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Between Pragmatism and Normativity: Legal Standards for Issuing Subpoenas and Witnesses Summons in International Criminal Procedure

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Abstract:	The article systematizes the legal standards of the ad hoc international criminal tribunals on subpoenas' requests and reviews the International Criminal Court stance on the nature of witness summonses. It then proceeds to examine the courts' power in the light of the fair trial standard. The issue of the immunities of Heads of State and State officials from subpoenas and witness summonses is also explored. The analysis 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 witness and the court's mandate. The International Criminal Court iterated that the power to compel witnesses to appear to testify and to produce documents constitutes a customary rule of international criminal procedural law. The article maps the content of this rule.
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4 **Between Pragmatism and Normativity: Legal Standards for Issuing Subpoenas and**
5 **Witnesses Summons in International Criminal Procedure**
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11 **Abstract**
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14 The article analyses the criteria that the international criminal tribunals have developed when
15 exercising their discretion to obtain additional evidence through witness testimony. It systemizes
16 the elaborate legal standards of the ad hoc international criminal tribunals on subpoenas' requests
17 and reviews the International Criminal Court stance on the nature of witness summonses. After
18 defining the specific types of subpoenas and the legal implications that the distinctions entail, the
19 article analyses the different tests applied by the courts. It then proceeds to examine the courts'
20 discretionary power in the light of the fair trial standard and examines the appellate standard for
21 such discretionary decisions. The issue of the immunities of Heads of State and State officials
22 from subpoenas and witness summonses is also explored. The analysis shows that when the
23 tribunal had to adjudicate a request to compel a witness to appear, it adapted the relevant legal
24 standard by taking into consideration the type and the object of the subpoena, the prospective
25 witness and the court's role and mandate. The International Criminal Court iterated that the
26 power of international criminal courts to compel witnesses to appear to testify and to produce
27 documents constitutes a customary rule of international criminal procedural law. The article
28 essentially maps the content of this customary international procedural rule.
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53 **Keywords:** Subpoenas, Witness summons, Equality of arms, Fair Trial Standard, Immunity from
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7 **1 Introduction**
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11 A typical problem that international criminal tribunals have faced regarding criminal
12 evidence is how to deliver justice and ascertain the truth with limited resources, time and
13 mandate, while respecting the normative requirements for a fair trial, the fundamental rights of
14 the accused and the underlying pragmatic objective of peace. International criminal courts are
15 often called to take into consideration the normative implications that a case may have for the
16 interpretation and the development of international criminal law and the pragmatic effects that
17 the historical context and the objective of the peace process bear on the litigation of the case.
18 This pull between pragmatism and normativity is tangible in international criminal justice. The
19 case law developed by the ad hoc international criminal tribunals on granting requests for
20 subpoenas puts forth this problem, which is intertwined with the role of these international
21 criminal tribunals. The latter are called to respect the normative rules established for ascertaining
22 the truth and delivering justice fairly but also consider the pragmatic objective of the court's
23 mandate and of the peace process.
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25 The article looks at the discretionary power of the international criminal tribunals and of
26 the International Criminal Court to order and obtain additional evidence, specifically through
27 subpoenas orders and witness summonses respectively. The article begins by reviewing the
28 scope and the application of the relevant Rule of Procedure and Evidence. After establishing the
29 legal definition and the types of subpoenas, the article reviews and systemises the legal standards
30 developed by the International Criminal Tribunal for the former Yugoslavia (ICTY), the
31 International Criminal Tribunal for Rwanda (ICTR) and the Special Court of Sierra Leone
32 (SCSL). In this regard, the issue of the immunities of State officials from subpoenas is explored.
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4 The article then proceeds to examine whether the legal standards developed by these courts may
5 challenge at times the principle of procedural fairness. The hypothesis is whether, by adapting
6 the criteria for granting subpoenas and by adding more requirements and burden on the side of
7 the defendant to prove the necessity of an order, the international courts' interpretation of the
8 relevant rule may compromise the principle of equality of arms.
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16 As procedural errors may arise from the exercise of the courts' discretion, the appellate
17 standard for such discretionary decisions is also considered in this paper. The analysis shows that
18 when the tribunal had to adjudicate a subpoena request, it adapted the relevant legal standard by
19 taking into consideration the type and the object of the subpoena, the prospective witness and the
20 court's role and mandate. The exercise of the courts' discretion reveals their distinctive judicial
21 function in international criminal law. The latter is closely intertwined not only with ascertaining
22 the truth and upholding legal certainty, but also with promoting the process of peacemaking. This
23 issue illustrates the tension between pragmatism and normativity faced by international criminal
24 tribunals, as they have considered each request for subpoena, their mandate and the pragmatic
25 objective of the peace process. This tension, however, between adjudicating specific cases,
26 rendering justice and promoting peace is compatible with setting sound general rules in
27 international criminal procedural law. This article contributes to the clarification of the
28 procedural rule on issuing subpoenas and witness summons in international criminal justice.
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50 2 Ordering the Appearance of Witnesses in International Criminal Law 51 52 53 54

55 The different mechanisms through which the ad hoc international criminal tribunals may
56 obtain additional evidence are laid down in their Rules of Procedure and Evidence (RPE), and
57 specifically, in common Rule 54 of the ICTY and ICTR RPE. According to the wording of this
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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, it is the Rome Statute in Article 64 (6) (b) that provides the court with the discretion to issue a witness summons, in order to order the attendance and testimony of a witness ‘as necessary’. The term ‘subpoena’ has thus given way to the term ‘witness summons’ when the time came to establish the International Criminal Court. The definition of these terms had substantive legal implications on the interpretation of the relevant rule.

2.1 Subpoenas and Witness Summons

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:¹

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 this term consisted in whether a subpoena should be understood as an injunction, which issued by the court 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

¹ Rule 54 ICTY RPE, Rule 54 ICTR RPE, Rule 54 SCSL RPE.

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4 connotation of the equivalent word ‘assignation’ in French, which initially appeared in the
5 French text of the Rule 54 of the ICTY RPE.
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9 It was in *Blaškić* case, when the ICTY Appeals Chamber grappled with the question of the
10 validity of a *subpoena duces tecum* against the Republic of Croatia and its Defence Minister, that
11 the legal meaning of the term ‘subpoena’ was disambiguated. While the ICTY Trial Chamber
12 had previously considered the matter ‘as pertaining more to nomenclature than to substance’, the
13 Appeals Chamber asserted that the interpretation of the term has substantive legal
14 consequences.² The ICTY Appeals Chamber sided with the first interpretation of the term,
15 upholding that subpoenas refer to compulsory orders, which entail a possible imposition of a
16 penalty, should they be disobeyed. The court based its decision on the general principle of
17 effectiveness and determined that the use of the word ‘subpoena’ in the RPE should be given a
18 different meaning than ‘orders’ and ‘requests’, otherwise it would be redundant.³
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21 This conclusion adopted by the ICTY in the *Blaškić* case indicated the path to be followed
22 by both the ICTR and the SCSL, when ascertaining that subpoenas refer only to injunctions by
23 the court accompanied by threat of penalty. Interestingly, after the *Blaškić* judgment, the French
24 text of the ICTY RPE was amended and the word ‘assignations’ was altered into ‘ordonnances
25 de production ou de comparution forcées’, in order to reflect and be consistent with the ICTY
26 Appeals Chamber’s interpretation of the term.⁴ However, the term ‘assignations’ still appears in
27 the French text of the ICTR RPE.
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56 ² ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18
57 July 1997, *Blaškić* (IT-95-14), Appeals Chamber, 29 October 1997, § 20.

58 ³ ICTY, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18
59 July 1997, *Blaškić* (IT-95-14), Appeals Chamber, 29 October 1997, § 21.

60 ⁴ See the difference between the 10th and the 11th version of the French text of the ICTY RPE.
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4 Although the term ‘subpoena’ does not appear in the ICC Statute, the ICC adopted a
5 similar stance regarding the power of the court to compel the appearance of witnesses.⁵
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7 Specifically, Article 64 (6) (b) ICC Statute provides the ICC Trial Chamber with the
8 discretionary power to require the attendance and testimony of witnesses and production of
9 documents.
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19 In performing its functions prior to trial or during the course of a trial, the Trial Chamber
20 may, as necessary: (...) b) require the attendance and testimony of witnesses and
21 production of documents and other evidence by obtaining, if necessary, the assistance of
22 States as provided in this Statute;

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30 When seized with the issue of interpreting this provision, the ICC Trial Chamber resorted
31 to the theory of implied powers and determined that ‘it is also a matter of customary international
32 criminal procedural law that a Trial Chamber of an international criminal court has traditionally
33 been given the power to subpoena the attendance of witnesses’.⁶ The power of the International
34 Criminal Court to require the attendance of witnesses was considered by the Trial Chamber
35 ‘equal’ to its power to order or subpoena the appearance of witnesses as a compulsory measure.⁷
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45 When the issue arrived at the ICC Appeals Chamber, the latter confirmed the court’s power to
46 compel the appearance of witnesses, thereby creating a legal obligation for the individual
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53 ⁵ Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber
54 V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting
55 Request for State Party Cooperation’, *Situation in the Republic of Kenya* (ICC-01/09-01/11 OA 7 OA 8), Appeals
56 Chamber, 9 October 2014.

57 ⁶ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’,
58 *Situation in the Republic of Kenya* (ICC-01/09-01/11-11274-Corr2), Trial Chamber V (A), 17 April 2014, §§74, 88.

59 ⁷ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation’,
60 *Situation in the Republic of Kenya* (ICC-01/09-01/11-11274-Corr2), Trial Chamber V (A), 17 April 2014, § 100.

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4 concerned.⁸ However, the Appeals Chamber adopted this position by relying only on the letter
5 of the provision, rather on customary law. The court also clarified that states parties to the ICC
6 are under an obligation to provide assistance in compelling the prospective witnesses to appear
7 before the court.
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14 This case law is important as it overturns the so called ‘principle of voluntary appearance’
15 of witnesses, which was initially argued to be applicable at the ICC, presumably based on
16 Articles 93 (1) (e), 93(7), the travaux préparatoires and the opinions of academic commentators.⁹
17 Therefore, although the term subpoena, as such, is absent from the ICC Statute, the ICC
18 reiterated its power to compel the appearance of witnesses through the issuance of witness
19 summonses, the latter ending up being synonymous with subpoenas.
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28 The nature of the penalty which is imposed should a prospective witness disobeys a subpoena
29 was also a matter of dispute before the ad hoc tribunals. Regarding the ICTY, according to Rule
30 77 RPE, judges can initiate proceeding for contempt of court. This rule expresses the inherent
31 power of the tribunal to hold in contempt those who knowingly and willfully interfere with its
32 administration of power.¹⁰ This inherent power was confirmed, among others in the *Delalic*, in
33 the *Tadic* and in the *Simic* cases, as deriving from the court’s judicial function. Similarly, Rule
34 77 of the ICTR RPE provides the court with the power to impose sanctions for contempt. In the
35 *Ngirabatware* case, the ICTR, by referencing the ICTY case law on contempt cases, considered
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48 ⁸ Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber
49 V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting
50 Request for State Party Cooperation’, Situation in the Republic of Kenya (ICC-01/09-01/11 OA 7 OA 8), Appeals
51 Chamber, 9 October 2014, §107.

52 ⁹ During the Rome Conference, the power of the Trial Chamber to order the production of evidence was a subject of
53 controversy between the common law countries and France. G. Bitti, ‘Article 64’ in O. Triffterer and K. Ambos
54 (eds.), *Rome Statute of the International Criminal Court, A Commentary* (3rd edn., C.H.Beck, Hart, Nomos, 2016)
55 p. 1591. See also A. Chaumette, ‘The ICTY’s Power to Subpoena Individuals, to Issue Binding Orders to
56 International Organisations and to Subpoena Their Agents’, 4 International Criminal Law Review (2004) 357- 429,
57 p. 357. G. Sluiter, ““ I beg you, please come testify”-The Problematic Absence of Subpoena Powers at the ICC”, 12
58 New Criminal Law Review (2009) 590-608.

59 ¹⁰ S. Ntube Ngane, *The position of Witnesses before the International Criminal Court* (Leiden, Boston: Brill Nijhoff,
60 2015).

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4 that the same legal standard is applied for both tribunals, since Rule 77 is identical: a *prima facie*
5 evidence of contempt is sufficient for a case of contempt to be initiated.¹¹ The SCSL judges also
6 affirmed the ICTY case law that the inherent power of the court to deal with contempt ensues
7 from its judicial function, regardless of the specific terms of Rule 77 RPE.¹² Finally, the ICC
8 asserted that a witness, who disregards a summons to appear before the court, risks at most a
9 misconduct and certainly, he does not run the risk of being prosecuted for having committed a
10 crime.¹³
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2.2 Immunity of State officials from subpoenas

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28 Although Rule 54 RPE does not provide any distinction, the case law of the ad hoc
29 tribunals discerned two different forms of subpoenas: *subpoenas ad testificandum* and *subpoenas*
30 *duces tecum*. Both terms refer to injunctions issued by the court aiming to have additional
31 evidence produced before it: the *subpoena ad testificandum* through the appearance and
32 examination of a witness before the court, the *subpoena duces tecum* through the provision and
33 presentation of documents. This distinction does not only refer to the conceptual difference of
34 the two terms but also bears legal consequences as to the determination of the persons who may
35 be subpoenaed. Therefore, the distinction between the different forms of subpoenas is as crucial
36 as the legal definition of the term as such.
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54 ¹¹ S. Ntube Ngane, *The position of Witnesses before the International Criminal Court* (Leiden, Boston: Brill Nijhoff,
55 2015) at 182.
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57 ¹² Margaret Brima Contempt Judgment, paras 9-11.
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59 ¹³ Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber
60 V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting
61 Request for State Party Cooperation', Situation in the Republic of Kenya (ICC-01/09-01/11 OA 7 OA 8), Appeals
62 Chamber, 9 October 2014, § 109.
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4 Again in the *Blaškić* case, the ICTY Appeals Chamber determined that the term ‘subpoena’
5 could not be applied or issued against States or State officials acting in their official capacity.
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7 The rationale was that the ad hoc international tribunal did not possess the power to take
8 enforcement measures against states.¹⁴ The court determined that a subpoena *duces tecum* may
9 be issued to State officials only if they gained the sought document in their private capacity.¹⁵
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11 Consequently, the Appeals Chamber quashed the request for a subpoena *duces tecum* against
12 Croatia and its Minister of Defence. Only ‘binding orders’ and ‘requests’ for the production of
13 documents were found to be relevant with regard to States and States officials, and not
14 subpoenas. Following this judgment, a new Rule was subsequently added in the ICTY RPE
15 under the title: ‘Orders Directed to States for the Production of Documents’. This new Rule 54
16 *bis* came as a response to the *Blaškić* judgment and it lays down in detail the conditions under
17 which the court may order a State or a State official to produce documents and information.
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20 According to this landmark judgment, functional immunity bars the issuance of a subpoena
21 *duces tecum* against a State official. However, such functional immunity of State officials does
22 not exist for subpoenas *ad testificandum*. Six years after the *Blaškić* judgment, in the *Krstić* case
23 the ICTY Appeals Chamber determined that State officials may be compelled to appear as
24 witnesses before the court to give evidence of what they saw or heard even in the course of
25 exercising their official functions.¹⁶ The tribunal, however, noted that the tribunal’s power to
26 issue a subpoena *ad testificandum* to a State official does not leave states’ national security
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¹⁴ ICTY, 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.

¹⁵ ICTY, 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, § 49.

¹⁶ ICTY, Decision on application for subpoenas, *Krstić* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 27. See contrary the Dissenting Opinion of Judge Shahabuddeen, who argued that although the *Blaškić* case dealt with documents, its reasoning should also be applicable for subpoenas *ad testificandum*. Dissenting Opinion of Judge Shahabuddeen on the ICTY, Decision on application for subpoenas, *Krstić* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 4.

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4 interests unprotected. The tribunal explicitly stated that a State official may decline to answer on
5 grounds of confidentiality, were he to be asked questions related to national security.¹⁷
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7 Therefore, according to the ICTY case law, the court may issue subpoenas when there is a
8 request for a State official's testimony (subpoena *ad testificandum*), but it may not when there is
9 a request for a State official to provide documents (subpoena *duces tecum*) if these came into his
10 possession when acting in official capacity.

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12 The functional immunity of incumbent State officials was also raised before the SCSL in
13 the Fofana and Norman case, when the defendants filed a request to subpoena to bring the then
14 President of the country to testify.¹⁸ The SCSL Trial Chamber rejected the request, without
15 addressing this issue of the immunity of the President of Sierra Leone. Although the request
16 offered a historic opportunity for a legal stand to be taken on this matter by the SCSL, neither the
17 SCSL Appeals Chamber addressed the issue. However, the Trial Chamber seemed to accept the
18 possibility of Heads of State testifying before the Court at the sentencing stage. Specifically, the
19 Trial Chamber declared that if the court established that the defendant was following the
20 President's orders, this fact would have to be taken into consideration during sentencing. In other
21 words, the Trial Chamber stated that the evidence that the President may provide would be
22 relevant to the determination of an appropriate sentence but not for the purposes of the trial to
23 grant the request for a subpoena. The SCSL Appeals Chamber refrained from adjudicating this
24 issue and limited the scope of the appellate standard as it decided that no issue was raised as to
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57 ¹⁷ ICTY, Decision on application for subpoenas, *Krstic* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 28.
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59 ¹⁸ Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad
60 Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Fofana and*
61 *Kondewa* ('CDF'), (SCSL-04-14-T), Trial Chamber I, 13 June 2006 and Appeals Chamber I, 11 September 2006.

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4 whether the status of the prospective witness as Head of State would have given him immunity
5 from a subpoena *ad testificandum*.¹⁹
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8 Regarding the immunities of Heads of State and State officials from witness summonses
9 in general under public international law, Article 31, paragraph 2, of the Vienna Convention on
10 Diplomatic Relations of 1961 provides that a diplomatic agent is not obliged to give evidence as
11 a witness. At the *Certain Questions of Mutual Assistance in Criminal Matters* before the
12 International Court of Justice (ICJ), Djibouti claimed that France, by sending witness summonses
13 to the Head of State and State officials of Djibouti (to the 'Procureur de la Republique' and to the
14 Head of National Security), violated 'the obligation deriving from established principles of
15 customary and general international law to prevent attacks on the person, freedom or dignity of
16 an internationally protected person.'²⁰ The court found that the witness summons, addressed to
17 the President of Djibouti by a French investigative judge, was not associated with a measure of
18 constraint and was 'merely an invitation to testify which the Head of State could freely accept or
19 decline'.²¹ Hence, the Court found that France did not violate its international obligations
20 regarding immunity from criminal jurisdiction and the inviolability of foreign Heads of State.²²
21 Furthermore, with regard to summons towards other State officials, the ICJ found that there are
22 no grounds in international law that confer immunities to these officials. When the State officials
23 are not diplomats, within the meaning of the Vienna Convention on Diplomatic Relations of
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¹⁹ There is however, a considerable and thought-provoking analysis of the matter in the Concurring and Dissenting Opinions in that case.

²⁰ Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters (Djibouti V. France), Judgment, I.C.J. Reports 2008, p. 177, para. 157.

²¹ Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters (Djibouti V. France), Judgment, I.C.J. Reports 2008, p. 177, para. 171.

²² Such would be the case if the French judiciary had passed confidential information regarding the President of Djibouti to the media.

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4 1961, they do not enjoy personal immunity from witness summonses.²³ Interestingly the
5 International Court of Justice noted that the obligation of the state, which claims functional
6 immunity for State officials, to notify accordingly the foreign authorities of the forum state, so
7 that the latter would not violate any immunities under international law. By doing so, the sending
8 state, however, assumes responsibility for any internationally wrongful act committed by such
9 state organs.²⁴

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11 Although this case concerned the immunity of Heads of State and State officials from
12 testifying before a foreign national court – and as such it may not be relevant to international
13 criminal courts – the reasoning of the ICJ on the nature of witness summons is interesting. The
14 fact that the Head of State had the freedom to accept or reject the invitation to testify before the
15 French judiciary organ had a bearing on the court's decision that France did not violate its
16 international obligations. The determining factor for the ICJ in assessing whether there has been
17 an attack to the immunity of the Head of State was whether the latter is subjected to a
18 constraining act of authority.²⁵ This approach on the nature subpoenas/ witness summonses is
19 quite different from the one adopted by the ad hoc tribunals and the ICC, which confirmed that a
20 subpoena *ad testificandum* or a witness summons respectively is of compulsory nature and
21 entails a penalty if disobeyed. The ICJ considered that, for the second summons issued by the
22 French judiciary to the President of Djibouti, his express consent was sought. This reasoning
23 coupled with the view that the President could freely deny to appear, suggest that according to
24 the ICJ an incumbent Head of State enjoys personal immunity from summons to appear before
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55 ²³ *Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters* (Djibouti V. France), Judgment,
56 I.C.J. Reports 2008, p. 177, para. 194.

57 ²⁴ *Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters* (Djibouti V. France), Judgment,
58 I.C.J. Reports 2008, p. 177, para. 196.

59 ²⁵ *Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters* (Djibouti V. France), Judgment,
60 I.C.J. Reports 2008, p. 177, para. 170.

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4 foreign courts. Such a conclusion, however, is not that evident in the context of the ad hoc
5 tribunal and must be precluded at the ICC, given Article 28 of the Rome Statute.
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3 Legal Standards for granting requests for witness testimonies

16 The language of the Rule 54 RPE seems to be plain and unambiguous. It provides each ad
17 hoc tribunal with the discretionary power to issue subpoenas to any persons for the purposes of
18 the investigation or the trial. Specifically, according to the letter of the provision, the court has
19 the discretion to issue a subpoena when it may be necessary for the purposes of an investigation
20 or for the preparation or conduct of the trial. The key terms in the provision are: 'may issue';
21 'may be necessary'; and 'for the purposes', with the first referring to the discretionary power of
22 the court to issue subpoenas, while the interpretation of the other two provoked laborious
23 discussion and different approaches before the courts.
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35 The two ad hoc tribunals interpreted this rule through a statutory construction by
36 developing and applying various legal tests when adjudicating requests for subpoenas. The SCSL
37 adopted mainly the ICTY's approach, building on previous case law. The distinction between
38 these tests is not always clear and often the courts determined their application upon the type of
39 the requested subpoena or upon their perception of the overarching objectives of their mandate.
40 In the following paragraphs, there is an attempt to systemize these criteria developed for granting
41 subpoenas under common Rule 54 RPE.²⁶ At the end of the analysis, a table is provided which
42 portrays the cases reviewed, the objective of each subpoena request, the legal standard adopted
43 and the outcome.
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58 ²⁶ See a different categorization of the legal standards in A. Chaumette, 'The ICTY's Power to Subpoena
59 Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents', 4 *International*
60 *Criminal Law Review* (2004) 357-429, at 367.
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7 **3.1 The ‘necessity’ and the ‘purpose’ requirements**

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11 Starting from the letter of the provision, Rule 54 RPE encompasses two elements that
12 need to be met for issuing a subpoena or any order under this provision: a) the ‘necessity’
13 requirement, according to which the applicant must prove that the requested measure is
14 necessary; and b) the ‘purpose’ requirement, according to which the applicant must prove that
15 the measure serves the purposes of the investigation or the conduct of the trial. When deciding
16 on granting a request under Rule 54, the court needs to respond to the question of whether such
17 an order is necessary - not simply useful or helpful - for the purposes of the investigation or for
18 the preparation or conduct of the trial.
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21 In an early case, the then President of the ICTY adopted a similar test on the
22 interpretation of Rule 54 RPE when deciding that the test under this rule is twofold: a) an order
23 of the court must be necessary so that the applicant obtains the material and b) the material being
24 sought must be relevant to an investigation or prosecution.²⁷ This approach is not far from the
25 literal interpretation of the provision. According to the ICTY, the applicant making such an order
26 cannot simply ‘conduct a fishing expedition’ without providing proof of the relevance of the
27 material sought. Furthermore, when assessing the necessity to grant an order, the court takes into
28 consideration the fundamental rights of the accused ‘since the Statute favours the highest
29 consideration for these rights’.

30 This literal interpretation of the provision grants the courts a broad power to adjudicate
31 requests for subpoenas. The question however remained of how the court should decide whether
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²⁷ 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.

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4 the order is necessary ('necessity' requirement) and whether it serves the purposes of the trial
5 ('purpose' requirement). These two elements were further elaborated by the ICTY in subsequent
6 cases.
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12 ***3.2 The 'legitimate forensic purpose' and the 'last resort' requirements***

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16 By drawing an analogy to its case law on access to confidential material, the ICTY
17 determined that a requested subpoena *ad testificandum* would become necessary for the purposes
18 of Rule 54, where the applicant has shown a legitimate forensic purpose for having the subpoena
19 granted. In exercising its discretionary power to issue a subpoena, the court should consider: a)
20 whether the information that the prospective witness may provide is necessary for the resolution
21 of specific issues of the case ('legitimate forensic purpose' requirement); b) whether this
22 information could be obtainable through other means ('last resort' requirement). These two
23 requirements seem to particularise further the 'necessity' element of Rule 54.
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35 Regarding the 'legitimate forensic purpose' requirement, the ICTY determined that it is
36 not sufficient for the applicant to show that the witness has information relevant to the case. The
37 applicant needs to provide evidence - of a reasonable basis - that the witness may give
38 information that will materially assist the applicant to issues clearly identified in the trial.²⁸
39 Regarding the 'last resort' requirement, the court specified that it encompasses the need for the
40 applicant to prove that the sought information can only be brought before the Court through the
41 subpoenaed witness and that this course of action is necessary in order to ensure that the trial is
42 informed and fair.
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55 This interpretation of Rule 54 RPE serves to explain when and how a subpoena becomes
56 necessary (the necessity requirement) for the application of this provision. However, the
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60 ²⁸ ICTY, Decision on application for subpoenas, *Krstic* (IT-98-33 -A), Appeals Chamber, 1 July 2003, § 10.
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4 ‘legitimate forensic purpose’ requirement seems to conflate the necessity requirement with the
5 purpose requirement. Rule 54 RPE provides the court with the power to issue subpoenas when
6 this may be necessary for the purposes of the trial or the investigation, and not when the measure
7 serves the purposes of the applicant. The ICTY interpreted this rule by requiring the defendant to
8 prove that the subpoena will assist him in his defense, while the provision requires that the
9 subpoena should serve the purpose of the trial. This interpretation introduces a heightened legal
10 standard to be met by the applicant of a subpoena in order to have his request granted by the
11 court.
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3.3 The test of materiality and of relevance

31 In the *Krstić* case, the ICTY specified further the ‘legitimate forensic purpose’ element.
32 According to the court, an applicant of a subpoena before or during the trial ‘would have to
33 demonstrate a reasonable basis for his belief that there is a good chance that the prospective
34 witness will be able to give information which will materially assist him in the case, in relation to
35 clearly identified issues relevant to the forthcoming trial.’²⁹ This construction contains two
36 additional elements: the materiality and the relevance of the information sought to be brought
37 before the court through subpoenas. An applicant for a subpoena must prove that the prospective
38 witness would give information, which will materially assist him in the case (test of materiality),
39 in relation to clearly identified issues relevant to the trial (test of relevance).
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53 The relevance and the materiality of the evidence was also considered by the ICTY in the
54 context of Rule 66 RPE regarding the disclosure of evidence by the Prosecutor. In the *Delalic*
55 case, the court, following the US federal courts’ case law, stated that ‘the requested evidence
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²⁹ ICTY, Decision on application for subpoenas, *Krstic* (IT-98-33 –A), Appeals Chamber, 1 July 2003, § 10.

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4 must be significantly helpful to an understanding of important inculpatory or exculpatory
5 evidence'. Furthermore, the evidence is material if there 'is a strong indication that it will play an
6 important role in uncovering admissible evidence, aiding witness preparation, corroborating
7 testimony or assisting impeachment or rebuttal.'³⁰
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14 When seized with an application to request interview and testimony of Tony Blair and
15 Gerhard Schröder , the ICTY determined that the applicant for a subpoena must be specific about
16 the information sought from the prospective witness and must demonstrate a connection between
17 this information and the case.³¹ Factors that may establish this nexus include the position of the
18 prospective witness, his relation with the defendant, his statements and any opportunities he had
19 to learn or observe the events in question. The assessment of the possibility that the prospective
20 witness will be able to give information, which will materially assist the defence, depends largely
21 upon the position already held by the prospective witness. Factors, which may be relevant, are
22 the relationship of the prospective witness with the defendant, the opportunity the witness may
23 have had to observe the events in question, and statements made by him to the prosecutor or
24 others.
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41 According to the ICTY, this legal standard would have to be applied in a reasonably
42 liberal way. The defence is not permitted to undertake a 'fishing expedition' through subpoenas
43 requests, when it is unaware whether the prospective witness can provide information which may
44 assist the defence. Starting from this reasoning, the court reached the conclusion that where the
45 prospective witness had previously been uncooperative with the defence, a subpoena should only
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55 ³⁰ ICTY, Decision on the Motions by the Accused Zejnil Delalic For the Disclosure of Evidence, *Delalic* (IT-96-21-
56 T), Trial Chamber II, 26 September 1996, §§ 8, 9.

57 ³¹ ICTY, Decision on assigned counsel application for interview and testimony of Tony Blair and Gerhard Schröder,
58 *Milošević*, (IT-02-54 -T), Trial Chamber, 9 December 2005, § 40. See also, A. Klip and G. Sluiter, *Annotated
59 Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia
60 2005-2006*, Vol. 28 (Cambridge: Intersentia, 2012) at 65.

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4 be issued by the court when it is reasonably likely to produce the sought cooperation. Therefore,
5 when the prospective witness has proven unwilling to cooperate with the defence, the court
6 should be cautious on granting the request for subpoena, as this element of unwillingness
7 demonstrates that the sought witness testimony probably will not materially assist the
8 proceedings.³²
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16 Contrary to this heightened legal standard developed through the ICTY case law, the
17 ICTR applied the test of relevance in a more lenient for the applicant way. Specifically, in the
18 *Bagosora* case, the ICTR determined that when the defence is not fully aware of the nature and
19 relevance of the testimony of the prospective witness, it is in the interests of justice to allow the
20 defendant to meet the witness in order to assess his testimony at a pre-trial interview.³³ The
21 ICTR did not require from the applicant to demonstrate the relevance of the sought testimony to
22 strictly specific issues of the trial. While the ICTY in the *Krstić* case called the applicant to
23 explicitly identify the issues of the trial related to the information which would be of material
24 assistance, the ICTR adopted a broader interpretation of the ‘materiality’ criterion by calling the
25 defendant to prove only his unsuccessful attempt to meet with the witness on his own volition.
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3.4 Distinctions and discrepancies

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48 There is a paradox resulting from the different legal standards developed by the ICTY and
49 the ICTR. When an applicant requests a subpoena in order to compel a person to attend a pre-
50 testimony interview with the defence, he must first demonstrate that he has made reasonable
51 attempts to obtain the voluntary cooperation of the party involved and these attempts have been
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58 ³² ICTY, Decision on application for subpoenas, *Krstic* (IT-98-33-A), Appeals Chambers, 1 July 2003, § §10 - 12.
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60 ³³ ICTR, Decision on Request for subpoena of Major General Yaache and cooperation of the Republic of Ghana,
61 *Yaache* (ICTR-98-41-T), Trial Chambers I, 23 June 2004, § 4.

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4 unsuccessful.³⁴ This obligation is pursuant to the principle of due diligence which requires him to
5 have taken all the necessary steps for bringing additional evidence before the court. The ICTY,
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7 however, determined that if the defence shows that the prospective witness is unwilling to appear
8 voluntarily before the court and testify, then the court should consider very cautiously whether
9 the subpoena would produce any cooperation with the defence. The unwillingness of the
10 subpoena would produce any cooperation with the defence. The unwillingness of the
11 prospective witness, while being a requirement for issuing a subpoena for a pre-trial meeting,
12 ends up becoming a factor weighing against issuing a subpoena, because it indicates that the
13 information sought may not assist materially the defendant, thereby failing the test of
14 materiality.³⁵ Not only did the jurisprudence add a heightened standard for the application of
15 Rule 54, but also it rendered the element of the unwillingness of a witness to testify before the
16 court an indicator of the irrelevance of the information sought.³⁶

33 ³⁴ ICTR, Decision on Request for subpoena of Major General Yaache and cooperation of the Republic of Ghana,
34 *Yaache* (ICTR-98-41-T) Trial Chambers I, 23 June 2004, § 4.

35 ³⁵ Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad
36 Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Fofana and*
37 *Kondewa* ('CDF') (SCSL-04-14-T), Trial Chamber I, 13 June 2006, footnote 78.

38 ³⁶ See the Concurring Opinion, where the Judge added seven additional requirements: “(...) I consider that other
39 relevant issues should be addressed in the course of considering Rule 54 Subpoena Motions. I have taken them into
40 consideration in writing this opinion and they have, including the ICTY Judicial precedents, influenced my
41 reasoning in this Separate Concurring Opinion. They include:

42 1. That the evidence sought to be adduced is relevant to disproving the allegations in a Count or Counts in the
43 Indictment.

44 2. That the evidence cannot or has not been obtained by other means including the testimony of witnesses
45 who have or are yet to testify at the trial.

46 3. That such evidence has not already been adduced in the course of the trial so far.

47 4. That in the absence of such evidence, the case for the Accused will suffer a prejudice and that the overall
48 interests of justice will be compromised.

49 5. That without such evidence, the Court cannot arrive at a verdict which will be seen to have fully protected
50 the rights of the Accused whilst at the same time, remaining in harmony with the standards of the overall interests of
51 justice.

52 6. That the prospective witness will be cooperative, useful, and understanding and not hostile to their case.

53 7. That it should not be issued at all where its issuance will put the interests of peace, law, and order and the
54 stability of the Country and of its Institutions in peril or in jeopardy, particularly where the Subpoena is directed
55 against The President and the Head of State, and within the context and environment of a general mobilisation and a
56 committed will, of the people in the Country, to consolidate the hard-earned peace.”

57 Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision on
58 Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H.E.
59 Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Fofana and Kondewa* ('CDF') (SCSL-
60 04-14-T), Trial Chamber I, 13 June 2006, § 92.

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4 The different approaches adopted by the ad hoc tribunals render the position of the
5 applicant of a *subpoenae ad testificandum* tenuous, especially when the defence requests a
6 subpoena to achieve the two objectives, i.e. to obtain both a pre-testimony meeting with the
7 prospective witness and a testimony before the court. Specifically, a further and more subtle
8 classification of subpoenas *ad testificandum* results from the ICTY and ICTR case law. Through
9 a request for a subpoena *ad testificandum* the applicant may request the court to compel a
10 prospective witness either to attend at a pre-trial interview with the defence or/and to appear and
11 testify as a witness before the court. Both these objectives can be achieved with a subpoena *ad*
12 *testificandum*. Indeed, the ICTY determined that Rule 54 RPE provides the court with the power
13 to issue a subpoena requiring the witness to attend an interview with the defence at a nominated
14 place and time when this is necessary for the preparation or conduct of trial. Such a course of
15 action is considered necessary when the defence is unaware of the precise nature of the evidence
16 that the prospective witness may provide.

17 In terms of legal requirements for having this request granted, the applicants must prove
18 that the information that the prospective witness may provide will materially assist their case, in
19 relation to clearly identified issues relevant to the forthcoming trial. This means that the
20 applicant of a subpoena *ad testificandum* needs to prove different and possibly contradictory
21 elements depending on the objective pursued by the subpoena: to a pre-trial interview and to a
22 testimony before the court. When the applicant of a subpoena *ad testificandum* aims at achieving
23 both goals, then the legal standards for granting his request become obscure.

24 The conflation between the different constructive interpretations of Rule 54 RPE
25 becomes evident in the SCSL jurisprudence. In the *Fofana* and *Kondewa* case, the SCSL failed
26 to identify these subtle nuances of the legal standards applied by the ad hoc tribunals and rejected
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4 an application to subpoena the President for a pre-testimony interview with the defence and for a
5 testimony before the court. Following the ICTY's jurisprudence, the court found that the element
6 of 'necessity' does not refer only to the issuance of the subpoena (i.e. that the subpoena is
7 necessary), but also to the evidence sought by the subpoena (i.e. that the testimony of the
8 prospective witness is necessary). The SCSL then used the 'last resort' requirement as part of the
9 'necessity' element of Rule 54. It asserted that the subpoena should not be issued if the sought
10 information can be obtained through other means. Regarding the purpose requirement, the SCSL
11 stated that it refers to a legitimate forensic purpose and encompasses the applicant's obligation to
12 show that the information sought from the prospective witness is likely to be of material
13 assistance to the case, in relation to clearly identified issues relevant to the trial. The court added
14 that the stance of the prospective witness in his willingness to testify determines largely whether
15 the information will be of material assistance.³⁷

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

24 However, the need to interpret Rule 54 without constructing interpretations which result
25 in creating and imposing restrictions on the Courts' jurisdiction was underlined in the Dissenting
26 Opinion of SCSL Judge Thompson, who found it hard to comprehend why the SCSL Chamber
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28 ³⁷ Decision on Motions by Moinina Fofana and Sam Hinga Norman for the Issuance of a Subpoena ad
29 Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah, President of the Republic of Sierra Leone, *Fofana and*
60 *Kondewa*, ('CDF') (SCSL-04-14-T), Trial Chamber I, 13 June 2006.

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’.³⁸

Overall, the different tests developed by the ICTY, ICTR and SCSL jurisprudence 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 fulfillment of the legitimate forensic purpose’ standard and all of them most likely correspond to the wider ‘purpose’ requirement mentioned in the letter of Rule 54. Finally, the ‘last resort’ requirement corresponds to the ‘necessity’ element of the provision, explaining 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 every 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, all these tests were adopted by the

³⁸ 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, §§ 10 - 13.

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4 international criminal tribunals as a basis for rejecting the specific request for subpoena, by
5 increasing the threshold for the applicant to prove the need for the application of Rule 54.
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12 **4 The right to obtain the attendance and the examination of witnesses**

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4.1 Appellate standard for discretionary decisions

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Rule 54 RPE is an expression of the courts' freedom of appraisal when seized with a request to issue orders, summonses, subpoenas, warrants and transfer orders. According to Bedjaoui, the discretionary power of the international courts is closely related with 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.³⁹ Should procedural errors result from the exercise of this discretionary power at the trial phase, an appeals chamber may be called to judge trial chambers' decisions taken at discretion.

Specifically regarding decisions taken under Rule 54 RPE, where an appeal is brought against a discretionary decision of a trial chamber to grant or reject a request for subpoena, the appellate standard is whether the court had exercised its discretion without errors in reaching the impugned decision. According to the ICTY jurisprudence, only when the trial chamber makes a discernible error in the exercise of its discretion, should the Appeals Chamber intervene.⁴⁰ Following the ICTY case law, the SCSL averred that the appeals chamber assesses whether the effect that the subpoena would have is necessary for the Court to try the case fairly. That is to say

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³⁹ M. Bedjaoui, 'Expediency in the decisions of the International Court of Justice' 71 (1) *The British Yearbook of International Law* (2001) 1-27, at 3.

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60 ⁴⁰ ICTY, Reasons for Decision on Prosecution Interlocutory Appeal from refusal to order joinder, *Milošević*, (IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73), Appeals Chamber, 18 April 2002, § 4.

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4 that the discretionary power of the court is examined in the light of the requirements for a fair
5 trial.⁴¹
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9 This conclusion is also consistent with Rule 73 (b), common to ICTY, ICTR and SCSL
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11 RPE. Indeed, the discretionary power of a court to issue a subpoena is scrutinized against an
12 appellate standard that takes into consideration Rule 73 (b) RPE. The rationale of this provision
13 is to avoid irreparable prejudice to a party of the trial and secure the fair and expeditious conduct
14 of the proceedings or the outcome of the trial.⁴² Consequently, the review standard on a
15 discretionary decision of a court not to issue a subpoena upon a defendant's request is to examine
16 whether the exercise of this discretion has produced an unfair decision for the accused
17 throughout the trial. What is however, this fair trial standard in international criminal justice?
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31 ***4.2 Fair trial standard in international criminal justice***

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37 The right of the accused to obtain the attendance and examination of witnesses on his
38 behalf under the same conditions as witnesses against him is encompassed to the standard of
39 equality of arms, which is a fundamental aspect of the principle of fair trial. The International
40 Covenant on Civil and Political Rights provides for this right, while the Human Rights Council
41 (HRC) and the European Court of Human Rights (ECHR) have established that restricting the
42 defence in its right to call witnesses may amount to inequality of arms.⁴³
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52 ⁴¹ See also G. Boas, J. L. Bischoff, N. L. Reid and B.D. Taylor III, *International Criminal Law Practitioner Library*
53 – Vol. III, *International Criminal Procedure* (Cambridge: Cambridge University Press, 2011), at 437.
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55 ⁴² ICTY Rule 73 (B): Decisions on all motions are without interlocutory appeal save with certification by the Trial
56 Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair
57 and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial
58 Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. See similarly
59 ICTR Rule 73 (B) and SCSL Rule 73 (b).
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61 ⁴³ Article 14 (3) ICCPR. See also *Brickmont v. Belgium*, ECtHR (1989), No. 19/1987/142/196, *Vidal v. Belgium*,
62 ECtHR (1992), No. 14/1991/266/337, *Doorson v. The Netherlands*, ECtHR (1996), No. 54/1994/501/583.
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4 In international criminal law, this right is provided in Article 67 of the ICC Statute, Article
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6 21 of the ICTY Statute, Article 20 of the ICTR Statute and Article 17 of the SCSL Statute.⁴⁴ The
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8 defendant may obtain the attendance and the examination of a recalcitrant witness by requesting
9 the issuance of a subpoena or a witness summons through the procedure provided in Rule 54 of
10 the ICTY, ICTR, SCSL RPE and Article 64 (6) (b) of the ICC Statute.
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16 This right, albeit fundamental to a fair trial, is not absolute. Not granting a defendant's
17 request to have a witness subpoenaed does not *ipso facto* result in a violation of the principle of
18 equality of arms. The right is qualified by the discretionary power of the courts to issue such
19 orders and it needs to be balanced with the rights of the prospective witness who may object to a
20 request for subpoena.
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28 In the *Oric* case, the ICTY contextualized the principle of equality of arms by dismissing a
29 strict principle of mathematical equality in favor of a principle of basic proportionality. This
30 principle of proportionality governs the the time and witnesses allocated to the two sides.⁴⁵ The
31 equality of arms does not entail material equality of resources (financial or personal) but a
32 positive obligation of the court to assist the accused in fulfilling his right to call witnesses
33 through the necessary measures to obtain the testimony. Therefore, the principle of equality of
34 arms postulates that the judicial body is under the obligation to ensure that neither party is put at
35 disadvantage, either substantive or procedural.
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50 ⁴⁴ The provision is identical in all Statutes. Article 21 of the ICTY Statute reads as follows:
51 'Article 21: Rights of the accused
52 1. All persons shall be equal before the International Tribunal.
53 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to
54 article 22 of the Statute (...)
55 (...)
56 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be
57 entitled to the following minimum guarantees, in full equality: (...)
58 (...)
59 (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of
60 witnesses on his behalf under the same conditions as witnesses against him; (...)'
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⁴⁵ ICTY, Interlocutory Decision on Length of Defence case, *Naser Oric* (IT-03-68-AR73.2), Appeals Chamber, 20 July 2005, § 7.

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4 According to the jurisprudence, the crucial element is that the prosecution and the defence
5 are equal before the court when presenting their case.⁴⁶ Specifically, the ICTY underlined that
6 the principle of equality of arms is applicable to cases where the court prevented a party from
7 securing the attendance of certain witnesses, when it had the power to grant a subpoena. By
8 referencing the ECHR jurisprudence, the ICTY explicitly determined that the question of the
9 applicability of the principle of equality of arms is raised when the judicial body has the power to
10 grant the requested measure in order to ensure that the defence is on equal footing with the
11 prosecution before the court.⁴⁷ The ICTY, however, recognized that the court has a limited role
12 to ensure the equality of arms if the disparity between the parties comes from external factors,
13 such as the lack of state agents' collaboration. Therefore, in cases where there is inequality
14 between the parties, it is upon the court to provide a remedy for this disparity, by granting a
15 defendant's request to subpoena a witness, unless external factors, beyond the court's control,
16 prohibit such course of action.

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18 The ICTY interpreted this discretionary power by stating that the court is vested with this
19 discretion so that the 'subpoenas should not be issued lightly, for they involve the use of coercive
20 powers and may lead to the imposition of a criminal sanction.'⁴⁸ This argument became recurrent
21 even more when the potential witnesses were incumbent or former Heads of State. In the
22 *Halilovic* case, the ICTY suggested that the subpoenas should not be used routinely as part of
23 trial tactics, but only when they serve the overall interests of the criminal process. The SCSL
24 Concurring Judge proceeded even further than *Halilovic*, by indicating that subpoenas should not
25 be issued at all, if the interests of peace and stability of the country are at stake.

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⁴⁶ ICTY, Judgment, *Duško Tadić* (IT-94-1-A), Appeals Chamber, 16 July 1999, § 56.

⁴⁷ *Ibid* §§48, 49.

⁴⁸ ICTY, Decision on Interlocutory Appeal, *Brđanin and Talić* (IT-99-36-AR73.9), Appeals Chamber, 11 December 2002, § 31.

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4 It is difficult, however, to discern how the appearance of a witness before the court, even
5 if the requested witness is a State official of the Head of State, could or would jeopardise the
6 peace process, since these persons enjoy the right to decline to answer to questions if the national
7 interests are at stake. Such an approach does not comply with the quest for truth, which should
8 be the principal imperative of a judicial process and certainly of a criminal procedure.
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11 Furthermore, one of the most interesting and simultaneously disconcerting element of
12 such an approach is the position that the court is to apply ‘liberally’ the legal standards of Rule
13 54, especially in cases where the applicant had been unable to interview the witness. The ICTY
14 determined that the principle of equality of arms must be given a more liberal interpretation than
15 the one normally upheld in domestic proceedings, in light of the lack of independent means of
16 enforcement.⁴⁹ Defining this approach as ‘more liberal’ has led to a theoretical confusion, since it
17 seems to suggest an approach favorable to the defence.⁵⁰ While in the ICTY *Tadić* case, the
18 reasoning provided for this liberal interpretation of the principle of equality of arms was
19 accompanied by the explicit instruction for the court to alleviate the difficulties faced by the
20 parties so that each side may have equal access to witnesses, in the *Fofana and Kondewa* case
21 the SCSL Appeals Chamber used this liberal interpretation to avoid the issuance of a subpoena to
22 the unwilling witness.⁵¹ By designating both approaches as liberal interpretations of Rule 54
23 RPE, the courts may risk compromising the rights of the defendants. Additionally, this case law
24 seems to overlook the inherent purpose of a subpoena, which is to be issued in order to compel
25 an unwilling witness to appear and testify before the Court.⁵² The measures under Rule 54 are to
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⁴⁹ ICTY, Judgment, *Duško Tadić*, (IT-94-1-A), Appeals Chamber, 15 July 1999, § 52.
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30 ⁵⁰ J.T. Tuinstra, *Defence Counsel in International Criminal Law*, (The Hague: T.M.C. Asser Press, 2009) at 176.
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32 ⁵¹ ICTY, Judgment, *Duško Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 52.
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34 ⁵² The Dissenting Opinion on the Trial Chamber Decision is derisory of the “legal technicalities”, the “outmoded
35 judicial doctrines” and the “novel artificial judicial conceptual distinctions” that were applied by the Chamber,
36 which could not possibly result from the plain wording of Rule 54. The Judge considers the approach of introducing
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4 be used whenever it is necessary for the Court to obtain evidence and secure a fair trial.
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6 However, the ICTY and SCSL concluded that compulsory measures should be used ‘sparingly’
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8 by international courts because they carry the threat of criminal sanctions. Conversely, the
9 International Criminal Court in the *Ruto* and *Sang* case asserted that a witness, who disregards a
10 summons to appear before the court, risks at most a misconduct and certainly, he does not run
11 the risk of being prosecuted for having committed a crime.⁵³ In that sense, the ICC is more in
12 line with the letter of the provision and did not impose such restrictions on its discretion to grant
13 such requests.
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16 In order to assess whether the defendant is put into disadvantage, the position of the
17 prosecution in each court and its right to call and examine witnesses in each case also need to be
18 assessed. The ICTY highlighted that it is the Prosecutor’s duty to assist the Tribunal to arrive at
19 the truth and to do justice for the accused.⁵⁴ Furthermore, because of this duty, in cases where the
20 defence has brought to the attention of the court the difficulties it encountered to obtain the
21 cooperation of a prospective witness, the prosecution should use its own resources to facilitate
22 the examination of an unwilling witness by the defence.⁵⁵ At times, the Prosecutor objected to
23 requests for subpoenas submitted by the defence. Such was the case at the SCSL, where the
24 defense argued that the SCSL Statute does not provide the Prosecution with such a right, and that
25 the prosecution’s objection violated the defence’s right to obtain in full equality the attendance
26 and examination of witnesses under the same conditions as witnesses against them, pursuant to
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29 the additional elements of “Legitimate Forensic Purpose” and of “Last Resort” too formalistic and inconsistent with
30 Rule 89 that does not authorise an assessment of the reliability of the evidence at the stage of its admission.
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32 ⁵³ Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber
33 V (A) of 17 April 2014 entitled ‘Decision on Prosecutor’s Application for Witness Summonses and resulting
34 Request for State Party Cooperation’, Situation in the Republic of Kenya (ICC-01/09-01/11 OA 7 OA 8), Appeals
35 Chamber, 9 October 2014, § 109.
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37 ⁵⁴ ICTY, Decision on application for subpoenas, *Krstic*, (IT-98-33-A) Appeals Chamber, 1 July 2003, § 13.
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39 ⁵⁵ See also A. Klip and G. Sluiter, *Annotated Leading Cases of International Criminal Tribunals*, Vol. 14
40 (Cambridge: Intersentia, 2008) at 538.
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4 Article 17 (4) € of the Statute.⁵⁶ The Dissenting Judge argued that at the SCSL the prosecution
5 has no judicial restriction to call any witnesses at volition; therefore, the prosecutor's objection
6 to a subpoena requested by the defendant may not be consistent with the fulfillment of its duty to
7 arrive at the truth, as this duty was designated in the *Krstić* case by the ICTY.
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10 Furthermore, the fact that a witness may have already been called by the prosecution to
11 testify, does not necessarily preclude the issuance of a subpoena to this witness for a pre-trial
12 interview with the defence. As stated by the ICTY in *Halilovic* case, 'to deprive the defendant of
13 the ability to interview a subpoenaed witness would hand an unfair advantage to the prosecution,
14 which would be able to block the defendant's right to interview crucial witnesses simply by
15 placing them on its witness lists.⁵⁷ Moreover, the prosecution may even decide not to call the
16 witness at all, thereby rendering the position of the defendant tenuous.⁵⁸ Additionally, the
17 argument was made that since the prosecution does not exercise any control over the witnesses
18 the defence intends to call, it does not have the right to object to the defendants' request for a
19 subpoena to a witness. Such a right to object is only reserved for the prospective witness to
20 whom a subpoena is directed.
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23 From the perspective of the rights of the prospective witness, problems may arise when a
24 subpoena is requested to compel a witness to meet with the defence for a pre-trial interview. In
25 this case, the right of the defendant to obtain and examine a witness before the court needs to be
26 balanced with the witness's right to privacy. Additionally, a person so interviewed may not be
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55 ⁵⁶ The Prosecution's response in this case did not refer to the existence of such a legal right but targeted the evidence
56 that was sought by the issuance of the subpoena, clarifying its intention not to interfere with the defendants' right to
57 call any witnesses.
58 ⁵⁷ ICTY, Decision on the issuance of subpoenas, *Halilovic* (IT-01-48-AR73), Appeals Chamber, 21 June 2004, § 12.
59 ⁵⁸ See on the issue of whether equality of arms safeguards the position of both prosecution and defence in A.
60 Cassese, *International Criminal Law* (2nd edn., Oxford: Oxford University Press, 2008) at 383.
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4 called to appear before the court after all.⁵⁹ Therefore, in the case where a subpoena is requested
5 to compel an unwilling witness to meet with the defence, the court must also balance the rights
6 of the prospective witness with the fair conduct of a trial.
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11 Regardless of the view taken on the position of defendants at international criminal trials,
12 the fair trial standard prescribes that when the accused has less power than the prosecution to
13 compel the attendance of witnesses, the tribunals should remedy any disadvantage may occur.
14 The principle of equality of arms designates the duty of the court to be as flexible in the process
15 of receiving evidence by the defence as it is with the evidence by the prosecution. This duty is
16 paramount for the discovery of truth, which should be the principal normative value of a criminal
17 trial.⁶⁰
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20 To conclude, according to the case law developed by the ad hoc tribunals, the principle
21 for a full equality of arms prompts the courts at least to consider that the defendant be granted the
22 same legal standing as the prosecution to compel certain witnesses, especially when applying
23 elaborate legal standards for rejecting subpoena or witness summonses requests.⁶¹ Additionally,
24 since the relevant provisions do not expressly impose such restrictions, in cases where the
25 tribunals adopt a generally cautious approach that subpoenas should be used sparingly, because
26 they are coercive measures and should not become a routine tool of trial tactics, a risk for not
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49 ⁵⁹ ICTY, Declaration of Judge Shahabuddeen on the Decision on the issuance of subpoenas, *Halilovic* (IT-01-48-
50 AR73), Appeals Chamber, 21 June 2004, § 12.

51 ⁶⁰ SCSL Judge Thompson argued that in international criminal trials, it is often very difficult for the defense to
52 convince witnesses to appear before the court and testify in favor of a suspected international criminal. According to
53 his reasoning, this difficulty results from a variety of reasons; witnesses' disinclination to be associated with accused
54 war criminals, ongoing internal conflicts, public opinion, or simply narrowness of time and difficulties of accessing
55 the *locus delicti*. SCSL, Dissenting Opinion of Bankole Thompson on Decision on Motions by Moinina Fofana and
56 Sam Hinga Norman for the Issuance of a Subpoena ad Testificandum to H.E. Alhaji Dr. Ahmad Tejan Kabbah,
57 President of the Republic of Sierra Leone, *Fofana and Kondewa* ('CDF') (SCSL-04-14-T), Trial Chamber I, 13 June
58 2006, § 2.

59 ⁶¹ Especially when the prosecution is institutionally at better position than the defendant, as was the argument raised
60 before the SCSL.
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4 taking into consideration the right of the applicant to obtain the requested testimony may be
5 present.⁶²
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12 5 Reconciling pragmatism with normativity 13 14 15

16 Granting a request to compel the attendance of a witness turns both on the normative
17 values that the international criminal tribunals serve and the pragmatic implications of the
18 particular context in which they were created and the relevant decisions were rendered. Much
19 emphasis is always placed on the importance of the ICTY's and ICTR's mandate to contribute to
20 the transitional justice and stability of the country in which they operated and to ascertain the
21 truth.⁶³ The historical context, the nature of each case and the objective of each subpoena had a
22 huge impact on the adjudication of each request and the development of the relevant case law.
23 Pragmatic considerations came into play depending on the person that each request of subpoena
24 intended to bring before the court and the relevant legal standard had to be adapted accordingly.
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27 This approach was recognized by the ICTY.⁶⁴ In the very first case before the ICTY,
28 when referring to the rights of the accused, the court underscored that the tribunal worked under
29 unique circumstances that were not foreseen by the drafters of the Statute.⁶⁵ In the *Blaškić* case
30 the ICTY limited its power to issue subpoenas to persons acting in private capacity and excluded
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33 ⁶² SCSL, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of
34 Sierra Leone, *Fofana and Kondewa* ('CDF') (SCSL-2004-14-T), Appeals Chamber I, 11 September 2006, § 29.
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36 ⁶³ The same applies for the Special Court for Sierra Leone.
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39 ⁶⁴ ICTY, Decision on Application for subpoenas, *Krstic* (IT-98-33-A), Appeals Chamber, 1 July 2003, § 17.
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42 ⁶⁵ As such, the Trial Chamber agrees with the Prosecutor that the International Tribunal must interpret its provisions
43 within its own context and determine where the balance lies between the accused's right to a fair and public trial and
44 the protection of victims and witnesses within its unique legal framework. While the jurisprudence of other
45 international judicial bodies is relevant when examining the meaning of concepts such as "fair trial", whether or not
46 the proper balance is met depends on the context of the legal system in which the concepts are being applied'.
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50 ICTY, Decision on the Prosecutor's request for protective measures for victims and witnesses, *Duško Tadić*, (IT-94-
51 1-T), Trial Chamber, 10 August 1995, §§ 28-30.
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4 state officials from being subpoenaed to provide state documents.⁶⁶ In the *Krstić* case, the Court
5 confirmed its authority to issue *subpoenas ad testificandum* even to state officials, but after
6 introducing adopting an elaborated interpretation and adding more requirements to the legal
7 standard of Rule 54. In the *Brdanin* and *Talic* case, the ICTY determined that in deciding
8 whether the court should issue a subpoena, it must take into consideration not only the interests
9 of the litigants but the overarching interests of justice and other public considerations.⁶⁷ The
10 SCSL reiterated the tests applied by the ICTY, without entering into the discussion on state
11 officials' functional immunity from subpoenas. The ICTR had rarer occasions to deal with
12 subpoena requests, but in those cases, difficult questions arose regarding immunities of state
13 officials and agents of international organizations as well.⁶⁸

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15 The language in Rule 54 is undeniably wide. All the rule requires is a showing that an
16 order is necessary to bring the relevant evidence before the court. The applicant of a subpoena
17 needs only to make a *prima facie* demonstration that the issuance of the subpoena is necessary,
18 and does not need to show by convincing evidence that it is. It is also somewhat odd to consider
19 that the term 'subpoenas' was added in the ICTY RPE for the purpose of 'clarifying the rules'.⁶⁹
20 The letter of the provision of Rule 54 enables the Court to order a measure that will bring any
21 valuable information before it, without setting out any requirements about the nature of the
22 evidence to be elicited by a subpoena. The legal standards, developed by the ICTY and ICTR
23 and adopted by the SCSL, may be useful for evaluating the materiality of the evidence but shall
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66 The ICTY highlighted, however, that State agents who witnessed a crime or possessed evidentiary material of relevance before they took office may be subject to subpoenas.

67 ICTY, Decision on Interlocutory Appeal, *Brdanin and Talic* (IT-99-36-AR73.9), Appeals Chamber, 11 December 2002, § 46.

68 G. Sluiter, 'The ICTR and the Protection of Witnesses', 3 *Journal of International Criminal Justice* (2005) 962-976, at 966.

69 J.R.W.D. Jones and S. Powles, *International Criminal Practice*, (Oxford: Oxford University Press, 2003) at 538.

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4 not be regarded as inhibiting factors of the courts' discretion and should not affect the court's
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6 discretionary authority to grant a compulsory order to obtain the relevant evidence.
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9 The stance of the courts on granting requests for bringing additional evidence before
10 them, especially through witnesses, confirms the normative implications that such decisions bear
11 on the development of international criminal law and public international law in general. The
12 question of state officials' immunities and the application of subpoenas under Rule 54 was raised
13 by the International Court of Justice Judge Higgins when she referred to the *Milošević* case and
14 the possible implications of a successful defendant's request to subpoena Blair and Schröder.⁷⁰
15 The SCSL followed the ICTY jurisprudence on the scope of Rule 54 and determined that the
16 court does not commit an error of law when it decides to follow one ad hoc tribunal's
17 jurisprudence over another's.
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20 Taking into consideration the pragmatic implications that a subpoena may have on the
21 peace process and on the specific circumstances of each case seems to be the practice of the
22 tribunals, when they had to grapple with each request for subpoena. One example may suffice to
23 illustrate this conclusion. In the *Fofana/Kondewa* case, the SCSL rejected the defendants'
24 request to issue a subpoena to the President of the country. The President, himself, had
25 requested that the Security Council establish a 'strong and credible court that will meet the
26 objectives of bringing justice and ensuring lasting peace' in Sierra Leone.⁷¹ Both lines of
27 argumentation used the role and the mandate of the court accordingly. The SCSL concurring
28 Judge invoked the preservation of peace as a reason not to issue a subpoena to the President,
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⁷⁰ See on the impact of the interpretation of Rule 54 on International Law 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, at 361.

⁷¹ In his concurring separate opinion, Judge Itoe interpreted Rule 54 in light of the historical context and the hybrid nature of the Court and he distinguished the status of the President from the other, 'normal', 'routine' and 'ordinary' witnesses.

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4 while the dissenting Judge underlined the need to bring this witness before the Court in order to
5 ascertain the truth. Consequently, the issue of granting a defendant's request for a subpoena
6 reflects a typical problem that the specialized and ad hoc international criminal tribunals faced
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8 regarding their judicial function and mandate.
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12 The fact that the power of the ad hoc tribunals to subpoena witnesses is judge-made may
13 explain why these courts developed different standards for the application of Rule 54. In this
14 sense, the fact that the Rome Statute provides the permanent court with the power to require the
15 attendance and testimony of witnesses is already a progress.
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18 By closely examining the conditions laid down by the international criminal tribunals on
19 issuing orders to compel witnesses to appear and testify, the article contributes to the
20 clarification of the procedural law, specifically of the ICC Rule Article 64 (6) (b) RPE, and sheds
21 new light on the rarely acknowledged right of the defendant to obtain the attendance and
22 examination of witnesses under the same conditions as witnesses against him in international
23 criminal law. Establishing sound legal standards on hearing all parties and securing a
24 procedurally fair process should be reconciled with the realities behind the establishment of
25 international criminal tribunals. In fact, the sound interpretation of international criminal
26 procedure is the prerequisite for legitimacy in international criminal justice.
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The following table illustrates the ICTY, ICTR, SCSL and ICC cases, analysed in the article. The table demonstrates the objective of each request, the standard that the respective courts applied and the outcome. The selection of these cases for the analysis was based on their relevance, impact and their referencing in the subsequent case law on this issue. The order is strictly chronological, without any other indication.

Case	requested subpoena	Objective of subpoena	Outcome	Reasoning/Legal Standard applied
ICTY <i>Blaskic</i> Appeals Chamber 29.10.1997	Subpoena <i>duces tecum</i>	To the State and State official: Croatia/Defence Minister	Rejected	Immunity of state officials
ICTY <i>Krstić</i> Appeals Chamber 01.07.2003	Subpoena <i>ad testificandum</i> (for a pre-trial interview with the defence)	Two witnesses (confidential)	Granted	Legitimate Forensic Purpose. Test of materiality and relevance
ICTY <i>Halilovic</i> Appeals Chamber 21.06.2004	Subpoena <i>ad testificandum</i> (Pre-trial interview with the defence)	Three witnesses (confidential)	Granted	Test of materiality and relevance.
ICTR <i>Bagosora</i> Trial Chamber	Subpoena <i>ad testificandum</i>	Major General Yaache	Granted	Test of materiality and relevance.

23.06.2004	(Pre-trial interview with the defence)			Last resort.
ICTY <i>Slobodan Milošević</i> Trial Chamber 09.12.2005	Subpoena <i>ad testificandum</i> (Pre-trial interview with the defence and testimony before the court)	Tony Blair and Gerhard Schröder	Rejected	The request failed the test of relevance and of materiality. Legitimate Forensic Purpose. Last Resort. Test of materiality and relevance
SCSL Fofana/Kondewa 13.06.2006	Subpoena <i>ad testificandum</i> (Pre-trial interview with the defence and testimony before the court)	President of the Republic of Sierra Leone	Rejected	Test of materiality and relevance. Last resort.
ICC Ruto/Sang Appeals Chamber 09.10.2014	Witness summons to appear before the court (request by the prosecution)		Granted	Letter of the provision