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A study of comparative practice of the international tribunals. Under which conditions may subpoenas be issued against witnesses and potential witnesses who refuse to cooperate... subpoena has been issued.

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MEMORANDUM FOR THE SPECIAL TRIBUNAL FOR LEBANON

ISSUE: A study of comparative practice of the international tribunals

Under which conditions may subpoenas be issued against witnesses and potential witnesses who refuse to cooperate with a Chamber, the Prosecution or the Defence at the pre-trial stage or trial stage of the proceedings? Please also address how other tribunals have dealt with non-compliance from a witness and potential witness with a subpoena where a subpoena has been issued.

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I. INTRODUCTION

A. Issue

Under which conditions do international tribunals issue subpoenas to gather testimony, documents and other evidence? In this paper, I will address the practice of the international tribunals when subpoenas are issued against witnesses and potential witnesses who refuse to cooperate and how the other tribunals have dealt with non-compliance from a witness and potential witness where a subpoena has been issued*.

B. Summary of Conclusions

International tribunals issue subpoenas under the conditions that a witness has information that is needed to have a fair trial. If the evidence is relevant to the case and can only be gathered by a single source, then a subpoena may be issued to compel the potential witness to appear before the court. Having the ability to gather all relevant information helps to ensure a proper decision can be made by the tribunal.

II. Background

A subpoena is a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. In international tribunals, such as ICTY and ICTR, the registry of the Tribunal must communicate with the State in which the person resides to service the subpoena to the person. For the SCSL, the government of Sierra Leone and any person living in Sierra Leone are obliged to ensure the mission of the Special Court, such as a subpoena, is satisfied[1].

* A study of comparative practice of the international tribunals. Under which conditions may subpoenas be issued against witnesses and potential witnesses who refuse to cooperate with a Chamber, the Prosecution or the Defence at the pre-trial stage or trial stage of the proceedings? Please also address how other tribunals have dealt with non-compliance from a witness and potential witness with a subpoena where a subpoena has been issued.

III. International Criminal Tribunal for the Former Yugoslavia ("ICTY")

A. Issue

Under which conditions may the ICTY issue subpoenas? How does the ICTY handle situations where there is noncompliance after a subpoena has been issued?

B. Conclusion Summary

The ICTY may issue a subpoena under the condition that the evidence brought to the trial will be relevant and only obtainable through the subpoenaed source. If there is noncompliance after issuing a subpoena, the ICTY issues a warrant for the potential witnesses' arrest.

C. Rules

1. ICTY Rules of Procedure and Evidence

Rule 54[2]

General Rule

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.

Rule 77[3]

Contempt of the Tribunal

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[1]Thomas George, *Legal Arguments on Subpoena of the President of Sierra Leone to Testify at the Special Court*, Centre for Accountability and Rule of Law (2009)

[2] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 54, Rev. 46, 20 October 2011 *available at* http://www.icty.org/.

[3] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 77, Rev. 46, 20 October 2011 *available at* http://www.icty.org/.

(A) The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who

(iii) Without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

2. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia

Article 29[4]

Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

[4] Statute of the International Criminal Tribunal For the Former Yugoslavia, Article 29, adopted by Security Council on 25 May 1993, U.N. Doc/S/RES/827 (1993), *available at* http://icty.org/.

D. Application

1. The ICTY may subpoena an individual acting in his or her own capacity.

The ICTY has the power to order the appearance and testimony of an individual. The ICTY Rules of Procedure and Evidence provide the Tribunal with this subpoena power. Subpoena is the ability to impose a penalty on a person refusing to comply to appear before the Tribunal. Many States have implemented into their own legislation that the responsibility of individuals to comply with a decision of the Tribunal has been recognized and may even be enforced by the State[5]. Unlike binding orders issued to a State, subpoenas issued to an individual have a criminal nature[6].

a. Prosecutor v. Blaskic

The defining case for the Tribunal's ability to subpoena is *Prosecutor v. Blaskic*. As confirming judge on the *Blaskic* indictment, Judge McDonald issued a subpoena to the Republic of Croatia and its Defence Minister, Mr. Gojko Susak, to present documents to the Tribunal[7]. The Republic of Croatia appealed the subpoenas to the Appeals Court and the Appeals Court took jurisdiction of the issues.

The Appeals court had to investigate the issue of whether the Tribunal could subpoena a State or a high government official of the State. The Appeals Chamber said the term "subpoena" could not be applicable to State, but only binding "orders" or "requests." The Appeals Chamber found that a high government official of the State also could not be subpoenaed for his acts committed on behalf of the state:

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[5] Danesh Sarooshi, The Powers of The United Nation's International Criminal Tribunals 159 (199)

[6] Anne-Laure Chaumette, "*The ICTY's Power to Subpoena Individuals, to Issue Binding Orders to International Organisations and to Subpoena Their Agents"* 375 (2004).

[7] Prosecutor v. Blaskic, Case No. , Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para 4 (Oct. 29, 1997).

> "The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity'."[8]

However, the Chamber found that, "the International Tribunal may issue binding orders in the form of subpoenas (that is, under threat of penalty), to individuals acting in their private capacity."[9]

To be more specific about the distinction between individuals acting in their own capacity and state officials, the Chamber added that individuals acting in their own capacity includes State agents who, for instance, witnessed a crime before they took office, or given/found evidentiary material of relevance for the prosecution or the defence prior to the initiation of their official duties. In this case, the individuals can legitimately be the addressees of a subpoena[10].

The Appeals Chamber unanimously found that the International Tribunal is empowered to issue binding orders and requests to States, who are obligated to comply to Article 29, that the International Tribunal may not address binding orders under Article

[8] Prosecutor v. Blaskic, Case No. , Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para 38 (Oct. 29, 1997).
[9] Prosecutor v. Blaskic, Case No. , Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para 46 (Oct. 29, 1997).
[10] Prosecutor v. Blaskic, Case No. , Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para 49 (Oct. 29, 1997).

29 to State officials acting in their official capacity, and that the International Tribunal may summon, subpoena, or address other binding orders to individuals acting in their private capacity.

2. The ICTY may subpoena a potential witness if his or her testimony is relevant to the case.

The Trial Chamber and the Appeals Chamber need to determine if the potential witness has any evidence that is related to the case. If it is found that the potential witness or witnesses know information that is material to the case, then they can be subpoenaed to testify.

a. *Prosecutor v. Karadzic*

The Prosecution requested that the Trial Chamber issue a subpoena asking Dr. Berko Zecevic to appear and give testimony[11]. Zecevic was an associate professor and head of advanced technology of the mechanical engineering faculty at the University of Sarajevo. He also had thirty-five years of experience in the design, testing, and manufacturing of artillery and mortar projectiles[12]. After considering expected testimony of this witness, the Trial Chamber was satisfied that he could materially assist the Prosecution[13] and granted the subpoena. Because Zecevic's evidence would address the nature of modified air bombs, his expert testimony would materially assist the Prosecution. Therefore, a condition in which the ICTY subpoenas a potential witness if his or her testimony is relevant enough to materially assist with the case.

b. *Prosecutor v. Krstic*

[11] Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion to Subpoena Berko Zecevic, at para 1 (Jan. 20, 2011).
[12] Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion to Subpoena Berko Zecevic, at para 2 (Jan. 20, 2011).
[13] Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion to Subpoena Berko Zecevic, at para 15 (Jan. 20, 2011).

The Defence requested the Appeals Chamber to issue subpoenas to two potential witnesses[14]. The Chamber had to assess the likelihood that the potential witnesses would be able to assist the case. This assessment depends largely on the position the prospective witness who is associated with the events in question holds, any relationship he may have (or has had) with the accused which is relevant to the charges, and the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) [15].

The two potential witnesses in this case were officers in the Army during the time in question and would have gained all their information as state officials, not as individuals acting in their own capacity[16]. As a result, the Appeals Chamber allowed the State officials to be subpoenaed. This conflicts with the *Blaskic* case which states that state officials acting in their official capacity cannot be subpoenaed[17]. However, this discrepancy arises because; the Appeals Chamber in the *Blaskic* case was concerned with the production of documents, not the giving of evidence by a State official like in *Krstic*. The Appeals Chamber says no immunity will be given to officials whose testimonies are sought in Krstic[18].

c. *Prosecutor v Mucić and ors*

Zdravko Mucić was indicted for violating the laws of war at the Čelebići prison camp. Mucić was charged as a superior with responsibility for crimes committed by his

[14] Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, at para 1 (July 1, 2003).
[15] Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, at para 6 (July 1, 2003).
[16] Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, at para 9 (July 1, 2003).
[17] Prosecutor v. Blaskic, Case No. , Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para 70 (Oct. 29, 1997).
[18] Prosecutor v. Krstic, Case No. IT-98-33-A, Decision on Application for Subpoenas, at para 10 (July 1, 2003).

subordinates[19]. He was found guilty for both superior and individual crimes against the laws of war[20].

Mucić appealed against the Trial Chamber's decision to admit into evidence interviews following his arrest and the decision by the Trial Chamber refusing to subpoena an interpreter[21]. Mucić felt that the interview used was tainted and could not be fairly used. He claimed that a conversation where he was persuaded not to ask for representation was not recorded. He asked for representation earlier in the conversation then, when the conversation was being recorded again, he no longer wanted representation. Mucić claims the interpreter, Alexandra Pal, could testify as to why he suddenly changed his mind through the content of the conversation[22].

The Trial Chamber rejected the request for a subpoena of the interpreter claiming that there was no evidence of omission in the record of the interviews. The Appeals Chamber agreed, stating that the order was not necessary for the purpose of the investigation[23]. Therefore, the ICTY subpoenas witnesses whose testimonies are relevant to the outcome of the case.

d. *Prosecutor v Kupreškić and ors*

Vlatko Kupreškić was charged with murder, cruel treatment, and other offenses when expelling Bosnian Muslims from the Lašva River Valley region[24]. Kupreškić submitted an application for a summons to appear for testimony to be issued to four witnesses who were reluctant to appear as defence witnesses. The witnesses were

[19] Prosecutor v. Mucic, Case No. IT-96-21-A, Appeal Judgment, at para 1 (Feb. 20, 2001).
[20] Prosecutor v. Mucic, Case No. IT-96-21-A, Appeal Judgment, at para 2 (Feb. 20, 2001).
[21] Prosecutor v. Mucic, Case No. IT-96-21-A, Appeal Judgment, at para 528 (Feb. 20, 2001).
[22] Prosecutor v. Mucic, Case No. IT-96-21-A, Appeal Judgment, at para 531 (Feb. 20, 2001).
[23] Prosecutor v. Mucic, Case No. IT-96-21-A, Appeal Judgment, at para 558 (Feb. 20, 2001).
[24] Prosecutor v. Kupreskic and ors., Case No. IT-95-16-T, Decision on Defense Motion to Summon Witness, at para F1 (Oct. 6, 1998).

reluctant to appear for reasons of personal security and possible intimidation[25]. The Trial Chamber II issued the requested summons. The Chamber found that the witnesses needed to testify so all relevant information was available for justice and a fair trial[26].

e. *Prosecutor v. Brdjanin, Talic*

In this case, the Prosecution sought to submit a Washington Post article written by reporter Jonathon Randal into evidence. Randal was contacted to appear to give evidence, but refused to appear because of his position as a journalist. As a result, the Prosecution requested a subpoena to give evidence addressed to Randal[27].

Brdjanin argued that the interview was done through the interpreting service of another journalist ("X"), who was hostile towards him and therefore, what was written in Randal's article was not Brdjanin's word[28].

The Trial Chamber rendered the decision that Randal's article and testimony were admissible because, they were relevant and could help expose the frame of mind of the accused in 1992[29]. Randal claimed journalistic privilege with regards to news gathering. In a statement to the Prosecution, Randal expressed that if he testified, he would be in a position to disclose whether the quotes in the article were true and accurate[30]. The Chamber expressed its interest in protecting journalists and the confidentiality of their

[25] Prosecutor v. Kupreskic and ors., Case No. IT-95-16-T, Decision on Defense Motion to Summon Witness, at para 2 (Oct. 6, 1998).
[26] Prosecutor v. Kupreskic and ors., Case No. IT-95-16-T, Decision on Defense Motion to Summon Witness, at para 5 (Oct. 6,1998).
[27] Prosecutor v. Brdjanin, Talic, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, at para 1 (June 7,2002).
[28] Prosecutor v. Brdjanin, Talic, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, at para 3 (June 7,2002).
[29] Prosecutor v. Brdjanin, Talic, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, at para 5 (June 7,2002).
[30] Prosecutor v. Brdjanin, Talic, Case No. IT-99-36, Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, at para 13 (June 7,2002).

sources, however, it still denied Randal's appeal of the subpoena on the grounds that his article and testimony were relevant to the case.

f. *Prosecutor v. Kovacevic*

Defense requested the Trial Chamber to issue a subpoena on the Secretariat of the United Nations for certain documents. The Chamber determined that the request was related to matters that were either irrelevant or peripheral to the issues in the case and declined the subpoena[31]. Therefore, the ICTY does not issue subpoenas when the information is irrelevant to the case.

3. The ICTY may subpoena potential witnesses who refuse to cooperate even after multiple attempts to be reached.

The Chambers of the ICTY may issue a subpoena if the Prosecution or Defence has shown that it has made attempts to obtain the evidence from a potential witness through his or her voluntary cooperation.

a. *Prosecutor v. Karadzic*

In this case which was discussed earlier, the Prosecution discussed the issue with potential witness Dr. Berko Zecevic over the telephone. The Chamber was satisfied by this and determined that the Prosecution made reasonable attempts to get voluntary cooperation from Dr. Berko Zecevic. When he still showed an unwillingness to cooperate, the Chamber found that the Prosecution made enough of an effort to get voluntary cooperation[32] that they granted the subpoena.

b. *Prosecutor v. Blagojevic, Jokic*

[31] Prosecutor v. Kovasevic, Case No. IT-97-24, Decisino on Defense Motino to Issue a Subpoena to United Nations Secretary, at para 4 (July 1, 1998).
[32] Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Prosecution's Motion to Subpoena Berko Zecevic, at para 17 (Jan. 20, 2011).

Vidoje Blagojevic's Defense made substantial effort to contact Mr. Ton Karremans, Colonel (Ret.) and Commander of the Dutch UNPROFOR Battalion III[33]. Both the Prosecutor and Defence agreed that Mr. Karremans testimony would assist the Trial Chamber[34] and the Trial Chamber found the testimony to be directly relevant for the case[35].

The Trial Chamber noted that while a subpoena can be used here, the fact that Mr. Karremans never responded to the Defence may mean that Mr. Karremans may not have realized he was being contacted by the Defence[36]. As a result, Mr. Karremans did not notify the Defence if he would be a voluntary witness. The Chamber requested the help of the Kingdom of the Netherlands to contact and inform Mr. Karremans of the request for his testimony. This just shows it was too early in the process to issue a subpoena. Karremans may not have known he was being contacted therefore, even though attempts to reach him were made, the attempts were not satisfactory to rise to the level of needing to issue a subpoena yet.

4. The ICTY will put out arrest warrants for potential witnesses who are noncompliant after a subpoena has been issued.

In cases of noncompliance after a subpoena has been issued to a potential witness, the ICTY issues a warrant for the potential witness's arrest. The ICTY reaches out to the

[33] Prosecutor v. Blagojevic, Jokic, Case No. IT-02-60-T, Decision on Vidoje Blagojevic's Request for the Issuance of *Subpoenas Ad Testificandum* and Supportiong Documentation, and Subsequent Request to the Governmetn of the Netgherlands, para 4 (May 27, 2004).
[34] Prosecutor v. Blagojevic, Jokic, Case No. IT-02-60-T, Decision on Vidoje Blagojevic's Request for the Issuance of *Subpoenas Ad Testificandum* and Supportiong Documentation, and Subsequent Request to the Governmetn of the Netgherlands, para 7 (May 27, 2004).
[35] Prosecutor v. Blagojevic, Jokic, Case No. IT-02-60-T, Decision on Vidoje Blagojevic's Request for the Issuance of *Subpoenas Ad Testificandum* and Supportiong Documentation, and Subsequent Request to the Governmetn of the Netgherlands, para 8 (May 27, 2004).
[36] Prosecutor v. Blagojevic, Jokic, Case No. IT-02-60-T, Decision on Vidoje Blagojevic's Request for the Issuance of *Subpoenas Ad Testificandum* and Supportiong Documentation, and Subsequent Request to the Governmetn of the Netgherlands, para 9 (May 27, 2004).

State in which the accused resides to detain and transfer the witness to the Tribunal to face the charge of contempt of the court.

According to Rule 77 (G) of the Rules of Procedure and Evidence, the maximum fine for being in contempt of the court is 100,000 Euros and the maximum imprisonment cannot exceed seven years[37].

a. *Prosecutor v. Krajišnik*

In the case of *Prosecutor v. Krajišnik,* trial judges issued a subpoena to Branko Deric to appear as a witness. Deric failed to appear before the court and was unable to show just excuse for noncompliance. This triggered the issuance of the warrant which directed the Bosnian authorities to arrest and transfer Deric to the Tribunal[38]. This highlights that if the subpoenaed person is noncompliant and has no just excuse for being so, the ICTY may and does issue a warrant for his or her arrest.

b. *Prosecutor v. Tolilnir*

In the case of *Prosecutor v. Tolilnir*, Dragomir Pecanac was issued a subpoena to appear before the court. When Pecanac still did not appear before the court, the Prosecutor requested a warrant for his arrest and for the Republic of Serbia to execute the warrant and transfer the accused to the custody of the Tribunal[39]. The Republic of Serbia arrested Pecanac, detained him in the UN detention center, and transferred him to the

[37] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 77, Rev. 46, 20 October 2011 *available at* http://www.icty.org/.

[38] Press Release, International Tribunal for the Former Yugoslavia, Trial Chamber Orders Arrest of Former Bosnian Serb Premier For Contempt (June 27, 2006).

[39] In The Contempt Case of Dragomir Pecanac, Case No. IT-05-88/2-R77.2, Judgment on Allegations of Contempt, at para 4 (Dec. 9, 2011).

Tribunal[40]. This further indicates how the ICTY exercises its power to request that the noncompliant person have a warrant out for his or her arrest.

E. Conclusion

The ICTY has the power to subpoena an individual whose testimony is relevant to the case and can be found through no other source. Also, if a potential witness has been contacted but still refuses to voluntarily testify, a subpoena can be issued if enough effort has been made to request the witness directly to satisfy the Chamber. States cannot be subpoenaed, but instead, they can be given orders to assist the Tribunal. Many States are willing to cooperate with the Tribunal and help in the issuance of subpoenas to potential witnesses. When a subpoenaed witness is still noncompliant, the ICTY can issue a warrant for his or her arrest and ask the State in which the witness resides for help.

F. Relation to the Special Tribunal For Lebanon ("STL")

The STL can look to the ICTY when considering which conditions to issue subpoenas. The STL can adopt the practice that relevant testimony should always be sought after; and a subpoena should be issued when an individual is the only source for important testimony as these practices have ensured a fair trial. The STL could also follow the ICTY's willingness to issue arrest warrants for witnesses who are noncompliant after receiving a subpoena as this has proved useful for the ICTY in the past. Also, it is not only because the practices of the ICTY are effective, but because the language in the ICTY's Rules of Procedure and Evidence is almost identical to the STL's Rules of Procedure and Evidence. This parallel can be used to justify the STL's adoption of some of the ICTY's practices with respect to subpoenaing witnesses.

[40] In The Contempt Case of Dragomir Pecanac, Case No. IT-05-88/2-R77.2, Judgment on Allegations of Contempt, at para 6 (Dec. 9, 2011).

IV. International Criminal Tribunal for Rwanda ("ICTR")

A. Issue

Under which conditions may the ICTR issue subpoenas? How does the ICTR handle situations where a witness is noncompliant after a subpoena has been issued?

B. Conclusion Summary

The ICTR may issue a subpoena to an individual under the condition that the witness in question has evidence or testimony relevant to the issue and that the witness has already been reasonably approached to appear before the Tribunal voluntarily. The ICTR will not issue a subpoena to a potential witness whom it feels will not comply if the subpoena is given. Because the ICTR avoids issuing a subpoena to a witness the Tribunal feels will not comply anyway, the ICTR does not deal with noncompliance after a subpoena.

C. Rules

1. Rules of Procedure and Evidence

Rule 54: General Provision[41]

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.

Rule 77: Contempt of the Tribunal[42]

[41] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 54, 9 February 2010 *available at* http://www.unictr.org/.

[42] Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 77, 9 February 2010 *available at* http://www.unictr.org/.

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who

(iii) Without just excuse fails to comply with an order to attend before or produce documents before a Chamber

2. Statute for the International Criminal Tribunal for Rwanda

Article 28: Cooperation and Judicial Assistance[43]

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(c) The service of documents;

(d) The arrest or detention of persons;

(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

D. Application

1. The ICTR may subpoena an individual if his or her testimony is determined necessary to ensure a fair trial.

[43] Statute of the International Criminal Tribunal for Rwanda, Article 28, adopted by Security Council 8 November 1994, U.N. Doc. S/RES/955 (1994), *available at* http://www.unictr.org/.

The ICTR may issue a subpoena to a potential witness if the testimony or evidence is necessary to give a fair trial. If the potential witness is important enough to the case that it would be unfair to not have his or her testimony, then the ICTR may issue a subpoena requesting the witness to appear before the court.

a. *Prosecutor v. Bikindi*

The Defence in this case, pursuant to Rule 54, requested the Trial Chamber to issue subpoenas to potential witnesses DUR, FIV, and JHI[44]. In this case, the Chamber lays out three factors which must occur before issuing a subpoena. The actual application for a subpoena must show that (i) reasonable attempts have been made to obtain the voluntary cooperation of the witness; (ii) the witness's testimony can materially assist the applicant in respect of clearly identified issues; and, (iii) the witness's testimony must be necessary and appropriate for the conduct and fairness of the trial[45].

In this particular case, the Chamber noticed that the intended testimony for all three potential witnesses would materially help the case. These witnesses would have each given evidence about killings that no one else could have been expected to give; therefore, the testimonies were necessary for a fair trial[46].

Because all three witnesses' potential testimonies satisfy the requirements for a subpoena, the Chamber decided to subpoena DUR and FIV, and to obtain JIH's testimony from a video-link from the State of residence of the witness. The Defence made reasonable attempts to obtain the witnesses' voluntary cooperation, the witnesses'

[44] Prosecutor v. Bikindi, Case No. ICTR-2001-72-T, Decision on Ex Parte and Confidential Application for Subpoena, at para 2 (Oct. 1, 2007).
[45] Prosecutor v. Bikindi, Case No. ICTR-2001-72-T, Decision on Ex Parte and Confidential Application for Subpoena, at para 5 (Oct. 1, 2007).
[46] Prosecutor v. Bikindi, Case No. ICTR-2001-72-T, Decision on Ex Parte and Confidential Application for Subpoena, at para 7-9 (Oct. 1, 2007).

testimonies could materially assist the case, and their testimonies were deemed necessary for a fair trial therefore, the three factors necessary for the application for the subpoena were met, and the subpoenas were issued. This shows that when the proper measures to obtain the information are taken, and when the information is necessary in order to have a fair trial, the ICTR issues subpoenas.

b. *Prosecutor v. Nzirorera et al.*

In *Nzirorera*, the Defence asked for a subpoena compelling Witness G to appear for a pre-trial interview[47]. The Defence claimed that Witness G had evidence showing that Mr. Nzirorera tried to stop the killings in 1994[48].

The Prosecutor claimed that the Defence had plenty of time to view Witness G's evidence during cross-examination and in advance of the Defence case[49]. This means there is no reason to subpoena Witness G for a pretrial interview since the Defence would have the opportunity to gather evidence from him during cross-examination. This shows that any evidence potentially gained from the pretrial interview would not be necessary since it would be gathered at another point in the trial. Therefore, the Chamber dismissed the Defence's Notion. So, when the information that could be obtained is not necessary, the ICTR does not issue subpoenas.

2. The ICTR may subpoena a potential witness whose testimony is relevant to the case.

Like the ICTY, the Chambers of the ICTR may issue subpoenas to individuals if the testimony and evidence expected to be brought by them is relevant to the case. If the Chambers determine that the witness has information that would be material to the case,

[47] Prosecutor v. Nzirorera et al., Case No. ICTR-98-44-I, at para 1 (Oct. 20, 2003).
[48] Prosecutor v. Nzirorera et al., Case No. ICTR-98-44-I, at para 2 (Oct. 20, 2003).
[49] Prosecutor v. Nzirorera et al., Case No. ICTR-98-44-I, at para 10 (Oct. 20, 2003).

and is the only source of this information, a subpoena may be granted to obligate the witness to appear before the court.

a. *Prosecutor v. Semanza*

The Defence in this case requested that the Trial Chamber issue a subpoena for a witness, but the Prosecutor claimed the request was premature[50]. The Trial Chamber found that the Defence did not yet chose a date on which the named person would testify. Under Article 28 and Rule 54, the Chamber has the authority to issue subpoenas to a witness, but has to decide if it is proper or warranted under the circumstances[51], circumstances in this case being a designated time and date. The Chamber thought it was too early in the process to issue a subpoena. The Chamber will not issue a subpoena that does not have a specific time and date. The Chamber found the request for a subpoena too premature at this stage therefore, the request has failed to show the Chamber the relevancy of the proposed witness's testimony[52].

b. *Prosecutor v. Karera*

The Prosecution asked for a newspaper article to be admitted as evidence. The Prosecution also requested the Trial Chamber for a subpoena of the author of the article, Jane Perlez, as a witness before the Chamber[53]. The Prosecutor claims that both Perlez

[50] Prosecutor v. Semanza, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, at para 16 (Oct. 20, 2000).
[51] Prosecutor v. Semanza, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, at para 23 (Oct. 20, 2000).
[52] Prosecutor v. Semanza, Case No. ICTR-97-20-I, Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure, at para 24 (Oct. 20, 2000).
[53] Prosecutor v. Karera, Case No. ICTR-01-74-T, Decision on Admissibility of Newpaper Article and Subpoena to Journalist, at para 1 (Jan. 23, 2006).

and the article constitute evidence that is of "direct important value in determining a core issue in the case" and that it cannot be obtained anywhere else[54].

Using Brdjanin as a precedent, the interest of justice and having all relevant evidence must be balanced with the public interest of the right to gather news without constraints. Based on the allegations against Karera and the evidence against him, the Chamber did not find that the Prosecution showed enough to prove that Karera's comments in the article were of value in determining the core values of the case[55]. The Chamber denied the motion for the subpoena because, it was not relevant to determining the core values of the case and because it was not relevant, it was not take priority over the right to gather news without constraints.

3. The ICTR may subpoena potential witnesses who refuse to cooperate even after multiple attempts have been made to reach them.

The ICTR's Chambers may issue a subpoena to a potential witness if it finds that the Prosecution or the Defence has shown that they have made a satisfactory effort to contact the potential witness. If the potential witness refuses to voluntarily cooperate after attempts by the Prosecution or Defence, a subpoena may be issued.

a. *Prosecutor v. Bizmungu, Ndindiliyimana, Nzuwonemeye, Sagahutu*

The Defence for Nzuwonemeye requested the Chamber to issue an order for cooperation and assistance of the Government of the Netherlands to set up an interview

[54] Prosecutor v. Karera, Case No. ICTR-01-74-T, Decision on Admissibility of Newpaper Article and Subpoena to Journalist, at para 6 (Jan. 23, 2006).
[55] Prosecutor v. Karera, Case No. ICTR-01-74-T, Decision on Admissibility of Newpaper Article and Subpoena to Journalist, at para 11 (Jan. 23, 2006).

with Major Robert Alexander Van Putten. The Defence wanted to interview Major van Putten about his role as a UNAMIR soldier in Rwanda[56].

Defence made reasonable efforts to obtain the assistance of the Government of the Netherlands by requesting authorization to meet with the former UNAMIR officer it needed. The Chamber further noted that the Defence's efforts to obtain an interview from the officer were unsuccessful due to the policy of the Government of the Netherlands not to comply with non-obligatory requests[57]. The Chamber cited Article 28 of the Statute to highlight that they have the power to impose an obligation on the State to cooperate with the Tribunal[58]. The Chamber therefore concluded that the criteria for granting an order requesting cooperation have been met. As a result, the Chamber then asked the Netherlands government to allow the Defence to meet with Van Putten. This shows that the ICTR can subpoena a witness when multiple attempts to contact him or her have been made and when the criteria for granting an order requesting cooperation have been met.

b. *Prosecutor v. Ngeze*

In *Ngeze*, the Defence requested the Tribunal to issue a subpoena to the Minister of Justice of Rwanda to produce documents relating to Ngeze's arrest and court records.

[56] Prosecutor v. Bizimungu, Ndindiliyimana, Nzuwonemeye, Sagahutu, Case No. ICTR-00-56-T, Decision on Nzuwoneymeye's Motion Requesting the Cooperation from the Government of the Netherlands Pursuant to Article 28 of the Statute, at para 1 (Feb. 13, 2006).
[57] Prosecutor v. Bizimungu, Ndindiliyimana, Nzuwonemeye, Sagahutu, Case No. ICTR-00-56-T, Decision on Nzuwoneymeye's Motion Requesting the Cooperation from the Government of the Netherlands Pursuant to Article 28 of the Statute, at para 6 (Feb. 13, 2006).
[58] Prosecutor v. Bizimungu, Ndindiliyimana, Nzuwonemeye, Sagahutu, Case No. ICTR-00-56-T, Decision on Nzuwoneymeye's Motion Requesting the Cooperation from the Government of the Netherlands Pursuant to Article 28 of the Statute, at para 5 (Feb. 13, 2006).

The Defence submitted that Ngeze was arrested several times and the crimes that he was alleged to have committed occurred during the time he was in prison[59].

The Prosecution claimed there was no legal basis for the Tribunal to subpoena the Government of Rwanda for the documents, because the ICTR statute above states that tribunals can make requests of the State, but not subpoena a State[60]. However, the Defence claimed all documents concerning Ngeze should be available to the defense[61]. Therefore, the Trial Chamber noted that there was nothing in the Rules to support the Defence's request. But, the real issue is that the Defence made no effort to obtain the documents it needed from the State before requesting the subpoena[62]. Therefore, not only were multiple attempts not made, but no attempts were made to reach the Minister of Justice of Rwanda. Consequently, the Chamber rejects the Defence's motion. This indicates that the STL may want to make multiple attempts to reach a potential witness before considering issuing a subpoena.

4. The ICTR may only subpoena a potential witness whose rights are not being violated.

The ICTR looks to how subpoenaing a witness will affect his or her fundamental rights before forcing him or her to appear before the court. If the court decides that

[59] Prosecutor v. Ngeze, Case No. ICTR-97-27-I, Decision on the Defence Motion To Have the Court Request a Subpoena Duces Tecum for the Production of the Defendant's Arrest and Certified Court Records, at para 5 (May 10, 2000).

[60] Statute of the International Criminal Tribunal for Rwanda, Article 28, adopted by Security Council 8 November 1994, U.N. Doc. S/RES/955 (1994)

[61] Prosecutor v. Ngeze, Case No. ICTR-97-27-I, Decision on the Defence Motion To Have the Court Request a Subpoena Duces Tecum for the Production of the Defendant's Arrest and Certified Court Records, at para 9 (May 10, 2000).

[62] Prosecutor v. Ngeze, Case No. ICTR-97-27-I, Decision on the Defence Motion To Have the Court Request a Subpoena Duces Tecum for the Production of the Defendant's Arrest and Certified Court Records, at para 17 (May 10, 2000).

testifying is in violation of the witness's fundamental rights, the court does not compel the witness to testify.

a. *Prosecutor v. Akayesu*

Jean Paul Akayesu was charged with twelve counts of genocide and crimes against humanity. He claimed he did not commit, order, or participate in any of the killings even though he conceded that the genocide occurred in Rwanda[63].

The Defence requested and acquired the issuance of a subpoena for Major-General Roméo Dallaire, the former force Commander of UNAMIR (United Nations Assistance Mission in Rwanda), whose immunity was partially lifted by the UN Secretary-General, to appear as a witness for the Defence[64]. This was granted because Dallaire's rights would not be violated by testifying. However, the Chamber did not grant the Defence's subpoenas for two persons asked to appear as Defence witnesses. The Chamber rejected the request for the subpoena on the grounds that the two potential witnesses' fundamental rights would perhaps be violated because their appearance as witnesses could cause prejudice to them, although it does not say why. The Chamber also rejected the appearance of an expert witness for similar reasons[65]. This conveys that the ICTR places priority of a potential witness's fundamental rights over the need for evidence even if the evidence is necessary to ensure a fair trial.

b. *Prosecutor v. Nzirorera et al.*

This case was mentioned above for necessity of testimony, but it also deals with the issue of violation of a witness's rights.

[63] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, at para 1 (Sep. 2 1998).
[64] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, at para 25 (Sep. 2 1998).
[65] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, at para 26 (Sep. 2 1998).

The Prosecution acknowledged that the Chamber had the authority to issue a subpoena under Rule 54, but argued that the power should not be used on someone who will not be prosecuted or tried[66].

The Prosecutor did not, in principle, object to Nzirorera's request to interview certain witnesses. However, the Prosecutor called for the Chamber's attention to a particular Witness G's special circumstances which led to the witness being relocated and placed in a national witness protection program. Additionally, the threat to his security was linked to the Accused Nzirorera[67]. To expose such a witness would compromise the very protection that was afforded to him by the protection program therefore, would be in violation of his fundamental rights. This is another example of how the ICTR places a potential witness's rights as priority over gathering evidence.

5. The ICTR will not issue a subpoena to a potential witness if the court does not feel that the subpoena will ensure the needed cooperation.

If the court does not feel compliance will be achieved with the issuance of a subpoena, then the court will forgo issuing the subpoena. The court worries that even if the witness complies and appears before the court, the witness's unwillingness to testify will prevent him or her from cooperating thus possibly preventing him or her from giving meaningful testimony.

a. *Prosecutor v. Nzabonimana*

[66] Prosecutor v. Nzirorera et al., Case No. ICTR-98-44-I, at para 5 (Oct. 20, 2003).
[67] Prosecutor v. Nzirorera et al., Case No. ICTR-98-44-I, at para 8 (Oct. 20, 2003).

In the case of *Prosecutor v. Nzabonimana*, the defence filed a motion for the issuance of a subpoena of a witness identified by the pseudonym T171[68]. Because the witness was not willing to cooperate without the subpoena, and the defence was unable to prove that the witness would be responsive to a subpoena, the Trial Chamber denied the issuance of a subpoena to witness T171[69] and avoided the situation altogether.

b. *Prosecutor v. Karemera, Ngirumpatse, Nzirorera*

In the case of *Prosecutor v. Karemera, Ngirumpatse, Nzirorera*, Nzirorera filed a motion seeking the issuance of a subpoena of Paul Rusesabagina to have his testimony taken by video link[70]. Nzirorera claimed that Rusesabagina's testimony was material because it contradicted the testimony of previous witnesses[71]. However, the Chamber found that it did not appear that Rusesabagina was likely to cooperate with the Defence, even after a subpoena. Rusesabagina was informed that the Defence sought his testimony but he still did not responded to any messages regarding the matter. Therefore, it is unlikely that a subpoena would produce compliance[72]. This further portrays how the ICTR avoids subpoenaing potential witnesses who are unlikely to comply.

While the ICTR has penalties in the Rules of Procedure and Evidence for contempt of court, they will not be included because, as outlined above, the ICTR does not even issue subpoenas to witnesses they do not think will be compliant.

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[68] Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion for Subpoena, Protective Measures and the Cooperation of France in Respect of Prospective Witness T171, at para 2 (May 10, 2011).

[69] Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Decision on Nzabonimana's Motion for Subpoena, Protective Measures and the Cooperation of France in Respect of Prospective Witness T171, at para 16 (May 10, 2011).

[70] Prosecutor v. Karemera, Ngirumpatse, Nzirorera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Subpoena Paul Rusesabagina, at para 1 (Feb. 22, 2010).

[71] Prosecutor v. Karemera, Ngirumpatse, Nzirorera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Subpoena Paul Rusesabagina, at para 8 (Feb. 22, 2010).

[72] Prosecutor v. Karemera, Ngirumpatse, Nzirorera, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Subpoena Paul Rusesabagina, at para 10 (Feb. 22, 2010).

E. Conclusion

The ICTR may issue a subpoena to an individual if it is needed to ensure a fair trial. Witnesses whose testimonies are relevant to the case and in situations in which the evidence can only be discovered through their testimony may be subpoenaed to ensure justice. Also, if a potential witness refuses to testify, even after good faith effort attempts by the Prosecutor or Defence to convince the witness to voluntarily comply, then a subpoena may be issued to the witness. Nonetheless, as proved above, as important as any witness's testimony is to a given case, if the potential witness's fundamental rights could be violated, a subpoena may not be issued. If a potential witness is deemed likely to be noncompliant even after a subpoena is issued, the ICTR will not issue the subpoena at all. If a potential witness does not want to comply, and shows no signs of future compliance, then a subpoena may not be issued.

F. Relation to the Special Tribunal For Lebanon

There are effective practices the STL can draw from the ICTR with respect to the conditions under which it subpoenas witnesses. The ICTR looks to relevance of evidence and whether the Prosecution or Defense has made a good faith effort to obtain voluntary compliance. If the information is necessary for a fair trial and the potential witness's rights are not being violated, then a subpoena may be issued. This balance of ensuring a fair trial, yet maintaining the notion that individual rights are paramount creates effective yet humane guidelines for issuing a subpoena. However, the ICTR's method of handling potential witnesses that may not cooperate should not be followed. As mentioned above, if the ICTR determines that a subpoena may not force a witness to comply, they do not

issue one. This practice removes subpoena power in general. There needs to be some inherent power that backs up the ability to subpoena potential witnesses.

V. Special Court for Sierra Leone ("SCSL")

A. Issue

Under which conditions may the SCSL issue subpoenas? How does the SCSL handle situations where there is noncompliance after a subpoena has been issued?

B. Conclusion Summary

The SCSL may issue a subpoena to any individual whose testimony will ensure a fair trial.

C. Rule

1. SCSL Rules of Procedure and Evidence

Rule 54: General Provision[73]

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.

2. Statute of the Special Court for Sierra Leone

Article 17[74]

Rights of the accused

4. 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:

[73] Rules of Procedure and Evidence of The Special Court for Sierra Leone, Rule 54, 16 November 2011 *available at* http://www.sc-sl.org/.

[74] Statute of the Special Tribunal for Sierra Leone, Article 17, adopted by Security Council 14 August 200, U.N. Doc. S/RES/1315 (2000), *available at* www.sc-sl.org/.

e. 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;

D. Application

1. The SCSL may issue a subpoena to any witness whose testimony is necessary to ensure a fair trial.

The SCSL subpoenas any individual as long as his or her testimony is necessary for a fair trial.

a. *Prosecutor v. Norman, Fofana, Kondewa*

The Trial Chamber denied the request for a subpoena of H.E. Dr. Ahmad Tejan Kabbah claiming that there was no forensic purpose[75]. Fofana and Norman appealed this decision.

Rule 54 gives the Trial Chamber the power to determine whether a subpoena should be issued. In Rule 54, the use of the word "may" gives the Chamber the power of discretion whether to issue a subpoena as well as never obligating the Chamber to issue a subpoena[76]. The Chamber's treatment of Rule 54 recognizes that a subpoena may be issued when a party shows that it is necessary for an investigation[77].

In *Norman*, the Appeals Chamber claimed that the Defendant did not prove to the Trial Chamber that President Kabbah was the only means of procuring the evidence[78].

[75] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 35 (Sep. 11, 2006).
[76] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 8 (Sep. 11, 2006)
[77] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 23 (Sep. 11, 2006)
[78] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 32 (Sep. 11, 2006)

The Defendant also did not prove that President Kabbah's testimony would be relevant to the case[79].

The ability to issue a subpoena to a head of state was not discussed in the decision. Nonetheless, the subpoena request was denied on the fact that the Defence never satisfied Rule 54 because, since Kabbah's testimony was not the only means of obtaining the evidence, it was not necessary for a fair trial[80].

b. *Prosecutor v. Sesay, Kallon, Gbao*

In this case, the Defence submits that the evidence H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, could give testimony that would assist in proving Mr. Sesay's innocence. The Defence also stated that the evidence was unique and could not be obtained from any other person[81].

The Defence also claimed that it made several attempts to contact Dr. Kabbah but no meeting materialized, and since 2007, Dr. Kabbah did not respond to any communication from the Defence[82].

The Trial Chamber recalled that it needed a 2-1 majority to issue a subpoena and that the subpoena was for the purpose of investigating and preparing for the trial[83]. The Trial Chamber found that it was good for the Chamber to look both to whether the

[79] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 36 (Sep. 11, 2006)
[80] Prosecutor v. Norman, Fofana, Kondewa, Case No. SCSL-2004-14-T, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, at para 43 (Sep. 11, 2006)
[81] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, at para 3 (June 30, 2008).
[82] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, at para 4 (June 30, 2008).
[83] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, at para 16 (June 30, 2008).

information sought was necessary thus whether the subpoena was a necessary measure[84]. Pursuant to Rule 54, the Chamber granted the issue of the subpoena since both factors for determining necessity were satisfied[85]. This, like *Norman* right above, further proves that evidence needed from a potential witness must be necessary to a fair trial in order for a subpoena to be granted.

2. If a potential witness is noncompliant after a subpoena has been issued, the SCSL can begin criminal proceedings for contempt of court.

The SCSL may use its powers to punish anyone who is in contempt of the court. The Registrar would seek assistance of the country in which the subpoenaed person resides to ensure that he or she appears at the proper time and place. However, if he or she does not appear, then criminal proceedings may begin. The history does not give a clear explanation of what these criminal proceedings are exactly, but the SCSL has the rules in place to charge noncompliant witnesses in contempt of the court[86].

E. Conclusion

The SCSL may subpoena any individual, even high powered State officials, to appear before the Tribunal if the testimony of the individual will ensure a fair trial. If the Chamber reaches a majority decision that the testimony is relevant, can only be given by the potential witness, and necessary for the case, a subpoena may be issued. In a circumstance where the SCSL issues a subpoena and the potential witness still does not comply, the SCSL can begin criminal proceedings.

[84] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, at para 17 (June 30, 2008).
[85] Prosecutor v. Sesay, Case No. SCSL-04-15-T, Written Reasoned Decision on Motion for Issuance of a Subpoena to H.E. Dr. Ahmad Tejan Kabbah, Former President of the Republic of Sierra Leone, at para 18 (June 30, 2008).
[86] Sylvia Ngane, *Blood Diamond: Supermodel Naomi Campbell may be compelled to Testify at the Special Court for Sierra Leone*, Blog of the European Journal of International Law (2010).

F. Relation to the Special Tribunal For Lebanon

The SCSL takes an aggressive approach with respect to the types of witnesses they will subpoena. The SCSL's willingness to subpoena an ex-President of its own supporting nation shows that gathering the evidence for the trial is of the upmost importance. The STL should follow this behavior in deciding who can be subpoenaed. This is not only because it is the most effective, but also the STL should model itself after the SCSL because they are both international courts that were created with a supporting nation. Because they were formed in similar manners, it is natural that they should follow similar rules.

VI. International Criminal Court ("ICC")

A. Issue

Under which conditions may the ICC issue subpoenas? How does the ICC handle situations where there is noncompliance after a subpoena has been issued?

B. Conclusion Summary

The ICC does not have the authority to issue a subpoena under any conditions.

C. Rule

1. ICC Rules of Procedure and Evidence

Rule 65[87]

Compellability of witnesses

1. A witness who appears before the Court is compellable by the Court to provide testimony, unless otherwise provided for in the Statute and the Rules, in particular rules 73, 74 and 75.

[87] Rules of Procedure and Evidence of the International Criminal Court, Rule 65, adopted by the Assembly of State Parties 10 September 2002, ICC-ASP/1/3 (2002) *available at* http://www.icc-cpi.int/.

2. Rule 171 applies to a witness appearing before the Court who is compellable to provide testimony under sub-rule 1.

Rule 171[88]

Refusal to comply with a direction by the Court

1. When the misconduct consists of deliberate refusal to comply with an oral or written direction by the Court, not covered by rule 170, and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, impose a fine.

2. If the person committing misconduct as described in sub-rule 1 is an official of the Court, or a defence counsel, or a legal representative of victims, the Presiding Judge of the Chamber dealing with the matter may also order the interdiction of that person from exercising his or her functions before the Court for a period not exceeding 30 days.

3. If the Presiding Judge in cases under sub-rules 1 and 2 considers that a longer period of interdiction is appropriate, the Presiding Judge shall refer the matter to the Presidency, which may hold a hearing to determine whether to order a longer or permanent period of interdiction.

4. A fine imposed under sub-rule 1 shall not exceed 2,000 euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines

[88] Rules of Procedure and Evidence of the International Criminal Court, Rule 171, adopted by the Assembly of State Parties 10 September 2002, ICC-ASP/1/3 (2002) *available at* http://www.icc-cpi.int/.

shall be cumulative.

5. The person concerned shall be given an opportunity to be heard before a sanction for misconduct, as described in this rule, is imposed.

2. Rome Statute of the International Criminal Court

Article 64[89]

Functions and powers of the Trial Chamber

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

Article 93[90]

Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

[89] Rome Statute of the International Criminal Court, Article 64, adopted by the Security Council on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998) *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm/.

[90] Rome Statute of the International Criminal Court, Article 93, adopted by the Security Council on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998) *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm/.

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7.

(a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

D. Application

1. The ICC did not give its Chambers the authority to issue subpoenas to potential witnesses.

a. *Appearances of Witnesses and Unavailability of Subpoena Powers for the Court*

In his book, Sluiter claims that it is a wonder that any criminal court could function with an absence of subpoena power. It is expected that potential witnesses will be reluctant to testify due to legitimate fears of doing so. The ICC is unlike the ICTY and ICTR in that it relies solely on voluntary appearance[91].

The question is how the word "voluntary" came to be in Article 93(1)(e) of the Rome Statute[92]. The absence of the ability to enforce an order to appear raises the question of what should be the power to require the appearance of a witness as shown in Article 64(6)(b) of the statute. Because no sanction can be imposed on the witness by the Court for failure to appear, it is up to parties to ensure the appearance of a witness. A party can be ordered to seek the appearance of a witness, but no direct obligation can be imposed directly on the witness[93].

Witnesses have the right to not testify before the ICC because they have no subpoena power, even when this goes against the interest of justice[94].

b. *Statement by the Registrar*

In this statement, Mr. Adama Dieng speaks of the obstacles that prevent the exchange of information and collection of evidence. He claims the problem lies in the incompatibility between domestic laws and the procedure followed by international jurisdictions. As a result, serving a subpoena in some countries has not been possible.

[91] Göran Sluiter, Appearances of Witnesses and Unavailability of Subpoena Powers for the Court, 459 (2010).
[92] Göran Sluiter, Appearances of Witnesses and Unavailability of Subpoena Powers for the Court, 465 (2010).
[93] Göran Sluiter, Appearances of Witnesses and Unavailability of Subpoena Powers for the Court, 466 (2010).
[94] Göran Sluiter, Appearances of Witnesses and Unavailability of Subpoena Powers for the Court, 466 (2010).

The ICC has taken many steps to domesticate the Rome Statute. The ICC is encouraging systematic studies on the national laws passed. There is a need for better congruence between international criminal procedure and the different domestic practices[95].

c. *I Beg You, Please Come Testify*

The lack of subpoena power in the ICC needs to be explored because this lack of power could violate the accused's right to a fair trial[96]. Proceedings cannot be fair when the courts cannot subpoena a significant number of defence witnesses. Also, the quality of evidence may be in jeopardy when testimony becomes too much the subject of negotiation[97].

2. The ICC does not deal with noncompliance after issuing a subpoena.

Because they have no subpoena power, the ICC does not deal with the issue of noncompliance after a subpoena is issued.

E. Conclusion

The ICC has no power to issue a subpoena. The Court relies on voluntary witnesses and cannot legally require potential key witnesses to appear before the Court. Both in the Rules and the Statute, the Court has no authority to subpoena potential witnesses to appear before the court. Because of this lack of power, the ICC also does

[95] Statement by the Registrar, Mr. Adama Dieng, at International Criminal Court Review Conference, Eight Plenary Stocktaking of International Criminal Justice Cooperation, Kampala, 3 June 2010, *available at* http://www.unictr.org/tabid/155/Default.aspx?ID=1137.

[96] Goran Sluiter, "I Beg You, Please Come Testify" – The Problematic Absense of Subpoena Powers at the ICC, 601 (2009).

[97] Goran Sluiter, "I Beg You, Please Come Testify" – The Problematic Absense of Subpoena Powers at the ICC, 607 (2009).

not deal with the issue of noncompliance from a witness where a subpoena has been issued.

F. Relation to the Special Tribunal For Lebanon

The ICC has no power to issue subpoenas therefore, has no power to obtain a witness's testimony. The STL should not look to the ICC as a proper model for obtaining a potential witness's testimony.

VII. Overall Conclusion

Throughout the tribunals, subpoenas may be issued when necessary to ensure a fair trial. If a potential witness has testimony and evidence material to the case that can be given only through that particular witness, a subpoena may be issued to insure justice. A fair trial cannot be achieved if all the necessary evidence is not available for the Chamber to make its decision. Because of this, if the Defence makes a good faith effort to convince a potential witness to voluntarily comply, and this witness is the only source for the needed information, a subpoena may be issued to bring the testimony and evidence to the court.

VIII. Special Tribunal for Lebanon Rules ("STL")

Rule 77[98]

General Rule

(A) At the request of a Party, the Pre-Trial Judge may issue such orders, summonses, subpoenas, warrants and transfer orders or requests as may be necessary for the purposes of an investigation or for the preparation or conduct of the proceedings.

[98] Rules of Procedure and Evidence of The Special Tribune for Lebanon, Rule 77, 8 Ferbruary 2012 *available at* http://www.stl-tsl.org/.

(B) Notwithstanding Rule 16, a Party may, when it deems it necessary and appropriate, request the Pre-Trial Judge to authorise it to carry out investigative activities, including questioning suspects, victims or witnesses, collecting evidence, and conducting on-site investigations. (added 5 June 2009)

(C) Where the Prosecutor requests the Pre-Trial Judge to issue a warrant of arrest against an accused, the Judge may decide that, in the interests of justice, a summons to appear is more appropriate and accordingly issue such summons. (renumbered 5 June 2009)85

(D) Where a Party requests the Pre-Trial Judge to issue a summons to appear, he may either grant the request or decide to issue a warrant of arrest. (renumbered 5 June 2009)

(E) Except for warrants of arrest, the Pre-Trial Judge may, in the interests of justice, issue proprio motu such orders as may be necessary for the preparation or conduct of the proceedings. (renumbered 5 June 2009)

IX. Recommendation for the STL based on patterns of other tribunals

The Rules for the Special Tribunal of Lebanon allow for the issuance of a subpoena when it is necessary for the trial. The conditions of the trial aid the Chamber in determining whether to issue a subpoena. The other international criminal tribunals have shown that there are many possible conditions under which they subpoena witnesses and potential witnesses. However, the condition that is constant throughout all the tribunals is that a subpoena is issued when it is necessary to ensure a fair trial. When an individual with no immunity has information that is relevant to the case and the individual is the only person with access to the information, then to have a fair trial, that individual needs to give testimony to the court. A Chamber cannot make a proper judgment without all the relevant information possible. The Defence is only given a fair trial when it has

access to all the witnesses it needs to prove its innocence. If the Defence knows a potential witness that is material to its case, but the witness refuses to comply, the issuance of a subpoena is the only way to get the testimony that is needed for the case. A subpoena is used to ensure justice in the court. Because the other international tribunals use this method and also because it is in the STL's Rules of Procedure and Evidence allow for the issuance of a subpoena when it is needed to ensure a fair trial, the STL should look to how the other international tribunals have dealt with the issuance of subpoenas when they are needed for justice.

Additionally, both the SCSL and the STL came to being from an agreement between the United Nations and its local government to create a special court. The SCSL was created because, at the time, President Kabbah asked the international community to try those responsible for the crimes of the Sierra Leone civil war. The UN Security Council then negotiated with the Sierra Leone government to create the SCSL. This is similar to the UN Security Council creating an agreement with the Lebanese Republic to prosecute those responsible for the assassination of Rafic Hariri under Lebanese laws. The STL is a "hybrid" criminal court like the SCSL because; they apply national law instead of international law. Because of the similarity in their creation and the application of their laws, the STL should look to the manner in which the SCSL deals with subpoenaing witnesses. The similarity in the Tribunals' inner workings should give indications that they should use the same methods when dealing with this particular issue as well.