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## IMMUNITY OF HEADS OF STATE AND SENIOR STATE OFFICIALS FROM SUBPOENAS AND WITNESS SUMMONSES

**ABSTRACT.** Although the law on immunities under international law is a very rich field of study, not much analysis has been done on the immunities of Heads of State from acts other than prosecution, namely from witness summonses and subpoenas in international criminal law. This article poses the question whether international law allows for Heads of State and Senior State officials to be subpoenaed or summoned to testify as witnesses, and seeks to answer it by systemizing the relevant case law of international criminal courts and tribunals. After defining the types and the application of subpoenas and witness summonses in international criminal proceedings, the article examines whether the immunity of Heads of State is upheld when such requests are filed before international and national courts. The case law of the ad hoc international criminal tribunals shows that when the tribunal had to adjudicate a request to compel a witness to appear, it adapted the legal standard by considering the type and the object of the subpoena, the status of the prospective witness, and the court's role and mandate. The International Criminal Court iterated its power to compel the appearance of witnesses. As the immunities that are attached to the office of Heads of State and Senior State officials are largely sourced in rules of customary international law, the article maps the content of the customary rule governing specifically the immunity from subpoenas and witness summonses in international criminal law.

### I INTRODUCTION

The article explores a less researched and documented ambit of the law on immunities, that of the participation of Heads of State and Senior State officials as witnesses, rather than as defendants, in trials concerning international crimes. Even though this is a matter of

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“extreme legal, domestic and international importance”,<sup>1</sup> not much analysis has been done across the courts on the immunity of Heads of State from subpoenas and witness summonses.<sup>2</sup> There are digests which review specific judgments dealing with such requests, but largely the discretionary power of the international tribunals and courts to issue summonses and subpoenas has not attracted academic attention.<sup>3</sup> In the case of the ad hoc international criminal tribunals,

<sup>1</sup> Separate Concurring Opinion of Judge Benjamin Mutanga Itoe, 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, *Norman, Fofana and Kondewa* (SCSL-04-14-T), Trial Chamber I, 13 June 2006, §126.

<sup>2</sup> The following is a selection of recent publications on the law of immunities of Heads of State: for a treatise on the position of Heads of State in general under international law, see J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014); for a shorter analysis, see J. Foakes, “Immunity for International Crimes? Developments in the Law on Prosecuting Heads of States in Foreign Courts” in *Chatham House Briefing Paper*, IL BP 2011/02; for an overview of customary international law relating to immunity of Heads of State, see Pedretti, *Immunity of Heads of State and State Officials for International Crimes* (2015) at 101. On the privileges and immunities of Heads of State and State officials, see: H. Fox, “Privileges and Immunities of the State, the Head of State, State Officials, and State Agencies” in Sir I. Roberts (ed.), *Satow’s Diplomatic Practice* (7th ed. 2017) at 199; O’Keefe, *International Criminal Law* (2015) at 405; on the tension between immunity and impunity see the four essays in Part 4 in A. Peters, E. Lagrange, S. Oeter and C. Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (2015) at 223; on State immunity see: H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. 2013); X. Yang, *State Immunity in International Law* (2012); M. Bergsmo and L. Yan (eds) *State Sovereignty and International Criminal Law* (2012).

<sup>3</sup> D. Mundis and F. Gaynor, “Current Developments at the ad hoc International Criminal Tribunals: Evidentiary Developments”, 2 *Journal of International Criminal Justice (JICJ)* (2004) 642, at 687; Jalloh, “Prosecutor v. Ruto” 109 *The American Journal of International Law (AJIL)* (2015) 467, at 610; Cryer and Kalpouzos, “International Court of Justice, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) Judgment of 4 June 2008 Current Developments: International Courts and Tribunals” 59 *International and Comparative Law Quarterly (Int’l & Comp. L.Q.)* (2010) 193. Buzzini, “Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v France Case” 22 *Leiden Journal of International Law (LJIL)* (2009) 455. Pichou, “Between Pragmatism and Normativity: Legal Standards for Issuing Subpoenas and Witnesses Summonses in International Criminal Procedure” 17 *International Criminal Law Review (IntlCLR)* (2017) 135; Chaumette, “The ICTY’s Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena their Agents” 4 *International Criminal Law Review (IntlCLR)* (2004) 357.

this power is based on the judge-made Rules of Procedure and Evidence, whereas it is the Rome Statute that provides the International Criminal Court (ICC) with the competence to issue witness summonses.

This article looks specifically at the immunity of Heads of State and Senior State officials from witness summonses and subpoenas. To answer the question whether international law allows the issuance of subpoenas and witness summonses to Heads of State and Senior State officials, the article reviews the relevant statutes, the Rules of Procedure and Evidence (Rules or RPE) and case law of the ad hoc tribunals on subpoena requests and of the International Criminal Court (ICC) on witness summonses. The article is divided in two parts. After establishing the legal definition and the types of subpoenas and summonses in international criminal law, the article systemises the legal standards developed by the ad hoc international criminal tribunals – International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and by the Special Court of Sierra Leone (SCSL) – when dealing with subpoena requests. It then turns to the issue of immunities of State officials from subpoenas and witness summonses, by focusing again on the case law. By doing so, the article takes into consideration the issue from a public international law perspective, and it reviews the International Court of Justice (ICJ) stance on the concept of witness summonses, when these are issued by a foreign judicial institution.

The analysis shows that the approach of the ICJ both on the legal effect of subpoenas and on the immunity protecting Heads of State from these acts, is different from the one adopted by the international criminal courts and tribunals. The research suggests that the immunity of Heads of State from subpoenas and witness summonses is upheld in international law regarding foreign criminal jurisdictions and foreign national courts. Regarding international criminal courts, the response is less clear, and the case law suggests that the immunity of Heads of State from subpoenas and summonses subsides with certain caveats. It is noteworthy, however, that when the ad hoc international criminal tribunals had to grapple with subpoena requests to specific Heads of State, they often rejected the requests and construed the relevant rule by introducing heightened standard for its application, without addressing the immunity argument. Concerning the immunity of Heads of State at the ICC, the position of the court is clear in that no such immunity is upheld either from prosecution or

from witness summonses; the reasons for such a conclusion, however, have not been that consistent in the court's case law.

During the analysis, the article considers certain nuances that are extant to the law of immunities under international law: the apparent distinctions between functional and personal immunity, vertical and horizontal application, immunity and the irrelevance of official position, and immunity of incumbent and former Heads of State. The article demonstrates that these distinctions, albeit useful for analytical purposes, do not always convey neat dichotomies. As the immunities that attach to the office of Heads of State and Senior State officials are obscure and largely sourced in rules of customary international law, the article seeks to answer the question whether international law permits the issuance of subpoenas and witness summonses to Heads of State by systemizing the relevant case law of international courts and tribunals. By doing so, the article contributes to the clarification of the procedural rule on issuing subpoenas and witness summonses in international criminal justice, specifically when such orders are directed towards a Head of State or a Senior State official.

## II SUBPOENAS AND WITNESS SUMMONSES IN INTERNATIONAL CRIMINAL PROCEDURE

A typical problem that international criminal tribunals have faced regarding criminal evidence is how to deliver justice and ascertain the truth with limited resources, time and mandate, while respecting the normative requirements for a fair trial, the fundamental rights of the accused and the underlying objective of peace. In fulfilling their role as criminal courts and ultimately seeking the truth, international criminal tribunals and courts are equipped with the power to order and obtain additional evidence, but the scope and the application of the relevant rules varies in practice. Furthermore, this power is discretionary to allow these courts consider the pragmatic objective of each request, the court's mandate, and the peace process in the country / region where the crimes are committed. The case law developed by the ad hoc international criminal tribunals on granting requests for subpoenas to State officials puts forth this problem, which is intertwined with the role that these international criminal tribunals were called to play. The latter are called to apply the rules established for delivering justice fairly and ascertaining the truth but also consider the court's mandate, the peace process and the status of

each prospective witness in this process. All of these considerations influenced the way that international criminal tribunals and courts dealt with subpoena requests to State officials.

The different mechanisms through which the *ad hoc* international criminal tribunals may obtain additional evidence are laid down in their Rules of Procedure and Evidence (RPE), and specifically, in common Rule 54 of the ICTY and ICTR RPE.<sup>4</sup> According to the wording of this provision, the court has the discretion to issue a subpoena, when it may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. Regarding the International Criminal Court (ICC), it is the Rome Statute in Article 64(6)(b) that provides the court with the discretion to issue a witness summons, to order the attendance and testimony of a witness “as necessary”. The term “subpoena” has thus given way to the term “witness summons” in the context of the ICC. The definition of these terms had substantive legal implications on the interpretation of the relevant rule and on the application of this rule to Heads of State and Senior State officials. The following section examines how these terms were defined and applied by the respective international criminal courts and tribunals.

## 2.1 *Definition and Application*

The term “subpoena” appears in the Rules of Procedure and Evidence (RPE) of the two *ad hoc* tribunals and of the Special Court for Sierra Leone (SCSL). The provision, which is identical in all three texts, is formulated in a broad way:<sup>5</sup>

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

The problem with the term “subpoena” consisted in whether it should be understood as an injunction, which issued by the court

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<sup>4</sup> The Special Court of Sierra Leone (SCSL) provides for “subpoenas” in its Rule 54 RPE, following largely the ICTY case law in its interpretation. The Special Tribunal for Lebanon RPE provide for both “subpoenas” (Rule 77) and “summonses to appear” (Rule 78), while the case law suggests that this tribunal issued “summonses” to order the appearance of witnesses.

<sup>5</sup> Rule 54 ICTY RPE, Rule 54 ICTR RPE, Rule 54 SCSL RPE.

entails a threat of penalty in case of non-compliance; or whether it is a binding order, which does not necessarily imply the power to fine or imprison the prospective witness in case of non-compliance. The first interpretation follows the etymology of the word (“sub-poena” meaning “under penalty” in Latin), while the second rests on the milder connotation of the equivalent word “assignation” in French, which initially appeared in the French text of Rule 54 of the ICTY RPE. The interpretation of the term “subpoena” by the courts determined their authority to subpoena State officials and Heads of State when such requests were filed.

It was in the *Blaškić* case, when the ICTY Appeals Chamber grappled with the question of the validity of a *subpoena duces tecum* against the Republic of Croatia and its Defence Minister, that the legal meaning of the term “subpoena” was disambiguated. While the ICTY Trial Chamber had previously considered the matter “as pertaining more to nomenclature than to substance”, the Appeals Chamber asserted that the interpretation of the term has substantive legal consequences.<sup>6</sup> The ICTY Appeals Chamber sided with the first interpretation of the term, upholding that subpoenas refer to compulsory orders, which entail the possible imposition of a penalty should they be disobeyed. The court based its decision on the general principle of effectiveness and determined that the use of the word “subpoenas” in the RPE should be given a different meaning than “orders” and “requests”, otherwise it would be redundant.<sup>7</sup>

This conclusion adopted by the ICTY in the *Blaškić* case indicated the path to be followed by both the ICTR and the SCSL, when ascertaining that subpoenas refer only to injunctions by the court which are accompanied by a threat of penalty. Interestingly, after the *Blaškić* judgment, the French text of the ICTY RPE was amended and the word “assignations” was altered into “*ordonnances de production ou de comparution forcées*”, in order to reflect and be consistent with the ICTY Appeals Chamber’s interpretation of the term.<sup>8</sup> However, the term “assignations” still appears in the French text of the ICTR RPE.

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<sup>6</sup> Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14), Appeals Chamber, 29 October 1997, § 20.

<sup>7</sup> *Ibid.*, § 21.

<sup>8</sup> See the difference between the 10th and the 11th version of the French text of the ICTY RPE.

The nature of the penalty which is imposed should a prospective witness disobeys a subpoena was also a matter of controversy before the *ad hoc* tribunals. In the ICTY, judges may initiate proceeding for contempt of court pursuant to Rule 77 RPE. In *Blaškić* the Appeals Chamber confirmed that an inherent power exists to hold individuals in contempt when they fail to comply with subpoenas.<sup>9</sup> This inherent power was confirmed, among others in *Delalić*, *Tadić* and *Simić*, as deriving from the tribunal's judicial function. Similarly, Rule 77 of the ICTR RPE provides the tribunal with the power to impose sanctions for contempt. In *Ngirabatware*, the ICTR, by referencing ICTY's contempt cases, ruled that the same legal standard is applied to both tribunals: a prima facie evidence of contempt is sufficient for a case to be initiated.<sup>10</sup> The SCSL affirmed the ICTY case law; that the inherent power of the court to deal with contempt stems from its judicial function, regardless of the specific terms of Rule 77 RPE.<sup>11</sup>

Finally, the ICC asserted that a witness, who disregards a summons to appear before the court, risks at most a misconduct and certainly does not run the risk of being prosecuted for having committed a crime.<sup>12</sup> It is for the state party to the Rome Statute, having been requested by the Court to enforce a witness summons, to stipulate what sanctions would be imposed on the recalcitrant witness under its domestic law.<sup>13</sup>

## 2.2 Criteria for Granting Requests for Subpoenas

The language of the Rule 54 RPE seems to be plain and unambiguous. It provides each *ad hoc* tribunal with the discretionary power to issue subpoenas to any persons for the purposes of the investigation

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<sup>9</sup> Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14), Appeals Chamber, 29 October 1997, §59. See also Sluiter, "The ICTY and Offences against the Administration of Justice" 2 *JICJ* (2004) 631, at 633.

<sup>10</sup> S. Ntube Ngane, *The Position of Witnesses before the International Criminal Court* (2015) at 182.

<sup>11</sup> Sentencing Judgement in Contempt Proceedings, *Margaret Fomba Brima* (SCSL-2005-02) Trial Chamber I, 21 September 2005, §§ 9–11.

<sup>12</sup> Judgment on the appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", *William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), Appeals Chamber, 9 October 2014, § 109.

<sup>13</sup> *Ibid.*, §§ 110–113.

or trial. Specifically, according to the letter of the provision, the court has the discretion to issue a subpoena when it may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. The key terms in the provision are: “may issue”; “may be necessary”; and “for the purposes”, with the first referring to the discretionary power of the court to issue subpoenas, while the interpretation of the other two provoked laborious discussion and different approaches before the courts.

The two *ad hoc* tribunals interpreted this rule through a statutory construction by developing and applying various legal tests when dealing with requests for subpoenas. The SCSL adopted mainly the ICTY’s approach, building on previous case law. The distinction between these tests is not always clear and the courts often determined their application based on the type of the requested subpoena, the official position of the prospective witness or upon their perception of the overarching objectives of their mandate.<sup>14</sup> The following paragraphs systemize the criteria developed for granting subpoenas under common Rule 54 RPE.<sup>15</sup>

### 2.2.1 *The “Necessity Requirement” and the “Purpose Requirement”*

Starting from the letter of the provision, Rule 54 RPE encompasses two elements that need to be met for the court to issue a subpoena or any order under this provision: a) the “necessity” requirement, according to which the applicant must prove that the requested measure is necessary; and b) the “purpose” requirement, according to which the applicant must prove that the measure serves the purposes of the investigation or the conduct of the trial. When deciding on granting a request under Rule 54, the court needs to respond to the question of whether such an order is necessary – not simply useful or helpful – for the purposes of the investigation or for the preparation or conduct of the trial.

In an early case concerning a motion for the production of notes, the then President of the ICTY adopted a similar test on the interpretation of Rule 54 RPE, in deciding that this rule encompasses a

<sup>14</sup> For an analysis on the legal standards adopted by the courts when adjudicating requests for subpoenas, see Maria Pichou, “Between Pragmatism and Normativity: Legal Standards for Issuing Subpoenas and Witnesses Summonses in International Criminal Procedure”, 17 *International Criminal Law Review* 1, 135–160.

<sup>15</sup> See a different categorization of the legal standards in A. Chaumette, “The ICTY’s Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents”, 4 *International Criminal Law Review* (2004) 357–429, 357, at 367.



twofold test: a) an order of the court must be necessary so that the applicant obtains the material and b) the material being sought must be relevant to an investigation or prosecution.<sup>16</sup> This approach ensues from the literal interpretation of the provision. According to the ICTY, the applicant making such an order cannot simply “conduct a fishing expedition” without providing proof of the relevance of the material sought through a court’s order. Furthermore, when assessing the necessity to grant an order, the court takes into consideration the fundamental rights of the accused “since the Statute favours the highest consideration for these rights”.<sup>17</sup>

This literal interpretation of the provision provides the courts with a broad power to adjudicate requests for subpoenas. The question however remained of how the court should decide whether the order is necessary (“necessity” requirement) and whether it serves the purposes of the trial (“purpose” requirement). These two elements were further elaborated by the ICTY in subsequent cases.

### 2.2.2 *The “Legitimate Forensic Purpose” and the “Last Resort” Requirements*

By drawing an analogy to its case law on access to confidential material, the ICTY determined that a requested subpoena *ad testificandum* would become necessary for the purposes of Rule 54, where the applicant has shown a legitimate forensic purpose for having the subpoena granted. In exercising its discretionary power to issue a subpoena, the court should consider: a) whether the information that the prospective witness may provide is necessary for the resolution of specific issues of the case (“legitimate forensic purpose” requirement); b) whether this information could be obtainable through other means (“last resort” requirement). These two requirements seem to particularise further the “necessity” element of Rule 54.

Regarding the “legitimate forensic purpose” requirement, the ICTY determined that it is not sufficient for the applicant to show that the witness has information relevant to the case. The applicant needs to provide evidence – of a reasonable basis – that the witness may give information that will materially assist the applicant to issues

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<sup>16</sup> Decision of the President on the Prosecutor’s motion for the production of notes exchanged between Zejnil Delalic and Zdravko Mucic, *Delalic* (IT-96-21), 11 November 1996, §§ 38, 40–41.

<sup>17</sup> *Ibid.*

<sup>18</sup> Decision on application for subpoenas, *Krstic* (IT-98-33-A), Appeals Chamber, 1 July 2003, § 10.

clearly identified in the trial.<sup>18</sup> Regarding the “last resort” requirement, the court specified that it encompasses the need for the applicant to prove that the sought information can only be brought before the Court through the subpoenaed witness and that this course of action is necessary to ensure that the trial is informed and fair.

This interpretation of Rule 54 RPE explains when and how a subpoena becomes necessary (the necessity requirement) for the application of this provision. However, the “legitimate forensic purpose” requirement seems to conflate the necessity requirement with the purpose requirement. Rule 54 RPE provides the court with the power to issue subpoenas when this may be necessary for the purposes of the trial or the investigation, and not when the measure serves the purposes of the applicant. The ICTY interpreted this rule by requiring the applicant to prove that the subpoena will assist him in his defense, while the provision requires that the subpoena should serve the purpose of the trial. This interpretation introduced a heightened legal standard to be met by the applicant of a subpoena in order to have his request granted by the court.

### 2.2.3 *The Test of “Materiality” and “Relevance”*

In the *Krstić* case, the ICTY specified further the “legitimate forensic purpose” element. According to the court, an applicant of a subpoena request before or during the trial “would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in the case, in relation to clearly identified issues relevant to the forthcoming trial”.<sup>19</sup> This construction contains two additional elements: the materiality and the relevance of the information sought to be brought before the court through subpoenas. An applicant of a subpoena must prove that the prospective witness would give information, which will materially assist him in the case (test of materiality), in relation to clearly identified issues relevant to the trial (test of relevance).

The relevance and the materiality of the evidence were also considered by the ICTY in the context of Rule 66 RPE regarding the disclosure of evidence by the Prosecutor. In the *Delalic* case, the court, following the US federal courts’ case law, stated that “the requested evidence must be significantly helpful to an understanding of important inculpatory or exculpatory evidence”. Furthermore, the evidence is material if there “is a strong indication that it will play an

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<sup>19</sup> *Ibid.*, § 10.

important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal”.<sup>20</sup>

When presented with an application to request an interview and the testimony of Tony Blair and Gerhard Schröder, the ICTY determined that a subpoena request must be specific about the information sought from the prospective witness and must demonstrate a connection between this information and the case.<sup>21</sup> Factors that may establish this nexus include the position of the prospective witness, his relation with the defendant, his statements and any opportunities he had to learn or observe the events in question. The assessment of the possibility that the prospective witness will be able to give information, which will materially assist the defence, depends largely upon the position already held by the prospective witness. Factors, which may be relevant, are the relationship of the prospective witness with the defendant, the opportunity the witness may have had to observe the events in question, and statements made by him to the prosecutor or others. According to the ICTY, this legal standard would have to be applied in a reasonably liberal way. The defence is not permitted to undertake a “fishing expedition” through subpoenas requests, when it is unaware whether the prospective witness can provide information which may assist the defence. Starting from this reasoning, the tribunal reached the conclusion that where the prospective witness had previously been uncooperative with the defence, a subpoena should only be issued when it is reasonably likely to produce the sought cooperation. Therefore, the tribunal should be cautious about granting a subpoena request, when the prospective witness has proven unwilling to cooperate with the defence, as this element of unwillingness demonstrates that the sought witness testimony probably will not materially assist the proceedings.<sup>22</sup> Moreover, the ICTY ruled that a subpoena, being a mechanism of judicial

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<sup>20</sup> ICTY, Decision on the Motions by the Accused Zejnir Delalic for the Disclosure of Evidence, *Delalic* (IT-96-21-T), Trial Chamber II, 26 September 1996, paras.8, 9.

<sup>21</sup> Decision on assigned counsel application for interview and testimony of Tony Blair and Gerhard Schröder, *Milošević*, (IT-02-54 –T), Trial Chamber, 9 December 2005, § 40.

<sup>22</sup> Decision on application for subpoenas, *Krstić* (IT-98-33-A), Appeals Chambers, 1 July 2003, § 10–12.

<sup>23</sup> Decision on the Issuance of Subpoenas, *Halilović* (IT-01-48), Appeals Chambers, 21 Jun 2004, § 10.

compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, must be used sparingly.<sup>23</sup> Accordingly, the ICTY quashed the request to subpoena the two Heads of State.

Contrary to this heightened legal standard developed through the ICTY case law on rule 54 RPE, the ICTR applied the test of relevance in a way more lenient for the applicant. Specifically, in the *Bagosora* case, the ICTR determined that when the defence is not fully aware of the nature and the relevance of the testimony of the prospective witness, it is in the interests of justice to allow the defendant to meet the witness to assess his testimony at a pre-trial interview.<sup>24</sup> The ICTR did not require from the applicant to demonstrate the relevance of the sought testimony to strictly specific issues of the trial. While the ICTY in the *Krstić* case called the applicant to explicitly identify the issues of the trial related to the information which would be of material assistance, the ICTR adopted a broader interpretation of the “materiality” criterion by calling the defendant to prove only his unsuccessful attempt to meet with the witness on his own volition.

The different approaches adopted by the ad hoc tribunals render the position of the applicant of a *subpoena ad testificandum* tenuous, especially when the defence requests a subpoena to achieve the two objectives, i.e. to obtain a pre-testimony meeting with the prospective witness and a testimony before the court. Specifically, a further and more subtle classification of subpoenas *ad testificandum* results from the ICTY and ICTR case law. Through a request for a subpoena *ad testificandum* the applicant may request the court to compel a prospective witness either to attend at a pre-trial interview with the defence and/or to appear and testify as a witness before the court. Both these objectives can be achieved with a subpoena *ad testificandum*. Following however, the standards developed by the two *ad hoc* tribunals, the applicant of a subpoena *ad testificandum* needs to prove different and possibly contradictory elements, especially when the applicant is attempting to achieve both goals through a subpoena *ad testificantum*.

Indeed, the ICTY determined that Rule 54 RPE provides the court with the power to issue a subpoena requiring the witness to attend an interview with the defence at a nominated place and time when this is necessary for the preparation or conduct of trial. Such a course of

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<sup>24</sup> Decision on Request for subpoena of Major General Yaache and cooperation of the Republic of Ghana, *Yaache* (ICTR-98-41-T), Trial Chambers I, 23 June 2004, § 4.

action is considered necessary when the defence is unaware of the precise nature of the evidence that the prospective witness may provide. The applicant must prove that the information that the prospective witness may provide will materially assist their case, in relation to clearly identified issues relevant to the forthcoming trial. According to the ICTR, when an applicant requests a subpoena to compel a person to attend a pre-testimony interview with the defence, he must first demonstrate that he has made reasonable attempts to obtain the witness' voluntary cooperation and these attempts have been unsuccessful.<sup>25</sup> This obligation is considered pursuant to the principle of due diligence which requires the defendant to have taken all the necessary steps to bring additional evidence before the court.

The ICTY, on the other hand, determined that if the defence shows that the prospective witness is unwilling to appear voluntarily before the court and testify, then the court should consider very cautiously whether the subpoena would produce any results or that that the witness would cooperate with the defence. The unwillingness, thus, of the prospective witness, while being a requirement for issuing a subpoena for a pre-trial meeting with the defense ends up being a factor weighing against issuing a subpoena for a trial testimony, because it indicates that the information sought may not assist materially the defendant, thereby failing the test of materiality.<sup>26</sup> Not only did the jurisprudence add a heightened standard to the application of Rule 54, but it rendered the element of the unwillingness of

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<sup>25</sup> Ibid., § 4.

<sup>26</sup> 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, *Fofana and Kondewa* ("CDF") (SCSL-04-14-T), Trial Chamber I, 13 June 2006, footnote 78.

a witness to testify before the court an indicator of the irrelevance of the information sought.<sup>27</sup>

The conflation between the different constructive interpretations of Rule 54 RPE becomes evident in the SCSL jurisprudence. In the *Fofana* and *Kondewa* case, the SCSL failed to identify these subtle nuances of the legal standards applied by the *ad hoc* tribunals and rejected an application to subpoena the President for a pre-testimony interview with the defence and for a testimony before the court. Following the ICTY's jurisprudence, the court found that the element of "necessity" does not refer only to the issuance of the subpoena (i.e. that the subpoena is necessary), but also to the evidence sought by the subpoena (i.e. that the testimony of the prospective witness is necessary). The SCSL then used the "last resort" requirement as part of the "necessity" element of Rule 54. It asserted that the subpoena should not be issued if the sought information can be obtained

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<sup>27</sup> See the Concurring Opinion, where the Judge added seven additional requirements: "(...) I consider that other relevant issues should be addressed in the course of considering Rule 54 Subpoena Motions. I have taken them into consideration in writing this opinion and they have, including the ICTY Judicial precedents, influenced my reasoning in this Separate Concurring Opinion. They include:

1. That the evidence sought to be adduced is relevant to disproving the allegations in a Count or Counts in the Indictment.
2. That the evidence cannot or has not been obtained by other means including the testimony of witnesses who have or are yet to testify at the trial.
3. That such evidence has not already been adduced in the course of the trial so far.
4. That in the absence of such evidence, the case for the Accused will suffer a prejudice and that the overall interests of justice will be compromised.
5. That without such evidence, the Court cannot arrive at a verdict which will be seen to have fully protected the rights of the Accused whilst at the same time, remaining in harmony with the standards of the overall interests of justice.
6. That the prospective witness will be cooperative, useful, and understanding and not hostile to their case.
7. That it should not be issued at all where its issuance will put the interests of peace, law, and order and the stability of the Country and of its Institutions in peril or in jeopardy, particularly where the Subpoena is directed against The President and the Head of State, and within the context and environment of a general mobilisation and a committed will, of the people in the Country, to consolidate the hard-earned peace."

Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority 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, *Fofana and Kondewa* ("CDF") (SCSL-04-14-T), Trial Chamber I, 13 June 2006, para. 92.

through other means. Regarding the purpose requirement, the SCSL stated that it refers to a legitimate forensic purpose and encompasses the applicant's obligation to show that the information sought from the prospective witness is likely to be of material assistance to the case, in relation to clearly identified issues relevant to the trial. The court added that the stance of the prospective witness in his willingness to testify determines largely whether the information will be of material assistance.

While having as reference the wording of Rule 54, the SCSL Appeals Chamber determined that under the "purpose requirement" of the provision, the defendant is required to show additionally that the requested subpoena is likely to elicit evidence material to the case, which cannot be obtained without judicial intervention. The SCSL sided with the ICTY approach in a stance which was particularly crucial for the outcome of the defendants' motions, since they were found to have failed to identify with sufficient specificity the particular issues to which the President's requested testimony would be relevant or materially assisting.

The need, however, to interpret Rule 54 without constructing interpretations, which result in creating and imposing restrictions on the court's jurisdiction, was underlined in the Dissenting Opinion by SCSL Judge Thompson, who found it hard to comprehend why the SCSL Chamber imposed a self-limitation on its own jurisdiction. Interestingly, he called for an extra prudence when making legal analogies to other international criminal tribunals jurisprudence, since "the indiscriminate reliance on the jurisprudence of other tribunals can inhibit the constructive growth of one's own jurisprudence".<sup>28</sup>

Overall, the different tests developed by the ICTY and ICTR on the application of Rule 54 RPE may be framed compendiously as follows: The requirements of "materiality" and of "relevance" refer to the information sought through the testimony of the subpoenaed witness. These elements contribute to the fulfilment of the "legitimate forensic purpose" standard and all of them correspond to the broader "purpose" requirement, mentioned in the letter of Rule 54. Finally, the "last resort" requirement corresponds to the "necessity" element

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<sup>28</sup> SCSL, Dissenting Opinion of Bankole Thompson on 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, *Fofana and Kondewa* ("CDF") (SCSL-04-14-T), Trial Chamber I, 13 June 2006, paras. 10–13.

of the provision, and serves to explain when the granting of subpoena becomes necessary for the purposes of Rule 54 RPE.

Both the ICTY and the SCSL adopted a cautious approach on issuing subpoenas. The SCSL unequivocally adopted the ICTY's approach by simply stating that it is more consistent with Rule 54 RPE. The court explained its decision by stating that the ICTR case law largely depends on the particulars of each case. However, the same argument can easily be raised regarding any case before the ICTY. Taking into consideration the pragmatic implications that a subpoena may bear on the specific circumstances of each case or on the peace process, seems to be the invisible factor that determined the practice of the courts when they had to grapple with adjudicating each request for subpoena. Interestingly, these tests adopted by the international criminal tribunals as a basis for rejecting the specific request to subpoena Senior State officials, did so by increasing the threshold for the applicant to prove the need for the application of Rule 54.

### III IMMUNITY FROM SUBPOENAS AND WITNESS SUMMONSES

This section reviews the immunity of Heads of State and Senior State officials from subpoenas and witness summonses through the case law of the international criminal tribunals and courts. A thread throughout the analysis is the stance that these courts take on the function of immunities of Heads of State and Senior State officials. In this regard, the distinction between the function of immunity as a procedural bar to jurisdiction or as a substantive defence, connected to the principle of the irrelevance of the official capacity, is crucial.<sup>29</sup>

#### 3.1 *Immunity of State Officials from Subpoenas*

Although Rule 54 RPE does not provide any distinction, the case law of the *ad hoc* tribunals discerned two different forms of subpoenas: *subpoenas ad testificandum* and *subpoenas duces tecum*. Both terms refer to injunctions issued by the court aiming to have additional evidence produced before it: the *subpoena ad testificandum* through the appearance and examination of a witness before the court, the *subpoena duces tecum* through the provision and presentation of

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<sup>29</sup> What the case law demonstrates is that functional immunity serves as a substantive defence, while personal immunity has a procedural nature.



documents. This distinction does not only refer to a conceptual difference of the two terms but also bears legal consequences as to the determination of the persons who may be subpoenaed.

It was first in *Blaškić* that the ICTY Appeals Chamber determined that the term “subpoena” could not be applied or issued against States or State officials acting in their official capacity. The rationale was that the *ad hoc* international tribunal did not possess the power to take enforcement measures against states.<sup>30</sup> The tribunal determined, however, that a subpoena *duces tecum* may be issued to State officials only if they gained the sought document in their private capacity.<sup>31</sup> Consequently, the ICTY Appeals Chamber quashed the request for a subpoena *duces tecum* against Croatia and its Minister of Defence. Only “binding orders” and “requests” to produce documents were found to be relevant regarding States and States officials, not subpoenas. Following this judgment, a new Rule was subsequently added in the ICTY RPE under the title: “Orders Directed to States for the Production of Documents”. This new Rule 54 *bis* came as a response to the *Blaškić* judgment and it lays down the conditions under which the court may order a State or a State official to produce documents and information.

According to this landmark judgment, functional immunity bars the issuance of a subpoena *duces tecum* against a State official, including *a fortiori* against Heads of State. Such functional immunity of State officials, however, does not exist for subpoenas *ad testificandum*. Six years after the *Blaškić* judgment, in the *Krstić* case the ICTY Appeals Chamber determined that State officials may be compelled a) to attend a pre-testimony interview with the defence and b) to appear as witnesses before the court to give evidence of what they saw or heard, even in the course of exercising their official functions.<sup>32</sup> The tribunal noted, however, that the ICTY’s power to issue a subpoena *ad testificandum* to a State official does not leave states’ national security interests unprotected. The tribunal explicitly

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<sup>30</sup> Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Blaškić* (IT-95-14), Appeals Chamber, 29 October 1997, § 25. See also paras 42–44 of the Judgement where the court determined that both under general international law and the ICTY Statute itself, Judges or Trial Chambers cannot address binding orders to State officials.

<sup>31</sup> *Ibid.*, § 49.

<sup>32</sup> Decision on application for subpoenas, *Krstić* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 27. But see Dissenting Opinion of Judge Shahabuddeen on the ICTY, Decision on application for subpoenas, *Krstić* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 4.

stated that a State official may decline to answer on grounds of confidentiality, were the official asked questions related to national security.<sup>33</sup> Therefore, according to the ICTY case law, the court may issue subpoenas when there is a request for a State official's testimony (subpoena *ad testificandum*), but it may not do so when there is a request for a State official to provide documents (subpoena *duces tecum*) if these came into his possession when acting in official capacity. ICTY Trial chambers have since issued subpoenas to State officials for both testimony and pre-testimony interviews.<sup>34</sup>

The immunity of incumbent and former Head of State was specifically raised at the SCSL in *Fofana and Kondewa* ("CDF"), when the defendants filed a request to subpoena the then President of the country to testify.<sup>35</sup> The SCSL grappled specifically with two subpoena requests to the President of Sierra Leone: the first request was filed when the President was incumbent, and it was rejected, whereas the second request was filed when the President left office, and it was granted. Although these requests were adjudicated on other grounds, without the court addressing the immunity argument, there is a considerable and thought-provoking analysis of the issue in the concurring and dissenting opinions.

The requests to subpoena the President of Sierra Leone to testify at the SCSL offered a historic opportunity for a legal stand to be taken on this matter. Neither the Trial Chamber nor the Appeals Chamber, however, addressed the question in their majority decisions. Regarding the request to subpoena the President while he was still in office, the Trial Chamber rejected the request on the basis that

<sup>33</sup> *Ibid.*, § 28.

<sup>34</sup> See, e.g., Decision on Prosecution's Motion for Issuance of a Subpoena Ad Testificandum and Order for Lifting *Ex Parte* Status, *Halilovic*, (IT-01-48-T), 8 April 2005; Decision on the Prosecution's Additional Filing Concerning, *Martic*, (IT-95-11-PT), 3 June 2005; Prosecution Motion for Subpoena, *Martic* (IT-95-11-PT) 16 September 2005; Subpoena ad Testificandum, *Strugar*, (IT-01-42-T) 28 June 2004; 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, *Blagojevic*, (IT-02-60-T), 5 May 2004; Subpoena ad Testificandum, *Brdanin and Talic*, (IT-99-36-T), 17 July 2003; 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, *Milosevic*, (IT-02-54-T), 5 July 2002.

<sup>35</sup> 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, *Fofana and Kondewa* ("CDF"), (SCSL-04-14-T), Trial Chamber I, 13 June 2006 and Appeals Chamber I, 11 September 2006.

the legal standards for the application of Rule 54 were not met, but it did accept the possibility of Heads of State testifying before the court at the sentencing stage. Specifically, the Trial Chamber stated that the evidence that the President may provide would be relevant to the determination of an appropriate sentence and not for the purposes of the trial regarding the subpoena request. Based on the fact that the operative part of the impugned decision did not address the issue of the President's immunity, the majority decision of the SCSL Appeals Chamber remained silent and ruled conveniently that no issue was raised as to whether the status of the prospective witness as Head of State would have provided him immunity from a subpoena *ad testificandum*.<sup>36</sup> In his separate concurring opinion, Judge Itoe attempted to place these motions in their proper historical context. He underlined the President's role to the creation of the court and called for the application of the Absurdity Rule principle, so as to avail the President of immunity from processes, which lower-rank public servants would enjoy under national law. On the other hand, in his dissenting opinion, Judge Thompson argued that since the President cannot claim immunity from prosecution at the SCSL, *a fortiori* he cannot claim immunity from subpoenas either. The court's mandate was used by both Appeals Judges: the concurring judge invoked the preservation of peace as a reason not to issue a subpoena to the President, while the dissenting Judge emphasized the need to ascertain the truth, regardless of the witness' official position.

Interestingly, the SCSL did eventually issue a subpoena *ad testificandum* to the now former (emphasis added) President in the so-called "RUF trial".<sup>37</sup> In the latter case, the Trial Chamber decided to subpoena the former President, who was willing to appear and testify in this trial. The Trial Chamber held that the immunity of the former President from subpoenas was not an issue in this case and that it would be superfluous to address it in this decision.<sup>38</sup> The subpoena

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<sup>36</sup> 'Therefore, while it may become relevant in the determination of an appropriate sentence, it would not be relevant for the purposes for which this substantive evidence is being sought at this stage.' Ibid, para.48.

<sup>37</sup> 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, *Sesay, Kallon and Gbao*, (SCSL-04-15-T), Trial Chamber I, 30 June 2008.

<sup>38</sup> 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. Ahmed Tejan Kabbah, Former President of the Republic of Sierra Leone, *Sesay, Kallon and Gbao*, (SCSL-04-15-T), Trial Chamber I, 30 June 2008, § 9.

request in the “CDF” trial was denied on the basis of the same criteria on which the one for the “RUF” was granted. While in the “CDF” Trial, the defendants failed to reach the threshold of establishing the “Purpose” and “Necessity” requirements, as stipulated in Rule 54, in this case this threshold was considered reached. It is clear however that the willingness of the President to testify before the court and his relationship with the defendants – as formulated in the parties’ submissions before the court – influenced the SCSL decisions in both cases. In the first case, the incumbent President was unwilling to appear, as the defendants claimed that they were following the President’s orders and that he was the one that bore the greatest responsibility for the crimes for which they were accused; In the second case, the former President was willing to appear and testify on behalf of the defendants.<sup>39</sup>

To summarise, when there is a request for a State official to provide documents (*subpoena duces tecum*), if these came into his possession when acting in official capacity, the court is not allowed to grant such a request. A *subpoena duces tecum* may only be issued to State officials when they gained the sought information in their private capacity. On the other hand, when there is a request for a State official’s testimony (*subpoena ad testificandum*), the tribunal may issue a subpoena, following the legal tests developed by the case law. Consequently, no functional or personal immunity exists for Heads of State or State officials to *subpoenas ad testificandum*, as the ICTY Appeals Chamber in the *Krstić* determined that State officials may be compelled to appear as witnesses to give evidence of what they saw or heard even in the course of exercising their official functions. It should be noted, however, that the ICTY’s dichotomy of documents and witness testimony does not leave states’ national security interests unprotected, because it was explicitly stated that a State official may decline to answer on grounds of confidentiality, were he to be asked questions related to national security.

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<sup>39</sup> See also Maria Pichou “Commentary on 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, Prosecutor v. Norman, Fofana and Kondewa” in André Klip, Steven Freeland and Anzinga Low (eds), *Annotated Leading Cases of International Criminal Tribunals : Special Court for Sierra Leone 1 January 2008–2018 March 2009*, vol. 45, (Intersentia, 2016), pp. 143–227.

### 3.2 *Immunity of State Officials from Witness Summonses*

Two sets of articles of the Rome Statute provoked great controversy on the issue of the immunities of Heads of States and State officials at the ICC: the dipole of Articles 27 and 98 regarding the irrelevance of official capacity and the immunities of Heads of States and the dipole of Articles 64 (6) (b) and 93 (1) regarding the power of the ICC to compel the attendance of witnesses. The complexity is aggravated by the conflation between the immunity from the ICC jurisdiction and the immunity from arrests warrants executed by member states to the ICC, a distinction often overlooked in the case law and literature.<sup>40</sup>

The Rome Statute provides the principle of the irrelevance of the official capacity in Article 27 (1), whereas it dismisses any immunity of Heads of State, functional or personal, as a bar to their prosecution in 27 (2). Article 27 of the Rome Statute broached the issue of whether it reflects a rule of customary international law or whether it introduces an exception to a rule of customary international law. Regarding the first paragraph, drawing from the third Nuremberg principle, it is generally accepted that Article 27 (1) codifies a rule of customary international law, according to which the official capacity of a Head of State is irrelevant to his criminal responsibility for international crimes.<sup>41</sup> Regarding the second paragraph, the response is crucial on its applicability to states non-parties to the Rome Statute, and the case law has not been that clear, with the ICC providing at times different reasoning as to why the immunity of Heads of State is not upheld before the court. The following paragraph, however, focuses on the dipole of Articles 64 (6) (b) and 93 (1) of the Rome Statute, as the scope of this article is on the immunities of State officials from witness summonses.

#### 3.2.1 *Immunity from Witness Summonses at the ICC*

Article 64 (6) (b) of the Rome Statute provides the ICC Trial Chamber with the discretion to require the attendance and testimony of witnesses and the production of documents. Article 93 (1) governs the assistance that states need to provide to the court regarding *inter*

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<sup>40</sup> Claus Kress distinguishes the two questions. Claus Kress, “The International Criminal Court and Immunities under International Law for States Not Party to the Court’s” in Bergsmo and L. Yan (eds) *State Sovereignty and International Criminal Law* (2012), 223 at 225.

<sup>41</sup> ILC, “Memorandum by the Secretariat” (31 March 2008) UN Doc A/CN.4/596, at 12, § 9.

*alia* the appearance of persons as witnesses before the court.<sup>42</sup> Although the term “subpoena” does not appear in the ICC Statute, the ICC adopted a position similar to that of the *ad hoc* tribunals regarding the power of the court to compel the appearance of witnesses.<sup>43</sup>

When interpreting Article 64 (6) (b), the ICC Trial Chamber, in a controversial decision granted the ICC prosecutor’s request to summon eight witnesses to testify in the joint trial of Kenya’s vice president, William Samoei Ruto, and former journalist Joshua Arap Sang, both of whom faced charges of crimes against humanity for their alleged role in “post-election violence”.<sup>44</sup>

In reaching its decision, the Trial Chamber resorted to the theory of implied powers and determined that “it is also a matter of customary international criminal procedural law that a Trial Chamber of an international criminal court has traditionally been given the power to subpoena the attendance of witnesses”.<sup>45</sup> The power of the International Criminal Court to require the attendance of witnesses was considered by the Trial Chamber “equal” to its power to order or subpoena the appearance of witnesses as a compulsory measure.<sup>46</sup> The ICC stance on this issue leads to the conclusion that subpoenas and witness summonses have the same connotation and legal consequences, as the ones determined by the *ad hoc* international criminal tribunals. As to the criteria that the court employed for granting the request to issue a witness summons, three principles were used: (i) relevance, (ii) specificity and (iii) necessity. The principle of *necessity* refers both to the testimony of the prospective witness, as being necessary to determine the truth, and to the measure, as being nec-

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<sup>42</sup> See also Article 58 (7) Rome Statute where the Pre-Trial Chamber may issue a summons to appear when there are reasonable grounds that the person committed the alleged crime and the summons is sufficient to ensure the appearance.

<sup>43</sup> Judgment on the appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, *William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), Appeals Chamber, 9 October 2014.

<sup>44</sup> Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, *William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), Trial Chamber V (A), 17 April 2014, §§ 74–88.

<sup>45</sup> Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’, *William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), Trial Chamber V (A), 17 April 2014, §§ 74–88.

<sup>46</sup> *Ibid.*, § 100.

essary to obtain the testimony.<sup>47</sup> The principle of *relevance* refers to the testimony of the witnesses sought by the summons, as being relevant to the case and the crimes charged.<sup>48</sup> As to *specificity*, this principle refers to the request for summons, as being sufficiently specific for the identification of the witnesses.<sup>49</sup>

Furthermore, the Trial Chamber ruled that the court can issue binding cooperation requests to the relevant state (Kenya) to employ compulsory measures to compel the appearance of witnesses summonsed by a Trial Chamber.<sup>50</sup> Specifically, the Trial Chamber relied on the sub-provisions 93(1)(d) and (1) of the Statute, to obligate Kenya both to serve summonses and to assist in compelling the attendance (before the Chamber) of the witnesses thus summonsed. Interestingly, the dissenting Judge, Herrera Carbuccia underlined that “the Court has no mechanism to make an individual liable for refusing to testify in contravention of a Court order [...] [c]onsequently, a fundamental element of subpoena powers is absent”.<sup>51</sup> Moreover, the dissenting Judge held that “[p]ursuant to Article 93 of the Statute, read in its integrity, the Government of Kenya is under no legal obligation to compel a witness to appear before the court, either in The Hague or in situ”.<sup>52</sup>

When the issue arrived at the ICC Appeals Chamber, the latter confirmed the court’s power to compel the appearance of witnesses, thereby creating a legal obligation for the individual concerned.<sup>53</sup> The Appeals Chamber, however, adopted this position by relying only on the letter of the provision of Article 64 (6) (b), thereby creating a legal obligation for the individual concerned, rather than on customary law.<sup>54</sup> By doing so, the Appeals Chamber dispensed with the need to

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<sup>47</sup> Ibid., § 181.

<sup>48</sup> Ibid., § 182.

<sup>49</sup> Ibid., § 184.

<sup>50</sup> Ibid., § 180.

<sup>51</sup> Dissenting Opinion of Judge Herrera Carbuccia on the ‘Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’ ICC-01/09-01/11-1274-Anx, 29 April 2014, § 11.

<sup>52</sup> Ibid., § 17.

<sup>53</sup> Judgment on the appeals of William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, *William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11), Appeals Chamber, 9 October 2014, § 107.

<sup>54</sup> Ibid., § 113.

define the scope of its powers through custom or inherent powers. Regarding the court's power to request a State Party to compel witnesses to appear, the Appeals Chamber read its power to do so into the enumerated provision of Article 93(1)(b), which was found to be more specific than the sub-provision 93(1) (l), invoked previously by the Trial Chamber. The Appeals Chamber applied the principle *lex specialis derogate legi generali*, and resorted to article 93 (1) (b) of the Statute as the appropriate legal basis for requesting state parties to compel the appearance of witnesses.<sup>55</sup> The court, however, limited its judgment to the matter under appeal and ruled that states parties to the ICC are obliged to provide assistance in compelling the prospective witnesses to appear before the court sitting *in situ* or by way of videolink. Such a remark is especially relevant when summoning a Head of State as witness before the court.

Additionally, Article 93 (4) envisages the situation where a state party may deny a court's request for assistance, if the request concerns the production of documents or the disclosure of evidence which relates to national security. This provision echoes the ICTY jurisprudence as it introduces the caveat of national security as a reason for a state party to deny a request for assistance.

This case law is important as it overturns the so called "principle of voluntary appearance" of witnesses, which was initially argued to be applicable at the ICC, based on Articles 93(1)(e), 93(7), and the *travaux préparatoires*.<sup>56</sup> During the Rome Conference, the power of the Trial Chamber to order the procurement of evidence was a subject of controversy between the common law countries and France. The issue also divided international criminal lawyers.<sup>57</sup> Although the term subpoena, as such, is absent from the Rome Statute, the ICC reiterated its power to compel the appearance of witnesses through

<sup>55</sup> *Ibid.*, § 2 and 128.

<sup>56</sup> G. Bitti, "Article 64", in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court, A Commentary* (3rd edn., 2016) at 1591; see also Chaumette, "The ICTY's Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents", 4 *Int'lCLR* (2004) 357, at 357;

<sup>57</sup> On the one side, proponents of the "voluntary appearance principle", Sluiter, "'I beg you, please come testify'" – The Problematic Absence of Subpoena Powers at the ICC', 12 *New Criminal Law Review* (2009) 590. William A. Schabas, 'The International Criminal Court: A Commentary on the Rome Statute (2010) 768. On the other side, see Claus Kress & Kimberly Prost, "Art.93 (1) e" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2008) 1576–1577, para. 21.



the issuance of witness summonses, the latter ending up being synonymous with subpoenas. Crucially, when the Appeals Chamber ruled that the ICC Trial Chamber has the power to order witnesses to appear and give testimony before the court and thereby imposing legal obligations to the persons concerned, the witness summonses were directed to non-cooperating witnesses in the case against Kenya's Vice President, William Samoei Ruto.

The issue is also closely related to the duty of states to cooperate with these courts, a duty that becomes even more complex to discharge, when the prospective witness is a Head of a state which is not party to the Rome Statute.<sup>58</sup> Regarding states parties to the Rome Statute, immunity – either functional or personal – from jurisdiction and arrest – and arguably *a fortiori* from witness summonses – of either former or sitting Heads of State and Senior State officials does not apply at the ICC.<sup>59</sup> In this regard, the ICC position is consistent with the ICTY jurisprudence. Since immunity from jurisdiction and arrest of Heads of States parties to the Rome Statute is not upheld, it is difficult to see how the ICC would take a different stand and rule that Heads of States parties to the ICC are immune from witness summonses.

As the ICC has yet to pronounce on the irrelevance of immunities of Heads of State from witness summonses, the *ratio decidendi* of the Court on the immunities of Heads of State from jurisdiction and arrest is relevant. When the Head of State is national of a state not party to the Rome Statute, then the situation is more complex, as the reasoning of the court on why immunity is not upheld has not been consistent.<sup>60</sup> A decisive factor weighing against the immunity of a

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<sup>58</sup> For the cooperation regime at the ICC, see O. Bekou and D. Birkett, *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016).

<sup>59</sup> The Rome Statute provides the principle of the irrelevance of the official capacity in Article 27 (1) whereas it dismisses any immunity of Heads of State, functional or personal, as a bar to their prosecution in 27 (2). See also D' Argent, "Immunity of State Officials and the Obligation to Prosecute" in A. Peters, E. La-grange, S. Oeter and C. Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (2015) 244, at 249.

<sup>60</sup> Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Omar Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December 2011§36; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, Omar Al Bashir (ICC-02/05-01/09-195), Pre-Trial Chamber II, 9 April 2014 §§ 25 and 29; Decision on the Prosecution's

Head of State of a state not party to the Rome Statute is the referral of a situation by the Security Council. The referral acts as an authority of the UN member states obligations to cooperate with the court, rather than as a waiver of the immunity of the Head of State of a third state.

Should a request compelling a Head of State to appear as a witness at the ICC is filed before the ICC, one might expect the same reasoning to be applied *a fortiori* for such requests. On the other hand, as the Court has the discretion to issue a witness summons, it might follow the practice of the *ad hoc* tribunals, avoid pronouncing on the issue of the immunity and apply the legal standards of Article 64 (4) b and 93 (1) (b) in a “liberal way” to grant or quash the request according to its discretion. The ICC could also follow the SCSL case law, which is crucial, since the latter did issue a subpoena to a former Head of State, as explained above, thereby implying that the former President enjoyed no functional immunity from such acts, albeit without addressing specifically the issue of his immunity in its judgment.

### 3.2.2 *Immunity from Summonses at the International Court of Justice*

The rationale for immunities was underlined in *US v Iran*, where the International Court of Justice (ICJ) held that immunities are necessary for facilitating international relations.<sup>61</sup> The case law shows that immunities on horizontal (inter-state) level are treated very differently from the immunities on vertical (supranational) level. In the *Arrest Warrant*, the ICJ took into consideration the ICTY, ICTR and ICC Statutes, and concluded that customary international law provides

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Footnote 60 continued

application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, Bashir (ICC-02/05-01/09), 4 March 2009; Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Bashir (ICC-02/05-01/09), 6 July 2017. See also Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir (ICC-02/05-01/09-309) Pre-Trial Chamber II, 11 December 2017, currently on appeal.

<sup>61</sup> *United States Diplomatic and Consular Staff in Iran*, Merits, 1980 ICJ Reports 3, § 91. In the *Jurisdictional Immunities* case, the ICJ clearly stated that *jus cogens* norms and procedural immunities do not clash. In the Advisory Opinion on *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, the ICJ found that the question of immunities from jurisdiction is a preliminary issue to be expeditiously decided in *limine litis*. *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 20 April 1999, ICJ Reports 1999, § 67.

for personal immunity as a bar to prosecution for international crimes before national courts.<sup>62</sup> The ICJ held, however, that the personal immunity of an incumbent Foreign Minister does not bar his prosecution before an international court, when the latter has jurisdiction, even under the following circumstances: if he is in his own country; if his state waives his immunity; if he has left office.<sup>63</sup>

Regarding specifically the appearance as a witness, international treaty law provides rules applying to officials who enjoy immunity *ratione personae*. Article 31, paragraph 2, of the Vienna Convention on Diplomatic Relations of 1961 provides that a diplomatic agent is not obliged to give evidence as a witness.<sup>64</sup> For Heads of State, Heads of government and Ministers of Foreign Affairs the status is less clear since there is no relevant convention, except for Heads of State while leading a special mission, which is the subject of a specific article in the Convention on Special Missions of 1969.<sup>65</sup> On the other hand, the Vienna Convention on Consular Relations provides for the possibility of consular staff being called upon to attend as witnesses.<sup>66</sup> This possibility, however, is curtailed, in the following circumstances: a) no coercive measure or penalty may be applied, should a consular officer declines to give evidence; b) the authority requiring the evidence of a consular officer, shall not interfere with the performance of his duties; c) consular officers are not obliged to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto.<sup>67</sup> In its 2018 Report, the Special Rapporteur of the International Law Commission (ILC), concluded that “it is impossible to find rules of

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<sup>62</sup> *Case Concerning the Arrest Warrant of 11 April 2000*, 2002] Judgment ICJ Reports 2002, §§ 56–58.

<sup>63</sup> *Ibid.*, § 61.

<sup>64</sup> A similar provision is found in Article 3, para. 3 of the Convention on Special Missions, and in Arts. 3, para. 3, and 60, para. 3 of the Vienna Convention on the Representation of States in Their Relations with International Organisations of a Universal Character.

<sup>65</sup> The 1969 New York Convention on Special Missions, the 1972 Convention on Internationally Protected Persons distinguishes the position of Heads of State, while the 1961 Vienna Convention on Diplomatic Relations of 1961 does not make a specific reference. H. Fox, “Privileges and Immunities of the State, the Head of State, State Officials, and State Agencies” in Sir I. Roberts (ed.), *Satow's Diplomatic Practice* (7th ed. 2017) at 207.

<sup>66</sup> Vienna Convention on Consular Relations, “Art. 44: Liability to give Evidence”.

<sup>67</sup> *Ibid.*

international treaty law or customary international law which lay down general rules in respect of appearance as witness of a State official” who is not covered by the aforementioned Conventions.<sup>68</sup>

This however did not prevent the International Court of Justice (ICJ) from ruling on the issue in the cases *Certain Criminal Proceedings in France* (Republic of Congo v France) and *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France). In the first case, the Republic of the Congo filed an application against France seeking the annulment of the investigation and prosecution measures taken by the French judicial authorities against the President of the Republic of the Congo, Mr. Denis Sassou Nguesso, the Congolese Minister of the Interior, and other Senior State officials, concerning crimes against humanity and torture allegedly committed in the Congo. Congo submitted that, in issuing a warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France had violated “the criminal immunity of a foreign Head of State – an international customary rule recognized by the jurisprudence of the Court”. Both parties to the dispute, during the proceedings regarding provisional measures, accepted that a summons to appear as a witness was not necessarily contrary to the rules governing immunity.<sup>69</sup> Although the ICJ did not rule on the merits, it nonetheless rejected Congo’s request for provisional measures, as it found that the application to appear as a witness did not irreversibly prejudice the immunity of the President of the Republic of Congo from jurisdiction.<sup>70</sup>

In the second case, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France) Djibouti claimed that France, by sending witness summonses to Djibouti’s Head of State and State officials (Head of National Security), violated “the obligation deriving from established principles of customary and general international law to prevent attacks on the person, freedom or dignity of an internationally protected person”.<sup>71</sup> The ICJ found that the witness summons, addressed to the President of Djibouti by a French investigative judge, was not associated with *measures of constraint* (emphasis added); that witness summons was “merely an invitation to

<sup>68</sup> UN Doc.A/CN/.4/722, 12 June 2018, para. 81.

<sup>69</sup> *Certain Criminal Proceedings in France* (Republic of Congo v France). Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003, p. 102 et seq., para. 32.

<sup>70</sup> *Ibid.* paras. 30–35.

<sup>71</sup> *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, I.C.J. Reports 2008, at 177, § 157.

testify which the Head of State could freely accept or decline".<sup>72</sup> As the witness summons was not considered to place any obligation on the Head of State, the court found that France did not violate its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of State.<sup>73</sup> The ICJ based its reasoning on the *Arrest Warrant* of 11 April 2000 case, where the binding nature of the measure adopted by the foreign criminal jurisdiction was a determining factor for assessing its effect on the immunity.

Furthermore, with regard to the witness summons to Djibouti's Head of National Security, the ICJ found that there are no grounds in international law that confer immunities to such State officials. When the State officials are not diplomats, within the meaning of the Vienna Convention on Diplomatic Relations of 1961, they do not enjoy personal immunity from witness summonses.<sup>74</sup> Interestingly the ICJ underlined the obligation of the state, which claims functional immunity for State officials, to notify the foreign authorities of the forum state accordingly, so that the latter would not violate any immunities under international law. By doing so, the sending state assumes responsibility for any internationally wrongful act committed by such state organs.<sup>75</sup>

Although these cases concerned the immunity of Heads of State and State officials from testifying before a foreign national court, the position of the ICJ on the nature of witness summons and immunities of Heads of State is relevant. The fact that the Head of State had the freedom to accept or reject the invitation to testify before a foreign judiciary organ had a bearing on the court's assessment that the forum State did not violate its international obligations. The determining factor for the ICJ in assessing whether there has been an attack on the immunity of the Head of State by the witness summons was whether the requested Head of State is subjected to a constraining act of authority.<sup>76</sup> The Court found that since the witness summons was issued by a foreign judicial organ, it was not considered as a constraining act of authority against the Head of State.

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<sup>72</sup> Ibid., § 171.

<sup>73</sup> Such would be the case if the French judiciary had passed confidential information regarding the President of Djibouti to the media.

<sup>74</sup> *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, at 177, § 194.

<sup>75</sup> Ibid., § 196.

<sup>76</sup> Ibid., § 170.

This approach on the *nature* (emphasis added) of subpoenas/witness summonses to Heads of States and Senior State officials is quite different from the one adopted by the ad hoc tribunals and the ICC. The latter confirmed that a subpoena *ad testificandum* or a witness summons respectively is of *compulsory* nature that entails a penalty if disobeyed. On the other hand, the ICJ even considered that, for the second summons issued by the French judiciary to the President of Djibouti, his express consent was sought. This reasoning coupled with the view that the President could freely deny appearing, lead the ICJ to conclude that no attack to the immunities of the Head of State took place. For the ICJ, therefore, witness summonses issued by foreign criminal jurisdiction are not of compulsory nature. If they were, they would violate the customary rule of Heads of State immunity. It should be noted, however, that the ICJ did not recognize a general, abstract right of a Head of State not to be summoned to appear as a witness before a foreign national criminal court, only that the Head of State was under no obligation to testify.

According to the ICJ, therefore, an incumbent Head of State, Head of Government and Minister of Foreign Affairs, enjoys personal immunity from summons to appear before foreign national courts. Such a conclusion, however, was not upheld in the case of the *ad hoc* tribunals and is precluded for Heads of State parties to the ICC, given Article 27 of the Rome Statute. This different approach is explained, should one take into consideration the different authorities issuing the subpoenas and witness summonses. For the ICJ, this conclusion concerned interstate litigations regarding immunities from foreign criminal jurisdictions, while it is the international criminal tribunals and courts which constitute the authorities issuing the subpoenas and witness summonses. Despite the apparent rationale for this differentiated approach, the ICJ, when adjudicating on the issue of the immunities of Heads of State from witness summonses, did not consider it necessary to draw such a distinction, as it did in the *Arrest Warrant* case when dealing with the issue of immunity from foreign criminal jurisdiction.<sup>77</sup> Furthermore, the Special Rapporteur of the International Law Commission, in its 2018 Report, - did underline the relevance of the ad hoc tribunals' case law on subpoena requests to Heads of State, even though the ILC work

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<sup>77</sup> *Case Concerning the Arrest Warrant of 11 April 2000*, 2002] Judgment ICJ Reports 2002, §§ 61.

concerns the immunity of Heads of State from foreign criminal jurisdictions.<sup>78</sup>

#### IV CONCLUDING REMARKS

The Rule allowing the international criminal tribunals and court to issue subpoenas and witness summonses is a judge – made Rule, and the way the ad hoc tribunals and the SCSL interpreted it illustrates their broad discretion in exercising their power to issue such orders to State officials and Heads of State. According to the ad hoc tribunals, Senior State officials are immune from subpoenas to produce documents before an international criminal tribunal, unless they possessed the document, sought by the court, while acting in private capacity. On the other hand, no functional or personal immunity argument was upheld for State officials regarding subpoenas to appear and testify before them. This is not the full picture, nonetheless. Both the ICTY and the SCSL adopted a cautious approach on issuing subpoenas, by elaborating legal standards, which finally would often lead in rejecting such subpoena requests. Specifically, when subpoena requests to incumbent Heads of State were filed, both the ICTY and the SCSL ruled, by construing Rule 54 legal standards and deciding that these have not been met, without addressing directly the immunity of Heads of State from such acts. The SCSL did issue a subpoena to a former Head of State, again by accepting that Rule 54's threshold was reached, without addressing the issue at all. Implicitly, however, since the SCSL issued the subpoena to the former president, arguably the former President enjoyed no functional immunity from such acts. For the ICJ, the determining factor in assessing whether the immunity of a Head of State was attacked by a third state's witness summons, was whether the person was considered to be subjected to a constraining act of authority. As this was found not to be the case when witness summonses are issued by a foreign national judicial authority, then the state issuing such a summons does not violate international law.

The analysis of the ad hoc tribunals case law on subpoena requests reveals a nuanced and subtle interplay inherent to international criminal justice's goals: ascertaining the truth and delivering justice fairly, also considering the pragmatic objective of each court's mandate, and of the peace process in the country / region where the crimes are committed. This is a tension regularly found in the cases of

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<sup>78</sup> UN Doc.A/CN/.4/722, 12 June 2018, para. 88.

the *ad hoc* tribunals and the specialized courts established by Security Council Resolutions. Much emphasis has always been placed on the respective court's mandate, historical context and its role to ascertain the truth of the events and to contribute to the transitional justice and stability of the country. All of these considerations seemed to influence the way that these courts dealt with subpoena requests to State officials. Similar considerations are raised with the role that the International Criminal Court is called to play as well.

The ICTY interpreted this discretionary power by stating that the court is vested with this discretion so that the "subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction".<sup>79</sup> This argument became recurrent even more when the potential witnesses were incumbent or former Heads of State. In the *Halilovic* case, the ICTY suggested that the subpoenas should not be used routinely as part of trial tactics, but only when they serve the overall interests of the criminal process. The SCSL Concurring Judge proceeded even further than *Halilovic*, by indicating that subpoenas should not be issued at all, if the interests of peace and stability of the country are at stake. It is difficult, however, to discern how the appearance of a witness before the court, even if the requested witness is a State official or a Head of State, could or would jeopardise the peace process, since these persons enjoy the right to decline to answer to questions if national interests are at stake. Such an approach is hardly compatible with the quest for truth, which should be the principal imperative of a judicial process and certainly of a criminal procedure. Put aptly by Bedjaoui, the discretionary power of the international courts is closely related to judicial expediency. That is why their freedom of choice should be based on legality in the sense that international courts take a discretionary decision freely but legally.<sup>80</sup> This expediency becomes apparent when subpoenas and witness summonses targeted Heads of State or Senior State officials. Taking into consideration the official position of the prospective witness, the pragmatic implications that such an order may bear on the specific circumstances of each case and on the peace process, seem to be the

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<sup>79</sup> ICTY, Decision on Interlocutory Appeal, *Brdanin and Talic* (IT-99-36-AR73.9), Appeals Chamber, 11 December 2002, para. 31.

<sup>80</sup> M. Bedjaoui, "Expedience in the decisions of the International Court of Justice", 71 (1) *The British Yearbook of International Law* (2001) 1, at 3.



invisible factors that determined the practice of the courts when they had to grapple with such requests.

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