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Commentary

Introductory remarks

The decisions and opinions discussed in this commentary deal with the issuance of a *subpoena ad testificandum* by the Special Court of Sierra Leone (SCSL) to the President of the country, and with issues closely intertwined with this matter.[1] Two major legal issues are identified: the legal criteria the Court applies in order to issue a *subpoena ad testificandum*; and whether a *subpoena ad testificandum* may be issued to an incumbent Head of a State. Although the latter is a matter of "extreme legal, domestic and international importance" and these motions offered a historic opportunity for a legal stand to be taken on this matter by the SCSL, both the Trial and the Appeals Chambers avoided addressing it, and proceeded to examine only whether the defendants' submissions satisfied the legal requirements set out in Rule 54 of the SCSL Rules of Procedure and Evidence (RPE).[2] There is however, a considerable and thought-provoking analysis of the matter in the concurring and dissenting opinions.

Accordingly, this commentary begins by giving a brief overview of the context of the selected decisions, and then proceeds with examining the principal legal issues dealt by the SCSL Trial and Appeals Chambers, while providing a critical analysis of the answers given by the Court. It concludes by underlining that the issues in these motions turn to a large extent, on the particular context in which the SCSL was created.

Brief Overview

In their motions, the defendants Fofana and Norman requested the Trial Chamber to issue a subpoena to Mr. Kabbah - President at that time of the country - to compel him to attend a pre-testimony interview with the defence and to appear as a witness on their behalf in the CDF Trial before the SCSL. The Trial Chamber Decision analyzed systematically the legal criteria developed by the ICTY and ICTR for issuing a subpoena, and determined the elements that the applicants need to demonstrate in order for their request to be granted. The Trial Chamber dismissed the motions after finding that the issuance of a subpoena to the President was not warranted pursuant to Rule 54, and that this finding constituted a sufficient basis to reject their request, without adjudicating the issue of the President's immunity from criminal processes. The Trial Chamber's Decision was polarized; it was taken by majority, with one separate Concurring Opinion and one Dissenting Opinion. The Appeals Chamber's decision, which upheld the Trial Chamber's decision, was less controversial, with one dissenting opinion, which however, was critical of the approach adopted by the Appeals Chamber.

Procedural issues

Before considering the merits of the case, the SCSL Trial Chamber had to address two preliminary issues: whether the prosecution had standing to object to a request by the defence for the issuance of a subpoena to a witness; and how the Court should deal with submissions of different defendants which are repetitive when associated with each other. The latter issue did not raise any particular legal interest, and the Chamber decided to address it by attempting to show the sections where the submissions overlapped with no further implications on their applicability.

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[1] 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*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, in this volume; 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, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, in this volume; Dissenting Opinion of Hon. Justice 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, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, in this volume: Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, A. Ch., 11 September 2006, in this volume; Dissenting Opinion of Hon. Justice Robertson on decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, A. Ch., 11 September 2006, in this volume.

[2] As put eloquently by the Justice Mutanga Itoe, SCSL, 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, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, par. 126.

Regarding the issue as to whether the prosecutor had the right to object to the issuance of the subpoena requested by the defendants, the defence argued first that the SCSL Statute does not grant such a right to the prosecution and, secondly, that the prosecution's objection violated their right in full equality to obtain the attendance and examination of witnesses under the same conditions as witnesses against, in accordance with Art. 17(4)(e) SCSL Statute.[3] Since the prosecution does not exercise any control over the witnesses the defence intends to call, it does not have the right to object to the defendants' request for a subpoena to a witness. Such a right is only reserved for the prospective witness to whom a subpoena is directed, a right which was exercised in this case by the Attorney-General on behalf of the President Kabbah.

The prosecution's response did not refer to the existence of such a legal right, but targeted the evidence that was sought by the issuance of the subpoena, clarifying its intention not to interfere with the defendants' right to call any witnesses. Defence counsel did not follow up with their objections in the proceedings, however, leading the Trial Chamber to hold that the issue was rendered moot.[4] The dissenting Judge, however, underscored the duty of the Court to be as flexible in the process of receiving evidence by the defence as it is with the evidence by the prosecution. This duty is paramount for the discovery of truth.[5]

Relevant to this issue is the syllogism in the *Krstić* case, where the ICTY Appeals Chamber underlined the prosecutor's duty to assist the Tribunal to arrive at the truth and to do justice for the accused.[6] On account of this duty, in cases where the defence has brought to the attention of the Court the difficulties it encountered to obtain the cooperation of a prospective witness, the prosecution can use its own resources and somewhat more extensive powers to facilitate the examination of an unwilling witness by the defence.

In the commented case, however, not only did the prosecution not assist the Court in obtaining the testimony of the requested witness, but it raised objections to the requested subpoena (on the premise that the information sought would not materially assist the proceedings). Taking into consideration that there is no judicial restriction on the prosecution's ability to call any witnesses on its own volition, its objection to the subpoena requested by the defence may not be considered as consistent with the fulfillment of its duty to arrive at the truth, as this duty was designated in the *Krstić* case by the ICTY three years earlier.

The legal meaning of the term *subpoena ad testificandum*

The title of the SCSL Trial Chamber's decision refers specifically to a *subpoena ad testificandum*, taking into account the distinction between the two forms of subpoenas: *subpoenae ad testificandum* and *subpoenae duces tecum*. Both terms refer to injunctions issued by the Court aiming to have additional evidence produced before it: the first through the appearance and examination of a witness before the Court; the second through the provision and presentation of documents. This distinction not only refers to the semantic demarcation of the two terms but, according to the ICTY case law, it also bears legal consequences as to the determination of persons to be subpoenaed. The legal distinction between the two types of subpoenas is illustrated in the *Krstić* case, where the ICTY Appeals Chamber distinguished the functional immunity of state officials to subpoenas, depending on the requested type of subpoena.

According to the ICTY jurisprudence, the Court may issue subpoenas when there is a request for a state official's testimony, but not when there is a request for a state official to provide documents that came into his possession when acting in an official capacity. More precisely, in the *Blaškić* case, the ICTY determined that a *subpoena duces tecum* can only be issued to state officials when they gained the sought information in

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3 Article 17(4)(e) SCSL Statute: "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: (...) 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; (...)"

4 Judge Benjamin Mutanga Itoe found the defence's decision not to follow up their objections very surprising. SCSL, 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, *supra* note 2, par. 27.

5 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, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, par. 2.

6 ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, Klip/ Sluiter, ALC-XIV-521, par 13. See also Klip/Sluiter, ALC-XIV-538.

their private capacity.[7] Conversely, such an immunity enjoyed by state officials does not exist for *subpoenae ad testificandum* as, in the *Krstić* case, the ICTY Appeals Chamber determined that state officials may be compelled as witnesses to give evidence of what they saw or heard even in the course of exercising their official functions.[8]

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.[9]

A further classification of *subpoenae ad testificandum* should be made at this point as, in the commented case, the defence requested a subpoena to be issued by the Court in order to compel the President first to attend a pre-testimony interview with the defence and, secondly, to appear and testify as a witness. Semantically these two objectives fall under the same category of a *subpoena ad testificandum* but, in terms of legal requirements to be satisfied, the defendants must demonstrate different elements in order to have their request granted as concluded from the different approaches on the issue by the ICTY and the ICTR and as explained in the following paragraphs.

In terms of legal consequences, the distinction between the different forms of subpoenas is as crucial as the legal meaning attached to the term *subpoena* as such. The relevant analysis was disambiguated in the *Blaškić* case before the ICTY, where a *subpoena duces tecum* was requested by the defendant against Croatia. While the Trial Chamber Decision considered the analysis of the terminology of Rule 54 as a matter of nomenclature,[10] the Appeals Chamber, through the words of its Presiding Judge Antonio Cassese, asserted that the interpretation of the term *subpoena* has substantive legal implications. According to his analysis, *subpoenas* have semantically been accorded with two different meanings; *subpoena* as an injunction that is accompanied by a threat of penalty in case of non-compliance; and *subpoena* as a binding order that does not necessarily imply the power to fine or imprison the prospective witness. The first interpretation follows the original meaning of the word in common law jurisdictions, while the second rests on the milder connotation of the equivalent word "assignation" in French, which initially appeared in the French text of the Rule 54 ICTY RPE.[11]

The Appeals Chamber applied the first interpretation of the term, upholding that a *subpoena* only refers to compulsory orders that would entail a possible imposition of a penalty, were they to be disobeyed.[12] On account of this interpretation, the ICTY held that it can only issue *subpoenae duces tecum* to individuals acting in private capacity, as it does not possess the power to take enforcement measures against states and state officials. This conclusion drawn by the ICTY in the *Blaškić* case indicated the path to be followed by the SCSL, and was invoked by the Trial Chamber when ascertaining that subpoenas refer to injunctions by the Court accompanied by threat of penalty.

Legal standard for issuing a *subpoena ad testificandum*

Under the SCSL Statute, a Chamber or Judge has incidental jurisdiction over third persons other than the accused, should these persons be able to assist the Court in its pursuit of criminal justice.[13] Rule 54 lays

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[7] ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, A. Ch., 29 October 1997, Klip/ Sluiter, ALC-I-245, par. 49.

[8] *Ibid.*, par 27. See contrary the Dissenting Opinion of Judge Shahabuddeen, who argued that although the *Blaškić* case dealt with documents, its reasoning is also applicable for *subpoenas ad testificandum*. Dissenting Opinion of Judge Shahabuddeen on the ICTY, Decision on Application for Subpoenas, *Prosecutor v. Krstić*, Case No. IT-98-33-A, A. Ch., 1 July 2003, Klip/ Sluiter, ALC-XIV-531, par. 4.

[9] *Ibid.*,par. 28.

[10] ICTY, Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, *Prosecutor v. Blaškić*, Case No IT-95-14, T. Ch. II, 18 July 1997, par. 14.

[11] ICTY, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *supra* note 7, par. 20.

[12] After the Blaškić Judgement, the French text of the ICTY RPE was amended and the word "assignations" was altered into "ordonnances de production ou de comparution forces", in order to reflect, and be consistent with, the ICTY Appeals Chamber's interpretation of the term 'subpoenas'. See the difference between the 10th and the 11th version of the French text of the ICTY RPE. Nonetheless, the term "assignations" still appears in the ICTR text of the RPE.

[13] See the reference to the raison d'être of Rule 54 in the Bagosora case, ICTR, Decision on Request for subpoena of Major General Yaache and cooperation of the Republic of Ghana, *Prosecutor v. Bagosora*, Case No ICTR-98-41-T, T. Ch. I, 23 June 2004, par. 4.

down the different mechanisms through which the Court may obtain additional evidence, testimony and information in a broad way. According to the wording of the provision, the Court has the discretion to issue any order, summons, subpoena, warrant or transfer order, when it may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.[14] The key terms in the provision, which have received extensive legal analysis by the commented decisions and opinions, and by ICTY and ICTR case law, 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 has provoked complicated discussion and different approaches.

According to the two dissenting Judges, the language of the provision is plain and unambiguous. According to Judge Robertson, it has an ordinary meaning and is broad enough to encompass the authority of the Court to issue subpoenas to any persons in Sierra Leone for the purposes of the fulfillment of its mandate. This statutory interpretation of Rule 54 was endorsed by Judge Thompson, who argued that no further statutory construction is necessary, because it would enact a strained construction imposing limitations on the Court's authority. The applicant of a subpoena needs only to make a *prima facie* demonstration that the issuance of the subpoena is necessary, and does not need to show by convincing evidence that it is necessary. All the rule requires is a demonstration that an order is necessary to bring the relevant evidence into the court.[15] This simple approach resulting from the literal interpretation of the Rule 54 should have been adopted by the Trial Chamber, according to the dissenting Judges.

The "necessity requirement" and the "purpose requirement"

However, the Trial Chamber adopted a twofold test incorporating two requirements that need to be satisfied in order to meet the legal standard of Rule 54: a) the "necessity requirement", which requires that the subpoena must be necessary; and b) the "purpose requirement", which requires that the subpoena must serve the purposes of the investigation or the conduct of the trial. This twofold test was confirmed in the *Delalic* case, where the President of the ICTY submitted that the test under Rule 54 entails two parts: (a) a subpoena must be necessary for obtaining the evidentiary material; and (b) the material being sought must be relevant to the proceedings.[16] In the same case, the ICTY also emphasized that the Tribunal, in applying this test, must bear in mind the fundamental rights of the accused, since the Statute holds these rights in the highest regard.[17]

The "Legitimate Forensic purpose" requirement and the "Last Resort" requirement

The ICTY jurisprudence has further elaborated these elements of Rule 54 by a statutory construction. By drawing an analogy to its case law on the legal standard for access to confidential material, the ICTY in the *Krstić* case determined that a requested subpoena would become necessary for the purposes of Rule 54 where a forensic purpose for having the requested witness testimony has been shown. Therefore, in exercising its discretionary power to issue a subpoena, the Chamber should consider: a) whether the information that the prospective witness may provide is necessary for the resolution of specific issues of the case (the "Legitimate Forensic purpose" requirement); and b) whether this information could be obtainable through other means (the "Last Resort" requirement), namely whether this information could be sought through other means, and whether it is necessary in order to ensure that the trial is informed and fair.

In order to satisfy the "Legitimate Forensic purpose" requirement, it is not sufficient for the applicant to show merely that the witness has information relevant to the case, but provide evidence of a reasonable basis that the witness is likely to give information that will materially assist the applicant with regards to clearly identified issues in the trial, leading to the test of materiality and relevance.

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[14] "General Provision: at the request of either party or of its own motion, 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." Rules of Procedure and Evidence of the Special Court for Sierra Leone, 16 January 2002, Rule 54.

[15] SCSL, Dissenting Opinion of Hon. Justice Robertson on decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, A. Ch., 11 September 2006, par. 24.

[16] ICTY, Decision of the President on the Prosecutor's motion for the production of notes exchanged between Zejnil Delalic and Zdravko Mucic, *Prosecutor v. Delalić et al.*, Case No IT-96-21, President, 11 November 1996, par. 40.

[17] *Ibid.*, par. 41.

The tests of materiality and relevance

In the *Kristic* case, the ICTY particularized even further the legal standard of Rule 54, by stating that, when the prospective witness has proven unwilling to cooperate with the defence, this demonstrates that the prospective witness will not be able to give information that will materially assist the proceedings. That is why the *ad hoc* Tribunal called for the legal standard under 54 Rule to be applied in a reasonably liberal way. As with the prosecutor's search or seizure warrants, the defence cannot simply conduct a "fishing expedition" through the requested subpoena when it is completely unaware whether the prospective witness can provide the necessary evidence.[18] An applicant for such a subpoena therefore, 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 that will materially assist him in the case (test of materiality), in relation to clearly identified issues relevant to the trial (test of relevance).

In the *Milošević* case, the ICTY determined that the applicant for a subpoena must be specific about the information sought from the prospective witness, and must demonstrate a connection between this information and the case. Factors that may establish this nexus include the position of the prospective witness, his relationship with the defendant, his statements, and any opportunities he had to learn or observe the events in question.[19]

The ICTR, however, found that when the defence is not fully aware of the nature and relevance of the testimony of the prospective witness, it is in the interests of justice to allow the defence to meet the witness to assess his testimony. According to the ICTR, when an applicant requests a subpoena in order 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 voluntary cooperation of the party involved and that these attempts have been unsuccessful.[20] Consequently, the ICTR applied the test of relevance in a more liberal way for the applicant, since it did not demand that the applicant demonstrate the relevance of the sought testimony to strictly specific issues of the trial.

A paradoxical conclusion results from the combination of the legal standards developed by the ICTY and ICTR. According to the ICTR, the defence must demonstrate that it has attempted to interview the witness unsuccessfully, in order to prove the necessity of the issuance of the subpoena. According to the ICTY, however, if the defence shows that the prospective witness is unwilling to appear voluntarily before the Court and testify, then this indicates that the information sought may not materially assist the conduct of the trial, thereby failing the test of materiality. The different approaches adopted by the *ad hoc* Tribunals render the position of the applicant of *subpoenae ad testificandum* tenuous, especially when the defence requests a subpoena to achieve the two objectives, namely to obtain a pre-testimony meeting with the prospective witness, as well as his testimony before the Court, as is the case in this commentary.

The Trial Chamber failed to identify these subtle nuances attached to the legal standard applied by the *ad hoc* Tribunals for issuing a *subpoena ad testificandum* aiming for a pre-testimony interview with a witness and for his testimony before the Court. The Trial Chamber, however, did identify the different approaches of the ICTY and ICTR regarding the test of relevance and materiality.[21] In a footnote of its decision, the Court ascertained that, while the ICTR does not require an applicant to clearly identify the issues in relation to which the proposed testimony would be of material assistance, the ICTY does. The SCSL unequivocally adopted the ICTY's approach by simply stating that it is more consistent with the provision of Rule 54.

The legal standard applied by the SCSL Trial Chamber

The submissions forwarded by the parties did not contribute to the clarification of these conditions. The prosecution called for the application of the legal standard found in the jurisprudence of the ICTY in the

[18] ICTY, Decision on application for subpoenas, *supra* note 8, par. 10-12.

[19] ICTY, Decision on assigned counsel application for interview and testimony of Tony Blair and Gerhard Schroder, *Prosecutor v. Milošević*, Case No IT-02-54 -T, T.Ch. III, 9 December 2005, Klip/ Sluiter, ALC-XXVIII-65, par 40.

[20] ICTR, Decision on Request for subpoena of Major General Yaache and cooperation of the Republic of Ghana, *supra* note 13, par. 4.

[21] 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*, Case No. SCSL-04-14-T, T. Ch. I, 13 June 2006, footnote 78.

Krstić case. The Attorney-General, representing the prospective witness, referred to the prosecution's submissions without commenting on the legal standard to be applied. Interestingly, counsel for Norman combined the aforementioned legal criteria (the criteria of relevance and materiality and the "necessity requirement") and submitted that the SCSL should adopt its own standard for issuing a subpoena. Additionally, however, he submitted that any supplementary requirements, such as the "Legitimate Forensic purpose" and the "Last Resort" developed by the ICTY, are not inconsistent with the previous standards, revealing thus, the conflation between the different constructive interpretations of Rule 54. Counsel for Fofana called for the application of the twofold test and suggested that the Court take into consideration its unique features and the special circumstances of the trial.

As SCSL RPE Rule 54 is essentially identical to the equivalent rules in the ICTY and ICTR RPE, it is not surprising that the SCSL Trial Chamber sought guidance in the ICTY's approach. In a comprehensive analysis, the Trial Chamber systematized the legal requirements adopted by the *ad hoc* Tribunals and applied the ICTY's legal standard. Accordingly, the Chamber referred to the "necessity" and "purpose" requirements, determining that the subpoena must be necessary and must serve the preparation or conduct of the trial. Following the ICTY's jurisprudence, the Court declared that the element of "necessity" refers not only to the issuance of the subpoena (namely that the subpoena is necessary), but also to the evidence sought by the subpoena (namely that the testimony of the prospective witness is necessary).

The Court then used the "Last Resort" element as a part of the "necessity" element. It asserted that the subpoena should not be issued if the sought information can be obtained through other means. Regarding the purpose requirement in Rule 54, this 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 to a large extent whether the information will be of material assistance. Through its analysis, the Court also revealed its cautious position towards the issuance of subpoenas, which, being coercive measures, are meant to be used sparingly.

The contribution of the SCSL Trial Chamber to the systemization of the legal standards developed by the ICTY jurisprudence for the application of Rule 54 is significant.[22] According to the Court, the requirements of "materiality" and "relevance" of the information sought contribute to the fulfillment of the "Legitimate Forensic purpose" standard of the subpoena, and all of them correspond to the wider "purpose" requirement mentioned in the wording of Rule 54. Moreover, the Court pinpointed the difference between the broader interpretation of the "materiality" criterion given by the ICTR in the *Bagosora* case and its stricter application by the ICTY in the *Krstić* case, which calls for the applicant to explicitly identify the issues of the trial in relation to which the information would be of material assistance.[23] The SCSL Trial Chamber sided with the ICTY approach in a stand that 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 proposed testimony would be relevant or materially assisting.[24]

After establishing the legal standard under Rule 54, the Trial Chamber found that the defendants' motions failed to comply with it. The Court found that the defence had failed to demonstrate that the proposed testimony would materially assist its case ("purpose" requirement) or, alternatively, that the proposed testimony would be necessary for the conduct of the trial ("necessity" requirement). The Court analyzed the defendants' submissions one by one and concluded that some arguments were not sufficiently related to specific issues of the indictment because, even if established, they would not affect the defendants' individual criminal responsibility. Even where the Court found that the defence had demonstrated the specific

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[22] See also another systemization of the criteria developed by the ICTY 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, p. 367. According to the author, the ICTY has articulated four standards to issue a subpoena: a) the criterion of preciseness; b) the criterion of relevance; c) the criterion of inability by the applicant to obtain the witness' cooperation; and d) the criterion of usefulness.

[23] Klip/Sluiter, ALC-XXIV-315

[24] Furthermore, the Trial Chamber failed to take into consideration SCSL Rule 89, under which the evidence needs only to be relevant to be admissible, making the evidentiary law of SCSL more flexible than the equivalent provisions of the ICTY and ICTR RPE, which require that evidence be both relevant and probative. See Klip/Sluiter ALC-XXI-349.

indictment-related issues to which the proposed testimony would refer, it concluded that the information could be obtained through other means, or that the subpoena would not assist materially its case.

In his concurring separate opinion, Judge Itoe adopted a more purpose-oriented interpretation of Rule 54, taking into consideration that the requested subpoena was targeted at the President of Sierra Leone. He interpreted the provision in light of the historical context and the hybrid nature of the Court and distinguished the status of the President from other, as he refers to them, "normal", "routine" and "ordinary" witnesses. The Judge refers to the *Halilovic* case, where 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 concurring opinion proceeds 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.[25] It is not, however, indicated as to how the appearance of the President as a witness before the SCSL could or would jeopardize the preservation of law and order in Sierra Leone.

The Judge also emphasized the unwillingness of the President to appear voluntarily before the Court as a factor that proves that the subpoena under request is not going to assist materially the trial. He argued that, when a witness has proven unwilling to testify, then the request for a subpoena should be rejected. This position, however, seems to ignore that the *raison d'être* and inherent meaning of a subpoena is to order an unwilling witness to appear and testify before the court. Not only does the Judge render the element of unwillingness as proof of the irrelevance of the information sought, but he adds seven additional requirements to the standard of Rule 54.[26]

Some of these elements constitute specialized forms of the already established standard (i.e. that the evidence cannot or has not been obtained by other means, that such evidence has not already been adduced in the course of the trial so far), while others are particularized for this specific case (i.e. that the prospective witness will be cooperative, useful, and understanding, and not hostile to the defendants' case, that the subpoena should not be issued at all where its issuance will put the interests of peace, law and order, and the stability of the Country in peril). All of these additional requirements constitute inhibiting factors on the Court's authority to issue subpoenas as they increase the threshold for satisfying Rule 54.

Conversely, in his dissenting opinion, Judge Thompson highlighted the need to interpret Rule 54 without constructing interpretations that result in creating and imposing restrictions on the Court's jurisdiction. He finds it hard to comprehend why the Chamber imposed a self-limitation on its own jurisdiction by constructing such an interpretation for a "clear-cut rule". 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".[27]

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25 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, *supra* note 2, par. 62.

26 "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, *supra* note 2, par. 92.

27 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, *supra* note 5, par. 10-13.

The dissenting opinion in the Trial Chamber decision is also highly derisory of the "legal technicalities", the "outmoded judicial doctrines", and the "novel artificial judicial conceptual distinctions" that were applied by the Chamber, which could not possibly result from the plain wording of Rule 54. According to the Judge, the crux of the matter is whether the Court has jurisdiction to issue a subpoena to any person in Sierra Leone and whether the subpoena is necessary for the conduct of the trial. The Judge considers the approach of introducing the additional elements of "Legitimate Forensic Purpose" and "Last Resort" as too formalistic and inconsistent with Rule 89, which does not authorize an assessment of the reliability of the evidence at the stage of its admission.[28] Finally, it does not comply with the quest for truth, which should be the principal imperative of a judicial process.[29]

Standard of the appellate review of the Trial Chamber's discretionary decision not to issue the requested subpoena

As put eloquently by Professor Bedjaoui, international courts' discretionary power is nothing other than the ability of international courts to take a decision freely but legally. Because of this freedom of choice, which should be based on legality, the discretionary power of international courts is closely related to judicial expediency.[30] Semantically, this freedom of appraisal is expressed by the use of the verb "may issue" in Rule 54 SCSL RPE. Procedural errors, however, may arise from the exercise of the Trial Chamber's discretionary power, thus providing grounds for appeal.

According to ICTY jurisprudence, where an appeal is brought from a discretionary decision of a Trial Chamber, the issue on appeal is whether the latter correctly exercised its discretion in reaching that decision.[31] Where the applicant can demonstrate that the Trial Chamber made a discernible error in the exercise of its discretion, the Appeals Chamber will intervene, correct the error, and then exercise and substitute its own discretion. Even if the Appeals Chamber would have reached a different conclusion exercising the same discretionary power, the impugned decision should still be upheld as long as it was reached without a discernible error.

Following ICTY case law, the SCSL Appeals Chamber averred that the impugned discretionary decision was not to be overturned unless there was a discernible error in the Trial Chamber's exercise of its discretionary power to issue subpoenas. The Appeals Chamber also affirmed that there is no right to an interlocutory appeal against a dissenting or concurring opinion. After establishing this standard for the appellate review, the Appeals Chamber upheld the Trial Chamber's Decision on the basic premise that, since the latter followed the ICTY jurisprudence on the interpretation of Rule 54, it cannot have made any discernible error. To solidify its position, the Appeals Chamber made reference to the ICTY case law, approving the Trial Chamber's choice to follow the ICTY's jurisdiction in favor of the principle of judicial consistency in international criminal law.

According to the Court, the key question is whether the effect that the subpoena will have is necessary for the Court to try the case fairly. While having as a reference the wording of Rule 54, the 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. Regarding the "necessity requirement", the Appeals Chamber agreed with the Trial Chamber that the applicant must establish both that the subpoena is a necessary measure, and that the information sought is necessary for the conduct of the trial.

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[28] "General Provisions: (...) a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. A Chamber may admit any relevant evidence." Rules of Procedure and Evidence of the Special Court for Sierra Leone, 07 March 2003, Rule 89.

[29] 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, *supra* note 5, par. 29.

[30] M. Bedjaoui, Expedience in the decisions of the International Court of Justice, 71 (1) The British Yearbook of International Law 2001, p. 3.

[31] "That is fundamental to any discretionary decision. It is only where an error in the exercise of the discretion has been demonstrated that the Appeals Chamber may substitute its own exercise of discretion in the place of the discretion exercised by the Trial Chamber"; ICTY, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, *Prosecutor v. Milošević*, Cases No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, A. Ch., 18 April 2002, Klip/ Sluiter, ALC-VIII-163, par. 4

Regarding the choice of the Trial Chamber to follow the ICTY approach instead of that of the ICTR, the Appeals Chamber determined that the Court does not commit an error of law when it decides to follow one line of jurisprudence over another or even when introducing a new ground of case law. Moreover, the Court's view is that the *ad hoc* Tribunals apply the same legal standard when interpreting the provisions on issuing subpoenas, although the Trial Chamber noted that the ICTR did not set the relevant legal standard as high as the ICTY. The syllogism behind this conclusion is that the ICTR practice is not consistent and depends on the particulars of each case. The same however, can be claimed for ICTY jurisprudence, as demonstrated above with the *Krstić* and *Blaškić* cases.

In his dissenting opinion, Judge Robertson, was of the view that the standard of the appellate review was different from the one applied by the Appeals Chamber. In his opinion, the Appeals Chamber was called to review four issues: a) whether the President is immune from any process; b) if he is not, whether his evidence is likely to be material; c) if it is material, what is the test for issuing a subpoena under Rule 54; and d) was that test correctly applied by the Trial Chamber?

In addition to these questions, the Appeals Chamber should have examined whether the Trial Chamber's exercise of its discretion has produced an unfair decision for a party throughout the trial. The dissenting Judge rejects the ICTY approach on the appeal review standard that, when an issue is merely a matter of discretion, it is consequently not subject to appeal. According to him, the Appeals Chamber should intervene, should it be satisfied that the Trial Chamber Decision has produced serious unfairness to either side, independent of whether the impugned Decision was discretionary or not. This conclusion seems more consistent with Rule 73(b), which stipulates that leave to appeal may be granted in order to avoid irreparable prejudice to a party of the trial.[32]

The legal standard of issuing subpoenas and the principle of equality of arms

By adding more requirements and burden on the side of the defendant to prove the necessity of issuing a subpoena, the Court's interpretation may also be considered as a compromise of the basic principle of equality of arms. Granted that the prosecution has the right to call any witness at its volition, this differentiation is especially problematic in the case of the SCSL, where the institutional position of the prosecution is quite distinguishable from that of the defence, leading to the prosecution's greater ability to access evidence and examine witnesses.[33] Moreover, Art. 14(3)(e) ICCPR provides the accused with the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", while the Human Rights Council (HRC) and the European Court of Human Rights (ECHR) have established that restricting the defence in its right to call witnesses may amount to inequality of arms.[34]

It is often very difficult for the defence to track down and convince witnesses to appear before the court and testify in favor of a suspected international criminal for a variety of reasons; witnesses' disinclination to be associated with accused war criminals, ongoing internal conflicts, public opinion, or simply narrowness of time and difficulties of accessing the *locus delicti*. This point was emphasized in the dissenting opinion in the Appeal Chamber decision, where Judge Robertson accentuated the hybrid nature of the SCSL which sits in the country where the crimes have been committed, in a situation where the subpoena refers to a witness who is available in the country.[35]

In the *Tadić* case, the ICTY Appeals Chamber recognized that the Court has a limited role to ensure the equality of arms if the disparity comes from external factors, such as the lack of state agents' cooperation.[36] The Tribunal noted, however, that the "equality of arms obligates a judicial body to ensure that neither party is put at disadvantage when presenting a case", and that "the Prosecution and the Defence must be equal before the Trial Chamber". More importantly, the ICTY Appeals Chamber stressed that, according to the

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32 Rule 73(B): "Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. (...)"; Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 May 2005.

33 J.T. Tuinstra, Defence Counsel in International Criminal Law, T.M.C. Asser Press, The Hague 2009, p.159.

34 *Ibid.*, p.171

35 SCSL, Dissenting Opinion of Hon. Justice Robertson on decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *supra* note 15, par. 8.

36 ICTY, Judgement, *Prosecutor v. Tadić*, Case No. IT-94-1-A, A. Ch., 15 July 1999, Klip/ Sluiter, ALC-III-761, par. 56.

ECHR, the principle of equality of arms is applicable to cases where the court prevented a party from securing the attendance of certain witnesses, when it had the power to grant it. The ICTY also explicitly determined that the question of the applicability of the principle of equality of arms is particularly raised when the judicial body had the power to grant the requested measure and ensure that neither party is put at a disadvantage when presenting its case.[37]

In the present case, the SCSL had the discretion to decide on the issue and the disparity, if any, did not stem from external factors (i.e. the state refusing to present documentary evidence), but rather was dependent on the Court to enhance or provide a remedy for it. Since the accused had less power to compel the attendance of witnesses than the prosecution, the Court should have remedied this disadvantage. Consequently, the ECHR standard for a full equality of arms in relation to witness testimony should have prompted the Appeals Chamber at least to consider that the accused is granted the same legal standing as the prosecution to compel certain witnesses to appear before the Court and to be examined by the defence. On the contrary, the Appeals Chamber adopted the view that a subpoena should be used sparingly and should not become a routine tool of trial tactics.[38]

The most interesting and simultaneously disconcerting element of the Appeals Chamber's decision was that the Court is to apply liberally the legal standards of Rule 54, especially in cases where the applicant had been unable to interview the witness. Following ICTY case law, which stipulated that the principle of equality of arms must be given a more liberal interpretation than that normally upheld in domestic proceedings in light of the lack of independent means of enforcement, the Appeals Chamber seems to overlook that the inherent purpose of a subpoena is to be issued when a witness had proved unwilling to appear before the Court and testify.

Defining this approach as "more liberal" has led to a theoretical confusion since it has also been considered to suggest an approach favorable to the defence.[39] In the ICTY *Tadić* case, the reasoning provided for this liberal interpretation of the principle of equality of arms was accompanied by the explicit instruction for the Court to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. In the present case, the SCSL Appeals Chamber used this liberal interpretation to avoid the issuance of a subpoena to an unwilling witness.[40]

The dissenting opinion in the Appeals Chamber decision was highly critical of the legal standard adopted by the SCSL Court. Judge Robertson follows the letter of the provision and declares that it does not set out any "requirements", nor does it say anything about the nature of the evidence to be elicited, but instead simply enables the Court to order the measure that will bring any valuable information before it. The Judge stated that the measure will be "necessary" under Rule 54, when the prospective witness has refused to attend or surrender documents. He rejects the complicated tests developed by the ICTY and ICTR, which are useful for evaluating the materiality of the evidence but are a far cry from the letter of the provision of Rule 54, and are not applicable to the Court's decision to grant a compulsory order to obtain the relevant evidence.

Judge Robertson considers these tests to be mere factors or commonsense considerations, not exhaustive requirements, relevant to deciding whether the evidence sought is likely to be material. He relativizes the value of the "Last Resort" requirement in favor of the interests of the defence: the subpoena would end up being "unnecessary" under Rule 54 if the unwillingness of a witness could be overcome in other ways or if the same evidence would be available by other means. Finally, the dissenting Judge is critical of the conclusion reached by the Court, that compulsory measures should be used sparingly by international courts. Nothing in Rule 54 dictates such an approach, and subpoenas should be used whenever it is necessary for the Court to obtain evidence and secure a fair trial.

Whether a *subpoena ad testificandum* can be issued to an incumbent Head of State

This issue essentially divided the Trial Chamber. Judge Thompson forcefully rejected the position that President Kabbah was immune, while Judge Itoe expressed a rather fervent opinion that the President was above any court or legal process. The prosecution argued that it is unnecessary for the Trial Chamber to

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37 *Ibid.*, par. 48-49.

38 ICTY, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *Prosecutor v. Norman, Fofana and Kondewa*, Case No. SCSL-2004-14-T, A. Ch., 11 September 2006, par. 29.

39 J.T. Tuinstra, Defence Counsel in International Criminal Law, *supra* note 33, p.176.

40 ICTY, Judgement, *Prosecutor v. Tadić*, *supra* note 36, par. 52.

decide as to whether the President of Sierra Leone can claim any privilege in relation to a subpoena, as it should remain an open question for the Court. The defence contended that the Court should not refrain from issuing a subpoena to President Kabbah for a number of reasons: neither the laws of Sierra Leone, nor international law, accord the President immunity from judicial processes before the SCSL; the President is obliged to abide by the international agreement establishing the SCSL, including being called to testify as a witness before it; in case the President refuses to appear before the Court as a witness, he can be punished for contempt of court, according to the mechanism outlined in Rule 77(A)(iii) and (C).[41] Finally, the President is subject to Rule 8(B) which stipulates that, when the Government of Sierra Leone has failed to comply with a request made before the Chamber, the President of the Court has the right to take appropriate action.[42]

Conversely, the Attorney-General argued that the President cannot be subpoenaed because of Sierra Leone's Constitution, which prohibits a judicial penalty from being imposed on the Head of State. In very eloquent but fragile argumentation, he clarified his position, stating that, even if the Chamber may have the power to issue such an order, that order would be practically impossible to be enforced on the President.

Following the prosecution's submissions, the Trial Chamber abstained from ruling on the issue of whether the President is immune from judicial processes. The majority held that the defence's failure to satisfy the criteria of Rule 54 was a sufficient basis to dispose of the application for the issuance of a subpoena on those grounds alone. A historic opportunity was thereby missed by the Chamber to pave its own way in clarifying the relevant rules on immunities of Heads of States and take a bold step towards a progressive interpretation of Rule 54. However, the Trial Chamber seemed to accept the possibility of President Kabba's testifying before the Court at the sentencing stage when it declared that, if the defendant was following the President's orders, this fact would have to be taken into consideration during the sentencing process. In other words, the Trial Chamber says that the evidence that the President may provide will be relevant to the determination of an appropriate sentence, but not for the purposes of this trial.

The Appeals Chamber refrained from adjudicating on this issue, because it found that the operative part of the impugned decision did not address it. The Appeals Chamber limited the scope of the appellate standard to only reviewing whether the impugned decision followed the test for the issuance of a subpoena. Since the applications failed on their merits, no issue arose as to whether the status of the prospective witness as Head of State would have given him immunity.

However, in his separate concurring opinion, Judge Itoe commented on this issue and attempted to place these motions in their proper historical context. He adopted a relativistic approach by accentuating the special circumstances that led to the creation of the SCSL, after delicate diplomatic and political negotiations between the President and the United Nations. The Judge invoked the status of the proposed witness and concluded that the President of Sierra Leone belonged to a different regime of immunities, including the immunity to subpoenas, without clarifying this statement or stating why it is so. Since the Constitution grants immunity to Members of Parliament and civil servants who serve at lower positions than the President, then there is no reason to exclude the President from this type of immunities. The relevant articles of the Constitution provide immunity only for Parliamentarians, while the status of the President is distinguished.

Nonetheless, the Judge dismissed the literal interpretation of the Constitution and called for the application of the Absurdity Rule principle, so as to avail the President of immunity from processes which the lower ranks of public servants enjoy. This position, however, is opposed to the ICTY jurisprudence in the *Krstić* case, where the Tribunal averred that no functional immunity exists for state officials to *subpoenas ad testificandum*. In this regard, the concurring Judge noted that the *Krstić* case was not definitive on this issue, leaving room for such an immunity to apply for different categories of state officials.[43]

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41 Rule 77(A): "Contempt of the Special Court: (A) The Special Court, in the exercise of its inherent power, may punish for contempt any person knowingly and willfully interferes with its administration of justice, (...)"; Rules of Procedure and Evidence of the Special Court for Sierra Leone, 14 May 2003.

42 "...where a Chamber or a Judge is satisfied that the Government of Sierra Leone has failed to comply with a request made in relation to any proceedings before that Chamber of Judge, the Chamber of Judge may refer the matter to the President to take appropriate action";' Rules of Procedure and Evidence of the Special Court for Sierra Leone, 1 August 2003, Rule 8(B).

43 SCSL, 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, *supra* note 2, par.120-121.

The nature of the Special Court of Sierra Leone and the issuance of a subpoena to the President

Most importantly, the concurring separate opinion highlights the political nature of the establishment of the Court as a factor to be considered in order to ascertain whether a subpoena should be issued to the President. The creation of SCSL was the result of a political agreement between the United Nations and the Government of Sierra Leone. This agreement was based on elements that cannot be the object of adjudication and cannot be disclosed before the Court. What the Judge is really saying is that, since the President was the one who expressed the state's consent for the creation of the Court, he is essentially above it. This position however, sets the very legal foundations of the Court at stake, as it places more value on the protection of the President because of his role during the course of the creation of the Court, than the need to ascertain the truth and render justice.

Furthermore, the concurring opinion stresses the important political role of a Head of State as a symbol of democracy, and evokes the constitutional doctrine of separation of powers. Based on this principle, the Judge argued that if the Court issues a subpoena to the President, the principle of separation of powers would be violated, with the Judiciary interfering with the Executive organs. The concurring opinion invokes international customary law to support this argument. According to the Judge, resort to domestic legal orders is necessary, as the International Court of Justice (ICJ) in the *Yerodia* case did not resolve the issue as to whether the immunity of Head of States extends to immunity from subpoenas.

The Judge referred to the French 'Cour de Cassation' decision, which upheld President Chirac's immunity against the issuance of a subpoena to him, regarding that decision an indicator of an international customary rule. However, the ICJ in the *Yerodia* case held that immunities enjoyed by an incumbent (or former) Minister for Foreign Affairs do not represent a bar to criminal prosecution before certain international criminal courts. Furthermore, the Supreme Court in France upheld the immunity from prosecution of the President on national level and did not refer to international courts. Finally, as the SCSL Appeals Chamber determined in the *Taylor* case, Head of State immunity is not relevant to an international tribunal, which derives its authority from the international community.

Judge Itoe's final argument refers to the definition and nature of a subpoena that may lead to a criminal sanction if the President were not to comply. As Art. 48 of the Sierra Leone Constitution precludes any criminal or civil action against the President of the country, the issuance of a subpoena would be an "exercise in futility". The Court does not dispose its own police to enforce its orders, and the Inspector-General, having himself been appointed by the President, would encounter both legal and personal reasons not to proceed with the arrest. Appealing to the common law doctrine of "Equity does not act in vain", the Judge cites case law from the House of Lords to support his argument.[44]

This argumentation may make sense on a domestic level and in a common law system. However, connecting the delivery of international criminal justice with the enforceability of a decision, is at its best of questionable legal value and at worst dangerous. As dissenting Judge Robertson put it bluntly, the SCSL is not an equity court, but an international criminal court that should ensure a fair trial. It is inappropriate to resort to the doctrine "Equity does not act in vain" in proceedings before international criminal tribunals. This conclusion rests on two grounds. First, as the ICTY Appeals Chamber emphasized in the *Blaškić* case, "domestic judicial views or approaches should be handled with the greatest caution at the international level", given the unique characteristics of international criminal proceedings and the overriding values of the international criminal justice.

Secondly, if international criminal courts were to accept the merits of this doctrine, its application would lead to results that would negate the delivery of international criminal justice. Legal rules exist independently of their employability or their violation. As Professor Bedjaoui has pointed out, there should be no room for expediency in the jurisprudence of an international court. Whether or not a subpoena can be enforced should

[44] Reference could also be made to the *Delalic* case, where the Trial Chamber stated that it does not, and should not, do anything in vain, where there are supervening logistical obstacles that will render such an effort to issue a subpoena an impossible task to accomplish. However, in that case, the defence had given a list of 54 unnamed witnesses who were not residing in The Hague and had to travel there. ICTY, Decision on the alternative request for renewed consideration of Delalic's motion for an adjournment until 22 June or request for issue of subpoenas to individuals and requests for assistance to the government of Bosnia and Herzegovina, *Prosecutor v. Delalić, et al.*, Case No: IT-96-21, T. Ch. II, 22 June 1998, par. 50.

not become a legal criterion for its issuance. Otherwise, international courts and *a fortiori* international criminal courts would promote judicial expediency over the pursuit of truth and justice.

This point was also rebutted by dissenting Judge Thompson, who characterized this approach as unprincipled and inconsistent with the principle of legality. He underlined the broad scope of Rule 54, which encompasses the authority of the Court to issue a subpoena directed to any person in Sierra Leone, independently of his status. He referred to the Sierra Leone Supreme Court's jurisprudence, which affirmed that, under international law, no *a priori* entitlement exists for a serving Head of State to claim immunity from criminal process in relation to international crimes before an international court. The Judge invokes the Special Court Agreement (2002) Ratification Act, which in Section 29 stipulates that the existence of an immunity attached to the official capacity of any person shall not be a bar to his prosecution by the Special Court. In his opinion, since the President cannot claim immunity from prosecution before the Special Court, *a fortiori* he cannot claim immunity from subpoenas either.

Under the existing state of international law, there is a legal distinction between international criminal courts and national courts regarding the functional immunity of state officers from subpoenas. This distinction results from the modernization of international law after the promulgation of the Nuremberg Principles, which no longer accentuates the absolute sovereignty of states over international criminal courts.[45]

Indeed, the concurring opinion conflated the possible political outcomes of a judicial decision with the legal consequences that derive from legal rules. The legal issue of whether a President enjoys immunity from *subpoenas ad testificandum* is not relevant to the possible political outcome the subpoena would have. Nor does it depend upon the construction of a hypothesis of what will happen if the prospective witness refuses to comply with the Court's order.

Secondly, the international agreement that the President signed as the Head of State is part of international law. Although Sierra Leone's Constitution does not contain an express provision on the legal status of international treaties, it does impose on the President the obligation to ensure respect for treaties and international agreements.[46] As highlighted by the dissenting Appeals Judge, the concurring opinion's approach on "sovereign immunity" would render any further research into the defendants' motions useless, since the Court would breach the President's absolute immunity upon entering into such a discussion.[47]

Interestingly, the concurring Judge invokes the reliance of the Court on domestic law to support his arguments, while the dissenting Judge emphasizes the international character of the Court to solidify his position. The SCSL is not fully attached to either the United Nations or the Sierra Leone's constitutional systems. The SCSL itself in the *Taylor* case determined its precise legal nature as a truly international criminal court.[48] Consequently, the SCSL Appeals Chamber held that Taylor's official position as Head of State did not constitute a bar to his prosecution.[49] Perhaps Art. 6(2) SCSL Statute provides the proper answer to this issue.[50]

If the rule of law stipulates that the official position of any accused persons shall not relieve such person of criminal responsibility nor mitigate punishment, then there is no immunity claim that would preclude the SCSL from issuing a subpoena to the President. As established in the *Taylor* case, Art. 6(2) is not in conflict with any peremptory norm of general international law, and its provision should be given effect by the SCSL. According to the latter, the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal.[51]

45 A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell and A. Whiting, Cassese's International Criminal Law, Oxford U.P., Oxford, 2013, p. 245.

46 Article 40(3) SCSL Statute: "Chapter V: The Executive Part I: The President: The President shall be the guardian of the Constitution and the guarantor of national independence and territorial integrity, and shall ensure respect for treaties and international agreements".

47 SCSL, Dissenting Opinion of Hon. Justice Robertson on decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *supra* note 15, par. 18.

48 SCSL, Decision on Immunity from Jurisdiction, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, A. Ch., 31 May 2004, Klip/Sluiter, ALC-IX-187, par. 38.

49 *Ibid.*, par. 53.

50 Article 6(2) SCSL Statute: "The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."

51 SCSL, Decision on Immunity from Prosecution, *supra* note 48, par. 53.

In this case, should the Court have concluded otherwise, it would have been in contradiction not only with international law, as reiterated in the ICJ *Yerodia* case, but also with its own case law. Instead, the Court dismissed the defendants' motions on the grounds of the irrelevance of the evidence sought to be presented by the prospective witness, thereby avoiding the disconcerting position of taking a legal position on the issue of whether President Kabbah, a leading figure in the establishment of the Court, enjoyed immunity from injunctions such as subpoenas.

The element of "bearing the greatest responsibility"

Unlike the *ad hoc* Tribunals, the class of accused persons to be tried by the SCSL is defined in its Statute. Article 1 stipulates that the Special Court has the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law, including those leaders who threatened the establishment and implementation of the peace process in Sierra Leone.[52] The element of 'bearing the greatest responsibility' raises a number of interesting legal questions, identified in the dissenting opinion on the Appeal Chamber Decision. Is it a defense argument, a jurisdictional bar that can avail a defendant, or does it merely limit prosecutorial selection of the class of persons to be tried in the SCSL?[53]

The defence used this element to argue that the defendant was excluded by that category of persons, since he did not bear the greatest responsibility for the crimes committed during the fighting in Sierra Leone. The Trial Chamber determined that this does not constitute an element of the crimes prosecuted at the SCSL, but an evidentiary matter to be determined at the trial stage. However, in his dissenting opinion, Judge Robertson sustained that it is for the Court to determine whether a defendant has legitimate grounds to argue that he bears lesser rather than greater responsibility for a war crime under the SCSL Statute. The determination is important because, if this element refers to the defendant's individual criminal responsibility, then it will have an impact on the relevance of the evidence that the President could provide, rendering the subpoena necessary for the conduct of the trial.

As the ICC Statute has specified in Art. 33, the defence of superior orders can never be a defence for charges of genocide and crimes against humanity, but it may be a defence against charges for war crimes under certain conditions.[54] If, however, the question of who bears the greatest responsibility is an element to be taken into consideration by the prosecution when initiating an investigation, then it merely affects the class of people to be tried by the SCSL.

The issue remained open in this case, as neither the Court, nor the dissenting Judge, who raised the question, took a legal position on the issue. Moreover, as Professor Bassiouni noticed, the various SCSL Trial Chamber interpreted the concept of "bearing the greatest responsibility" differently, which led to different understandings of jurisdictional limitations and prosecutorial discretion, since this standard was not defined clearly in the Statute.[55]

The position of the SCSL regarding its relationship to the *ad hoc* international criminal Tribunals

The Appeals Chamber took the stance that the Trial Chamber was right in choosing to apply the legal standard set by the ICTY and ICTR jurisprudence. Interestingly, it elucidated that it is a matter of judicial prudency for the SCSL to consider the relevant jurisprudence of other international criminal tribunals. It was right to distinguish between the obligation and the discretionary power of the SCSL to follow other international criminal case law, dismissing the prosecution's submission that the SCSL was under the

[52] 'Article 1 SCSL Statute: "Competence of the Special Court: 1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."

[53] SCSL, Dissenting Opinion of Hon. Justice Robertson on decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, *supra* note 15, par. 33.

[54] "Article 33 ICC Statute: Superior orders and prescription of law 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

[55] C. Bassiouni, Introduction to International Criminal Law: second revised edition, Martinus Nijhoff Publishers, Leiden 2013, p. 752.

obligation to follow the jurisprudence of the ICTY and ICTR. The Appeals Chamber determined, rightfully, that the decision to follow or not to follow the jurisprudence of another tribunal does not constitute an error of law, since the SCSL is solely encouraged to be guided by the jurisprudence of other tribunals. Moreover, while stating the importance of developing judicial coherence between the international criminal tribunals' jurisprudence, the Appeals Chamber emphasized the hybrid nature and special character of the SCSL.

Concluding remarks

The language used in Rule 54 is undeniably wide. The provision provides the Court with a general power to issue subpoenas at its discretion. It is somewhat odd to consider that the term "subpoenas" was added in the ICTY RPE for the purpose of "clarifying the rules".[56] The ICTY and ICTR jurisprudence reveal that, despite the broad power granted to the Court, the issue of whether the international tribunal has the power to issue a subpoena depends on the nature of each case. Accordingly, in the *Blaškić* case, the ICTY limited its power to issue subpoenas to persons acting in private capacity, and excluded state officials from being subpoenaed to produce state documents. The ICTY however, highlighted that the category of private individuals encompasses State agents who witnessed a crime or possessed evidentiary material of relevance before they took office.

In the *Krstić* case, the power of the Court to issue *subpoenas ad testificandum* was reaffirmed, even for state officials, but after adding additional elements to the legal standard of Rule 54. In the present case, the SCSL repeated the tests applied by the ICTY, without entering into a discussion on the functional immunity of state officials from subpoenas. The ICTR had rarer occasions to deal with subpoena requests, but, even then, difficult questions arose regarding immunities of state officials and agents of international organizations.[57]

In this sense, the decisions in this commentary contribute to the development of international criminal law by applying the principle of judicial coherence between the case law of international criminal tribunals. Both the Trial and Appeals Chambers supported their findings by referencing the ICTY and ICTR jurisprudence and stressing the importance of letting other international criminal tribunals guide their interpretation of the relevant rules.

The historical context of the creation of the SCSL had a huge impact on the adjudication of this case. This has been put forward by the concurring Judge when deciding whether the President is subject to a judicial penalty or not. President Kabbah, himself, requested that the Security Council establish a "strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace" in Sierra Leone.[58] Much emphasis was placed on the importance of the Court's mandate, in the context of its role to first ascertain the truth of the events and, secondly, to contribute to the transitional justice and stability of the country.

This mandate was used accordingly by both sides: the concurring Judge invoked the preservation of peace as a reason not to issue a subpoena to the President, while the dissenting Judge emphasised the need to ascertain the truth. Thus, the decisions and opinions annotated by this commentary reflect a typical problem that international criminal tribunals face with regards to gathering criminal evidence; how to deliver justice by ascertaining the truth in a limited framework in terms of timeframe and resources, while respecting the requirements for a fair trial and the fundamental rights of the accused.[59]

It is always useful to bear in mind, when commenting on decisions of international courts, that their judicial function is closely intertwined not only with dispensing legal certainty but also with promoting the process of peacemaking. The Letter that President Kabbah submitted to the Security Council, and which initiated the whole process of establishing the SCSL, is a very strong indication of this truth:[60]

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[56] Rule 54 was amended at the fifth session in January 1995. See J.R.W.D. Jones and S. Powles, International Criminal Practice, Oxford U.P., Oxford 2003, p. 538.

[57] G. Sluiter, The ICTR and the Protection of Witnesses, 3 Journal of International Criminal Justice 2005, p. 966.

[58] F. Donlon, Hybrid Tribunals in W. Schabas and N. Bernaz (eds.), Routledge Handbook of International Criminal Law, Routledge, Oxon 2011, p. 92.

[59] Klip/Sluiter, ALC-XVIII-177.

[60] Letter from the Permanent Representative of Sierra Leone to the President of the United Nations Security Council, 9 August 2000, UN Doc. S/2000/786.

> On behalf of the Government and people of the Republic of Sierra Leone, I write to request you to initiate a process whereby the United Nations would resolve on the setting up of a special court for Sierra Leone. The purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages. This necessitates the establishment of a strong court in order to bring and maintain peace and security in Sierra Leone and the West African sub region. For this purpose, I request assistance from the United Nations Security Council in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace. To achieve this, a quick response from the Secretary-General and the Security Council is necessary.
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> Alhaji Ahmad Tejan Kabbah
>
> President of the Republic of Sierra Leone

Maria Pichou