officials as well as private individuals, and non-compliance with such orders leads to a penalty in terms of fine or sentence, for it is considered contempt of court.

In *Prosecutor v Blaškić*,¹²³ while overruling the decision of the Trial Chamber to issue a *subpoena duces tecum* to Croatia and its Defence Minister, the Appeals Chamber of ICTY held that subpoena ‘cannot be applied or addressed to states.’ The Appeals Chamber held that way for reasons it considered that, ‘first of all, the International Tribunal does not possess any power to take enforcement measures against states’, and that ‘this is not a power that can be regarded as inherent in its functions.’¹²⁴ It argued that ‘states can only be the subject of countermeasures taken by other states or of sanctions

¹²¹ Paras 20-21.

¹²² Para 21.

¹²³ *Prosecutor v Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, Appeals Chamber, 18 July 1997, 110 ILR 609.

¹²⁴ Para 25.

upon them by the organised international community, that is, the United Nations or other intergovernmental organisations.’ This led the Appeals Chamber to conclude that in respect of states, subpoenas do not apply. Instead, only binding orders or requests are applicable.

On whether the ICTY can issue binding orders against states, the Appeals Chamber held that it ‘has no power to take measures against either a state or a state official acting in an official capacity.’ It ruled that the International Tribunal might issue an order requiring a state or state official to produce documents under threat of penalty failing compliance. In so doing, it agreed with the Trial Chamber and Prosecution.¹²⁵

The Appeals Chamber apparently recognised that ‘it is well known that in many national legal systems, where courts are part of state apparatus and indeed constitute the judicial branch of the state apparatus, such courts are entitled to issue orders [directed at] other organs, including senior state officials and the Prime Minister or the Head of State.’ It observed that way based on the principle that nobody, not even the Head of State, is above the law (*legibus solutus*).¹²⁶ However, what is surprising to international lawyers today, is when the Appeals Chamber held categorically that,

The international community consists primarily of sovereign States; each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic of the international community. It follows from these various factors that international courts do not necessarily possess, vis-à-vis organs of sovereign states, the same powers which accrue to national courts in respect of the administrative, legislative and political organs of the State.¹²⁷

It is apparent that the Appeals Chamber suggested that only national courts have the power over state officials and not international courts as such. This seems to have a basis under the test question whether international law is really law properly so called. Again, the Appeals Chamber hinged on state sovereignty to protect states and their officials from

¹²⁵ Paras 26-31.

¹²⁶ Para 40.

¹²⁷ Para 40.

being subjects of orders of the ICTY. In its conclusion, the Appeals Chamber held that, ‘both under general international law and the Statute itself, Judges or Trial Chambers cannot address binding orders to State officials.’¹²⁸ It dismissed the possibility of ICTY ‘addressing subpoenas to state officials in their official capacity.’¹²⁹ By so holding, the Chamber emphasised that such state officials cannot be subject of subpoenas.

Based on the above, the Appeals Chamber quashed the decision of the Trial Chamber that issued a *subpoena duces tecum* to Croatia. The question that needs to be posed here is whether indeed ‘act of state’ and ‘state sovereignty’ are valid defences against issuance of *subpoenas duces tecum* to state officials. It is the view of this author that they are not. Insofar as there is potential evidence from state officials, courts should not be barred from summoning such officials to appear and produce documents or testify before them.

The position by the Appeals Chamber of ICTY that it has no power to issue subpoenas against states or its officials’ is surprising in international law because it denies the inherent jurisdiction of the ICTY. It can be said that the judgment of the Appeals Chamber in *Blaškić* case is a set back to international law in that it detracted from the already progressive development made by the Trial Chamber in the case regarding issuance of *subpoena duces tecum*. It is indeed surprising for the Appeals Chamber to have found that it lacked competence and authority to issue *subpoenas duces tecum* against state officials. This is so especially considering the fact that in *Prosecutor v Tadić*¹³⁰ it had inherent jurisdiction to deal with international crimes and try individuals responsible for such crimes.¹³¹

¹²⁸ *Prosecutor v Blaškić*, Case No. IT-95-14, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, Appeals Chamber, 18 July 1997, paras 43 and 44.

¹²⁹ *Prosecutor v Blaškić*, Case No. IT-95-14, Appeals Chamber of ICTY, para 38.

¹³⁰ See, *Prosecutor v Tadić*, Case No. IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995; (1996) 35 ILM 32, whereby the Appeals Chamber of ICTY had decided that it had jurisdiction to determine the validity of its own establishment.

¹³¹ See, H Fox, ‘Some aspects of immunity from criminal jurisdiction of the state and its officials: The *Blaškić* case’ in LC Vohrah, F Pocar, Y Featherstone, O Fourmy, C Graham, J Hocking and N Robson (eds.), (2003) *Man’s inhumanity to man: Essays on international law in honour of Antonio Cassese*, 298.

However, it should be recalled that, in 2003, the Appeals Chamber of the ICTY departed from the above myth and position held in *Blaškić* case, and stated categorically that the ICTY may compel senior state agents to testify before it, whether or not such agents witnessed the relevant facts in their official capacity.¹³² In fact, the Appeals Chamber in *Krštić* case clarified that the proper procedure to call the state official to be interviewed or testify as a witness before the Tribunal, is by way of issuing *subpoena ad testificandum* under *Rule 54 of the Rules of Procedure and Evidence of the ICTY*. It should be recalled that in this case, the applicant had applied for subpoenas to be issued against two state officials, both of whom were Officers of the Army of State –to attend an interview with defence counsel. Having determined that the Appeals Chamber was authorized by *Rule 54*, the Chamber held that ‘such a power clearly includes the possibility of a subpoena being issued against a prospective witness to attend at a nominated place and time in order to be interviewed by the defence.’¹³³

Therefore, the Appeals Chamber gave an order that a subpoena be issued against the two state officials as prospective witnesses to attend a location in Bosnia and Herzegovina at a time to be nominated by the defence in order to be interviewed.¹³⁴ Since the majority decision in the Appeals Chamber of the *Krštić* case, a number of Trial Chambers have issued ‘subpoenas to state officials for both testimony and pre-testimony-interviews.’¹³⁵ In this regard, the authority of the Appeals Chamber in *Blaškić* case should not to be followed. Instead, the position by the Appeals Chamber of the ICTY in the *Krštić* case

¹³² *Prosecutor v Krštić*, ICTY Appeal Chamber, Decision on Application for Subpoenas decision, para 27.

¹³³ Para 19.

¹³⁴ Para 29.

¹³⁵ *Prosecutor v Milošević*, Case No. IT-02-54-T, ‘Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroder’, Trial Chamber of ICTY, 9 December 2005, para 16, (referring to the following cases: *See, e.g., Prosecutor v Martić*, Case No. IT-95-11-PT, Decision on the Prosecution’s Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena, 16 September 2005 (“*Martić* Trial Decision”)); *Prosecutor v Halilović*, Case No. IT-01-48-T, Decision on Prosecution’s Motion for Issuance of a Subpoena Ad Testificandum and Order for Lifting *Ex Parte* Status, 8 April 2005; *Prosecutor v Strugar*, Case No. IT-01-42-T, *Subpoena ad Testificandum*, 28 June 2004; *Prosecutor v Blagojević*, Case No. IT-02-60-T, Order In re Defence’s Request for the Issuance of Subpoenas ad Testificandum, Orders for Safe Conduct and an Order for the Service and Execution of the Subpoenas and Orders for Safe Conduct, 5 May 2004; *Prosecutor v Brdanin and Talić*, Case No. IT-99-36-T, *Subpoena ad Testificandum*, 17 July 2003; *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on the Prosecution’s Application for Issuance of a Subpoena ad Testificandum for Witness K33 and Request for Judicial Assistance Directed to the Federal Republic of Yugoslavia, 5 July 2002).

and the subsequent cases as stated above must be followed as authorities on the question of *subpoenas duces tecum*.

Hence, it can be argued that the state official is no longer acting as an instrumentality of the state apparatus. For limited purposes of criminal proceedings, particularly in cases of subpoenas, 'it is sound practice to "down-grade" the state official to the rank of an individual acting in a private capacity and apply to him all the remedies and sanctions available against non-complying individuals.'¹³⁶

3.3.3 The ICTR and the question of subpoenas against state officials

Regarding issuance of subpoenas to serving state officials, the position of the ICTR, like that of the ICTY, is not uniform. The Trial Chambers of the ICTR have issued decisions that on one side reveal that subpoenas cannot be issued against serving state officials, and on the other, that, subpoenas can be issued against serving state officials. These are discussed here. On 19 February 2008, Trial Chamber III of the ICTR rendered a decision denying a motion to subpoena President Paul Kagame of Rwanda.¹³⁷ The Defence for Nzirorera had 'moved the Trial Chamber to issue a subpoena directed at the President of Rwanda, Paul Kagame, directing him to submit to an interview.'¹³⁸ In requesting for a subpoena, the defence for Nzirorera argued that President Kagame's testimony was certainly relevant and necessary to establish the role of the Rwandan Patriotic Front (RPF) leading to the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi. The defence argued that the 'evidence that the RPF was responsible for these acts were part of Joseph Nzirorera's joint criminal enterprise to destroy the Tutsi' and that 'it knows of no person other than President Kagame who can provide direct and conclusive evidence on these issues.'¹³⁹

¹³⁶ *Prosecutor v Blaškić*, Case No. IT-95-14, Appeals Chamber of ICTY, para 51.

¹³⁷ *Prosecutor v Karemera, Ntirumpatse and Nzirorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame*, Trial Chamber III, 19 February 2008 (Before Dennis CM Byron, Presiding; Gberdao Gustave Kam and Vagn Joensen), paras 1-16.

¹³⁸ Para 3, quoting Joseph Nzirorera's Motion for Subpoena to President Paul Kagame, filed on 28 January 2008.

¹³⁹ Paras 3, 12 and 14.

The defence for Nzirorera demonstrated that it had made reasonable attempts and efforts to contact and obtain the voluntary cooperation of President Paul Kagame, but that, President Kagame refused to cooperate and reply to the letters sent on 2 September 2003 requesting him to testify about the RPF activities in Rwanda leading up to and including the assassination of President Habyarimana. The refusal to such request was made available by a letter from the Rwandan Ministry of Justice dated 25 January 2008.¹⁴⁰ The Trial Chamber agreed with the defence for *Nzirorera* that it had made reasonable attempts to obtain evidence and cooperation from President Kagame. However, the Trial Chamber set conditions for issuance of the subpoena. It stated that it was necessary that ‘in considering whether the prospective testimony will materially assist the applicant, it is not enough that the information requested may be “helpful or consistent” for one of the parties: it must be of substantial or considerable assistance to the [a]ccused in relation to a clearly identified issue that is relevant to the trial.’¹⁴¹

The Trial Chamber further stated that it must consider the specificity with which the prospective testimony was identified and whether the information could be obtained by other means. In this regard, the applicant had to demonstrate a reasonable basis for the belief that the prospective witness (President Kagame) was likely to give the information sought. After all the above conditions, the Trial Chamber stated that the indictment did not allege that the accused persons were responsible for the assassinations of Emmanuel Gapyisi, Felicien Gatabazi or President Habyarimana. Surprisingly, the Trial Chamber declared that the question of who is responsible for those assassinations was not clearly an issue in this case.¹⁴²

Based on the above position, the Trial Chamber denied the motion entirely. It is submitted that the Trial Chamber did not give much weight on the fact that it had found and agreed with the defence that President Paul Kagame had refused to cooperate with the defence, and therefore that, a subpoena was the only means to get evidence from President Kagame and, that voluntary cooperation by President Kagame had failed.

¹⁴⁰ Para 12.

¹⁴¹ Para 13.

¹⁴² Paras 15 and 16.

Besides, the Trial Chamber did not bother assigning any reason to its decision, apart from denying the liability of the RPF in the assassination of President Habyarimana.

Further, the Trial Chamber did not discuss whether the defence for *Nzitorera* had failed to demonstrate that there was a reasonable belief that President Kagame's testimony was likely to give the relevant information sought for by the defence. The Chamber only stated the pre-conditions without examining whether the defence had failed to prove that the information sought from President Kagame would also materially assist the defence. It is therefore reasonable to argue that the decision of the Trial Chamber was unreasonable because the defence for *Nzitorera* had made attempts to obtain information and cooperation from President Kagame but to no avail, and that, the requested information would have been of considerable assistance to the defence's case.

The decision of the Trial Chamber was such that it aggrieved the defence for *Nzitorera* thereby leading to an application for certification to appeal decision on the motion for subpoena to President Paul Kagame.¹⁴³ In the application, Joseph *Nzitorera* contended that the Trial Chamber 'erred in concluding that the assassinations of President Habyarimana, Emmanuel Gapyisi and Felicien Gatabazi are irrelevant to the case', and that the Trial Chamber 'applied the wrong standard for subpoenas for interviews – applying a higher standard for obtaining evidence than for the admissibility of evidence – when interpreting the requirement that the prospective testimony “can materially assist his case.”’¹⁴⁴ The Chamber denied Joseph *Nzitorera*'s application for certification of an interlocutory appeal stating that there was no serious doubt as to the correctness of the legal principles and that *Rule 73(B)* of the *Rules of Procedure and Evidence* had not been satisfied.¹⁴⁵

¹⁴³ *Prosecutor v Karemera, Ngirumpatse and Nzitorera*, Case No. ICTR-98-44-T, Application for Certification to Appeal Joseph *Nzitorera*'s Motion for Subpoena to President Paul Kagame, filed on 25 February 2008.

¹⁴⁴ *Prosecutor v Karemera, Ngirumpatse and Nzitorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzitorera's Application for Certification to Appeal Decision on Joseph Nzitorera's Motion for Subpoena to President Paul Kagame*, 15 May 2008, para 1.

¹⁴⁵ Paras 1-9.

Hence, regarding the issuance of a *subpoena ad testificandum* against the serving President of Rwanda, Paul Kagame, the position of the Trial Chamber of the ICTR is that he cannot testify before it unless conditions are met, which conditions are contestable because the defence for Joseph Nzirorera had proved that President Kagame had failed to voluntarily cooperate with it, and therefore, there is no other way he could provide information regarding the assassination of President Habyarimana except by way of subpoena.

Regarding the alleged responsibility of President Kagame for the assassination of Habyarimana, one must resort to what is clear from the records of the testimony by Jean Kambanda in the *Bagosora* case. When called in to testify as to the existence of the Tutsis and Hutus genocide, and as to the responsibility of the RPF in the assassination of Habyarimana, Kambanda told the court that he did not deny the genocide of the Tutsis and Hutus in 1994, but he pointed out that President Kagame was responsible for the Hutus genocide. In his testimony, Kambanda said:

The events that took place in my country were so serious and so difficult to understand that as a former prime minister, I had the duty to explain them and politically assume responsibility. That is what I recognise. I did not perpetrate any crimes. I did not send anybody to kill anybody. But I was an authority.....I am not one of those who deny the genocide of the Tutsis....I saw that people were hunted down and killed for what they were, specifically, because they were Tutsis....Unfortunately, Mr President, during the same period and under the same circumstances, I saw that people from the Hutu ethnic group were massacred because they were Hutus....They were hunted down and killed. If the first was genocide, then the second was too. So I believe there was a double genocide in Rwanda: genocide of the Hutus, and genocide of the Tutsis. Now, the question that arises is who perpetrated these genocides, and I have answers for that. Regarding the genocide of the Hutus, this is easy to demonstrate. It [is] much easier because one does not need a lot of information to know that the genocide of the Hutus was committed by the current president of Rwanda, his regime, his army, his militia. I have evidence which has been forwarded to you, Mr President.¹⁴⁶

¹⁴⁶ Testimony of Jean Kambanda in *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T, 11 July 2006. The text of the testimony is reprinted in J Laughland (2008) *A history of political trials: From Charles I to Saddam Hussein*, 219-220.

The above paragraph demonstrates that there were two sides of genocide: genocide of the Hutus and genocide of the Tutsis. While it is notable that the majority of the accused persons before the ICTR are Hutus, one needs to note that even the Tutsis may have been perpetrators of genocide in Rwanda, at least against the Hutus. Kambanda has put it more succinctly above. In normal circumstances, one would have expected the ICTR to summon or subpoena President Kagame to tell the truth and assist the court in knowing about the events that caused genocide in Rwanda, not only by the Hutus, but also the Tutsis as claimed by Kambanda who testified whilst being a prisoner, serving sentence in Mali.

It appears that President Kagame is responsible for genocide in Rwanda, particularly that of Hutus. This is supported by the international arrest warrant issued for nine senior Rwandan state officials, including Rose Kabuye, and others, who were leading the RPF. The French Judge, Jean-Louis Brugière, issued the arrest warrant in 2006 which also state Kagame's key role in participating in the genocide in Rwanda. However, since French law prohibits issuance of arrest warrants against serving presidents, Kagame was not specifically indicted, even though he was described as obstructing investigations on the shooting of a plane that carried Habyarimana.¹⁴⁷

Further, from the discussion with the former official of the ICTR, there is an indication that the first Prosecutor of the ICTR had initially indicted President Kagame, even though the indictment remains sealed to date.¹⁴⁸ When Carla Del Ponte attempted to indict the RPF military commanders between April 2002 and August 2003, Kagame criticised her and played part in getting her dismissed as Chief Prosecutor.¹⁴⁹ The Government of Rwanda opposed Del Ponte's allegation by indicating that the RPF was the one that stopped the genocide in Rwanda.¹⁵⁰ Prosecution of the RPF military commanders was

¹⁴⁷ Laughland (2008) 213 (citing *Délivrance de Mandats d'arret internationaux, Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Brugière*, Premier Vice-President, Paris, 17 November 2006).

¹⁴⁸ Information obtained from a former official of the ICTR on 8 July 2010, at The Hague. But even then, there is ample literature regarding Kagame's indictment and responsibility for genocide in Rwanda. See for example, V Peskin (2008) *International justice in Rwanda and the Balkans: Virtual trials and the struggle for state cooperation*, 207-231 ('Victor's justice revisited: *Prosecutor v Kagame*').

¹⁴⁹ Peskin (2008) 207.

¹⁵⁰ Peskin (2008) 208-209.

more complicated because the ICTR depended on the state cooperation of Rwanda, and so, it was not easy to succeed in prosecuting the current regime of Rwanda. If indictments were issued against Rwandan officials, Rwanda could possibly obstruct justice by blocking potential witnesses.

After Del Ponte left ICTR, the new Prosecutor, Hassan Jallow succeeded her. Hassan Jallow seems simply unwilling to indict the RPF military commanders, including President Kagame for genocide against Hutus. Victor Peskin describes Hassan Jallow as a prosecutor who ‘has not made RPF atrocities against Hutu civilians a priority.’¹⁵¹ Peskin notes further that, ‘Jallow’s approach to the RPF issue has been marked by ambiguity. On the one hand, he has defended his right to pursue the RPF. In a June 2005 speech to the Security Council, Jallow asserted his prerogative to issue RPF indictments beyond the deadline set by the Council. But on the other hand, he has claimed that he is restrained by the Council from doing so.’¹⁵² From these statements, it is apparent that Jallow needs more time to prosecute the RPF leaders. But, the ICTR is about to phase out. Hence, even if Jallow is given more time to prosecute the RPF leaders, there is no apparent indication he may complete the prosecution soon.

Perhaps if President Kagame is brought before the ICTR, he can assist the court in knowing the truth about the genocide in Rwanda, and assist the court in terms of justice and equality of arms and fairness to the accused persons before the ICTR. But, with the ICTR completion strategy due soon, probably the triggering of criminal prosecutions against President Kagame might begin during the next phase of the ICTR – which is anticipated to be the ‘residual trials’ to be commenced after the current time limit for the court expires.¹⁵³

Although the Trial Chamber of the ICTR has not issued a subpoena against President Paul Kagame of Rwanda, it must be recalled that as far back as 2006, it made an

¹⁵¹ Peskin (2008) 225.

¹⁵² Peskin (2008) 227.

¹⁵³ Information from a former official of the ICTR during an informal discussion with the author on 8 July 2010, at The Hague.

important contribution regarding the position on issuance of subpoenas against state officials, which is of course, contrary to what is observed in respect of President Paul Kagame. That position is now discussed below.

The Trial Chamber of ICTR has affirmed the authority of international criminal courts, by asserting that state agents may be compelled to testify before international criminal courts.¹⁵⁴ In this decision, the Chamber had considered it necessary that ‘[g]overnment officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained in the course of the government service.’ Consequently, it observed, that, since the defence had made ‘reasonable efforts to secure the witness’s voluntary appearance, a subpoena *ad testificandum* [was] both necessary and appropriate for the fair conduct of trial.’¹⁵⁵

The Trial Chamber of ICTR has also emphasised that states as well as state officials can be compelled to appear and be interviewed by the accused. In particular, regarding subpoenas, it has decided that:

Article 28 of the Statute [of ICTR] imposes an obligation on States to “cooperate with the International Criminal Tribunal for Rwanda (...) The “investigation and prosecution of persons” encompasses not only Prosecution investigations, but the entire trial process, including the right of the Accused in Article 20(4) (e) to “obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her...”¹⁵⁶

¹⁵⁴ See, *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J. Biot, para 4. But see also, *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Defence Request to Correct Errors in Decision on Subpoena for Major Biot, Trial Chamber I, 29 August 2006, paras 1-3.

¹⁵⁵ *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, ICTR Trial Chamber, Decision on request for a subpoena for Major J. Biot, paras 3-4, citing, *Prosecutor v Kršić* Appeal Decision of the ICTY Appeals Chamber, para. 27, quotations omitted.

¹⁵⁶ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Kabiligi Motion for Cooperation of the Government of France and Subpoena of Former Officers, Trial Chamber I, 31 October 2006, para 2 (quoting: ‘*Prosecutor v Bagosora et al*, Decision on Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the Government of the United Republic of Tanzania, Trial Chamber, 26 August 2006, para 2’); *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Cooperation of the Government of France, Trial Chamber I, 6 October 2006, para 2; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance, Trial Chamber, 7 February 1995, para 5; *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana, Trial Chamber, 23 June 2004, para 4.

The above quoted position was also stated in yet another application for request to the Kingdom of Belgium.¹⁵⁷ In another motion, the defence lawyers for Col. Bagosora had asked the ICTR Trial Chamber to issue subpoena to the Minister for Defence of the Government of Rwanda, General Marcel Gatsinzi, requiring his appearance before the Trial Chamber as a witness, claiming that he was a Chief of the Armed Forces of Rwanda between 7 and 17 April 1994, and that, he had ‘unique and specific knowledge concerning certain material facts relevant to the case’ against Col. Bagosora. In its finding, the Trial Chamber held that:

Government officials enjoy no immunity from the normal legal processes available to compel the testimony of private individuals. It makes no difference whether the official’s knowledge was obtained in the course of official duties or not...¹⁵⁸

Additionally, the Trial Chamber made a finding that Rule 54 of the Rules of Procedure and Evidence of ICTR authorises a Trial Chamber to issue ‘orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation or conduct of the trial.’¹⁵⁹ The Chamber considered that it ‘does not lightly issue a subpoena to a serving Minister of a State.’ Nevertheless, it found that the defence had shown by specific submissions that the testimony of General Gatsinzi was ‘likely to be material to specific matters of importance in the present case’ and that the defence had shown reasonably that the evidence could not be obtained elsewhere, and that it had made reasonable ‘efforts to secure witness’s voluntary cooperation without success’ and therefore it granted the application for subpoena requiring the personal appearance of General Marcel Gatsinzi before the Chamber in a trial, and directed the Registrar of ICTR to communicate that decision to General Marcel Gatsinzi.¹⁶⁰

¹⁵⁷ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request to the Kingdom of Belgium for Assistance pursuant to Article 28 of the Statute, Trial Chamber I, 21 September 2006, para 2.

¹⁵⁸ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 4, (referring to: ‘*Prosecutor v Krstić*, Decision on Application for Subpoenas (AC), 1 July 2003, para 27; *Prosecutor v Milošević*, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder (TC), para 30’).

¹⁵⁹ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, para 5.

¹⁶⁰ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for a Subpoena, Trial Chamber I, 11 September 2006, paras 7 and 8.

Conclusively, it is observed from the experience of the Trial Chamber of the ICTR that a subpoena is the correct procedural mechanism for seeking to compel a state official to appear before the international criminal tribunals in order to testify. It would be noted that, the ICTR has also gone a step further in ordering state officials to appear before it. For example, in 2006 the Trial Chamber issued a subpoena for Mr Ami R Mpungwe, a Tanzanian ambassador to appear before it during the trial session.¹⁶¹ It should be understood that the ICTR has even issued subpoenas to international organisations such as UNHCR.¹⁶²

3.3.4 The SCSL and the question of subpoenas against state officials

The Trial Chamber of the SCSL has had also an opportunity to deal with the question of immunity of state officials in the case involving Charles Taylor. While it is undisputed fact that Charles Taylor is being prosecuted by the Special Court for Sierra Leone, it is also important to note that the Trial Chamber of the SCSL has inconsistently held that the then sitting president of the Republic of Sierra Leone, Dr. Ahmad Tejan-Kabbah was immune from being summoned as a witness, citing among others, an immunity of the serving president and that as a sitting head of state he could not be compelled to appear before the Special Court.¹⁶³ The contrary is proven and stated by the same Trial Chamber of the SCSL as we shall find out shortly in a different case decided in 2008.

The first subpoena decision of 2006 calls for a deeper analysis. The two accused persons, *Moinina Fofana* and *Samuel Hinga Norman* had applied for the issuance of a subpoena *ad testificandum* against the then sitting president of Sierra Leone, Ahmad Tejan Kabbah. They wanted him to appear and testify on their behalf before the Trial Chamber of the

¹⁶¹ *Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Request for Subpoena of Ami R. Mpungwe, Trial Chamber I, 19 October 2006, para 6.

¹⁶² *See, Prosecutor v Bagosora et al*, Case No. ICTR-98-41-T, Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting with one of its Officials, Trial Chamber I, 6 October 2006, para 6.

¹⁶³ *Prosecutor v Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, *Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone*, Trial Chamber I, 13 June 2006, *see the Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on Motions*, especially paras 57-58, 83-93, and 94-180.

SCSL. They believed that President Kabbah had refused to heed to their repeated requests for him to appear and testify on their behalf.

Norman and Fofana, who had filed joint submissions for the subpoenas on 15 December 2005, contended that as their Civil Defence Forces (CDF) leader, and that since they had been indicted for crimes committed in the course of fighting against the rebel groups of RUF/AFRC to restore the democratically elected government of Tejan Kabbah, which had been removed from power by the rebel forces, President Tejan Kabbah knew that they did not bear the greatest responsibility for such crimes. They further argued that President Kabbah was commanding and materially supporting and communicating with the leadership of the CDF which they had been heading. On the basis of his communication, command and support to them, President Tejan Kabbah also bore the greatest responsible for the crimes that Norman and Fofana were charged with, contending that the President was responsible both politically and militarily.

Further, Norman and Fofana contended that President Kabbah had issued commands, communications and materially supported them ‘both during his exile in Conakry [in Guinea] and from his presidential palace in Freetown.’ As such, they submitted that President Kabbah ‘may himself have been among a group or, at the very least, that he was in a position to give evidence regarding the relative culpability of the three accused persons.’¹⁶⁴ The Trial Chamber held that:

The President is as well the Head of State and finds himself at the top of the State machinery... President Tejan Kabbah is not an ordinary Sierra Leonean but also,...the current, sitting in, and incumbent President and Sovereign Head of State of the Republic of Sierra Leone...The President belongs to a different category and regime of immunities...In fact, his immunity under Section 48(4) of the Constitution [of Sierra Leone] should ordinarily include, not only immunity against criminal and civil actions, but also against Subpoenas, other Court processes, or even being compelled to appear in court as a factual witness unless he, President Kabbah on his own volition, voluntarily accepts and decides to so testify in these proceedings.¹⁶⁵

¹⁶⁴ See, *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-T, Fofana Motion for Issuance of a Subpoena *Ad Testificandum* to President Ahmad Tejan Kabbah, 15 December 2005, para 13.

¹⁶⁵ Paras 58, 98 and 100 of the SCSL Decision on Motions in *Norman, Fofana and Kondewa*.

The Trial Chamber of SCSL reached the above position and did not grant a request to issue *subpoena ad testificandum* against the incumbent President of Sierra Leone, because it found that the requirements set out in *Rule 54* of the *SCSL Rules of Procedure* (the necessity and legitimate forensic purpose) had not been met, and that it had discretion to refuse the application. However, in his *Dissenting Opinion on Decisions on Motions by Moinina Fofana and Sam Hinga Norman for Issuance of Subpoena Testificandum to H.E Alhaji Dr. Ahmad Tejan Kabbah*, then President of the Republic of Sierra Leone, Hon. Justice Thompson distinguished all arguments raised in the Majority Decision and stated, as is purposely quoted below:

There is nothing, I reckon, problematic about statutory powers to issue Subpoenas, nationally or internationally...I take for granted that, *if a priori there is no entitlement to immunity from international criminal prosecution reserved to a Head of State or government or any responsible government official under international law as regards the perpetration of international crimes, a fortiori international law does not confer any like immunity on such officials from testifying as witnesses in international criminal tribunals(...)* Specifically, therefore, in the context of the Special Court, no such immunity is expressly or impliedly provided for in the constitutive instruments or subordinate legislation of the tribunal...On this view, the President cannot claim immunity from subpoena as a logical derivative from his explicit immunity from prosecution since it is waived vis-à-vis the Special Court for Sierra Leone. Therefore, while the President enjoys immunity under the domestic law of Sierra Leone from prosecution by reason of Section 48(4) of the *Sierra Leone Constitution Act No.6 of 1991*, no immunity to appear as witness before the domestic court is granted. *No immunity to appear as a witness before the international criminal tribunals, likewise, exists.*¹⁶⁶

The dissenting opinion of Judge Thompson against the majority decision of the Trial Chamber has a very strong position that the law allowed the SCSL to issue subpoena *ad testificandum* to President Tejan Kabbah to testify before the court.¹⁶⁷ Due to the serious differences between the Judges on the interpretation of Rule 54, and hence leading to an

¹⁶⁶ See paras 8, 15 &16 of the *Dissenting Opinion of Hon. Justice Bankole Thompson on Decisions on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena Ad Testificandum to H.E Alhaji Dr Ahmed Tejan Kabbah, President of the Republic of Sierra Leone*, (Case No. SCSL-04-14-T). Emphasis as in the original, but some words are omitted in the quotation.

¹⁶⁷ See, *Dissenting Opinion of Judge Thomas Thompson, against the Decision of the Trial Chamber*, paras 14-30.

impugned decision as such, the Defence applied for leave to appeal against the Majority Decision. Leave was granted.¹⁶⁸

The Majority in the Appeals Chamber of the Special Court for Sierra Leone confirmed the decision of the Trial Chamber.¹⁶⁹ In view of this study, the majority decisions both by the Trial and Appeals Chambers of the SCSL were wrong. The correct position is that which is stated in the Dissenting Opinion of Judges Thompson (Trial Chamber) and Dissenting Opinion of Judge Geoffrey Robertson (Appeals Chamber). Judge Robertson's dissenting opinion against the majority decision of the Appeals Chamber is echoed along the same lines with the reasoning of the Dissenting Opinion of Judge Thompson of the Trial Chamber of SCSL.¹⁷⁰

By the reasoning of Justice Bankole Thompson in his Dissenting Opinion and Justice Geoffrey Robertson of the Trial Chamber and Appeals Chamber of the SCSL as shown above respectively, it is imperative that the question of immunity does not only involve prosecution but also does not extend to issuance of Subpoena *ad Testificandum* and, it can be added, *subpoena duces tecum* when the international or domestic criminal courts deal with core international crimes. In this regard, it is clear that state officials are not immune from the subpoenas issued by international criminal tribunals or courts. This study adopts this reasoning and position which is arguably, in line with contemporary obligations or requirements under international criminal law and human rights. Further, even if the Appeals Chamber and the Trial Chamber were correct in exercising their discretion under Rule 54 of the Rules of Procedure and Evidence of the SCSL, such discretion is not absolutely free. Accordingly, exercising discretion should have been in conformity with Articles 17(4) (e) of the Statute of SCSL and 14(e) of the International Covenant on Civil and Political Rights, 1966, and settled jurisprudence on the matter.¹⁷¹

¹⁶⁸ See *Prosecutor v Norman, Fofana, and Kondewa*, Case No. SCSL-04-14-T, Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 29 June 2006.

¹⁶⁹ *Prosecutor v Norman, Fofana and Kondewa*, SCSL Appeals Chamber, para 8-39 (majority decision).

¹⁷⁰ See Dissenting Opinion of Judge Geoffrey Robertson against the decision of the Appeals Chamber of SCSL, para 10-50.

¹⁷¹ See, *Prosecutor v Kordić and Mario Cerkeć*, Case No. IT-95-14/2, Decision on Appeal Regarding Statement of a Deceased Witness, Appeals Chamber, ICTY, 21 July 2000, para 20.

However, on 30 June 2008, the Trial Chamber of the SCSL having perhaps recognised the errors it had made in the first subpoena decision in the case of *Norman, Fofana and Kondewa* above, changed its position, albeit too late, and in respect of a former president (not the sitting president), Ahmad Tejan Kabbah of Sierra Leone. This time the Trial Chamber of the SCSL held boldly that ‘the [d]efence has met the prescribed standard for the issuance of a subpoena under Rule 54 thereby justifying the exercise by the Chamber of its discretion to grant the orders sought.’¹⁷² After this finding, the Chamber granted the application by Counsel for Issa Hassan Sesay for the issuance of subpoena to Ahmad Tejan Kabbah, former president of Sierra Leone, for a pre-testimony interview and for testimony at the trial. The Chamber thus ordered Ahmad Tejan Kabbah to testify, if called as a defence witness, which order was complied with.

The Chamber did so in the purported pretext that the present application was different from that of *Norman, Fofana and Kondewa*. Judge Benjamin Mutanga Itoe revealed the differences (which may not necessarily be genuine differences at all). The Judge observed that while in the first subpoena application the accused sought evidence of President Tejan Kabbah contending that he also bore the greatest responsibility for the crimes they were charged with, which also reveals that they wanted the president to be charged for the same crimes, in the second subpoena application, the accused persons ‘did not conceal their intention.’ Instead, ‘the objective of their application was for Ex-President Kabbah to appear in Court to testify on their behalf to the effect that they did not, as stipulated in the Agreement and in the Statute of [the] Court, bear the greatest responsibility for the crimes committed during the conflict to have warranted their prosecution.’¹⁷³ The Judge observed further that in the initial subpoena application, the accused had wanted to ridicule and embarrass President Tejan Kabbah by exposing his

¹⁷² *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, Trial Chamber I, 30 June 2008, para 21.

¹⁷³ *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber I, 30 June 2008, A Separate Concurring Opinion of Hon Justice Benjamin Mutanga Itoe on the Chamber’s Unanimous Written Reasoned Decision on the Motion for Issuance of a Subpoena to H.E Dr Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, para 22.

involvement and conduct in the conflict as the CDF boss, who would ultimately bear criminal responsibility.¹⁷⁴

An observation in the second subpoena decision by the Trial Chamber of the SCSL is that the court clearly lacks consistency in the way it treats state officials in relation to prosecution of international crimes. While it is a position stated in the first subpoena decision in *Norman, Fofana and Kondewa* on 13 June 2006 that President Tejan Kabbah (then serving president) enjoyed immunity from testifying before the Trial Chamber of the SCSL, in the second case decided on 30 June 2008, the Trial Chamber drastically deviated from its own weak position it had stated in 2006. A further observation is on the way Judge Benjamin Mutanga Itoe himself has come to agree that there is no immunity for President Tejan Kabbah from testifying before the SCSL. His inconsistency is also observed when he stated that:

Even though the earlier motion was denied on the basis of the same criteria on which this one is granted, it is my finding that these two applications, even though identical in their subject matter and in the objective they seek to achieve, are distinguishable and that the verdict or stand adopted by This Chamber, in the earlier one, does not necessarily bind it to come to a similar conclusion based on similar reasons, in the later case given the configuration and divergence of the facts on which the two applications were made and canvassed.¹⁷⁵

The above paragraph proves a self-contradicting position adopted by Judge Benjamin Mutanga Itoe and the Trial Chamber of the SCSL generally. It calls for the question – whether the position of the SCSL – regarding immunity is that there is no immunity for state officials from testifying before it. This is true, and more so, when the reality is revealed that at the time the second subpoena application was made, President Tejan Kabbah had ceased to be a president, but that the SCSL refused to grant an application for a subpoena against President Tejan Kabbah when he was still in office as president. Would the testimony of President Tejan Kabbah really not assist the accused persons, *Norman, Fofana and Kondewa* in 2006? Why has the SCSL now changed and stated that the evidence of former president Tejan Kabbah would materially assist the accused in

¹⁷⁴ Para 31.

¹⁷⁵ Para 34.

Sesay, Kallon and Gbao? Is there any significant difference between the two subpoena applications?

There is no difference between the two subpoena applications. Rather, there are more similarities than differences. All involve the same conflict, time; circumstances, crimes committed, same potential witness, and were before the same court. In this respect, one would have expected the court to treat same circumstances and cases alike. Arguably, President Kabbah was probably ‘uniquely placed to testify about those issues.’ By refusing to allow President Kabbah to testify in the first subpoena application, the SCSL denied the accused their right to call witness to support their case, as per Article 17(4) (e) of the Statute of the SCSL, as well as to ensure fair trial and equality of arms. There could have been truth in him ordering and communicating with the CDF leadership in Sierra Leone during the armed conflict. Commenting on the inconsistency in the jurisprudence of the SCSL on the issue of subpoenas, Patrick Hassan-Morlai has rightly observed that the jurisprudence of the court is highly inconsistent on this point, and that ‘it is doubtful whether the subpoena decision has created a precedent or made a positive contribution to existing jurisprudence in this area of law.’¹⁷⁶ Hassan-Morlai was seriously challenging the court’s first subpoena decision in that it substantially failed to follow and appreciate the jurisprudence of the ICTY and ICTR on subpoenas.

It appears from the jurisprudence of the SCSL that so far, it has been a position of that court *not* to recognise immunity of former state officials from testifying before it. This is observed above in the second subpoena decision where former President Tejan Kabbah was ordered to testify for the accused, Issa Hassan Sesay. Another example is when the SCSL allowed the prosecution’s motion for the issuance of a subpoena against former Vice-President of Liberia, Moses Blah to testify against Charles Taylor. On 14 May 2008, former Vice-President Moses Blah was called in to testify for the prosecution, but he turned to be a hostile witness and chose to testify for Taylor. This could have been influenced by the fact that he was a subordinate of Taylor, and Taylor had handed power

¹⁷⁶ PM Hassan-Morlai, ‘Evidence in International Criminal Trials: Lessons and contributions from the Special Court for Sierra Leone’ (2009) 3 *African Journal of Legal Studies* 96-118, 108.

to him when he left for asylum in Nigeria in 2003. The SCSL has only been faced with one really challenge involving the then serving president, Tejan Kabbah. The practice on granting subpoenas has apparently developed with easiness before the SCSL. On 29 June 2010, the Trial Chamber of the SCSL (Judge Julia Sebutinde, Presiding) granted an application for the issuance of a subpoena to three witnesses: Naomi Campbell, Carole White and Mia Farrow. The Chamber noted that it was in the interest of a fair and expeditious trial to grant such application.¹⁷⁷

It can be contended that state officials have a duty to assist international criminal tribunals or courts especially when dealing with international crimes. Arguably, such state officials should not be accorded immunity from prosecution and that such immunity does not extend to issues of subpoena *ad testificandum* or *duces tecum* as long as there are circumstances linking such senior state officials to the commission of international crimes. The idea is that state officials must not go unsummoned or unpunished before international and domestic courts for their involvement in the commission of international crimes. To crystallise this position, regard must be had, although in a different context, to the case of *South African Rugby Football Union and Others v President of the Republic of South Africa and Others*¹⁷⁸ wherein De Villiers, J of the Transvaal High Court, required Nelson Mandela, then President of the Republic of South Africa to give evidence. On two occasions, counsel for the President had objected to the order that the President be required to give evidence, but the Judge affirmed his order and President Mandela complied with it by giving evidence in court.

It is contended that courts must be proactive enough to summon state officials to give evidence insofar as international crimes are concerned. Courts must not shy away from

¹⁷⁷ *Prosecutor v Taylor*, Case No. SCSL-03-1-T, Decision on Public with Confidential Annexes A and B Prosecution Motion to call Three Additional Witnesses, Trial Chamber, 29 June 2010, paras 1-22, especially, 21.

¹⁷⁸ *South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1998 (10) BCLR 1256 (T); *President of the Republic of South Africa (first applicant), Minister of Sport and Recreation (second applicant), Director General of Sport and Recreation (third applicant) v South African Rugby Football Union (first respondent), Gauteng Lions Rugby Union (second respondent), Mpumalanga Rugby Union (third respondent), Dr Louis Luyt (fourth respondent)*, Constitutional Court of South Africa, Case CCT 16/98, Judgment of 2 December 1998, para 3, per Chaskalson, P.

issuing subpoenas *ad-testificandum* and *duces tecum* where justice so requires. They must not be hand-and tongue-tied with the shield of immunity of state officials to the detriment of the other party to the proceedings. It can also be argued that in the same way, civil claims for reparations may rightly be advanced by the victims of human rights abuses against state officials who commit international crimes.

3.4 Conclusion

In this chapter, the discussion has been on the following aspects: whether the practice on immunity of state officials before international courts is settled; whether there is uniform standard of application regarding the question of immunity of state officials, and whether immunity of state officials covers criminal prosecution and subpoenas. It is observed that state officials do not receive the same treatment before international courts. The jurisprudence of international courts is inconsistent on the aspect of subpoenas to state officials.

Whereas the Nuremberg and Tokyo Tribunals did not recognise immunity from prosecution, the ICJ has decided in the *Arrest Warrant* case that a serving state official, particularly a Minister for Foreign Affairs enjoys immunity from prosecution before domestic courts of a foreign state. But, it is necessary to also understand that from the ICJ's decision, a former state official is amenable to prosecution before the ICC and international criminal tribunals for international crimes, and even domestic courts of a foreign state if such courts have jurisdiction and if immunity is not recognised by such courts.

The ICTY, ICTR and SCSL have held that a former state official does not enjoy immunity from prosecution. This position is reflected in the cases of *Milošević*, *Karadžić*, *Kambanda* and *Taylor* respectively. It is also observed that the ICC has stated a clear position that a serving president of a state that has not ratified the Rome Statute does not enjoy immunity from prosecution before it. This, the ICC did in respect of President Omar Al Bashir of Sudan who has been indicted by the Prosecutor of the ICC but

remains at large. It is also the position as evidenced in the trial of Saddam Hussein that former state officials enjoy no immunity from prosecution for international crimes.

However, the Appeals Chambers of the ICTY and SCSL, and the Trial Chamber of ICTR have also surprisingly held that a sitting state official cannot be subpoenaed in order to testify or appear for interview or submit important documents to be used as evidence before the international criminal tribunals. These decisions are reflected in the *Blaškić* case, *Norman* and *Moinina Fofana* case, and *Karemera* and *Nzirorera*¹⁷⁹ case respectively. This position has created a state of ‘confusion’ and ‘controversy’ in the field of immunity of state officials in international law.

It appears that both the SCSL and the ICTY have emphasised that while the immunity enjoyed by the state officials does not cover prosecution, such courts have stated that it covers *subpoenas ad testificandum* and *duces tecum*. This is the main point of confusion. But, for purposes of avoiding and rectifying such confusion, it is important to understand the dissenting opinions expressed by Judges Bankole Thompson and Geoffrey Robertson in opposition to that position as stated by the SCSL in *Norman* and *Fofana* case. The Dissenting opinions are to the effect that no state official enjoys immunity from being subpoenaed to testify or produce important documents that may be used as evidence in international criminal tribunals. This position is also supported by the decision of the Appeals Chamber of ICTY in the *Kršić* and *Milošević* cases as discussed in this chapter. Also, the decision of the Trial Chamber of the ICTY in *Blaškić* case (Judge McDonald, presiding) must be followed, and is in line with the decisions in *Kršić*, and the dissenting opinions at both the Trial Chamber and Appeals Chamber of the SCSL in *Norman* and *Moinina Fofana* case.

However, the jurisprudence of the SCSL on the question of subpoena is inconsistent and confusing. The inconsistency is observed in the way the Trial Chamber of the SCSL later came to accept the fact that former presidents can testify before it and thus granted

¹⁷⁹ *Prosecutor v Karemera, Ngirumpatse and Nzirorera*, Case No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame*, Trial Chamber III, 19 February 2008, paras 1-16.

subpoena applications for President Tejan Kabbah to testify as a defence witness in *Sesay, Kallon and Gbao* on 30 June 2008. The same goes for the court's position in allowing former vice-president of Liberia, Moses Blah to testify against Charles Taylor in May 2008. Hence, there is a notable inconsistency and contradiction especially in the decisions of the Trial Chamber of the SCSL.

Furthermore, the Trial Chamber of the ICTR has emphatically held time and again that a state official does not enjoy immunity from being subpoenaed to testify or being interviewed for the purpose of fair conduct of a trial. The decisions of the ICTR in this regard are observed in various applications for subpoenas in the *Bagosora* cases as presented in this chapter.

There is need to treat state officials equally in respect of prosecution or testifying before international courts. This need is quite important for all trials before the ICC and other international tribunals. Since the ICC is a permanent court dealing with international crimes, it should adopt the good decisions on subpoenas by the Trial Chamber of the ICTR in *Bagosora* cases, and should consider the decision of the Trial Chamber of the ICTY in *Blaškić* case, and that of the Appeals Chamber of the ICTY in *Krštić* case, as well as the Dissenting Opinions of Judges Bankole Thompson and Geoffrey Robertson in the subpoena decisions before Trial Chamber and Appeals Chamber of the SCSL in *Norman and Fofana*, and the 2008 decision of the Trial Chamber of SCSL in *Sesay, Kallon and Gbao* case respectively. These decisions are important on the treatment of state officials, particularly on issues of subpoenas.

These decisions will help the ICC to interpret and apply the provisions of article 64(6) (b) of the Rome Statute in a more progressive way. The ICC should not shy away from compelling state officials to appear before it, or to testify and produce important documents before it for the purpose of fair preparation or conduct of trials. It is the view of this study that state officials enjoy no immunity from the normal legal processes to compel them to testify or give evidence before ICC and international criminal tribunals.

This is particularly so because such leaders have a duty to assist the ICC and the international criminal tribunals especially when dealing with international crimes.

Compelling such state officials to appear for interview or to testify inevitably renders fair trial for the accused in the courts especially when conditions for the issuance of subpoenas have been met and that, the efforts to secure their voluntary attendance have failed, and that such state officials may possess important information or evidence for the purpose of conducting or preparation of trials. From the practice at international and specialised criminal courts, state officials should not be accorded immunity from prosecution. Further immunity does not extend to issues of subpoenas *ad testificandum* or *duces tecum* as long as there are circumstances linking such senior state officials to the commission of international crimes.